

Dear Reader,

This special series in Estonia's only universal law journal *Juridica – Juridica International* – has reached its first noteworthy landmark – the fifth edition. This particular collection, primarily oriented toward our foreign reader, has reflected the most significant reforms taking place in the field of Estonian law since 1996. The topics discussed during previous years have included, *inter alia*, issues concerning our constitution in the context of integration into the European Union (1998) and issues related to the protection of personal rights and freedoms of the Estonian people (1999).

The keywords of this special issue are legislation and legal policy. Society's expectations of a legal system and lawyers rank high. While the process of developing legislation and presenting legislation for adoption to the parliament is well established and relatively efficient, the policy planning culture, including legal policy, has not yet reached a satisfactory level. Even today, the "best understanding" of the decision-maker frequently serves as the main argument when planning policy to an unacceptably significant extent. Analyses have often been viewed as time-consuming measures that hinder, rather than support the decision-making procedure.

However, the period of rapid decision-making seems to be nearing its end in Estonia. The new period emerging leaves us at the right time for the preparation of long-term planning activities. An understanding of the necessity to increase the level of legal development exists on a particular stratum and in particular circles in Estonia. From this derives an idea to create a model, functioning under the circumstances prevalent in Estonia, for handling of problems related to legal policy, which would combine an analysis by jurisprudence and professional expertise, as well as public interest. To establish the necessary preconditions for a satisfactory outcome, a discussion between practising lawyers, jurists, and other scholars of social sciences, accompanied by the involvement of the public will be inevitable. The pages of *Juridica* and *Juridica International*, where an open discussion could lead to consensus among jurists, would also provide an excellent opportunity thereof. Nevertheless, attainment of consensus should not become a goal *per se*, but only a means of enabling us to gain support for the practical implementation of one or any viable strategies.

Let it be noted here that from 28 September to 1 October this year, the Law Philosophy Society of Estonia and the Faculty of Law of the University of Tartu will organise an international symposium *Legislation and Legal Policy* in Tartu, in which the leading jurists from Germany, Italy and Finland will participate. We hope that the current special issue provides foundation for the discussions and dialogue to be conducted in the nearest future.

The fifth edition of *Juridica International* was published by the Iuridicum Foundation in cooperation with Interlex Legal Translations Ltd. Our sincere gratitude belongs to Mrs. Edda Harvey, Mrs. Adelines Beermann and Mr. Edward Beermann who helped transfer to us a grant from late René Beermann (University of Glasgow) for the publication of this special issue. Finally, we hope that the special issue is presented in an appropriate layout, upholding its more academic contents and is more reader-friendly than the previous ones. The undersigned would like to thank, with the kindest regards, all of the people whose collective effort is now available for the good intentions of all those who see fit.

Peep Pruks



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On Formation of Policy Analysis and Legal Policy in Estonia

This article*¹ is a policy analysis in the context of the transition societies of Western countries (USA) and, in particular, of East and Central European Countries, including Estonia. A review is provided of “think tanks” as an opportunity to shape an independent, analysis-based legal policy in Estonia.

1. Background

The short-term strategic goal of Estonia is to ensure acceptance into the European Union. However, this should not prevent us from thoroughly considering what exact conditions to adopt in order to procure accession, and what should be left for future decision-making. The period of urgent decisions, including the structuring of the state mechanism, is coming to pass, which leaves us at the time to draft long-term activity plans. Strategic planning based on objective analysis, presentation of alternatives, and inclusion of the public greatly determines Estonia’s development in the forthcoming decades. The policy planning culture in the general meaning has not reached a satisfactory level. Decisions are based on the “best understanding” of the decision-maker to a much greater extent than should be. Analysis has often been regarded as a time-consuming and unnecessary activity that more often impedes the process of decision-making rather than helping it.

On the other hand, the social status for analysts has been relatively low in Estonia. Analysts often lack access to high-level meetings and, hence, lack an overview of the actual situation. The results are lengthy analyses that do not indicate clear or feasible alternatives. Because of the lack of adequate analysis,

¹ The article is based on information collected by the author in the course of consultations: 13–14 January 2000 – International Centre for Policy Studies, Kiev, Ukraine. See <http://www.icps.kiev.ua/english/index.htm>; 13–14 March 2000 – Institute for Public Affairs (IVO), Bratislava, Slovakia; 24 March 2000 – European Policy Centre, Brussels, Belgium. See <http://www.theepc.be> and Centre for European Policy Studies, Brussels, Belgium. See <http://www.ceps.be>. As chairman of the board of the Open Estonia Foundation, the author had an opportunity to take part in discussions in the common meeting of Soros funds of the Baltic countries – Public Policy Development Workshop: Riga, February 3–4, 2000 and in the 5th Open Society Forum: Policy-making and Civil Society, Tallinn, 5 May 2000. The review also makes use of other materials drawn up in preparation for a public policy centre in Estonia. On 9–11 May 2000 George Soros, well-known US billionaire and philanthropist, visited Estonia on the occasion of the 10th anniversary of the Open Estonian Foundation and it was decided during the visit to found the public policy centre as a foundation. On 29 June 2000, the board of Open Estonia Foundation approved the start-up budget of the newly founded centre – the Foundation “PRAXIS Center for Policy Studies” (PRAXIS). See http://www.epl.ee/artikkel.php3?primary_id=86809&ID=1&grupp=69&kuupaev=2000-05-26.

politicians and officials often justify the ratification of one document by another document, or base their decision on “best intentions” lacking a meaningful argument. There is no serious experience in trusting the information necessary for analysis to nongovernmental institutions. Therefore, too many decisions that influence the future of Estonia are made without any prior policy analysis, *i.e.* without considering different options, and without assessing their possible social and economic impact. The weakness of the policy-making process has been outlined in the latest EU Progress Report regarding Estonia.^{*7}

Although Estonia has several institutions that provide a certain level of policy knowledge, the main problems of the policy research in Estonia^{*8} are the following:

- institutional identity of the research institutes is quite low because most of the researchers do not identify themselves with only one institution;
- there is no institutional guarantee: the quality depends rather on individual researchers;
- the research is often very narrow: the research is usually limited to the description of the problems and rarely includes policy alternatives and recommendations;
- most of the institutes operate on the basis of the short-term projects. That does not enable them to serve as independent critics and analysts of government policies;
- the efforts of the researchers are used in government expert committees on an individual basis and the results of the independent analyses are often ignored;
- there is almost no competition between the different experts and approaches used. It has been indicated that many topics are “monopolised” by certain experts and it is very difficult for newcomers to get in;
- there is the lack of expertise in many crucial and specific fields of public policy.^{*9}

The challenge of public policy development in Estonia is two-fold: governmental and societal.^{*10}

On the one hand, there is a need to enhance the capacity of official institutions ability to conceptualise and elaborate innovative policy initiatives. For instance, in recent years a number of government ministries and departments in Estonia have begun to establish limited policy planning staffs. At the same time, the majority of these groups suffer from two important shortcomings. Firstly, despite all of their good intentions many of them often remain preoccupied with day-to-day political battles instead of focusing attention toward long-term policy issues. As Estonia begins to face many of the strategic choices it must make during its accession to the European Union, government officials need a chance to develop a future perspective and elaborate those steps that will be necessary for successful accession. Secondly, existing policy planning staffs usually lack professional training in public policy development, relying instead on previous practical experience on the job. Thus, greater professional knowledge about policy-making must be indoctrinated into the system.

From the societal perspective, public policy development also requires a strong civil society to provide critical input and feedback all along the policy-making road. The ability of advocacy groups and interest sectors not only to participate in the process, but also to develop alternatives of their own, is essential for public policy to work in an open and cooperative context.

⁷ According to the Report: “The process of developing legislation, carrying out inter-ministerial consultations and presenting legislation for adoption to the parliament is well established and relatively efficient. However, it appears that this process takes place against a background of limited policy development and analysis – there is insufficient assessment of the budgetary, social and economic impact of proposals. There is also limited consultation with outside organisations. This reflects weaknesses of policy-making skills within Ministries. Although Explanatory Notes accompanying legislation are regularly prepared, the quality of this material is generally low. There is no tradition in Ministries in engaging in policy analysis, but rather the normal approach is to proceed directly to legal drafting.” Available at: http://europa.eu.int/comm/enlargement/estonia/rep_10_99/b4.htm.

⁸ It is clear that the general context of the Baltic countries is not much different from these conclusions. This is evidenced by the detailed review of the situation in Latvia that the author was able to examine. See Independent Public Policy Analysis in Latvia: Situational Overview and Conclusions. Manuscript by A. Neimanis and I. Indāns. Riga, 1999.

⁹ Public Policy Institute (PPI). Status Report. Open Estonia Foundation. Manuscript. 31 March 2000. Tallinn.

¹⁰ Public Policy Institute (PPI). Preliminary Programme Outline. Prepared by the PPI Programme Committee: H. Aru, P. Lõhmus, V. Pettai, T. Randma. Manuscript. 1 May 2000. Tallinn.

2. What Is a “Think Tank”?^{*11}

Public policy research organisations first appeared in the USA and Europe at the turn of this century when organisations such as the Brookings Institutions^{*12}, the Carnegie Endowment for International Peace^{*13}, the Kiel Institute of World Economics^{*14} and the Royal Institute for International Affairs (1920) were established. The term “think tank” was introduced in the United States during World War II to characterise the secure environment in which military and civilian experts were situated so that they could develop invasion plans and other military strategies. After the war, the term was applied to contract researchers, such as the Rand Corporation^{*15}, that did a mixture of deep thinking and programme evaluation for the military. The use of the term was expanded in the 1960s to describe other groups of experts who formulated various policy recommendations, including some quasi-academic research institutes concerned with the study of international relations and strategic questions. By the 1970s, the term “think tank” was applied to institutions focusing not only on foreign policy and defence strategy, but also on current political, economic, and social issues. They include a wide range of privately organised groups of experts who perform research in a variety of disciplines and inform policy-makers, and the general public, of their research findings.

As organisations of civil society, think tanks play a number of critical roles, including: playing a mediating function between the government and the public; identifying, articulating, and evaluating current or emerging issues, problems, or proposals; transforming ideas and problems into policy issues; serving as an informed and independent voice in policy debates; and providing a constructive forum for the exchange of ideas and information between key stakeholders in the policy formulation process.

There has been a veritable explosion in recent years of think tanks since the 1970s, and there are thought to be more than 3,500 think tanks in the world today.^{*16} One of the possible classifications of think tanks is presented in the following.

The culture and structure of **academic-diversified** think tanks (Brookings Institutions) are similar to universities in every respect except that they do not have students – a fact which has led some to describe this brand of think tank as a “university without students.” The primary difference between **academic-diversified** and **academic-specialised** think tanks (National Bureau of Economic Research)^{*17} is their degree of specialisation. **Academic-diversified** think tanks tend to conduct research and analysis on a whole range of policy issues such as economics, foreign policy, the environment, etc., while **academic-specialised** institutions focus on a single issue or discipline such as economics or welfare reform. Think tanks that perform the majority of their research and analysis for government agencies are often described as **contract research organisations** (RAND Corporation). Those that promote a point of view are described as **advocacy think tanks** (Institute for Policy Studies) because their analysis has a sharp partisan edge. In an effort to develop new and innovative ways to reach policy-makers, a host of **policy enterprises** have been

¹¹ The following part of the text is largely based on the report by James McGann (Foreign Policy Research Institute, USA), who has studied think tanks all over the world for many years, titled “Tanks and Civil Societies in a Time of Change” at the 5th Open Society Forum: Policy-making and Civil Society, Tallinn, 5 May 2000.

¹² The Brookings Institutions, founded in 1916, Washington D.C. A private, independent, nonprofit research organisation, Brookings, seeks to improve the performance of American institutions, the effectiveness of government programs, and the quality of US public policies. In its research, the Brookings Institution functions as an independent analyst and critic, committed to publishing its findings for the information of the public. In its conferences and activities, it serves as a bridge between scholarship and public policy, bringing new knowledge to the attention of decision-makers and affording scholars a better insight into public policy issues. Available at: <http://www.brookings.org/about/aboutbi.htm>.

¹³ The Carnegie Endowment for International Peace was established in 1910 in Washington D.C., with a gift from Andrew Carnegie ... [T]he Endowment conducts programs of research, discussion, publication, and education in international affairs and US foreign policy. The Endowment publishes the quarterly magazine, Foreign Policy. Available at: <http://www.ceip.org/index.html>.

¹⁴ Kiel Institut für Weltwirtschaft (IfW), has become an important international centre for economic research and documentation. The Institute Library is one of the world’s largest libraries for economics and social sciences.

¹⁵ Rand Corporation, founded in 1948. A nonprofit institution that helps improve public policy through research and analysis. Rand’s broad research agenda helps policy-makers strengthen the nation’s economy, maintain its security, and improve its quality of life by helping them make choices in education, health care, national defence, and criminal and civil justice, among many other areas. Available at: <http://www.rand.org/ABOUT/index.html>.

¹⁶ See http://www.vote-smart.org/organizations/THINK_TANKS_RESEARCH_INSTITUTES; NIRA’s World Directory of Think Tanks 1999. Available at: <http://www.nira.go.jp/ice/ttinfo/nwdtt99/index.html>; An Alphabetical Directory of Web Sites Providing Information on Multiple Public Policy Issues. Available at: <http://www.lib.msu.edu/harris23/govdocs/pubpol.htm>.

¹⁷ The National Bureau of Economic Research, Inc. (NBER), founded in 1920, Cambridge. NBER is a private, nonprofit, nonpartisan research organisation dedicated to promoting a greater understanding of how the economy works. The NBER is committed to promoting and disseminating unbiased economic research among public policy-makers, business professionals, and the academic community. Available at: <http://www.nber.org>.

established. These policy enterprises place a premium on packaging and marketing their ideas and stand in stark contrast to the academic-oriented think tanks that practice a more traditional approach to public policy research and analysis.^{*18} In the United States and other countries around the world, there are literally tens of thousands of university-based research centres (Asia Pacific Research Center)^{*19} that conduct research on a wide range of public policy issues. These institutions provide a critical link in the “intellectual food chain,” which consists of all those institutions that are engaged in public policy research and analysis. There is an ecology that exists in the policy research community that makes these institutions dependent on one another for their effectiveness and survival.

In Asia, Europe, and Latin America quasi-independent think tanks outnumber independent ones for a variety of reasons, including the close relationships between business and government in these countries, as well as the support that these institutions receive from political parties. In Germany^{*20}, for example, political parties instead provide many of the functions provided by think tanks in the United States. One should also keep in mind that within the United States there are for-profit organisations (Stanford Research Institute, founded in 1946) and government think tanks (Congressional Research Service, founded in 1914) that provide research and analysis for policy-makers.

It must be admitted that developing a precise definition for “think tank” is difficult to do, but most experts agree that independent public policy research organisations are best equipped to provide impartial analysis and debate of public policy issues. Think tanks are an integral part of the civil society and serve as an **important catalyst** for ideas and action in emerging and advanced democracies around the world. What they all have in common is that they are nonprofit, independent of the state, and dedicated to transforming policy problems into appropriate public policies.^{*21}

3. The Central and Eastern European Context (the Former Soviet Union – Ukraine)

3.1. General Remarks

As think tanks have expanded geographically, they have had to adapt to new conditions. In central Europe and the former Soviet Union think tanks developed at the end of the 1980s and later. Some of them have become known as the most successful centres in the region that, by involving the acclaimed experts of the area^{*22}, actively participate in debates and discussions. The author was able to visit the International Centre for Policy Studies (ICPS) in Kiev^{*23} and the Institute for Public Affairs (IVO) in Bratislava^{*24} in the first half of this year.

As the Ukrainian experience shows, the role of ICPS in policy-making is very much evident in the sphere of economy, especially through such key institutions as the bank and the Ministry of Economy and Finance.^{*25} A number of important projects have concentrated in these institutions and collaboration is

¹⁸ J. McGann (Note 6).

¹⁹ Asia Pacific Research Center, Stanford University 1977. Available at: <http://aparc.stanford.edu>.

²⁰ See e.g. M. Thunert. *Advising the Government and the Public: Think Tanks in Germany*. The American Institute for Contemporary German Studies.

²¹ J. McGann (Note 6).

²² I would like to refer to Professor B. Krawchenko who was a founder and director-general of the Ukrainian Institute (now Academy) of Public Administration, Chair of Steering Committee of Open Society Institute's (OSI) Local Government and Public Service Reform Initiative. He is charged with setting up Central European University's (CEU) Center for Policy Studies.

²³ International Centre for Policy Studies, director Vira Naniivska (PhD) – formerly Programme Development Officer at the World Bank Mission in Ukraine and a senior Researcher and Lecturer at Moscow State University).

²⁴ Other recognised institutions in this region are the Institute of Sociological Studies of Charles University (Director Martin Potucek) and the Institute for Public Affairs (IVO) in Bratislava. The author had an opportunity to consult the President of the latter, Grigorij Meseznikov, during a visit in March.

²⁵ For example, the ICPS project – Country Economic Memorandum Project – in dialogue between the government and the World Bank ICPS is involved in writing World Bank Country report. In the framework ICPS organises seminars and experts discussion. As the result of the discussions and with help of foreign consultants ICPS develops policy papers for eight sectors: fiscal policy, education, health, social security, etc.

made with them. To achieve actual changes in influencing policy, the president^{*26} and government spheres are an important partner since the project initiation. This attitude may be partly because, if ICPS stood in opposition in a situation where the tradition of democracy is short, experience inadequate, and different interests clash, it would be critical for reaching practical results. I would like to believe that the fact that the project supports state agencies in the first order does not exclude constructive criticism of the project.

The objective of ICPS projects is not to “produce papers”, but to offer alternative solutions and influence policy in cooperation with the public.^{*27} The role of the centre is to be the facilitator to the government and also the mediator between the government and foreign donors.

Still, it should be kept in mind that most countries in Central East Europe and the former Soviet Union do not have strong philanthropic traditions or tax laws that encourage private philanthropy; therefore, think tanks in these countries are primarily funded by governments, political parties, or international donors. This makes these institutions particularly dependent on potentially unstable sources of support. The lack of independent support also raises questions about both the long term viability of these institutions and their ability to provide truly independent research efforts and analyses.

Concerning Estonia, it must be brought into light that acquaintance with PPIs operating in various environments has been essential in the establishment of its own top level institution. The social situation greatly determines the strategy and main tasks of the centre in the given stage of development. It is essential to have knowledge of the PPI models functioning in developed and stable societies, particularly in the European Union member countries, so as to be able to make an educated final choice of the model to be effectively employed in Estonia.

3.2. On Cooperation Partners

The question of PPI partners is a key issue. This is the basis for determining the role of the institute against the background of other institutions in a specific country. Here is where public attitude and opinion originate from. One possibility to determine the PPI partners is to define as clearly as possible, the attitude (the so-called “inflexible” position) in the starting period of the institution, *i.e.* to work together with government agencies or to keep distance from them. It seems, however, that it is not practical to posit the problem in this way. The keyword in the dilemma, with or without the government, rather, is the specific environment in which the PPI functions. Another important basis is the essence and goals of the project to be launched. Depending on the project, PPI may, and has to have the opportunity to stand in opposition to the government and take the role of a critical thinker. The idea of the PPI project is to focus on policy analysis and offer alternative solutions before decisions are made. It is essential to offer a multiplicity of ideas for the given questions and to activate social dynamics.

International cooperation is essential to the viability and future of PPI, especially in view of the general trend of project partnership in the context of accession to the European Union. There is an efficient opportunity for international cooperation through specific projects and programmes rather than through the PPI institutional level. Foreign partnership is important from two aspects: knowledge, experience (including methodology^{*28}, etc.), and financing.

²⁶ Project – Ukraine’s future: Plan for the President. As the result of the roundtable discussions of experts, a paper is prepared that points out the areas where the need for reforms is most urgent. The paper points out goals, problems, necessary measures, resources and constraints. The document includes also a short guide to policy analysis.

²⁷ See *e.g.* People’s Voice Project – ICPS conducted public service delivery surveys in four cities of Ukraine. The survey estimated the quality of services and corruption. In the framework ICPS designed Code of Ethics for state officials and promoted open budget hearings – stating how much money was in the budget, how much there is now and where did it go. Public awareness campaign (publications, TV and radio programs) was part of the project.

²⁸ For methodology, see *e.g.* W. Dunn. *Public Policy Analysis: An Introduction*. 2nd ed., Prentice Hall: New Jersey, 1994; E. Bardach. *Policy Analysis: A Handbook for Practice*. A eight-step path has been described: define the problem, assemble some evidence, construct the alternatives, select the criteria, project the outcomes, confront the tradeoffs, decide, tell the story. – Cascade Center for Public Service, 1995.

4. Policy Analysis and Legal Policy

The connection between policy analysis and think tanks with legal policy development in Estonia is an interesting topic, especially in a situation where experience concerning think tanks^{*29} generally exists, but their role in the shaping of legal policy has been marginal so far. It must be said that the concept of think tank in itself is relatively new in the Estonian legal environment and requires implementation.^{*30} Legal policy is also rather little studied as a field of research. Partly, this may be due to the fact that it has not been desirable to assess the effect of decisions on the necessary level. Decisions are based on the “best understanding” of the decision-maker to a greater extent than they should be. Analysis has often been regarded as a time-consuming and unnecessary activity that impedes rather than helps decision-making.

Many top lawyers have expressed concern about the lack of the relevant practice.^{*31} Supreme Court Justice, Visiting Professor of the University of Tartu E. Kergandberg has written: “All larger Estonian political parties agreed that Estonia needs a new Code of Criminal Procedure (hereinafter: CCP). A commission consisting of Estonian lawyers and three foreign experts was formed by the Ministry of Justice, which had to formulate all the most important options related to the new CCP for the politicians and explain the consequences arising from the selection of different variants. The commission completed its work in three months and forwarded the catalogue of options to the politicians, who then made their choices and started preparing the code... Unfortunately, it has to be said that no such systematic and planned work as described above has actually occurred in Estonia. Subsequently, the draft of the Estonian CCP may undoubtedly be called a certain option (or sum of options) if one so wishes, but as a participant in the working group that prepared the draft, I have to admit that since there was no legal political order for development of a catalogue of options, there was no substantial theoretical discussion of the main conceptual issues of the draft. This does not mean that the persons who prepared the draft did not rely on the standpoints of special literature, or did not try to follow the contemporary tendencies in the law of criminal procedure and solutions from the practice other states have in the creation of laws. Despite this, many choices in the work group were made as a result of voting and sometimes they were rather intuitive than anything else. Therefore, it may be said that to a large extent, the drafts of the CCP have been designed by the great magician, chance. In my opinion, one of the reasons why accidental factors have actualised that could be mentioned above all is knowledge of foreign languages (for example, the opinion of a person who speaks only Swedish is that no issue can be solved better anywhere else than in Sweden): the opinion that some regulation seems to be “too Soviet” and therefore a completely different solution should be used; the standpoint that “I have treated this issue so thoroughly in my scientific articles that my *de lege ferenda* proposal simply must become law”; the understanding of practising lawyers that “how come things are suddenly like this when they have always been otherwise”, etc. At the same time one may assume that the described situation in the preparation of the draft of the Code of Criminal Procedure is not exceptional in the creation of laws in Estonia (maybe even in all of the so-called former Eastern bloc countries).”^{*32}

Criminal policy issues have been addressed in more detail by Professor J. Sootak.^{*33} In his article “Theories of Punishment and Criminal Law Reform (Reform as Change of Mentality)” he writes: “Estonian legal reform as a whole and, consequently the reform of Estonian criminal law aspire to disembark the totalitarian Soviet law and mould a European legal system that matches the current level of jurisprudence. The matter, however, does not just involve the dogmatic review of certain problems but also concerns the legal philosophical and legal political bases of the reform of criminal law. Hopefully, the issue of the exact theoretical basis of punishment which should underlie the development of our criminal law as a whole –

²⁹ See e.g. UNDP. Estonian Human Development Report working groups. Available at: <http://www.undp.ee/nhdr.ee.html>. State agencies also have used strategic planning before: many researchers of the Institute of International and Social Studies (RASI) are involved in the orders of ministries. Available at: <http://gaia.gi.ee/iiss/eng>.

³⁰ A short and practical guide book on how to do good policy analysis should be published. It should explain the main concepts and basic terminology, objectives, bases of activities, procedure and methodology of public policy – the general framework in which public policy programmes/projects function – as clearly as possible.

³¹ Statements have been made, as a rule, concerning law and politics: “There is no politics outside the law and no law outside politics. Legislative drafting is a chain of legal political decisions made by politicians who are authorised by people. Decisions adopted in the legislative drafting process are political and must be kept apart from decisions on the implementation of Acts which are nonpolitical. The responsibility of politicians should be clearly separated from the responsibility of officials”. In: M. Rask. Political Affiliations and Law. – Juridica, 1998, No. 4, pp. 166–167.

³² See the article by E. Kergandberg in the same issue.

³³ See e.g. J. Sootak. Kriminaalpoliitika (Criminal Policies). Tallinn: Õigusteabe AS Juura, 1997; J. Sootak. Uuematest arengutendentsidest karistusteoorias ja kriminaalpoliitikas (Newest Developments in Punishment Theory and Criminal Policy). – Juridica, 2000, No. 1, pp. 3–13.

an issue that is of paramount importance to Estonia as it continues to undergo reforms – and the law of sanctions and the bases of imposing penalties will attract the attention of scientific communities. ... The issue of punishment theories is a part of criminal policies or the bases of criminal law ...”³⁴

It should be noted that the Faculty of Law of the University of Tartu, as a representative of academic circles, has repeatedly raised the issue of participation in legal drafting.³⁵ The Faculty, in its mission, has seen its participation in the development of legal policy to ensure the implementation of the principles of a state governed by the rule of law in the Estonian legal order. This has been stressed in the development plans of the Faculty. In the preparation of the Faculty’s latest development plan in this year, it was realised that the Faculty must continue to participate in the preparation of conceptual bases for legal reform and in legislative drafting, to analyse the functioning of the legal order, and provide relevant opinions on constitutional institutions, as well as the inform the public.³⁶

In light of the aforementioned, the importance for influencing the previous action of politicians “deciding on the basis of gut reaction” and the present “tradition” in the sphere of law, becomes more apparent. During the new independence period, continuous reorganisation and legal changes have taken place in Estonia under the name of reform, while there has been no attempt to create a holistic picture of what is bad in the existing law, and what new laws should eventually be like. A functioning system should be created for “processing” problems by joining scientific analysis, expertise by specialists, and public interest.

One possibility is to set up inter-institutional working groups³⁷ whose positive aspects would be to have independence from institutional interests, personal responsibility (personal motivation) for project results, and the study of processes relevant from the public interest viewpoint.

Another possibility is to set up independent strategy centres that are able to adequately analyse the processes taking place in the society and influence these processes by offering analysis, finding alternatives, and formulating solutions. One may presume that certain circles in Estonia understand the necessity for such strategy centres, or at least the necessity to improve the quality of analysis: politicians would like to use correct arguments in preparation of their politics.³⁸ Unfortunately, this understanding has not concentrated sufficiently from the “critical mass” aspect, and a model that would function in our environment has not been developed. Discussions with practising lawyers, jurists, and other sociology specialists, and the involvement of the public are essential for reaching good results.

The initiators of such a centre should:

- have as close as possible link to top decision-makers (including the government) through personal contacts and be respected by these circles for their professionalism;
- have considerable contacts in foreign countries to gain the necessary knowledge where required;
- have earlier experience in practical public policy activities: how actual policy has been and is being drafted, what the existing mechanisms are, etc;
- be able to remain neutral where only political positions/programmes are in question (specific promises to electors);
- be capable of constructive cooperation with different interest groups and have the time essential for the initiation period.

³⁴ See the article by J. Sootak in the same issue.

³⁵ Participation of Academic Staff as Heads or Members of Work Groups (Authors) in Drafting Bills in 1991–1998. In: K. Merusk, R. Narits, P. Pruks. On Legal Bases and Process of Accreditation of Teaching of Law in Estonia (University of Tartu Faculty of Law Case). – *Juridica International. Law Review. University of Tartu*, III, 1998, pp. 159–162.

³⁶ See P. Pruks. Academic Legal Education in Estonia: Current State and Perspectives (Faculty of Law of the University of Tartu). – *Juridica International. Law Review. University of Tartu*, I, 1996, pp. 139–158.

³⁷ An example of such integration is the cooperation project of the Faculty of Law of the University of Tartu, the Supreme Court and the Estonian Law Centre Foundation “Restriction of Corruption in a Transition Society (Legal Aspect)” initiated by the Open Estonia Foundation. The main objective is to identify the corruption-sensitive areas in Estonia and provide legally competent methods of corruption control. The two-year project was initiated by a working group of five members: K. Merusk (Dean of Faculty of Law of University of Tartu, Professor of Constitutional and Administrative Law), R. Narits (Head of Institute of Public Law of University of Tartu, Professor of Comparative Jurisprudence), U. Lõhmus (Chief Justice of Supreme Court), M. Gallagher (Foreign Advisor to Estonian Law Centre) and K. Kenapea (lawyer). The project is carried out by the Estonian Law Centre (Managing Director Aavo Kaine). The project that started in 1999 is supported by the Open Estonia Foundation (OEF) and COLPI (Constitutional & Legal Policy Institute) in Budapest. See P. Pruks. *Korruptsiooni piiramisest Eestis (On Restriction of Corruption in Estonia)*. – *Juridica*, 2000, No. 1, pp. 67–68.

³⁸ This has been repeatedly stated by the Prime Minister: Opening speeches of M. Laar at the 5th Open Society Forum: Policy-making and Civil Society, Tallinn, 5 May 2000 and the XXIV Estonian Jurists Day: Legal Problems of Administrative Reform, Tallinn, 25 May 2000. The author has noticed the supportive attitude of Minister of Justice Mr. M. Rask to legal policy research in the course of consultations in spring this year concerning e.g. criminal procedure.

During establishment of a centre, a network of experts capable of launching and “processing” projects professionally should be created. Cooperation partners from foreign countries are necessary for comparative research, exchange of experience, and for the introduction of a functioning model to other countries.

If the position of the opinion-former is achieved through a politically neutral position and quality analysis, its influence on small countries may be greater than is currently believed. This would shape an environment where citizens are interested in the results of the decision-making process. Legal policy decisions taken this way would be much easier to legitimise. The centres would begin to create a tradition of strategic planning, and initiate a culture of more effective and better reasoned deciding in Estonia.

About the Meaning of the Legal Aspect of Practical Semantics in Estonian Legal Order

Legal Order Must Be Transparent

In many aspects, young legal orders develop and are developed on the basis of the already existing theory and practice of law. Therefore it is absolutely evident that Estonian legal order cannot be original in its content by any means. At the same time, no models can be found for the semantic form of this legal order. Nevertheless, it is *ius scriptum* and its language of manifestation that play a decisive role in the legal culture of Continental Europe. This role is decisive for the reason that rationalisation of a legal order begins and ends with the legislative process, on the one hand, and the realisation of law (laws), on the other. Both of those factual components of rationalising a legal order are interrelated. In today's rule of law, special importance is attributed to the aspect of law-realisation related to the public authority, namely the application of law, in which the adjudicative activity of courts can be distinguished. Thus, in the rule of law, special importance is borne not only by the opportunity of protecting one's interests (both in private and public law) by means of the regular way of law but by legitimate, *i.e.* equitable, protection of those interests by independent courts. For that reason, it has been justifiably noted in specialist literature that in everyday legal practice and the related theory of law, more and more thought is given to the question of how rationality in legal behaviour and decisions or in scientific cognition can be attained, given the transparency between social relationships, which complicates orientation in the legal reality. In reality, it can and must be understood that the bounds of rational orientation have already been reached, if not crossed, long ago. Hence the following question emerges: what are the presumptions and limits for rationality in law and jurisprudence being possible at all? Are there any *a priori* reasonable principles, structures or procedures which can be cognised by everybody? Is it right that these principles, structures or procedures transform even the pre-legal order into a legal obligation which must be met inevitably as a norm of correct behaviour? Or are we not dealing with nationally organised legal systems that provide evolutionary independence to the power of their normative autonomy and the positivity of the political and legal decisions (which should be understood here as the national order of human behaviour), protected by themselves, not

only with regard to religion but also to human mind and morals, and that nowadays have no normative institutional rationality?^{*7}

About the Starting Positions of the Structuring Theory of Law

This article is aimed at regarding, from the author's viewpoint, one possible jurisprudential theory for rational understanding of legal order – the structuring theory of law. It is very important that cognition of a legal order should be based on the rules which could be designated as “laws of jurisprudence”. Naturally, this does not mean legislation within the concept of objective law. Rather, these laws can be referred to as certain regularities, ignorance of which would, however, either impossibilite or substantially complicate the legal process of decision-making, both in law-making (as the so-called decisional function is contained in law itself^{*8}) or the practical legal process of making decisions (the application of law).

In recent years, a conception involving cooperation between linguists and jurists has emerged in the discussion of jurisprudential methodology. This constitutes an interdisciplinary approach to motivation of legal decision-making and involves, on the one hand, “practical semantics” and researchers thereof^{*9}, and on the other hand, representatives of the so-called structuring theory of law.^{*10} In specialist literature, the structuring theory of law has also been referred to as the Müller school.^{*11} The role of language and linguistic arguments in the discussion and practice of legal working methods serves as a connective principle in such interdisciplinary approach (cooperation).

Practical semantics deals with the rules of language underlying the behaviour of those who participate in linguistic communication. Those rules cannot exist by themselves, extrabehaviourally. Practical semantics disagrees with the thesis of realistic semantics that the meaning of a legal norm can be objectively and unambiguously derived from the formulation of the norm. Understanding (cognition) of a legal norm is not determined by the formulation of the norm. The meaning of the formulation is determined in the interpretation practice and must be determined by the applier of law, because that applier is under the obligation to decide. Since the criteria of whether legal norms are complied with or not are established by the practice that has developed in a rule-of-law society, a departure from or nonadherence to that practice by the applier of law will change the content of the legal norm and constitute the creation of a new rule.^{*12}

It must be noted that a rule and the formulation of the rule are two different entities. A legal norm is more than barely a text. In deciding about the meaning and content of a legal norm, legal practice must be taken into account.^{*13} It was stressed already by Wittgenstein that words and sentences acquire specific meanings in the context of their application (the language game). The process of constituting a legal norm, *e.g.* the determination of the meaning of the formulation and the norm-texts themselves, are all parts of the single application practice.^{*14} In addition, practical semanticists draw a distinction between interpretation and

⁷ About the boundaries of rational orientation within law in connection with advancement of theories in law, see W. Krawietz. Vernunft versus Rationalität des Rechts. Zur Theoriebildung in der Rechtswissenschaft. In: Staat und Recht. H. Haller, C. Kopetzki, R. Novak, S. L. Paulson, B. Raschauer, G. Ress, E. Wiederin (Hrsg.). Wien-N.Y.: Springer, p. 1515.

⁸ See A. Aarnio. Laintulkinnan teoria. Porvoo-Helsinki-Juva: Werner Söderström Osakeyhtiö, 1988, pp. 62 *et seq.*

⁹ *E.g.* D. Busse. Normtextauslegung als Regelfeststellung? Zur Rolle von Wittgensteins Regelbegriff für die juristische Methodenlehre. In: O. Weinberger, P. Koller, A. Schramm (Hrsg.). Philosophie des Rechts, der Politik und der Gesellschaft. Akten des 12. Internationalen Wittgenstein Symposiums. Wien, 1998, pp. 207–210; R. Wimmer, R. Christensen. Praktisch-semantische Probleme zwischen Linguistik und Rechtstheorie. In: Fr. Müller. Untersuchungen zur Rechtslinguistik. Berlin, 1989, pp. 27–46.

¹⁰ *E.g.* Fr. Müller. Arbeitsmethoden des Verfassungsrecht. In: Seminar: Die juristische Methode im Staatsrecht. Suhrkamp, 1977, pp. 508–553; Fr. Müller. Strukturierende Rechtslehre. 1. Aufl., Berlin: D&H, 1984; 2. Aufl., D&H, Berlin, 1994; B. Jeand'Heur. Gemeinsame Probleme der Sprach- und Rechtswissenschaft aus der Sicht der Strukturierenden Rechtslehre. In: Fr. Müller. Untersuchungen zur Rechtslinguistik. Berlin: D&H, 1989, pp. 17–27.

¹¹ M. Herbert. Rechtstheorie als Sprachkritik. 1. Aufl., Baden-Baden: Nomos Verl. Ges., 1995, p. 203.

¹² See D. Busse. Zum Regel-Charakter von Normtextbedeutungen und Rechtsnormen. – Rechtstheorie 19/1988, pp. 310–311.

¹³ It must be added that such approach is not unfamiliar to legal practitioners. During the past four years I have been providing supplementary training for Estonian administrative judges. At one seminar, I posed the question of what would be more needed by administrative judges as legal practitioners and, with a view to legal decision-making, top-level decision-makers: either a “good” Act or a resolution of the Supreme Court in an analogous question. Nobody doubted in the necessity (*i.e.* usefulness) of a decision rendered by the Supreme Court (which is of the highest instance in the Republic of Estonia).

¹⁴ D. Busse (Note 6), pp. 319–321.

development of law. In summary it can be said that practical semantics regards the structuring theory as one conforming to the rule-concept conception of Wittgenstein in the study of legal methodology.^{*15} M. Herbert has characterised the structuring theory of law as a post-positivistic theory of legal methodology which disagrees with the traditional positivist approach, whereunder the applier of law gives preference to the legal norm (a norm may represent the objectified will of the legislator – the objective interpretation theory; a legal norm may contain the will of a historical legislator – the subjective interpretation theory).^{*16}

Legal Work is Work with Legal Texts

The opinion that “... academic methodology provides a judge with neither assistance nor chances of verification”^{*17} has been expressed in specialist literature. In some aspects, however, the reason therefor is inherent in the practice itself. More exactly, the methodology of judges’ work is narrow-scoped.^{*18} For example, a recent analysis of adjudications of the Estonian Supreme Court demonstrated that the systematic interpretation method had been one of the most extensively used while the legal historical approach had been practically unexploited. However, literary (linguistic) considerations are not out of place, and with a certain reason. Namely, legal practice is established more on argumentation and interpretation rules selected on the basis of pragmatic considerations rather than doctrinal methods.^{*19} All this implies that the problem of understanding legal text is not at all primary in a judge’s practice. Therefore, legal practice cannot be assisted by one or other of the methodological concepts. At the same time, it is important to bring together the conditions (positions) of the theory and practice of decision-making. Figuratively, this would mean the preparation and development of theoretical bases for practical legal work.

On the other hand, there may be situations in which the main attention is focused on the text itself. For example, a draft Act entitled the “Act on ensuring the Intelligibility of Acts”^{*20} was introduced to the *Riigikogu* (Estonian parliament). Subsection 1 (1) (“Concept of intelligibility of an Act”) thereof provides that an Act is deemed intelligible if its meaning can be understood, after necessary penetration, by a person with at least elementary education who is fluent in Estonian and who is not a specialist of law-making, jurisprudence or the specific field concerned by the Act. The following provisions relate the expression of the meaning of a law with the entry into force of the law in an explicit and unambiguous description of changes occurring in the legally regulated living mode of the society. However, a derogation is made with regard to terminologies of any specific field, which does not cover the concept of the intelligibility of Acts.

Apparently it must be admitted that the objective of the above-referred bill is rational in every way. It is, however, doubtful whether the intelligibility of legal language can be improved by means of legislation.^{*21} The problem lies in the fact that everyday language as a sign system used for understanding each other is, like the legal system, a complicated phenomenon. An intertwining of those two complex systems can only result in new problems. And moreover, the complexity of legal language means more than only terminological matters.

Thus the already mentioned preparation and development of theoretical bases for practical legal work still have and will have their specific place. Problems of decisional theory and legal practice would then include the problems of norm and (legal) facts; the question of the structure and normativity of norms; the question

¹⁵ In his works, Fr. Müller has used the term “Juristische Methodik” (legal methodology). See Fr. Müller. *Juristische Methodik*. 6. Aufl., Berlin: D&H, 1995.

¹⁶ M. Herbert, pp. 207–208.

¹⁷ J. Esser. *Vorverständnis und Methodenwahl der Rechtsprechung. Rationalitätsgarantien der richterlichen Entscheidungspraxis*. Frankfurt am Main: Athenäum Fischer Taschenbuch, 1970, p. 7.

¹⁸ J. Berkemann, H. Rüssmann (Hrsg.). *Generalisierung und Individualisierung im Rechtsdenken*. – ARSP Beiheft NF, 1992, No. 45, p. 8.

¹⁹ At the same time it is obvious that, for example, with regard to value requirements expected from law, it does not matter whether positive law establishes a left- or right-hand system of traffic. A judge assessing a traffic case would apparently not even think about the good or bad nature of the right-hand system of traffic used in Estonia. Similarly, it would be unreasonable to doubt in a traffic participant’s value acceptance with regard to right-hand traffic.

²⁰ Draft Act 253 SE II. It should be added that the problem of the intelligibility of legal language is topical not only in the so-called young democracies. For example, the author of this article knows about a campaign for “translating official documentation into the human language”, which was launched in 1999 in the United States.

²¹ K. Floren, jurist, has commented on that draft as follows: “The unintelligibility of laws is but the most apparent part of the general officialese. Hopefully the drafters understand that the intelligibility of the language used in the official sphere, including the language of law, cannot be improved by a bare Act. Such pursuits resemble an order to start living well.” – K. Floren. *Kantseliiti ei hävita seadus, vaid toimetajad* (Officialese is not Eradicated by Laws but Rather by Editors). – *Eesti Päevaleht*, 10 January 2000.

of overall boundedness to law, of what the judge is bound to and of how that boundedness will be realised by the judge.

The examination of those questions will be of practical relevance when legal methodology can overcome the understanding that it offers only value-free solutions to the decision-maker. In connection with the structuring theory of law, these problems have been under examination for more than 30 years.^{*22} By today, the designation has acquired a conceptual character, particularly in the dogmatics of constitutional and administrative law but also in the theory of law as a whole.

At the same time, the structuring theory of law has not everywhere elicited extensive response. That is the case in German legal order, for example.^{*23} To the knowledge of the author of this article, problems of the structuring theory of law have not met with thorough regard, in connection with the theory of law and Estonian legal order, in Estonia, either.

The basic problem in the structuring theory of law is still that concerning the nature of the actual (functioning) legal order. Attention thereto has repeatedly been invited in specialist literature.^{*24} The problem lies in the very question of what is (should be) done by the subject who is making a legal decision (eliciting legal consequences into reality) when that subject subsumes objective law (*ius scriptum*) with regard to a case. In this point, rather laconic explanations have been offered by the legal positivist approach. It is the separation of the norm and the fact, distinguishment between law and reality as based on something therein – in the form as it has been rendered to the decision-maker – that provides the decision-maker with an understanding of the norm itself. Thus, normativity arises statically out of the case and, at the same time, the immediate content of legal text. And thus, legal work with a case that needs to be decided is principally reduced to the application of (an existing) legal norm. *Ius scriptum* is interpreted and, in best cases, concretised. In this approach, there are no problems with boundedness to law or reality or the constitutional requirement of boundedness to law.^{*25} In positivistic terms, an act has no power over the legal norm. The norm regulates a case immediately, it need not be changed. The norm can be subsumed directly, a law worker (decision-maker) is bound by the content of the norm. A large part of the legal rules serve as both behavioural norms for citizens and decisional norms for courts and authorities.^{*26} At the same time, it has been universally recognised that decision-making can never be as simple as bare deduction of a specific decision from the provided legal norm. In other words, norms provided by the state legislator are by no means pre-fabricated ready-to-use products.^{*27}

When we look at the administration of justice, another important (differentiated) structure of concretisation can be seen. Namely, the decision-making process embraces even those real-life facts that cannot be directly related to legal text, *i.e.* a legal norm. These facts become so-to-say codecisive components in the concretisation of law. However, they cannot be discussed very concretely, as courts change their rules in that respect on a case-by-case basis, behaving pragmatically. That way of action is necessary but theoretically, it represents a nonreflectory sign of the judge's activities in concretising the law. In this point, importance is borne by the empirical truth that such "enrichment" of the norm-text exists irrespective of whether it precedes the decision or the decision has been integrated into the motivation. This constitutes a linguistic bond between the language and factual data. That, and not only the norm-text^{*28} is, for the structuring theory of law, the first normative phase in the concretisation of a legal norm. Hence, from the viewpoint of the structuring theory of law, the text of a norm is not normative in itself. In principle, this applies to all legal texts. For the structuring theory of law, the scope of a norm (legal facts/real-life aspects), which will then be selected from the scope of the case on the basis of the normative underlying principle (the norm-programme), are important for making a decision. This means that the decision-maker must reach

²² Fr. Müller. Normstruktur und Normativität. Zum Verhältnis von Recht und Wirklichkeit in der juristischen Hermeneutik, entwickelt an Fragen der Verfassungsinterpretation. Berlin: D&H, 1966; Fr. Müller. Strukturierende Rechtslehre (Note 4); Fr. Müller (Note 9).

²³ Fr. Landeklos. Rechtsarbeit ist Textarbeit. – Kritische Justiz. 1997, p. 143.

²⁴ See *e.g.* Fr. Müller. Recht – Sprache – Gewalt. Elemente einer Verfassungstheorie. Berlin: D&H, 1975, p. 18.

²⁵ Section 146 of the Constitution of the Republic of Estonia.

²⁶ H. L. A. Hart. Concept of Law. Oxford, 1961, pp. 94 *et seq.* There, norms are classified into "primary rules" and "secondary rules".

²⁷ See P. Werner. Die Normentheorie Helmut Schelskys als Form eines Neuen Institutionalismus. Berlin: D&H, 1995, p. 102; W. Krawietz. Verhältnis von Macht und Recht in staatlich organisierten Rechtssystemen. In: P. Hofmann, U. Mayer-Cordig, H. Wiedemann (Hrsg.). Festschrift für Klemens Pleyer zum 65. Geburtstag. Köln, Berlin, Bonn, München, 1986, pp. 217–235.

²⁸ Legal language as used by jurists (lawyers) is not homogeneous. Thus, the language of norms, the language of enforcement acts (including court judgements), the law of jurisprudence can be distinguished. The latter is sometimes also referred to as the dogmatic language (see A. Podlech. Die juristische Fachsprache und die Umgangssprache. In: Fachsprache – Umgangssprache. Scriptor Verlag Kronberg /Ts, 1975, p. 161).

a situation in which the legal norm, as found and formed by the decision-maker, includes the norm-programme as well as the scope of the norm. Such text is potentially normative. The result of such work is expressed in the decisional norm. Observation of such legal work provides a picture which is substantially different from legal work carried out on the basis of legal positivism.

A legal norm is not found as the text of a law, the applier of law must “determine” the legal norm.^{*29} Non-normative norm-texts and potentially normative legal norms must be kept separate from each other (in positivism, they are united). For the purposes of the structuring theory of law, it is important to stress that there are two matters: that which already exists and that which must be attained by the law worker. For that reason, there is, besides the work with legal text (the interpretation), also the selection (analysis of the scope of the norm) of circumstances which are normatively directed by means of the norm (programme) and which assist in making the decision and, in the final stage, the determination of the norm. Hence, for the structuring theory of law, a legal norm is like an “order model coined by circumstances” (*sachgeprägtes Ordnungsmodell*).^{*30}

While only non-normative text of a norm exists in the beginning of the decision-making process and the normative legal norm is yet to be determined by the law worker, the static model of normativity must principally be replaced by a dynamic one, in order to provide an adequate description of how legal work functions in reality.

In methodological terms, this means that the positivist doctrine of subsumption is not able to offer, from the viewpoint of the rule of law, an adequate description of the phases of examining legal text and the selection of circumstances necessary for rendering a decision. A reduction of the decision-making to the logical scheme of subsumption (with a view to a syllogism) leaves a whole range of decisive stages latent.

Now we can ask whether such approach is of any practical assistance to legal practitioners. Can such jurisprudential methodology be regarded as a structural model for concretisation of law?

It seems that an answer should be of a positive rather than negative character. In connection with the structuring theory of law, legal methodology is given the task of supplementing the process of concretising legal norms with one structural model of concretisation – the structural analysis.

The starting point is comprised by learning about the factual circumstances of the case (what actually happened) and by hypotheses put forth by the practitioner regarding the norm-text. This naturally includes, first of all, the so-called *canones* developed by jurisprudence. Thus the structuring theory of law is not characterised by a teleological approach only. Regardless of the application of *canones*, the question will always remain in the meaning and objective of concretising the norm-text, besides the work that must be done with other elements of concretisation.

Grounds for interpreting a norm-text by all those means which are known and recognised in the methodology are provided by the norm-programme. A practical decision-maker takes a decision about the scope of the norm (norm-area) by means of the norm-programme. The scope of a norm and the norm-programme provide the norm, under which subsumptions can be made. In that manner, a decisional norm can eventually be individualised.

On that basis, one of the most fundamental conclusions would be that in a democratic rule of law, the “factual normativity” should not arise even from the state’s constitution. It is the task of the judge, who is bound by law, to find a lawful (normative) resolution by means of the decisional norm.

It has been stated in specialist literature that facts by themselves, without being verified, cannot be a part of that decisional norm in any manner. On the contrary, they are verified doubly in the analysis of the scope of the norm.^{*31} It must first be asked whether the facts are relevant to the norm-programme. Secondly, are they compatible (with a view to the case) with the norm-programme? Otherwise they would be nothing more than facts and be omitted from the further decision-making process. On the other hand, if they are

²⁹ It seems that the designation “to determine” justifies itself. The problem is in the fact that the object of regard is constituted by jurisprudence, as one immanent part of the law of science, which attempts to embrace the normative aspect of law, whereas this means the normative applicability of the norms of positive law. Hence, let us understand jurisprudence as the science of norms, which does not, however, imply that jurisprudence itself establishes norms (within the meaning of formal establishment of legal norms). On the contrary, “the science of norms” should be understood here as a system of notations about the applicable law. Thus jurisprudence deals with the problems of the normative applicability of objective law. K. Larenz. *Methodenlehre der Rechtswissenschaft*. Zweite, neu bearb. Aufl., Berlin: Springer, u.a. 1992, pp. 83 *et seq.*; R. Narits. *Õigusteaduse metodoloogia (Methodology of the Science of Law)*. Tallinn: Õigusteabe AS Juura, 1997, pp. 32 *et seq.*

³⁰ Fr. Müller (Note 4), p. 231.

³¹ Fr. Müller. *Juristische Methodik. Ein Gespräch im Umkreis der Rechtstheorie*. – *Verwaltungsrundschau*, 1994, 4, pp. 135–136.

compatible, they will fall within the scope of the norm and be a constituent part in decision-making. The structuring theory of law offers a differentiated answer even to the much-discussed question of the hierarchy of the elements of concretisation. This does not concern the determination of abstract conclusions belonging to a certain hierarchy but rather the ascertainment of a situation in which a rule for reaching a conclusion can be applied after all.

Practice has shown that not only elements of concretisation are used in deciding about a case. That is so for a specific objective reason. Namely, the process of concretisation is principally very extensive and it would be very problematic to have regard to all relevant methodical elements.

However, the question of hierarchy is topical when the use of different specific elements leads to different variants of meaning. In this point, the so-called preferred rules (rules that must be preferred) should be considered in order to avoid “cadi-justice”. But what should serve as a basis with regard to preferred rules? The hierarchy of specific rules is generally oriented towards the proximity of each specific element to the norm-text. The closer a specific element is to the norm-text, the more preference must be given to that element. As stated in literature: “Without doubt, partial results of grammatical and systematic interpretation are more preferable. In terms of preferred rules, notations of the historical and genetic aspects have no decisive meaning, as neither is based on the interpretation of the norm-text.”³²

The determination of limits for permissible specific results is one of the most problematic situations. The structuring theory of law tries, first of all, to construct the preferred rules so as to provide those rules with a perceptible connection with law itself. Such situation, however, also means that rules which are “close to law” are not insomuch provided with omnilateral methodological motivations. A preferred rule must, above all, be legally permissible, and at the same time methodologically possible. The same applies to the boundaries of the meanings of words.³³ The interpretation of any text must begin with knowledge about the meanings of words. By this we understand the meaning of an expression or interrelated words within the general usage or, if it is ascertainable with regard to the case, special usage, *i.e.* usage in the specific law.

The requirement that a decision must be compatible with the meaning of words is, in principle, normative and of a constitutional-law character. Judges must legitimatise their decisions by means of the text of norms enacted not by them but by the legislator.

Whether a possible meaning of a word can alone and directly demonstrate the limits of concretisation permissible under a rule of law is, however, an utterly different question.

Legal reality has shown that the interpretation of the norm-text in deciding about a case is necessitated by the sporadically indeterminable nature of law, or rather, legal texts. In many cases, the norm-text in its “pure form” does not elucidate the normative meanings of words. Legal texts are often either of a “loose-knit” nature or even “weak”.³⁴ In order to illustrate a so-called loose-knit case of semantic indeterminability, I should like to bring the example of § 3 of the Food Act³⁵, which attempts to unfold the content of concepts used in the Act. One such concept is “handling”, defined as market-oriented gathering, catching, hunting, growing, rearing, production or manufacture, processing, packaging, preservation, storage, loading, transport, export and import and sale or transfer, in some other manner (gifts, humanitarian aid, etc.), of food to another handler. The legislator has failed to fully elucidate the meaning of “handling”. Moreover, the problem of “weak” concepts is particularly topical in Estonian legal order. Namely, legal regulation is needed in a range of fields for which even vernacular designations may be inexistent. There may also be situations in which the semantic boundaries of concepts used in legal text are unknown and even if they are known, the applier of law is not confident about a binding meaning.

It is in those cases that the one-sidedness (metaphysicality) of the positivist doctrine becomes perceptible. The meaning of law cannot be reached by a bare reference to the text of a norm. The legislator has had a notion about language and tried, by means of applying that notion, to relate the semantic form of the norm to a certain part of reality. Thus an essential conception of a norm cannot be perceived without applying the syntax and semantics of the norm-text in the same manner as this was done by the legislator. Further, the so-called systematic context must be kept in mind. One should have a look at other legislative materials (historical interpretation) and know the respective dogmatics (dogmatic concretisation), etc.

³² Fr. Müller (Note 9), p. 253.

³³ K. Larenz. *Methodenlehre der Rechtswissenschaft*. 2. Aufl., Berlin: 1991, pp. 208–218.

³⁴ R. Narits. *The Role of Language Cognition in Legal Method*. – *Juridica International. Law Review*. University of Tartu, II, 1997, pp. 14–25.

³⁵ *Toiduseadus (Food Act)* – Riigi Teataja (the State Gazette) I 1995, 21, 324.

In addition it must be said that even such legislative materials themselves need to be interpreted, because they are a part of the parliamentary legislative process but do not directly belong in the final result, *i.e.* the law. Therefore, the elucidation of the boundaries of the meanings of words in reality is nothing else than a concretisation of the norm-text by means of relevant and thorough study of linguistic data. Nevertheless, it can be asserted that such work practically results in the norm-programme.

Thus (the methodology of) the structuring theory of law offers not only "... the polar dualism of existence/obligation, norm/case, norm/reality, a notion about the application of law as a subsumption and syllogism, which is constituted by the concretisation of a norm (which is already contained in the law) as well as by the approval of other means of jurisprudence, but it also offers a conception regarding the boundaries of the meanings of words, where norm-texts acquire their provided specifiable force through language..."^{*36}

A jurist/practitioner/decision-maker of the legal methodology that has been developed within the bounds of the structuring theory of law offers an option to provide critical reflections on his or her work and, with a view to the tasks of a democratic rule of law, to structuralise his or her work. The eyes and mind of a decision-maker do not move only between the norm and the facts of the case. A practitioner will not remain barely a passive party ("a talking text of the norm") but rather produce texts (the norm-programme, the legal norm and the decisional norm) on the basis of the non-normative, although binding, text of objective law.

A thorough examination of the described methods of work (production of text within one legal methodology) is a requisite for such exactitude which is necessary for the state, who establishes its legitimacy on a general and formalised (linguistically imparted) constitutional power. With a view to the Estonian situation and developments it must be said that in recent years Estonian society – in particular jurists – has begun to show interest in the question of the relationship between the textual provision and the meaning of law. The same problem has already attracted the attention of European legal culture for decades. However, we should not forget the situation from which we (Estonian society) originate and the amount of time that has been available in Estonia for creating and implementing a modern legal order.^{*37}

Language Cognition and Democracy are Interrelated

The structuring theory of law has been criticised particularly from the aspect of democracy. Namely, that theory says that practical decision-making with regard to law and reality and the communication are transferred from law itself to the concretisation of law, and therefore the democratic legality of legalness rests no more with the legislation but is rather determined by means of legal methodology.

That criticism implies that it would be possible to win back a piece of "lost land" to the legislator by constructing the theory of legal norms. At the same time, however, the theory does not describe that "good" theory of legal norms.

It seems that this can only lead to a positive conception of legal methodology. If methodology were reduced to the principle that the text has a meaning *per se*, questions would arise about how the preconception constructs itself, about the role then played by real-life circumstances and about when they are relevant. A situation of certain uncontrolledness would arise. But first of all, if legal work were reduced only to understanding the text, there would be a lack of a bearing methodological conception about the selection of real data.^{*38}

³⁶ Fr. Müller (Note 9), p. 297.

³⁷ In this point, I have mentioned only one aspect of the problem. Namely, the question cannot be nowadays reduced to the framework of only a national legal order. European Community law has already been created in converging Europe. For Estonia, this means that our national legal order must be shaped in good accordance with the legal order of the European Union. That must be done in order to make ourselves understandable. For example, Prof. U. Mereste, Member of the Estonian parliament (the *Riigikogu*) has written with regard to contract law: "It is natural that Estonian contract law should be shaped in good accordance with the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts (PICC) and the UN Convention on the International Sale of Goods (CISG) of 1980, which has also been ratified by the *Riigikogu*". – U. Mereste. Missugune peaks olema Eesti eraõiguse süsteem? (What Should the Estonian System of Private Law Be Like?). – *Riigikogu Toimetised*, 2000, No. 1, p. 117.

³⁸ See the criticism by I. Maus. Zur Problematik des Rationalitäts- und Rechtsstaatspostulats in der gegenwärtigen juristischen Methodik am Beispiel Friedrich Müllers. In: Abendrocht, Blanke, Preuß u.a. Ordnungsmacht? Frankfurt am Main, 1981; P. Röme. Kleine Bitte um ein wenig Positivismus. Thesen zur neueren Methodendiskussion. In: Abendrocht, Blanke, Preuß u.a. Der Kampf um das Grundgesetz über die politische Bedeutung der Verfassungsinterpretation. Frankfurt am Main, 1977.

It is true that involvement of real-life circumstances as an interim result of concretisation has been designated as a “legal norm” in the structuring theory of law. The verification scale is a norm-programme, created as a result of interpreting linguistic data. Initially, no real data has been entered in the norm-programme and therefore we cannot say that such a situation incorporates the very object of verification. The selection of real data as belonging to the norm-area, with prior formulation of linguistic data, results in the norm-programme.³⁹ This method, which is normatively controlled in a certain sense and at the same time an independent stage of concretisation, manages to attain, to the contrary of the critics’ views, something that is not a shortcoming of the structuring conception.

It may be added that the structuring theory of law does not limit itself to only designating that which has been found by its means. On the contrary, the work of norm construction represents a reflection on legal cognition based on real processes. In only this manner it becomes apparent that normativity is not a characteristic attributable only to norm-texts and that the structure of a norm does not mean too much, although it is the structure of the norm that can be found relatively easily. The conception of the decisional norm leads to the structure of the norm. This is not provided tangibly but is “... only a scientific interpretation model for the functioning and realisation of legal rules.”⁴⁰ Thus it is important to know that the process of concretisation of law is not comprised of something single and monolithic. The theory of legal norms must be able to see the multifaceted process of concretisation of laws with a view to its various stages, analyse those stages and, naturally, propose a theoretical model based on all of this. This also includes the task of identifying and describing connections between different stages and to determine the importance of interim results from one stage to another. And this is the point when constitutional fundamental norms and, additionally, the “laws” of jurisprudence become involved. By means thereof, single stages of concretisation can be structuralised and the connection between the stages can be seen. In this manner it is possible to demonstrate that the superiority of linguistic over real data and the analysis of the scope of a norm are a direct factual outcome based on normative requirements of law. Thus, the structuring theory of law and the norm model based thereon do not “bless” the superiority of the somewhat doubtful practice. However, the legal practice is taken into account.

In connection with the law-boundedness of judges, obliged by the rule of law, it is required under the principle of democracy that legal practitioners, who are able to do that, should found (develop, tie) their decisions on democratically legitimatised legislation. Hence the matter is not about offering to the legislator an opportunity to reconquer some “lost land” by means of a jurisprudential conception. After all, the “lost land” can only be reconquered for the legislator by the legislator itself. For that purpose, the legislator producing legislative acts must have a keen view of the legal practice.

It is equally natural that the legislator can influence a judge’s decision but not only by means of the text of a law. At the same time, it is the legal text that has a decisive role in moulding the decision, being, for any practitioner, the initial point of a legal solution (to the largest possible extent – according to one of the fundamental principles of the rule of law, namely the boundedness of public authorities primarily to the laws).

But is everything described until this point possible, or rather, real, after all? Yes, it is, if the text really serves as a starting point and if it is regarded seriously rather than “bent” from the very beginning.

Everything described can also be not possible. This would happen if a judge deciding about a specific case regards the text of a legislative act as one that is directly binding.

A bare norm-text is non-normative in the light of the structuring conception and, as such, it cannot have a binding regulatory effect on a specific case. The exploitation of different elements of concretisation helps to clarify the normativity of a text. For example, an element of dogmatic concretisation may be of such value to the understanding of a legal norm that the case may be even resolved thereunder. However, even such situations do not mean any special definedness (as a characteristic) of the norm-text, but rather imply the possibility of such definition. The theoretical source situation remains unchanged: all norm-texts are, in themselves – *i.e.* without context, etc. – equally undefined (within the meaning of “nonbinding”). However, language is language and in any case, practitioners must continue their work with it. Thus, this is not a semantically idealistic (process of) definition but a rational activity, in which language cognition and cognition of facts meet.

³⁹ Fr. Müller (Note 9), p. 252.

⁴⁰ *Ibid.*, pp. 138–139.

The structuring theory of law is also applicable to the cases of the so-called undefined legal concepts occurring in legal text. At the same time, it is true that, as stated in literature, “even methodologically correct attempts to interpret some legal rule are, every now and then, based on different interpretations. Particularly in the case of general clauses and undefined legal concepts, the administration of justice and the administration have some free space in interpretation and application, as they must meet the requirement of boundedness to the fundamental rights only constitutionally.”⁴¹

The structuring theory of law demonstrates how communication functions. And at the same time, the structuring theory manages to clearly demonstrate what fails to function: it is the boundedness of a legal practitioner to bare characters in legal text. No text alone can rule over decisions. On the contrary, an applier of law rules over the text and renders it ripe for decision-making. The legislator must express its principal notions in a norm (text), but cannot determine the meaning of that norm for a specific situation. On the other hand, it is required under the principle of democracy and the principle of the separation of powers that the legislator be provided with the “targets” of solutions (decisions). That paradox, a wish to bind legal practitioners – without a respective norm existing for actual binding – demonstrates the importance of legal methodology particularly in a rule of law.

A state where the “power” of law and universal equality before the law are ensured – which actually is the task of the state – must create a situation in which law (justice) is not only positioned on the level of an abstract law but rather, justice must be actualised in the specific process of the application of law. Legal methodology creates, for practice, a working environment oriented towards resolving tasks of a rule of law, and the legislator has already left that working environment by issuing the norm-text. I have stressed that with Prof. Kalle Merusk in the monograph dedicated to Estonian constitutional law.⁴² Namely, in Estonia, the legislator has not identified a law (as an act of legislation) with (objective) law. In rendering decisions which are accordant with law, the court must first find the case-norm (the most relevant norm of objective law, given the case) and thereafter begin to find the decisional norm (which is in accordance with law).

Hence, the task of legal methodology is to develop the working techniques which enable to practically unite the forms of democracy, politics and the activities of judges in a rule of law. Legal text, being the result of a democratic legal policy, can fulfil its function only in a situation in which legal work has been cast in a mould which principally conforms to the rule of law.

Finally, I should like to mention that the discussed subject-matter falls beyond the framework of legal methodology and is directly related to the process of realising the idea of the rule of law. More exactly, that part of legal methodology which can be designated as the structuring theory of law is an immanent component or means of the reality in a rule of law.

⁴¹ B. Pieroth, B. Schink. Grundrechte. Staatsrecht. II. 12, überarb. Aufl., Heidelberg: C. F. Müller Verlag, 1996, p. 25.

⁴² R. Narits, K. Merusk. Constitutional Law. Estonia. The Hague, London, Boston: Kluwer Law International, 1999, pp. 64–65.

Legal Knowledge of Estonian Youth.

Comparison of 1970s and 1990s

Legal knowledge is an important structural element of legal awareness besides socio-legal attitudes and behaviour patterns. A dominating role in ensuring a person's lawful behaviour is attributed to legal knowledge when placing it first in the list of structural elements of legal awareness, while on the other hand, the importance of legal knowledge is seen as the shaper of other structural elements of legal awareness (attitudes, readiness for lawful behaviour). Offenders are generally known to have better legal knowledge than law-abiding people. This is due to the peculiarity of the experience of offenders – they have more contacts with bodies of legal protection, from where they gain a great volume of legal knowledge. They also gain knowledge from contacts with criminals and actively seek legal knowledge by studying laws to learn how to avoid punishment. This does certainly not imply that offenders have a more developed legal awareness or that their high legal awareness makes them violate the law. Legal behaviour is influenced not only by legal knowledge, but also by attitudes and behaviour patterns. Otherwise stated, the lawful behaviour of an individual is influenced by the inner regulators of his or her behaviour – these are the social values and acting principles promoted and protected by legal norms that are accepted by the individual as subjective values.*¹

Description of Study

The political socio-economic changes in Estonia have brought about changes in all the structural elements of legal awareness. The shifts that have taken place are the subject of the research “Youth and law in the changing Estonia: 1974–1998” financed by the Estonian Science Foundation.

In our study, we divided the structural elements of legal awareness in further detail as follows:

- 1) legal knowledge;
- 2) perception of ideal law (justice is the basis and the applicable law is compared with justice);
- 3) attitude to applicable law;
- 4) requirements for law;
- 5) attitude towards abidance by legal rules.*²

¹ S. Kaugia. Structure of Legal Consciousness. – *Juridica International. Law Review. University of Tartu*, I, 1996, p. 18.

² L. Auväärt, H. Dsiss, S. Kaugia, P. Kenkmann, E. Raska. Noorte õigusliku sotsialiseerumise uurimine üleminekul riigisotsialismist vabaturumajandusse (Materjale kordusuuringust) (Research in the Legal Socialisation of Youth in Transition from State Socialism to Free Market Economy (Materials from a repeated study). – Tartu, 1999, p. 13.

This article is focused on one part of the legal awareness of young people, legal knowledge, by comparing questionnaire results for the years 1975 and 1995. The comparison is possible because the present study is a repeated study based on the concept developed at the criminology laboratory of the Tartu State University in 1974. The first stage of the study was carried out in 1974–1977.

The contingent of both the original and the repeated study is made up of young people aged 15–18 from different groups:

- 1) secondary school pupils;
- 2) vocational school pupils;
- 3) offenders.

For the purposes of this study, offenders are young people with regard to whom a condemnatory judgement has been made or the measures provided in the Juvenile Sanctions Act⁷ applied (the offenders in this study are convicts of the Viljandi Juvenile Prison and pupils of the Kaagvere Reformatory).

Opinions on Criminal Liability

The questionnaire contained several sets of questions to find out about the legal knowledge of the studied persons. It should be explained that as the study mainly deals with the criminological aspects of the legal education of youth, it deals with the norms of criminal law applicable at the time of answering the questionnaire and knowledge of these norms.

The opinions of youth on the criminal liability of minors are quite important from the criminological aspect. It helps to find better solutions to the issues of criminal liability of minors by making better use of means of criminal law in combat against juvenile delinquency.

Two basic questions arise in this respect:

- 1) who is prosecuted, in the opinion of youth, for offences committed by minors (younger than 18 years);
- 2) who should, in the opinion of youth, be prosecuted for offences committed by minors.

The answers of the studied persons to these questions are presented in Tables 1 and 2.

Table 1. Who is prosecuted for offences committed by minors (%)?

No.	Answer	Year	Secondary school pupils	Vocational school pupils	Offenders
1.	Only the minor himself/herself	1975	27.7	35.6	48.1
		1995	36.0	37.0	58.0
2.	The minor and his/her parents (caregivers)	1975	53.1	50.0	40.7
		1995	44.0	45.0	31.0
3.	The minor and his/her teachers	1975	0.2	0.4	0.7
		1995	1.0	0	3.0
4.	The minor, his/her parents and teachers	1975	4.0	2.9	3.0
		1995	2.0	1.0	0
5.	Only the parents (caregivers) of the minor	1975	14.4	10.4	6.7
		1995	16.0	15.0	4.0
6.	Other	1975	0.6	0.7	0.7
		1995	1.0	3.0	5.0

⁷ Alaealise mõjutusvahendite seadus (Juvenile Sanctions Act) – Riigi Teataja (the State Gazette) I 1998, 17, 264.

Table 2. Who should really be prosecuted and punished for offences committed by minors (%)?

No.	Answer	Year	Secondary school pupils	Vocational school pupils	Offenders
1.	Only the minor himself/herself	1975	56.7	52.9	61.5
		1995	73.0	69.0	75.0
2.	The minor and his/her parents (caregivers)	1975	35.5	35.3	30.4
		1995	24.0	23.0	15.0
3.	The minor and his/her teachers	1975	0.5	1.1	0
		1995	0	2.0	3.0
4.	The minor, his/her parents and teachers	1975	3.5	4.0	1.5
		1995	1.0	1.0	1.0
5.	Only the parents (caregivers) of the minor	1975	2.2	4.7	6.7
		1995	2.0	2.0	1.0
6.	Other	1975	1.7	2.2	0
		1995	1.0	3.0	5.0

According to § 3 of the Criminal Code of the Republic of Estonia (CC), only the person guilty in an offence, *i.e.* the person having intentionally or by negligence committed an act specified in the Criminal Code, is subject to criminal liability and punishment. Criminal punishment is applied only on the basis of a court judgement. The same holds true for minors subject to criminal liability. Criminal liability of minors begins at the 15th and in exceptional cases at the 13th year of age (CC § 10). The respective age limits in the Soviet criminal law were 16 and 14.

Other answers may be correct in certain cases – but only if minors are induced or engaged in crime, which is a separate set of elements of a criminal offence (*cf.* CC §§ 202 and 17). As the question in the questionnaire concerned prosecution **only** for offences committed by minors (without any additions or clauses), only one answer can be considered correct: only the minor himself/herself is prosecuted for an offence committed by him or her.

In this view, the legal knowledge of young offenders is much better than that of law-abiding youth, and has improved in time when compared to the other groups (see Table 1). Two important shifts are revealed in comparing the two questionnaires:

- 1) According to the data of the second questionnaire, 58% of offenders know that only the minor himself or herself is prosecuted for an offence committed by him or her (only 48% of young offenders knew it in the 1975 study);
- 2) When compared to other groups, the offenders group contains the smallest number (4%) of persons who believe that only the parents (caregivers) of a minor are liable for an offence committed by the minor. The respective share of studied persons who think so is 16% in the secondary school group and 15% in the vocational school group. The share of youths who think that parents are responsible for the offences of minors has generally increased in the last years, but it has decreased among offenders (see Table 1).

The results meet our expectations, especially when considering that the offenders questioned were youths who had committed an offence and had been convicted – owing to their experience, they have a better awareness of legal matters than their law-abiding peers. Those young offenders whose offences have not been discovered and who hence have no significant contacts with bodies of legal protection can be expected to be more similar to law-abiding youths than to special vocational school pupils or juvenile prison convicts in respect of their legal knowledge.

The mistaken understanding of mainly law-abiding youth that only parents (caregivers) are prosecuted for offences committed by minors is alarming. It gives young people a sense of impunity and lessens their responsibility for their acts.

At the same time, the opinion that the minor himself **should** be prosecuted for his or her offence dominates in all groups of studied persons (see Table 2). The number of vocational school pupils and offenders who find that only the parents (caregivers) of a minor should be liable for his or her offensive acts is significantly smaller in the latest study. No significant change can be seen in the answers of secondary school pupils: the share of this group who thought that only the parents (caregivers) should be liable for the acts of a minor

was 2.2% in 1975 and 2% in 1995. This suggests that secondary school pupils are the least willing to take responsibility for their acts, which is explained by the fact that these youths are more used to relying on their parents (caregivers), they have less experience in coping independently and less need to take their own decisions.

The results of the question of who young people think should be prosecuted for offences committed by minors show that in the opinion of youth, the liability of minors for their offences should be greater than they think it is. On the other hand, the liability of parents (caregivers) of minors for the offences of minors should be smaller than young people think it is. It can be concluded that the moral convictions of the youth generally correspond to the applicable criminal law.

The willingness of young people to take responsibility for their acts is certainly influenced by the severity of the sanction imposed for the offence committed.

Opinion of Youth on the Severity of Sanctions

From the viewpoint of the society, both excessive severity and excessive leniency of punishment may cause a sense of injustice and distrust of the criminal law. The severest term of punishment applicable for an offence has a decisive role in deciding on the severity of punishments. From the aspect of the sense of justice of people, the excessive severity of punishments provided by law is less dangerous than excessive leniency. The latter may cause people (including law-abiding people) to fear that state authority does not protect the life, health and dignity of its citizens against violent attacks with sufficient strictness. This in turn may cause people to take an extremely passive attitude in combating crime (for example, they may fear the revenge of criminals and persons close to the criminals and not report the offences committed against them or not make testimony that can reveal criminals, etc.). In extreme cases, such perception of the excessive leniency of sanctions may cause lynch law (especially where the victim or a person close to the victim is indignant at the excessive liberalness of the punishment imposed on the offender and has an actual lynch law opportunity (*i.e.* opportunity to take revenge).

To learn about the knowledge of youth about the severest term of punishment, the question was put separately with regard to minors and adults.

Table 3. The severest term of punishment than can be imposed pursuant to law for an offence is ... for minors (%)

Alternatives:

- 0 – does not know, is not able to say, doubts, no answer
- 1 – underestimates
- 2 – knows exactly
- 3 – overestimates

Alternative	Year	Secondary school pupils	Vocational school pupils	Offenders
0	1975	58.5	50.9	14.4
	1995	19.0	21.0	15.0
1	1975	14.4	30.6	50.0
	1995	65.0	64.0	47.0
2	1975	11.0	8.1	20.3
	1995	5.0	2.0	23.0
3	1975	16.1	10.4	15.3
	1995	11.0	13.0	15.0

... for adults (%)

Alternatives:

- 0 – does not know, is not able to say, no answer
- 1 – underestimates
- 2 – knows partly (15 years or death penalty (was applicable at the time of answering the questionnaire))
- 3 – knows exactly (15 years, in exceptional cases death penalty)
- 4 – overestimates (more than 15 years)

Alternative	Year	Secondary school pupils	Vocational school pupils	Offenders
0	1975	0	0	0
	1995	9.0	12.0	11.0
1	1975	4.1	5.0	9.2
	1995	11.0	9.0	18.0
2	1975	86.8	79.6	72.5
	1995	55.0	35.0	47.0
3	1975	6.4	9.2	10.0
	1995	2.0	9.0	4.0
4	1975	2.7	6.2	8.3
	1995	23.0	35.0	20.0

The data presented in Table 3 indicate that the number of offenders who can answer the question concerning minors correctly has increased over the years. The considerably poorer knowledge of law-abiding youth is evidenced by the fact that the number of young people who underestimate the severest term of punishment of minors is 65% of secondary school pupils (1975 – 14.4%) and 64% of vocational school pupils (1975 – 30.6%). This shows that minors perceive the current sanctions to minors as lenient. The tendency is opposite when speaking of adults – a significantly larger number of the studied persons have overestimated the sanction. The number of those who know the severest term of punishment of adults has substantially decreased among secondary school pupils and offenders; all three groups know the sanctions for adults mainly in part and are better informed of the punishment of minors.

The awareness of youth of the severest term of punishment applicable to adults for his or her crime is quite important from the criminological and criminal law aspect: today's minors are tomorrow's adults, and legal knowledge has both comprehensive educative and general preventive relevance for them.

Where Does Legal Knowledge of Youth Come From?

To find how young people obtain the most of their legal knowledge, we asked why they answered the previous question the way they did. The answers are shown in Table 4.

Table 4. Why did you answer the previous question this way (%)?

Multiple choice answers:

- 1 – I have heard and read about it
- 2 – I have read about it
- 3 – I have heard about it
- 4 – I just think so

No.	Minors /adults	Year	Secondary school pupils				Vocational school pupils				Offenders			
			1	2	3	4	1	2	3	4	1	2	3	4
1.	Minors	1975	18.3	3.8	42.3	35.6	24.2	2.1	35.6	38.1	23.0	11.5	36.1	29.5
		1995	15.0	2.0	31.0	52.0	10.0	2.0	33.0	54.0	32.0	1.0	32.0	35.0
2.	Adults	1975	47.1	6.9	35.6	10.2	44.7	6.1	32.6	16.7	32.5	13.0	36.6	17.9
		1995	33.0	5.0	34.0	28.0	23.0	4.0	41.0	32.0	33.0	5.0	35.0	27.0

The Table shows that concerning minors, more than a half of law-abiding youths (52% of secondary school pupils and 54% of vocational school pupils) have answered at random and therefore do not actually know the severest term of punishment prescribed by law. Of offenders, 35% answered, "I just think so" (*i.e.* at random). The proportion of those who answered so has increased in all groups when the two studies are compared. The same trend can be observed concerning terms of punishment of adults. The above Table shows that the dominant source of legal knowledge for all groups is information they have heard or read and heard somewhere. The number of those who had only read of the matter is the smallest. Heard information (heard or read and heard information) gives different knowledge to young people: on the one hand, it is a source of correct knowledge on the severest term of punishment of minors (offenders have relatively better knowledge of this) and adults, on the other hand, information thus obtained contains a large share of information that favours the underestimation of the prescribed severest term of punishment and therefore favours or can favour the sense of impunity in minors who are inclined to break the law.

The following Table is a review of the direct sources of legal knowledge of youth.

Table 5. Where have you obtained most of your legal knowledge (%)?

No.	Answer	Year	Secondary school pupils	Vocational school pupils	Offenders
1.	Unanswered	1975	0	0	0
		1995	9.4	9.7	11.4
2.	From parents	1975	0	0	0
		1995	4.9	5.2	5.1
3.	From several sources	1975	0	0	0
		1995	31.4	26.0	26.6
4.	From the radio	1975	11.3	11.8	2.4
		1995	1.3	1.9	2.6
5.	From friends	1975	2.0	3.5	5.6
		1995	2.7	3.9	5.1
6.	From television	1975	11.4	6.7	3.2
		1995	12.0	14.9	2.5
7.	From mother	1975	7.4	5.1	11.3
		1995	1.3	3.2	1.3
8.	From films	1975	1.8	2.0	0
		1995	0.9	0	1.3
9.	From a relative	1975	1.1	1.2	0
		1995	1.3	1.3	2.5
10.	From school	1975	33.5	41.6	46.0
		1995	7.6	9.1	8.9
11.	From father	1975	4.3	5.1	8.1
		1995	1.1	1.3	2.5

12.	From legal literature	1975 1995	7.7 2.4	8.2 1.3	4.8 1.3
13.	From newspapers	1975 1995	6.8 18.0	5.5 8.4	1.6 3.8
14.	From sister/brother	1975 1995	0.1 0	0 0	0.8 1.3
15.	From magazines	1975 1995	1.1 0.4	2.0 0.6	0 1.3
16.	From other sources	1975 1995	11.5 4.7	7.3 12.3	16.2 22.8

As Table 5 shows, the relative share of some sources of information in the shaping of the legal knowledge of youth has greatly changed. While in the 1975 study, the share of secondary school (11.3%) and vocational school pupils (11.8%) who obtained information from the radio was relatively large, the respective shares in the 1995 study were 1.3% and 1.9%. No great change has taken place in respect of young offenders. Today, other means of mass media are more popular when compared to the radio, which is reflected in the results of this study. When compared to the 1970s, the share of those who obtained information from the television has increased both among secondary school and vocational school pupils, and has somewhat decreased among offenders. The relative share of newspapers as sources of legal knowledge has increased in all groups. The number of those who have obtained legal knowledge from several sources is the largest. Several sources of information are probably interpreted as several means of mass media, because many sources of information that were relevant for youth in the 1970s have now lost their importance: while the school had a large role according to the results of the first study (33.5% of secondary school pupils, 41.6% of vocational school pupils and 46% of offenders obtained the bulk of their legal knowledge from school), the role of the school in the legal education of youth is very modest now (the respective shares are 7.6%, 9.1% and 8.9%). Young people are less interested in legal literature: while according to the 1975 study results, 7.7% of the studied secondary school pupils, 8.2% of vocational school pupils and 4.8% of offenders received their knowledge from literature, only 2.4%, 1.3% and 1.3% of the studied persons mentioned this source of information in the 1995 questionnaire. Our legal system has substantially changed between the two studies and the earlier popular scientific books are now outdated, while not many new books have been written yet. The new books that have been written are not easily available to youth because they are expensive. The relative share of parents in legal education has decreased for the same reasons. Parents have also not followed all the changes and their legal knowledge is no longer adequate. That is why young people have to turn to the mass media. Thus, the main sources of the legal knowledge of youth are the main channels of mass media – television and newspapers – while literature, school and radio have lost much of their importance. One has, however, to be critical about the mass media as a source of legal information – media channels need not improve the legal knowledge of youth, as they often only describe offences. There is a danger that the growing generation will have rather incomplete legal knowledge that does not allow young people to adequately assess their own or their friends' acts.

Knowledge of Youth of the Degrees of Crimes

The knowledge of youth of the degrees of crimes is equally important to their knowledge of the severest term of punishment prescribed by law. CC § 7² provides that crimes are classified as crimes in the first, second and third degree depending on the severity of punishment prescribed in the Criminal Code for committing them. According to the above provision of law, a crime in the first degree is a punishable act committed intentionally or by neglect, for which the Criminal Code prescribes more than eight years' imprisonment or the death penalty as the severest term of punishment^{*7}; a crime in the second degree is a punishable act committed intentionally or by neglect, for which the Criminal Code prescribes not more than eight years' imprisonment; a crime in the third degree is a punishable act committed intentionally or

⁷ Death penalty was an applicable form of punishment according to the criminal law applicable in 1996.

by neglect, for which the Criminal Code prescribes a fine, deprivation of the right to be employed in a certain position or area of activity, or detention.

It is important that the punishments prescribed for various offences be proportional with regard to each other and correspond to the legal awareness of people. This enforces the conviction of people that criminal law is fair. A situation where the punishment for some offences is excessively severe and for others excessively lenient favours a sense of injustice. Such a disproportion has an especially negative effect when punishment is excessively severe for offences that are not seen as serious by the majority of people, and excessively lenient for offences that the majority of people considers to be serious.

In this study, we tried to find out how well young people know the applicable criminal law, what offences are considered serious and what offences are considered less serious in their opinion, and to what extent their opinions are in accordance with the actual provisions of criminal law.

In the questionnaire, we asked the studied persons to answer which one of five specified crimes (intentional causing of serious bodily injury; theft of a person's personal property on a large scale; theft of a car; hooliganism together with acts of violence against a person; theft of state or national property on a large scale) is the most serious.

Changing of the criminal policy in the transition of the country from socialism to a market economy has caused changes in categories of offences. Differences between theft of personal property and theft of state or national property were not distinguished in 1995 (at the time of the second questionnaire), nor are they now (as opposed to the socialist period). The Criminal Code prescribes sanctions for concealed (§ 139) and unconcealed (§ 140) theft without specifying to the theft of whose property the sanctions are applied. In our questionnaire, we considered it necessary to make a distinction so as to learn about the attitude of young people to personal and nonpersonal (*e.g.* corporate, etc.) property and its theft.

To assess the opinions of youth concerning the above crimes, let us first briefly describe the relevant provisions of the applicable criminal law.

- 1) Intentional causing of serious bodily injury (CC § 108) – the severest term of punishment prescribed by law for this crime is up to seven years' imprisonment. This constitutes a crime in the second degree;
- 2) Concealed theft (CC § 139) – the severest term of punishment according to law is up to eight years' imprisonment (a crime in the second degree);
- 3) Unconcealed theft (CC § 140) – the law provides up to ten years' imprisonment as the severest term of punishment (a crime in the first degree);
- 4) Theft of a motor vehicle (CC § 197) – the severest term of punishment according to law is up to twelve years' imprisonment (a crime in the first degree);
- 5) Hooliganism (CC § 195) – the severest term of punishment is up to seven years' imprisonment (a crime in the second degree).

The legislator prescribes more severe punishments for the crimes it considers more serious and more lenient punishments for those it considers less serious. In assessing the severity of punishment, the severest term, not the most lenient term of punishment is generally decisive. This is because the punishment for a crime may not exceed the severest term of punishment prescribed by law for the particular crime, while the Criminal Code (§ 39) allows the imposition of a more lenient penalty than the most severe punishment applicable for the crime.

Where the severest terms of punishment applicable for different crimes are equal (concerning both the primary and supplementary punishment), it is presumed that the legislator considers the one for which the minimum punishment is more severe the more serious of the crimes.

Proceeding from these principles, we can present the following comparison of the seriousness of the above crimes in the 1970s and the 1990s.*⁸

⁸ The crimes are listed in the order of seriousness, ending with the least serious.

Table 6.

No.	1970s	No.	1990s
1.	Theft of state or national property on a large scale (five to fifteen years' imprisonment together with or without confiscation of property or part of property)	1.	Theft of a motor vehicle (three to twelve years' imprisonment)
2.	Hooliganism together with act of violence against a person (one to five years' imprisonment)	2.	Unconcealed theft (one to nine years' imprisonment)
3.	Theft of personal property at a large scale (up to five years' imprisonment)	3.	Concealed theft (three to eight years' imprisonment)
4.	Intentional causing of serious bodily injury (up to two years' imprisonment or up to one year's punishment with labour)	4/5	Intentional causing of serious bodily injury. Hooliganism (one to seven years of imprisonment for both)
5.	Theft of car (up to one year's imprisonment or up to one year's punishment with labour or a fine of up to one hundred roubles or public reprehension)		

Data on the opinions of youth on what they believe are the most serious crimes according to law are presented in Table 7.

Table 7. Which one of the listed crimes you think is the most serious according to law (%)?

No.	Crime	Year	Secondary school pupils	Vocational school pupils	Offenders
1.	Intentional causing of serious bodily injury	1975 1995	61.1 78.0	50.4 73.0	38.6 67.0
2.	Theft of personal property at a large scale	1975 1995	1.0 1.0	2.2 7.0	3.0 4.0
3.	Theft of a car	1975 1995	0.2 1.0	0.7 2.0	0.8 3.0
4.	Hooliganism together with act of violence against a person	1975 1995	14.7 17.0	17.6 18.0	20.5 25.0
5.	Theft of state of national property at a large scale	1975 1995	23.0 3.0	29.1 1.0	37.1 1.0

As we see, the youths of all three groups believed both in the 1970s and the 1990s that the most serious crime according to law is the intentional causing of serious bodily injury. By the time of the second questionnaire, the number of studied persons who consider hooliganism the second serious after intentional causing of bodily injury has increased. While those questioned in 1975 correctly thought that stealing a car is a less serious crime according to law than the other listed categories of crime, those questioned in 1995 did not know to consider stealing a vehicle the least serious of the listed crimes.

The data presented suggests that the majority of young people consider personal crimes relatively more serious and property crimes relatively less serious than they are according to law (when compared to other

crimes). This points to the fact that young people value the life, health, honour and dignity of a person and consider it important that all these values be protected by law.

Conclusions

The results of the study confirm that the legal knowledge of offenders is better than that of the law-abiding youth. This in turn shows that legal knowledge in itself cannot prevent people from committing offences (crimes).

Despite the above, the legal knowledge of the youth should be improved more systematically and intensively, because the greater the accordance between the subjective behavioural principles of an individual and the legal norms he or she has accepted as knowledge, the more consistently lawfully he or she acts. The possibility that the acquired legal knowledge may require one to reassess his or her established behavioural principles should also be taken into account. A person can abstain from committing an offence by learning at what age and how severely he or she can be punished for it. Therefore, the young person should obtain legal knowledge before he or she commits an offence.

The study demonstrates the declining role of the school in the legal education of young people. This dangerous and somewhat unnatural tendency (the school should be a major socialising agent and source of knowledge for the school-age youth) is explained by the decline of the school as a social institution and the reputation of a teacher's job during the last decades, and also the change in curricula in market economy conditions: in the 1970s and 1980s a subject called "Fundamentals of Soviet Law" was included in the curricula to provide pupils with general knowledge of law and explain to them the necessity of adhering to the acceptable norms of behaviour in the society. The current school curricula do not contain a similar subject. The mass media (television, newspapers and magazines, and radio to a greater extent than it has so far) should undertake to fill this gap, as the answers of the young people studied showed that these are the sources from where they have obtained (by hearing and reading) the bulk of their legal knowledge.

In drafting norms the legislator should, more than earlier, take into account the sense of justice and the legal awareness of people (including youth). This would help to prevent (or diminish) the presently common sceptical attitude to the activities of legal protection bodies (including courts), because the law is believed not to protect the interests of common people, while the serious crimes of public servants in high positions are believed by the public not to be punished severely enough (*i.e.* in accordance with the seriousness of the crime).

The fairness of the legal system (in the above meaning) would help to improve the reputation of legal protection bodies in the eyes of people, this in turn would make young people more interested in law, which naturally would improve the level of legal knowledge of youth generally, not only offenders. This is an essential factor in ensuring lawful behaviour, because legal knowledge together with subjective regulators of behaviour constitute a precondition for the lawful behaviour of an individual.

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State Continuity in the Light of Estonian Treaties Concluded before World War II^{*1}

The Republic of Estonia as a new state emerged in 1918, separating from Russia undergoing a period of confusion. Estonian soldiers who had taken over the front from the retreating German army at the end of the First World War won the War of Independence against the troops of Soviet Russia. The victory was formalised with the Tartu Peace Treaty (2 February 1920)^{*2}, which recognised the independence and sovereignty of the state of Estonia and the waiver by Russia of the rights of a sovereign with regard to the Estonian nation and country forever. The Tartu Peace Treaty also determined the border between Estonia and Russia.

The Soviet Union “resorted to revanchism” in the summer of 1940. Europe, which had once again sunk into confusion, could observe how the Republic of Estonia, Republic of Latvia and Republic of Lithuania, members of the League of Nations were annexed by the Soviet Union at a direct military threat.^{*3} The Treaty on Mutual Assistance between Estonia and the Soviet Union (28 September 1939)^{*4}, supported by the so-called Molotov-Ribbentrop Secret Protocol (23 August 1939)^{*5} assigned to the Soviet Union the right to rent some marine bases and airfields on the Estonian territory (article III) and provided the prerequisites for the presentation of an ultimatum (16 June 1940)^{*6}, which demanded that army units of the Soviet Union be brought to the crucial centres in Estonia and that a new pro-Soviet government be

¹ This paper constitutes a part of a research project carried out by International and European Law Research Centre established at Law Faculty of the University of Tartu in 2000.

² See Riigi Teataja (the State Gazette) 1920, 24/25; or 11 League of Nations Treaty Series (LNTS) 30 (1922).

³ See generally, Baltic States: a study of their origin and national development, their seizure and incorporation into the U.S.S.R.: third interim report of the Select Committee on Communist Aggression, House of Representatives, Eighty-third Congress, second session, 1954, under the authority of H. Res. 346 and H. Res. 438. 3rd reprint ed., Buffalo: W. S. Hein, 1972; B. Meissner. Die Sowjetunion, die baltische Staaten und das Völkerrecht. Köln: Verlag für Politik und Wirtschaft, 1956.

⁴ See Riigi Teataja (the State Gazette) II 1939, 15, 25.

⁵ Secret Protocol to the Treaty on Non-aggression between Germany and the Soviet Union. – DGFP. Ser. D, Vol. VII, pp. 246–247.

⁶ For the text of the Note Verbale, See *Mezhdunarodnaya zhizn'*, 1990, No. 3, pp. 129–130. Referred via: Baasidelepingust anneksioonini (From the Agreement on the Military Bases to Annexation). Compiled by J. Ant. *et al.*, Tallinn: Perioodika, 1990.

established. As a result of the formal arrangement of the new government and the actual arrangement of the embassy of the Soviet Union, 14–15 July 1940, an extraordinary election to the lower chamber of the parliament (State Council) took place with two candidates in only one out of 80 electoral districts and all the opposing candidates of the pro-Soviet Estonian League of Working People were removed by the persons arranging the elections; the upper chamber remained unformed.⁷ The new State Council adopted a declaration (22 July 1940), asking the Supreme Council of the Soviet Union to admit the Estonian Soviet Socialist Republic to the Soviet Union. On 6 August 1940, the Supreme Council of the Soviet Union “granted the request of the State Council of Estonia”.

The majority of the states in the world disapproved of the annexation and the membership of the Baltic states of the Soviet Union was not recognised (at least *de iure*) for decades.⁸ The procedure for the re-establishment of independence starting in 1987–1988 and involving the entire population of Estonia, Latvia and Lithuania culminated in August 1991, when the failing *coup d'état* in Moscow (19–22 August 1991) provided an impetus for the formal liberation (as regarded by the Soviet Union) of these states from the Soviet Union. The Baltic peoples who became members of the UN in less than a month (17 September 1991) after the *coup d'état* in August convincingly declared the re-establishment of their sovereign states and ruled out the creation of a new state.⁹ In 1991, many states declared that they would **re-establish** their diplomatic relations with Estonia, not establish relations with a newcomer.¹⁰

When a state re-establishes its sovereignty after illegal occupation or annexation, its international rights and obligations are automatically recovered as a rule. In 1918–1940, Estonia concluded over 210 bilateral treaties and was a party to over 80 multilateral conventions. R. Müllerson has written about them: “Still, most treaties concluded more than fifty years ago by the Baltic states had become obsolete. It is clear that *restitutio ad integrum* after more than fifty years is more often a legal fiction than a realistic option.”¹¹ While consenting to this argument, we still have to ask whether the refusal to *de iure* recognise the use of force by the Soviet Union against the Baltic states, or the desire of the Baltic peoples – both those who remained on the occupied territory and those who moved on to the free world as refugees – to **re-establish** their independence instead of **accepting** sovereignty as a **donation** from the occupying state was not equally fictitious.

As there is no precedent similar to the re-establishment of independence of the Baltic states, we have to ask if *restitutio ad integrum* is inevitable in case of continuity of a state and to what extent would its application be possible and reasonable. Here we face a collision of **ethical arguments** – the right of political self-determination of a social entity, carrying the same and stable identity and capable of existing as a state is not refuted by the actual power of any other social entity, however long-lasting, over this social entity –, and **practical arguments** – the relationships emerging from the life of a social entity that has lasted over a sufficiently long period and organised as a state have become so stable that their abrupt replacement with old relationships excessively destabilises the life of this social entity. Although these contrasts rather imply the national dilemma of *restitutio*, the same ethical and practical statements are weighed also in international politics.

⁷ For the annexation process, see e.g. B. Meissner. Die baltischen Staaten im weltpolitischen und völkerrechtlichen Wandel. Beiträge 1954–1994. Hamburg: Bibliotheca Baltica, 1995; see also E. Sarv. Õiguse vastu ei saa ükski. Eesti taotlused ja rahvusvaheline õigus (Nobody Can Fight Justice. Pursuits of Estonia and International Law). Tartu: Okupatsioonide Repressiivpoliitika Uurimise Riiklik Komisjon, 1997.

⁸ See e.g. J.-H.-W. Hough. The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory. – New York Law School Journal of International and Comparative Law, Vol. 6, No. 2, 1985, pp. 391–446.

⁹ For declarations regarding Estonia, see e.g. Resolution of the Supreme Council of the Estonian Soviet Socialist Republic on national status of Estonia (29 March 29, 1990) – Riigi Teataja (the State Gazette) 1990, 12, 180; Declaration of the Supreme Council of the Republic of Estonia (11 March 11, 1991) on the results of referendum regarding restoration of Estonian sovereignty and independence – Riigi Teataja (the State Gazette) 1991, 8, 124; and Resolution of the Supreme Council of the Republic of Estonia on national independence of Estonia (20 August 20, 1991) – Riigi Teataja (the State Gazette) 1991, 25, 312; in parallel with the pro-liberation Soviet authorities, Estonian Congress, the representative institution of the citizens of the Republic of Estonia and their successors was established on civil initiative; the above-mentioned declaration of 20 August 1991 created of the members of the Supreme Council and Estonian Congress on an equal basis the Constitutional Assembly preparing a new constitution; the *Riigikogu* (Estonian parliament), elected under the new Constitution, adopted the Declaration on restoration of constitutional power (7 October 1992) – Riigi Teataja (the State Gazette) 1992, 40, 533.

¹⁰ See M. Kaljurand. Some Aspects of Succession of Estonia to the International Treaties Concluded in 1918–1940. – Master’s Thesis at The Fletcher School of Law and Diplomacy. A Manuscript, 1995, Fn. 17; See also R. Pullat. The Restoration of the Independence of Estonia 1991. – Finnish Yearbook of International Law, Vol. II, 1991, pp. 529–530.

¹¹ R. Müllerson. Law and Politics in Succession of States: International Law on Succession of States. – Dissolution, Continuation and Succession in Eastern Europe. Ed. by B. Stern. The Hague: Kluwer Law International, 1998, p. 16.

The present remarks raise the most important aspects of the issue of the identity and continuity of states under international law: under what conditions can the situation created through occupation be regarded as fixed to the extent that the continuity of the occupied state ceases? In what activities has the re-established state's status to manifest itself in order that one could speak of continuity? Must – and can – the re-establishment of sovereignty after a considerable period be complete? If no, to what extent does international law allow re-establishment of the legal relations applicable before the occupation? Answers to these questions would create a legal basis for Estonian continuity-based legal policy in communicating with other states or international organisations. It is likely that these answers will also develop international law, offering a fulcrum for the treatment of states restored after annexation. The purpose of this paper is to examine the relevance of the issue of continuity and to map the fields of international treaty law to be examined in order to provide answers to the above-mentioned questions.

The authors find that the issue of continuity is currently in a latent phase in Estonian law. First attempts to clarify the standpoints of Estonia's counterparties have been made. Various opinions have been brought out, but the rise of new foreign policy priorities has pushed the issue of earlier treaties aside. In the following section, we will demonstrate that the actual relevance of this issue with regard to foreign and internal policy is substantial.

Relevance of Issue

The issue concerning the validity and applicability of continuing treaties is characterised by a more practical significance than the re-establishment of historical justice or investigation into the conscience of international community. We would like to offer three examples where the validity or invalidity of Estonian treaties concluded before 1940 could have far-ranging consequences: determination of the Estonian-Russian border, restitution of the property of Baltic-German émigrés in the course of the ownership reform and the compatibility of Estonian international obligations with the *acquis* upon accession to the European Union.

From among the treaties concluded before the Second World War, the **Tartu Peace Treaty** emerges as relevant to the sovereignty of Estonia^{*12}; it has been laid down *expressis verbis* in § 122 of the valid Estonian Constitution: “The land border of Estonia shall be established by the Tartu Peace Treaty of 2 February 1920 and the other interstate border treaties ...” The first principal matter agreed upon at the Tartu peace conference (January 1920) was the recognition of Estonian independence. Unconditional recognition of independence and determination of the state border marked a critical turn both in the stabilisation of interstate relations and development of Estonia's statehood. In the border negotiations with the Russian Federation held in the 1990s, Estonia has proceeded from the principle of continuity and regarded the Tartu Peace Treaty as valid and binding. Russia has viewed the Treaty as “a historical document” and disregarded its legally binding nature with regard to interstate relations. The principle of *rebus sic stantibus* has been used, although article 62 of the Vienna Convention on the Law of Treaties does not permit that to be done by a state due to whose activities aimed against international law the treaty could not be complied with. Also, article 62 refers to the fact that a fundamental change of circumstances may not be invoked with regard to treaties establishing a boundary, of which a part of the Tartu Peace Treaty (article III) is. At the moment, the Petroskoy draft boundary agreement, in compliance with which the boundary established by the Tartu Peace Treaty was changed to Estonia's disadvantage is ready to be signed. According to one opinion, the government of Estonia has, through consenting to the new boundary agreement, abandoned the principle of continuity as a priority because the above-mentioned § 122 of the Constitution assigns constitutional force to article 3 of the Tartu Peace Treaty, laying down the geographical position of the border (“The frontier between Estonia and Russia take the following course: ...”). The persons protecting this step taken by the government of Estonia (*Realpolitiker*) refer to the wording of § 122 of the valid Constitution, pointing out that the border is not exclusively regulated by this Treaty but the principle of *lex specialis* applies.

Disregard of the principle of continuity would also entail amendment to the **Estonian ownership reform** that has functioned to date, on the basis of which nationalised, collectivised or in any other manner

¹² See E. Mattisen. Searching for a Dignified Compromise: The Estonian-Russian Border 1000 years. Tallinn: ILO, 1996, particularly Chapter 4 “Lawful and Internationally Recognised Estonia”, pp. 52–70.

unlawfully expropriated property taken by occupation authorities is restituted or compensated for. Section 7 (3) of the Republic of Estonia Principles of Ownership Reform Act^{*13}, adopted on 13 June 1991, sets out: “Applications for return of or compensation for unlawfully expropriated property which was in the ownership of persons who left Estonia on the basis of agreements entered into with the German state and which was located in the Republic of Estonia are resolved by an international agreement”. This provision excludes applications of émigrés for the restitution of their property from the general circle of entitled subjects. The giving of content to this provision is one of the topical questions on the issue of continuity.

There are two treaties that might relate to the giving of content to this provision. Firstly, the protocol on the resettlement of German population living in Estonia to the State of Germany^{*14}, concluded between the State of Germany and the Republic of Estonia on 15 October 1939 and its supplementary protocol of 6 April 1940 concerning transfer of money to the State of Germany.^{*15} The protocol is important for determining the scope of émigrés to Germany at that time.

Secondly, the treaty between the Soviet Union and Germany, signed on 10 January 1941^{*16} and entered into force on the same day, article 1 of which set out: “The government of the Soviet Union shall pay to the government of the State of Germany as complete and final compensation for all claims presented by Germany to the Union of Soviet Socialist Republics with regard to the German property situated on the territories of the Soviet Socialist Republics of Lithuania, Latvia and Estonia as well as for all claims presented by Germany against natural and legal persons who owned or own dwellings on the territories of these republics, 200 million state marks.” The State of Germany, in its turn, undertook to pay to the USSR for the analogous property located on its own territory 50 million state marks, leaving a lump sum in the amount of 150 million state marks for the benefit of Germany.

The issue of the validity of both treaties and the impact on the ownership reform should be solved proceeding from the continuity of the state and legal succession. With the conclusion of the treaty of 1941, Germany violated the international treaty with the Republic of Estonia. According to article 62 (2b) of the Vienna convention, Germany can not refer to the principle of *rebus sic stantibus* as a ground for termination of the treaty with regard to it as a party thereto due to the fact that the fundamental changes were a result of the breach of its obligation under the treaty. Under the occupation, the legal personality of the Republic of Estonia was *de iure* indisputable, but *de facto* almost void, external sovereignty or *imperium et iurisdictio* was restrained; thus, it was impossible to comply with the treaties concluded earlier or even discuss the issue with other parties to the treaty. The important question whether some of these treaties have developed into customary law, which should be regarded as part of the law of a state according to revisionist scholars^{*17}, no longer exists already because it was impossible for the Republic of Estonia to comply with the treaties over a particular period, not to mention recognition of these treaties as a part of international customary law. On the other hand, the use of the *rebus sic stantibus* doctrine in this case seems to be a weak argument, taking into account that the Permanent Court of International Justice did not extend this principle to ownership issues.^{*18}

The most essential issue in practice is **the conformity of the international obligations of Estonia with the *acquis* of the European Union**. The Prime Ministers of the Baltic states signed the association agreements (so-called Europe Agreements) with the European Communities and their member states in Luxembourg on 12 June 1995. The *Riigikogu* ratified the Estonia’s Europe Agreement unanimously on 1 August 1995.^{*19} Estonia is the first Central European state which concluded an association agreement without a transition period. The Europe Agreement imposes on Estonia an obligation to harmonise Estonian law with Community law in fields related to the domestic market, *i.e.* particularly in trade and economy. The association agreement between Estonia and the European Communities and the member states thus caused an increase in the direct legal obligations of the Republic of Estonia. The harmonisation of legislation

¹³ Eesti Vabariigi omandireformi aluste seadus (Republic of Estonia Principles of Ownership Reform Act) – Riigi Teataja (the State Gazette) 1991, 21, 257, entered into force on 20 June 1991.

¹⁴ Riigi Teataja (the State Gazette) II 1939, 18, 29.

¹⁵ Riigi Teataja (the State Gazette) II 1940, 2, 4.

¹⁶ About the regulation of mutual claims on property of the State of Germany and the USSR with regard to Lithuania, Latvia and Estonia: Bundesarchiv, Abteilungen Potsdam.

¹⁷ See H. H. Koh. Is International Law Really State Law?. – Harvard Law Review, Vol. 111, 1998, No. 7 pp. 1824–1861.

¹⁸ Free Zones of Upper Savoy and the District of Gex, P.C.I.J., 1932, Ser. A/B, No. 46, 157.

¹⁹ Riigi Teataja (the State Gazette) II 1995, 22–27, 27.

with which the obligations are concerned means voluntary harmonisation in reality.^{*20} The harmonisation also effects international treaties serving as integral parts of the legal order of Estonia. It is important to note that the accession conditions^{*21} to states – the so-called Copenhagen criteria may be regarded as a political test that even exceed by their content the provisions set out in the association agreements.

Presuming that Estonia will be a member state of the European Union in the future, one has to prevent the conflict between our law, including the conflict of the international treaties concluded before the Second World War, and the primary legislation of the Community. Article 307 of the Treaty Establishing the European Community (previous article 234) sets out: “The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty ...” However, Community law does not permit the member states to exercise the rights arising from the Treaty, if this violates the legal obligations of the member state to the supranational Community: “... To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established” (article 307).

Thus, the member states cannot rely on international treaties concluded before accession to the European Union, which would justify the restrictions imposed with regard to the domestic market. The phrase “all appropriate steps” refers to a possibility that the states will denunciate the conflicting agreement. From this, one may conclude that an individual may contest the provisions of an international treaty incorporated into domestic law, if these are in conflict with the Community law ensuring more favourable rights to him or her. From the Community viewpoint, this provision is certainly valid. If a member state uses an international alternative, it can be brought to justice for violating the Treaty. An individual cannot be brought to justice, as it is the state that allows for application of law (both international and Community law) in its jurisdiction.

Also, article 307 (2) (previous 234 (2)) of the Treaty Establishing the European Union sets out: “To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude,” and the third paragraph of the provision contains a particular admonition, “In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States”. The phrase concerning common advantages can be regarded as prohibition against the freedom to implement communitarised international law.^{*22} Article 10 (previous article 5) of the Treaty of Rome establishing the obligation of loyalty sets out: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community [...]”.

It is likely that a state as a subject of international law may have obligations not related to Community law. However, due to the expansion of the latter, these possibilities gradually decrease. A state cannot be viewed as a bifurcated entity, which, being a party to an international treaty as a sovereign state and simultaneously as a member state of the Community, acts in a dual manner. Delegation of sovereignty is still an objective act which obviously alters the content of the legal personality of the state. At least in theory, there cannot be a situation where a ruling of the European Court of Justice is binding on a state as a member state, not as a sovereign subject in international law.

It has been claimed that generally the European Court of Justice does not have jurisdiction to declare a treaty concluded with third states void. The member states are not obliged to follow such a decision. Consequently, the European Court of Justice can only decide whether a treaty is recognised and applied within the legal system of the Community. When discussing the conformity of the obligations of the Republic of Estonia in international law with the requirements presented by the European Union, one also has to point out a ruling of the European Court of Justice of 16 June 1998.^{*23} The European Court of Justice

²⁰ A. Evans. Voluntary Harmonisation in Integration between the European Community and Eastern Europe. – European Law Review, June 1997.

²¹ D. Kennedy and D. E. Webb. The Limits of Integration: Eastern Europe and the European Community. – Common Market Law Review, 1993, Vol. 30, No. 6, p. 1095.

²² See C-124/95, The Queen, *ex parte*: Centro-Com Srl. v. HM Treasury and Bank of England [1997] ECR I-114.

²³ C-162/96, Racke v. Hauptzollamt Mainz [1998] ECR I-3655.

declared “even though the Vienna convention does not bind either the Community or all its Member States, a series of its provisions, including Article 62, reflect the rules of international law [...]” Moreover, the Court set out that upon the alteration of circumstances, “the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order”. The Court also declared its will to recognise the other principles of international law, pointing out that the principle of *pacta sunt servanda* is “a fundamental principle of any legal order”.

The practice has demonstrated that four conditions have to be met in order that the treaties concluded between the member states be binding on the Community:

- the treaty has to be concluded before the Community was established and it must be done by all the member states;
- the member states themselves have to wish that the Community follow this treaty;
- the institutions of the Community must act in accordance with the treaty, and
- the other parties have to recognise the transfer of rights and obligations to the Community.

The international treaties concluded by the Republic of Estonia before the Second World War do not conform to these criteria; consequently, it is extremely important to identify the treaties valid with regard to Estonia and then analyse their conformity with the *acquis*.

Validity of International Treaties upon Re-establishment of Full Statehood

The issue of the validity of treaties concluded before illegal occupation after the state has re-established its independence becomes very complicated. In addition to legal matters, this is influenced by political, economic and other factors.*²⁴ The historical examples of the restoration of state identity in the 20th century (e.g. Ethiopia, Czechoslovakia, Albania, Austria) as presented in literature contain a considerably shorter “pupation period” as the examples derived from the Baltic states.*²⁵

Several states have announced that they do not consider the treaties concluded with Estonia from 1918–1940 valid (Japan, Germany, Italy, China and Russia).*²⁶ At the same time, “The United States consistently refused to recognize the incorporation of Estonia [...] into the Soviet Union. [...] Britain accorded only *de facto* recognition.”*²⁷ The United States of America have regarded the old treaties concluded with Estonia always as binding on itself and also partially complied with them (in diplomatic relations with the foreign representations of Estonia that operated also during the annexation period).

Belgium, for instance, announced that having recognised the continuity of the Baltic states, it regards the treaties concluded before 1940 as valid and assured that invalidation of treaties can be carried out according to the Vienna convention on the Law of Treaties after the treaties have been reviewed in detail. Also, Belgium announced that its refusal to recognise the Soviet occupation entails non-application of the bilateral treaties concluded with the Soviet Union in 1940–1991 to Estonia.*²⁸ Review of and agreement upon the continuation or termination of each bilateral treaty will probably be the best practice. The standpoints of the parties to treaties concerning the validity and applicability of treaties may be reconfirmed. For example, visa freedom between the United Kingdom and Estonia was restored according to the visa freedom agreement concluded in 1928 via exchange of notes in 1992. The validity of the treaty on intellectual cooperation concluded on 11 December 1937 between Estonia and Finland was restored on 5 February 1992.

²⁴ For tentative viewpoints concerning the possibility to strictly apply the principle of continuity in addition to Müllerson, *op. cit.* See also: K. Marek. *Identity and Continuity of States in Public International Law*. 2nd ed., Genève: Droz, 1968; M. Lehto. *Succession of States in the Former Soviet Union. Arrangements Concerning the Bilateral Treaties of Finland and the USSR*. – Finnish Yearbook of International Law, Vol. IV, 1993, p. 208; M. Kaljurand, p. 22 *et. seq.*

²⁵ See e.g. K. Marek; I. Brownlie. *Principles of Public International Law*. 5th ed., Oxford: Clarendon Press, 1998, pp. 81–83.

²⁶ This piece of information is provided by the Estonian Ministry of Foreign Affairs.

²⁷ R. M. M. Wallace. *International Law*. 2nd ed., London: Sweet & Maxwell, 1992, p. 95.

²⁸ Note of the Embassy of the Kingdom of Belgium of 19 October 1998 – the archive of the Estonian Ministry of Foreign Affairs.

Before one continues with description of criteria from which Estonia should proceed when determining the validity of old treaties, one should mention the principle of *pacta sunt servanda*, creating a presumption that all old treaties are in force. This principle is deemed to be a part of customary law and it is particularly important in relation to this issue. Namely, the Vienna convention on the Law of Treaties does not have retroactive force (article 4) and is applicable only to treaties concluded after 27 January 1980. Before 1969, and in fact until 1980, international law of treaties consisted of customary law, the majority of which was codified in the Vienna convention on the Law of Treaties (1969).

There has been a discussion about the customary law nature of the principle of *pacta sunt servanda* in the very context of international law. F. R. Tésou remarks that it is rather a moral rule, because according to the model of rational interest, the states tend to support rules that allow for opportunistic breach.²⁹ Although state governments publicly support the principle of *pacta sunt servanda*, the practice is coloured by opportunism. Tésou says that those who consider the principle as having customary law nature possess the “right moral instinct coupled with the wrong theory of custom”.³⁰ The positivist approach to international law does not consent to such views.³¹ The above-mentioned view nevertheless helps to understand the concept of the principle discussed and explains why international courts make so few references to international customary law, preferring the term *opinio iuris*.

Treaties guide states in the relations between them. They express wishes, promises and usually also mutual benefit (reciprocity, except for treaties on human rights). The purpose of treaties is to decrease ambiguity in international relations. Diplomatic relations between the states concluding treaties are not necessary. Nevertheless, it is useful to examine what parties to the treaty recognised the Republic of Estonia under the annexation period. When concluding a treaty, the Republic of Estonia treated other parties to the treaty as right bearers. During the occupation period, it was impossible for Estonia to perform its obligations to them. If now, in “renewed” contractual relationships, a question arises with regard to the obligations of the Republic of Estonia under international law, it can be tested on the basis of the principle of reciprocity. One has to take into account that the Vienna convention on the Law of Treaties does not treat the principle of *pacta sunt servanda* as an absolute rule.³² Article 26 points out “good faith” as a standard necessary for following this principle. It is logical, considering that international law is based on consensus (*volonté générale*). Thus, it is possible to judge to what extent one party as a sovereign imposes particular conditions on another party.

An opportunity to terminate treaties that fail to set out the validity period or possibility to terminate them would render the institute of the treaty too rigid. On the other hand, too simple a method of cancellation of treaties would violate the purpose of the law of treaties – to achieve security in international relations.

Termination of International Treaties

Treaties may be terminated automatically or as a result of expression of will by parties to the treaty. Will may be expressed by both (all) and one party. Proceeding from the principle of continuity, we presume that the old Estonian treaties were valid throughout the period of Soviet occupation. Despite that, treaties could terminate on the basis of international law. A framework of termination of treaties, accompanied by examples from Estonian practice will be presented below.

In case of termination of a treaty **by agreement of parties**, agreement may be expressed before the entry into force of the treaty, *i.e.* be contained in the treaty or manifested only during the treaty’s validity (article 54 of the Vienna convention). As a rule, the consent of both parties is required to terminate treaties between two or three parties; however, multilateral agreements are “open” and a unilateral state act will frequently suffice to terminate them.

The most common ground for terminating a treaty is termination **according to the provisions of the treaty**. The treaty may prescribe its term, possibility to denounce it or withdraw therefrom as well as automatic

²⁹ F. R. Tésou. *A Philosophy of International Law*. Oxford: Westview Press, 1998, p. 89.

³⁰ *Ibid.*, p. 89.

³¹ One has to agree with R.-A. Posner that “the greater puzzle is the persistence of academic moralism”, one feature of which is “intellectual weakness”. R.-A. Posner. *The Problematics of Moral and Legal Theory*. – *Harvard Law Review*, Vol. 111, No. 7, 1998, p. 1690.

³² See M. Koskenniemi. *From Apology to Utopia. The Structure of International Legal Argument*. Helsinki: Finnish Lawyers’ Publishing Company, 1989, Fn. 113.

termination, if the number of parties remains below a particular limit. **Upon arrival of the term**, the treaty may terminate automatically. A treaty concluded for a specified term may presume a particular period before notification of premature termination, otherwise extend automatically or change into a treaty concluded for an unspecified term. The majority of open conventions brought into force by Estonia before the Second World War were concluded for an unspecified term. Bilateral treaties, even if concluded for a specified term, extended automatically as a rule and no information about unilateral applications for non-extension of such treaties after 1940 by other counterparties of such treaties are not known to the authors. Considering the status of Estonia, such notification was not obviously regarded as necessary or the Soviet Union was not regarded as a legal successor of the Republic of Estonia to whom the respective notification should have been communicated.

Termination of a treaty **by unilateral application** (denunciation or withdrawal from a treaty) is the most common manner of termination. Most of the old international agreements of Estonia enable such termination – even if they contained a term, they extended after the expiry of the term and would have remained valid until cancelled by either party.

The right of states to terminate a treaty on the basis of a provision permitting termination “tacitly contained” therein is disputable. The International Law Commission has accepted the concept of *desuetude*: a tacit consent to terminate the treaty, if the consent has been clearly expressed in the behaviour of the states. *Desuetude* should not be applicable to open multilateral agreements. For example, the practice of the UN as a depositary concerning the treaties concluded during the last one hundred years considers all of them valid. A state wishing to withdraw from such a treaty can do it according to the provisions of this treaty. Closed multilateral treaties or bilateral treaties are a different case. The cause for the conclusion of such treaties is the interest of the states in relation to other particular states. In such a case, the failure to perform the treaty could prove as a legal fact. When applying *desuetude* to old treaties of Estonia, only non-performance before occupation or after re-establishing of independence can be taken into account – in the meantime, the performance of the treaties by Estonia was impossible.

Multilateral treaties often contain a provision that upon **reduction of the parties below a particular number**, the treaty shall automatically terminate. According to the authors’ knowledge, the open treaties concluded before the Second World War have not been denounced in such large numbers as causing the termination of any treaty on this ground.

One form of terminating a treaty by agreement of the parties is termination of a treaty **by agreement of all the parties** without the treaty regulating the termination *expressis verbis*.³³ Article 54 of the Vienna convention imposes thereon two conditions: all the parties must consent to it and consult with the other contracting states before using this right. This manner of termination presupposes recourse to the counterparty/counterparties. In case of bilateral or closed multilateral treaties, the restricted active legal capacity of Estonia as a partner obviously precluded the use of this model (the authors are not aware of any recourse to the Estonian government bodies or foreign representations with such proposals) – termination of multilateral conventions would have also presupposed consultation with Estonia as a formal party. Multilateral conventions have not been terminated but amended after Estonia was occupied. This means that the initial versions of the conventions continue to be valid. This is testified, *inter alia*, by the steps taken by the Secretary-General of the UN as a depositary who has for example registered new parties to old versions as a result of legal succession after the entry into force of new versions. Consequently, consent of all the parties other than Estonia cannot be regarded as a ground for the termination of the old treaties of Estonia.

³³ For example, the Agreement on Commerce and Shipping between Estonia and Turkey, concluded on 16 September 1929 (Riigi Teataja (the State Gazette) 1930, 56, 377) and other economic agreements on economy were terminated by the Agreement on Commercial and Economic Cooperation, concluded between Estonia and Turkey on 28 August 1995 (Riigi Teataja (the State Gazette) II 1995, 42, 188); article XIII thereof sets out: “The treaties and protocols and clearing agreements on commercial and economic cooperation concluded between the two states before 1940 shall be terminated upon the entry into force of this Agreement.”

Termination of a treaty implied by **conclusion of a later treaty** is equal to the above-mentioned ground. The later treaty may, but need not explicitly, replace the earlier treaty.^{*34} If the later treaty governs the same matter, the principle of *lex posterior* shall be applied upon solving a conflict. Article 59 of the Vienna convention imposes four preconditions on the termination of an earlier treaty:

- a later treaty shall be concluded by all the parties to the earlier one;
- a later treaty concluded shall concern the same issue as the earlier;
- it arises from the new treaty or it has been established in some other manner that this matter shall be governed by a new treaty;
- the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

These criteria suggest that if the conclusion of a later treaty does not imply the parties' wish to terminate the earlier treaty, the actual provisions of the treaties have to be compared. The provisions of the earlier treaty concerning the areas not regulated by the later treaty may remain valid (on condition that these can operate without the provisions invalidated due to the replacement or together with the replaced provisions).

Novation as well as termination of a treaty by agreement of all the parties would have presupposed the consent of the Republic of Estonia for terminating the treaties concluded before 1940. Insofar as it is known, such consent was not given during the occupation period; therefore one can speak about the application of such grounds only in relation to the treaties concluded after August 1991.

Termination of a treaty **upon the emergence of a new customary law norm** means in fact a new treaty between the parties. The latter is expressed in the customary law norm, the conscious behaviour of the states but not in documents executed in writing. The Vienna convention does not mention this ground. The basis arises from the view that a later customary law norm may overthrow the earlier provision of the treaty.^{*35} If two states involved in a treaty start to behave differently from the provisions of the treaty and mutually accept it, it may be considered to be a modification of the treaty, in which will is expressed through acts (indirect expression of will). From the viewpoint of the clarity of legal relations, this cannot be appreciated, and a treaty modified in this manner should certainly not bind third parties who wish to continue to perform the treaty in its initial form. Let us recall that article 54 (b) of the Vienna convention also demands the consent of all the parties for terminating a treaty. Consequently, international open treaties, the other parties to which have opted for a different type of behaviour from that provided for in the treaty, can not be terminated with regard to Estonia, unless Estonia consciously chooses to comply with the customary law norm that has emerged.

Another ground for terminating a treaty upon mutual agreement is the **tacit right to denunciate or withdraw from a treaty** mentioned in article 56 of the Vienna convention. According to the Vienna convention, this possibility shall be expressed in the intention of the parties upon conclusion of a treaty or be implied by the nature of the treaty. The origin and scope of such right to terminate is, however, unclear.^{*36}

The Republic of Estonia has not been persistent in raising the issue of validity or termination of the treaties concluded after the re-establishment of its independence. It is understandable that it is difficult to perform this with all counterparties, but in the interests of the clarity of interstate relations, a mutual agreement concerning the validity or termination of as large number of bilateral and closed multilateral treaties as possible should be reached.

³⁴ For example, the Single Convention on Narcotic Drugs of 1961 (Riigi Teataja (the State Gazette) II 1996, 19–22, 84) entered into force with regard to Estonia; according to article 44 thereof the convention terminated, *inter alia*, the following treaties concluded between counterparties before:

- International Opium Convention, concluded at The Hague on 23 January 1912 (Riigi Teataja (the State Gazette) 1922, 109–110, 82) that entered into force with regard to Estonia on 21 January 1931;
- International Opium Convention, concluded at Geneva on 19 February 1925; (Riigi Teataja (the State Gazette) 1930, 51, 323) that entered into force with regard to Estonia on 30 November 1930; and
- Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, concluded at Geneva on 13 July 1931 (Riigi Teataja (the State Gazette) 1935, 45, 47) that entered into force with regard to Estonia on 3 October 1935.

The Convention on the Performance of Judgement of Foreign Arbitration, concluded at Geneva on 26 September 1927 (Riigi Teataja (the State Gazette) 1929, 37, 280) and the Protocol on Arbitration Clauses, concluded in Geneva on 24 September 1923 (Riigi Teataja (the State Gazette) 1928, 57, 40) terminated with regard to Estonia with the entry into force of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958 (Riigi Teataja (the State Gazette) II 1993, 21/22, 51) on 28 November 1993 (article 7 (2)). There are more examples of this type.

³⁵ See *e.g.*, N. Kontou. *The Termination and Revision of Treaties in the Light of New Customary International Law*. Oxford: Clarendon Press, 1994, pp. 22–24.

³⁶ See *e.g.* M. Akehurst. *Treaties, Termination*. In: R. Bernhardt (ed.) *EPIL*, Instalment 7 (1984), p. 507–508.

There are several grounds for unilateral termination of a treaty (articles 59, 60 and 61 of the Vienna convention):

- termination of a treaty as a **consequence of its breach**;
- **impossibility of performance**; and
- **fundamental change of circumstances** (the principle of *clausula rebus sic stantibus*).

The first two cannot be applied to the old treaties of Estonia. The annexation deprived Estonia of the possibility to perform and breach treaties. Impossibility of performance does not imply cessation of the party of the treaty but the cessation of the object of the treaty.

A fundamental change of the circumstances set out in article 62 of the Vienna convention operates on condition that the treaty remains valid only as long as the conditions existing during the conclusion thereof exist. In relation with a fundamental change of circumstances, two more grounds may be pointed out with regard to the termination of treaties that are not expressly mentioned in the Vienna convention:

- **cessation of a party** (termination of a state without a legal successor); and
- **outbreak of war between the parties**.

Neither of the above-mentioned grounds applies to Estonia, because Estonia did not participate in the Second World War (Estonia also followed a strict policy of neutrality before the Second World War) and one could not speak about cessation of a party in case of state continuity.

The doctrine of *clausula rebus sic stantibus* has been viewed as international customary law.³⁷ In order to preserve the normative nature of the doctrine, the “changes” should be casuistically analysed and one should examine whether these happened in a legal manner or outside law. Moreover, it is important whether these changes were supported by the practice employed by a party to the treaty and by what is called *opinio iuris*.

Article 62 (1) of the Vienna convention sets out two conditions for applying this ground:

- “the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty”; and
- “the effect of the change is radically to transform the extent of obligations still to be performed under the treaty”.

Here it is suitable to cite J. L. Brierly, “[...] it is mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for the problems of a changing international world [...] law is bound to uphold the principle that treaties must be observed [...]”³⁸

To sum up the above-mentioned topic, one has to admit that the Republic of Estonia has a number of international rights and obligations arising from treaties, about the extent of which one does not have an actual overview. Several rights and obligations require updating – Estonia should accede to supplementary protocols amending open conventions (*e.g.* concerning trafficking in persons).

Section 123 (2) of the Constitution of the Republic of Estonia provides for direct application of the ratified international treaties in the Estonian legal system. Even if one considers as absolute the assertion that the treaties concluded before Soviet occupation became obsolete due to the alteration of the paradigm of international law (the international legal subjection of an individual – law of human rights – was established), it is a fact that the bearers of the highest state authority in Estonia are people who have to be informed about the contractual relations of the state with other states and international organisations.

When restoring its independence, Estonia has paid much attention to the provisions of international law and attempted to use legal means. Therefore, Estonia should continue this dignified trend and, proceeding from the principle of continuity, clarify the validity of its old treaties both in its own interests and the interests of all the other states in the world.

³⁷ See Decision of the International Court of Justice in the case of Fisheries Jurisdiction (United Kingdom v. Iceland). – 1973, ICJ Rep. 3.

³⁸ J. L. Brierly. The Law of Nations. An Introduction to the International Law of Peace. Oxford: Clarendon Press, 1963, p. 339.

Assignment of Public Tasks to Private Legal Persons.

Legal Bases and Limits

1. Introduction

In the last decades, many states have started to pay serious attention to the economics of the public sector and the components of private economy. Decrease of the loads on the budgets of the public sector has become an important issue. In Estonia, these problems have become topical in the last few years. The draft of the national budget strategy for four years (2001–2004) developed by the Ministry of Finance focuses on reduction of the tax burden, decrease of the expenditures of the state and acceleration of integration into the EU. One objective of the administrative reform that is being introduced in Estonia is delegation of the functions of state government and through this decrease of expenditures, provided that the quality of fulfilment of the functions and their availability to citizens does not decrease. One important aspect here is assignment of public tasks to persons in private law. Even though this issue has mainly been discussed by politicians and economists, it also concerns lawyers. Estonia is a state of law according to its Constitution and the Constitution stipulates the general organisation of the institutions and functions of state and the most important requirements to administration. Therefore the main task of lawyers is to mark these legal limits to which the assignment of public tasks to persons in private law may proceed, and which are the risks and legal problems that may arise.

In the context of the administrative reform, the following factors may be pointed out as the objectives of assignment of public tasks to persons in private law.

- 1) Efficiency. The main argument here is that the state does not have the mechanism which in the fulfilment of public tasks would increase their efficiency and productivity.
- 2) More extensive use of the private sector and its mechanisms in the fulfilment of public tasks (provision of services). The state simply does not have the capacity to fulfil all the tasks arising from public interests.
- 3) Reduction of the budget load of the state. According to the draft of the national budget strategy, the objective is to reduce the expenses of the government sector to 34 per cent of GDP by 2004. In parallel with the reduction of government costs, assignment of public tasks to persons in private law also allows to bring private investments into the relevant fields, which in the long run should improve the quality of fulfilment of the tasks.

2. The Term “Public Tasks”

Determination of the term “public tasks” is important in analysing the problem at hand proceeding from the legal aspect as well as in specifying the object of the assignment of tasks (privatisation). The Constitution

of Estonia does not use the term “public tasks”. But the term has been used in specific laws. In their essence, public tasks may be treated as objectively existing tasks determined by public interests, which have been sensed as such by the legislator and stipulated in laws as tasks of the state or given for fulfilment to different institutions of the society or voluntarily taken for fulfilment by the latter. In their essence, public tasks will remain public tasks even when the state assigns them – transfers them to persons in private law. Such treatment, however, is too extensive and fails to provide the exact legal criteria for determination of the legality of assignment of public tasks or for determination of the tasks themselves.

German lawyer Udo Di Fabio has determined public tasks as tasks that have been expressly acknowledged as such by law or can be derived therefrom by interpretation.^{*7} He treats public tasks as the matter of administration.^{*8} Austrian scholar Johannes Hengstschläger does not speak about public tasks within the framework of the given problem, but only about administrative tasks. In his opinion, administrative tasks are all such agenda that have been directly assigned to an administrative body by law or it has at least indirectly, proceeding from the idea and objective of the law, been made responsible for their fulfilment.^{*9} It is important to note here that the definitions of both authors proceed from the relevant legal norm, which gives the answer to the question what a public task is in the specific case in the legal meaning.

Subsection 3 (1) of the Constitution of Estonia stipulates the strict requirement of legality based on law and the principle of reservation of the legislature related thereto – the power of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.^{*10} Therefore the requirement provided for in § 3 (1) of the Constitution must be observed in the assignment of public tasks.

On the basis of the principles of the legal order of Estonia, public tasks may legally be determined as tasks assigned to administrative institutions directly with law or pursuant to law and tasks which have been derived from the relevant legal norm by way of interpretation.

Tasks of the state are one type of public tasks mentioned in literature.^{*11} The Constitution of Estonia does not use the term “task of the state” expressly, but the term “duties of the state” has been used in § 154 of the Constitution. Pursuant to subsection 2 of the said section, the expenditure related to duties of the state imposed by law on a local government shall be funded from the state budget.^{*12} In the given case assignment of the duties (tasks) of the state to the local government is meant. In the specific provisions of the Constitution, the wording “obligation of executive power”, “a citizen of Estonia is entitled to the assistance of the state”, etc., “the state shall organise vocational training”, etc. is also used. Regardless of the difference in wording, the tasks of the state in respective fields can and may be derived here by way of interpretation. Apart from the tasks of the state arising from the Constitution, the fulfilment of which is obligatory and done through the immediate state administration, a legislator may with formal laws consider other agenda arising from public interest also as tasks of the state, even though they can not be directly derived from the Constitution and have prescribed their fulfilment through immediate state administration. Subsection 65 (16) stipulates the universal competence of the *Riigikogu* (parliament) in the resolution of issues concerning the life of the state, *i.e.* the right to determine with formal laws what are tasks of the state and what are not.

A major part of public tasks are fulfilled through indirect administration. This also includes the tasks of local governments. Subsection 154 (1) of the Constitution stipulates the principle of the universal competence of local government – local governments shall resolve and manage all local issues, and they shall act independently pursuant to law. The determination “independently” can be specified with the term “on their own responsibility”, which means the right to decide on the tasks of local governments without the directions of the state.^{*13} In Estonian legal order, the legislator has made fulfilment of some of the tasks of the local government (local issues), which are determined from heightened public interest, obligatory for the local government. In the given case, we see the so-called obligatory tasks. For example, according

⁷ U. Di Fabio. Privatisierung und Staatsvorbehalt. – *Juristen Zeitung*, 1999, No. 12, p. 586.

⁸ *Ibid.*

⁹ J. Hengstschläger. Privatisierung von Verwaltungsaufgaben. – *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*. Heft 54. Berlin und New York, 1995, p. 173.

¹⁰ K. Merusk, R. Narits. *Eesti konstitutsiooniõigusest* (About Constitutional Law of Estonia). Tallinn, 1998, pp. 14–15.

¹¹ U. Di Fabio, pp. 587–588.

¹² *Eesti Vabariigi põhiseadus. Riigi Teataja toimetuse väljaanne* (Constitution of the Republic of Estonia. Publication of *Riigi Teataja* Publications). Tallinn, 1994.

¹³ Ü. Anton. Kohaliku omavalitsuse garantii Eesti Vabariigi 1992. aasta põhiseaduses (Guarantee of Local Government in the 1992 Constitution of the Republic of Estonia). – *Juridica*, 1998, No. 6, pp. 308–309.

to the Roads Act¹⁴, the building, repair, and organisation of the use of roads belonging to local governments are their tasks. This task is a classical substantial task of local government the fulfilment of which has been made obligatory for the local government by the legislator.

Some public tasks are fulfilled by persons in private law. Bearers of the mentioned administration, independent legal subjects, fulfil the tasks assigned to them with law. Thirty-seven persons in private law have been created in Estonia by today.

The specific features of Estonia as a transformation society must be considered in case of the public tasks fulfilled by the state and the local government. A huge amount of unnecessary production and tasks, which had to be got rid of, remained with the state and local government after Estonia regained its independence. During the ownership reform, the state of Estonia has managed to quickly privatise the production and property that the state did not need. Public tasks are being revised in the course of the current administrative reform. The tasks left from the Soviet period accrued to the state pursuant to the law that existed before the Constitution. According to § 2 (1) of the Constitution Implementation Act, the legal acts that were effective before the Constitution entered into force remained effective after the enforcement of the Constitution to the extent they were not contrary to the Constitution or the Constitution Implementation Act and until they are either annulled or made to comply fully with the Constitution.

Therefore, when public tasks are assigned to persons in private law, it is important to decide which tasks should be assigned, in which volume, with which guarantees, which tasks should be fulfilled by the state and local governments, etc.

3. Legal Limits of Assignment of Public Tasks

3.1. Constitutional Limits

Pursuant to the Constitution, the state has to fulfil its substantial tasks itself through direct state administration. It has been emphasised in the preamble of the Constitution that the state of Estonia has been created to protect internal and external peace and as a pledge to present and future generations for their social progress and welfare, which shall guarantee the preservation of the Estonian nation and culture through the ages.

The substantial tasks of the state include above all defence of the state, police, foreign relations, financial administration, tax administration, customs, compulsory fulfilment of legal decisions and administration of law. In principle, assignment of such tasks to persons in private law is not permissible. Otherwise the state as such and the idea and purpose of its existence shall disperse. Of course, drawing such a line is abstractly easier than solving the issue in each specific case. So some of the said tasks have been assigned to persons in private law. For example, according to § 21 (1) of the Probation Supervision Act¹⁵, the minister of justice may, on the basis of an administration agreement, assign the fulfilment of the probation supervision tasks to an appropriate nonprofit association who has requested it and which is located in the working area of the relevant court. On the basis of the Veterinary Activities Organisation Act¹⁶, the task of state supervision has been assigned to authorised veterinarians who are not civil servants, but persons in private law. The veterinarian has the right to have access to the supervised objects, necessary information, documents, etc. He or she issues veterinary certificates and deeds, may stop trading with animals that do not correspond to veterinary requirements, etc. A draft is currently prepared pursuant to which the enforcement of the judgements of civil courts shall be assigned to persons in private law. It is planned to follow a similar model with notaries. Some officials and politicians have spoken about the assignment of tax and customs administration to private legal persons. The Constitution does not stipulate clear prohibitions in the form of specific provisions here. These limits should, however, be looked for through the interpretation of the Constitution. Subsection 3 (1) of the Constitution, pursuant to which the powers of state, including administrative power, is exercised solely pursuant to the Constitution and laws which are in conformity therewith, presumes not only a legal basis for exercising the power in the form of a law, but also a national organisational form, which acts in the name of the state. In general, the state has to administer

¹⁴ Teeseadus (Roads Act) – Riigi Teataja (the State Gazette) I 1999, 26, 377; 93, 831.

¹⁵ Kriminaalhoolduseseadus (Probation Supervision Act) – Riigi Teataja (the State Gazette) I 1998, 4, 62.

¹⁶ Veterinaarkorralduse seadus (Veterinary Activities Organisation Act) – Riigi Teataja (the State Gazette) I 1999, 58, 608; 97, 861.

the power itself, which guarantees the fair and honest treatment of persons in the most optimal manner. At the same time it has to be admitted that within certain limits, assignment of tasks with the competence of power is possible without it damaging the principles arising from the Constitution. Therefore we may consider partial assignment of such tasks where persons in private law fulfil the so-called assisting function. For example, the tasks of probation supervision may be assigned to private legal persons on the basis of § 21 (1) of the Probation Supervision Act only partially. The main functions here are fulfilled by the probation supervision departments of county and city courts. The same applies to veterinary supervision. The Veterinary and Food Department conducts national veterinary supervision as a main task. Radical proposals about full assignment of customs and tax administration are very problematic in the opinion of the author of this article. Restriction of the rights and freedoms of persons and application of compulsion must generally be done through direct state administration. Another approach is possible in case of ordinary administration, which means provision of relevant public services.

Pursuant to § 13 (1) of the Constitution, everyone has the right to the protection of the state and of the law. Pursuant to § 14, the guarantee of rights and freedoms is, among others, the duty of the powers of the state and of local governments. Proceeding from this, it may be said that the state has to guarantee the rights and freedoms of persons and their protection through direct state administration and not only in the so-called negative meaning as protection of one person from another, but it has to create possibilities for persons to realise their constitutional rights and freedoms.

Section 10 of the Constitution of Estonia stipulates the principle of social state, which is rather abstract and needs additional interpretation and specification in ordinary laws. The general duty of the state to act socially and care for social justice arises from the principle of social state. The task of the state is to guarantee that all persons are treated equally and that their human dignity is respected.^{*17} The principle of social state has found some specification in the catalogue of principal social rights. In general, it may be said that the minimum concept of principal social rights has been developed in the Constitution of Estonia.^{*18}

Section 28 of the Constitution stipulates the right of everyone to the protection of health. It can not be read from this provision that the state has to fulfil the task (provide protection of health for everyone) in the organisational form of state. Pursuant to § 29 (3), the state organises vocational training and assists persons who seek employment in finding jobs. This does not include the prohibition to assign the said tasks to persons in private law. According to subsection 4 of the same section, working conditions shall be under the supervision of the state. Proceeding from this, the state has to exercise such control itself through its agencies. One principal social right is the right to education (§ 37). In order to make education accessible, the state and local governments have to maintain the requisite number of educational institutions pursuant to § 37 (2). At the same time the Constitution does not prohibit the opening of private schools. Pursuant to the provision in question, the state and local governments have to guarantee the accessibility of education through the schools of the state and local governments. This task can not be assigned to private schools in full extent, which also means a relevant prohibition. The state has to fulfil the said function itself and may not assign it to persons in private law.

Another problem is whether the state and local governments still have tasks that arise from the principle of social state and the fulfilment of which they have to guarantee. The author of the article is of the opinion that according to the discussed principle, the state and local governments have to guarantee minimum existence for persons. This concerns fields that are essential for persons, such as water supply, sewage, heat economy, electrical power, etc. These are fields that are related to guarantee of the security of persons.^{*19} The right of claim of persons against the state and local government also arises from here. Of course, the state or local government do not have to fulfil this task themselves, but have to guarantee the fulfilment thereof themselves.

In conclusion, it may be said that fulfilment of the social tasks arising from the Constitution need not generally be done by the state or local government themselves, but they may assign them to persons in private law while guaranteeing their fulfilment.

¹⁷ R. Maruste. *Põhisedus ja selle järelevalve (Constitution and Its Supervision)*. Tallinn, 1997, p. 99.

¹⁸ R. Alexy. *Theorie der Grundrechte*. 2. Aufl., Frankfurt am Main, 1994.

¹⁹ H. Maurer. *Allgemeines Verwaltungsrecht*. 12. Aufl., München, 1999, p. 16; H. P. Bull. *Allgemeines Verwaltungsrecht*. 6. neub. Aufl., Heidelberg, 2000, p. 22.

3.2. Legal Bases of Assignment of Public Tasks

A relatively strict principle of legality has been stipulated in § 3 (1) of the Constitution pursuant to which powers of the state, including administrative power is exercised solely pursuant to the Constitution and laws that are in conformity therewith. Therefore the assignment of the tasks of the state to persons in private law requires the authorisation of formal law. In some aspects, this principle has been specified in the Government of the Republic Act.^{*20} Pursuant to its § 41 (5), governmental institutions may not delegate the rights and duties placed within their competence to other governmental or local government institutions, unless otherwise provided for by law or unless this is prescribed in the administration agreement made pursuant to law. The said provision does not mention persons in private law, but pursuant to § 3 (1) of the Constitution, it is indisputable that assignment of tasks with competence of power to persons in private law may be done only on the basis of the authority of formal law. The principle of legality applies also to simple administrative tasks. This principle has been followed also in practice. The Government of the Republic Act prescribes such institutions as state institutions administered by government institutions, which are state institutions that in general do not have competence of power and that fulfil national tasks in the areas of culture, education, social affairs, etc. (§ 43). Pursuant to this law, such institutions may be formed by the Government of the Republic or state institutions pursuant to the procedure established by the Government of the Republic, unless otherwise provided for by law. Pursuant to the Foundation of and Participation in Legal Persons in Private Law by the State Act^{*21}, the state may establish legal persons in private law. The law stipulates that the objective of foundation of and participation in legal persons in private law by the state is above all to ensure enhanced performance of the functions of the state and the implementation of national economic policy (§ 1 (2)). Therefore the state may, on the basis of the general authorisation of the said laws, choose to fulfil simple administrative tasks either in the organisational form of state institutions or the organisational form of private law, which remains in the hands of public law. This can be done in the case when the Constitution or specific laws do not provide otherwise. Assignment of simple administrative tasks to persons in private law by the state has occurred either on the basis of special authorisation of formal law or the general authorisation of the Privatisation Act.^{*22} State institutions were and are privatised on the basis of the Privatisation Act together with the relevant tasks.

The principle of legality arising from § 3 (1) of the Constitution and the reservation of law with regard to assignment of such tasks to persons in private law, which mean duties of the state (tasks of the state) and the substantial duties made obligatory for local government are applied to units of local government. Assignment of such tasks is possible only on the basis of authorisation of formal law. Pursuant to § 6 (1) of the Local Government Organisation Act^{*23}, the task of a local government unit is to organise social welfare and services, care for the elderly, work with youth, residential and communal economy, water supply and sewage, general order, territorial planning, public transport within the commune or town and maintenance of the roads of the commune and streets of the town in the given commune or town, unless these tasks have been assigned to another person with law. Some of the mentioned substantial tasks of local government have been made obligatory for units of local government by the legislator with specific laws, which also prescribe the organisational form of their fulfilment. In case of the remaining tasks mentioned in the discussed provision, it has been left for units of local government to decide on their fulfilment, whether to do it themselves or assign them to subjects in private law. The obligation to organise and guarantee their fulfilment remains with the local government unit. This is where the right of claim of citizens against local government units is created. Pursuant to subsection 2 of the said section, it is the task of local government units to organise the maintenance of pre-school children's institutions, basic schools, gymnasiums and interest schools, libraries, community centres, museums, sports facilities, security and care homes, medical institutions and other local institutions in the given commune or town in case they are in the ownership of the local government units. The obligation to finance the relevant institutions belonging to the local government units either from the budget of the local government or other sources arises from the said provision. Pursuant to § 3 (2), the local government unit decides on and organises such issues of local life, which have not been assigned to any other person to decide on and organise with law. In the given case we are dealing with issues, which the local government unit has acknowledged as its task due to heightened

²⁰ Vabariigi Valitsuse seadus (Government of the Republic Act) – Riigi Teataja (the State Gazette) I 1995, 94, 1628; 1999, 95, 845.

²¹ Riigi poolt eraõiguslike juriidiliste isikute asutamise ja nendes osalemise seadus (Foundation of and Participation in Legal Persons in Private Law by the State Act) – Riigi Teataja (the State Gazette) I 1996, 48, 942.

²² Erastamiseseadus (Privatisation Act) – Riigi Teataja (the State Gazette) 1993, 45, 639; 1998, 30, 411.

²³ Kohaliku omavalitsuse korralduse seadus (Local Government Organisation Act). – Riigi Teataja (the State Gazette) I 1999, 82, 755.

public interest and which it has started to fulfil voluntarily. Local government units have the right to decide on “whether” and “how”. In such a case the local government unit determines the relevant task and the form of its fulfilment in terms of law. These are voluntary tasks of local government.^{*24} In case the local government unit starts to fulfil the relevant task itself, it will later have the right to assign it to a person in private law on the basis of its own right.

In conclusion, it may be said that local government units may assign state duties (tasks of the state), which have been assigned to it by the legislator and made obligatory for the local government unit, to persons in private law only on the basis of formal authorisation of law. The legislator may prescribe the freedom to choose the organisational form here, but in any case there must be the authorisation of the relevant law. Assignment of voluntary tasks of local government may be done on the basis of the decisions of the local government unit.

4. Legal Models of Assignment of Public Tasks

On the basis of legal regulation the following legal models may be differentiated in the assignment of public tasks.

4.1. Assignment of Tasks with Competence of Public Power to Persons in Private Law

The relevant tasks are fulfilled on the basis of the norms of public law (administrative law). Subjects in private law thereby become the carriers of administration (indirect state administration) and fulfil the tasks in their own name. In German legal space, such persons are known under the name *Beliehne*.^{*25} The authorisation for assignment of the relevant tasks may arise only from law and assignment shall take place either with an administrative deed or administration agreement. The already mentioned authorised veterinary and assignment of the tasks of probation supervision to nonprofit associations may be referred to again. Ticket inspectors, who have the right to fine persons who travel without a ticket in buses, trams, etc., notaries, construction supervision engineers, sole proprietors and nonprofit associations who provide fire fighting and rescue services may also be brought as such examples.

On the basis of this model, the so-called simple administrative tasks such as provision of archive services, etc. have also been assigned to persons in private law. Assignment of tasks with competence of power presumes the provision of state supervision over fulfilment of such tasks and solution of the issue of responsibility. However, the attention paid to these problems in valid legal order is not always sufficient. For example, the Planning and Building Act^{*26} does not stipulate supervision over the activities of construction supervision engineers. The said act as well as the Veterinary Activities Organisation Act do not answer the question as to who shall compensate the damages caused by persons in private law while conducting supervision. The extent of such damages may be so large that the person in private law who performs supervision is not able to compensate it. The application of a professional liability system similarly to those applied to notaries could be considered here.

4.2. Assignment of Public Tasks to Persons in Private Law Formed by the State or Local Government Units or by Other Legal Persons in Public Law

What we have here is so-called administration organised in private law and formal assignment of public tasks. Here, the person in private law remains in the hands of public law. The said persons in public law may found public limited companies, private limited companies, foundations and nonprofit associations.

²⁴ R. Stober. *Kommunalrecht in der Bundesrepublik Deutschland*. 3. Aufl., Stuttgart, Berlin, Cologne, 1996, p. 39.

²⁵ H. J. Wolff, O. Bachof, R. Stober. *Verwaltungsrecht*. 10. Aufl., München, 1994, p. 201; U. Häfelin, G. Müller. *Grundriss des Allgemeinen Verwaltungsrecht*. Zurich, 1990, p. 260.

²⁶ *Planeerimis- ja ehitusseadus (Planning and Building Act) – Riigi Teataja (the State Gazette) I 1995, 59, 1006; 1999, 29, 398.*

In general, such persons in private law are subjected entirely to the private legal regime, incl. law of competition. This model has been used in the sphere of education. Namely, pursuant to § 48 (3) of the Universities Act^{*27}, a public legal university may establish foundations together with the state, which in their turn have the right to establish private schools or private legal scientific and development institutions. For example, the University of Tartu and the state have established a foundation together with the state, which has created the private College of Information Technology in Tallinn. The Foundation Clinics of the University of Tartu is also in a private legal status and has been founded by the University of Tartu, Tartu Town and the state, and one of its tasks is organisation of medical education. For fulfilment of the said task, the clinics are financed partially from the state budget through the Ministry of Social Affairs under the Health Care Organisation Act (§ 26²).^{*28} No considerable legal or substantial problems have arisen in the foundation of legal persons in private law by the state and their functioning, but the same can not be said about local government units. For example, there is no unified approach in the selection of the organisational form of health care institutions. In practice, there are foundations, private limited companies, public limited companies as well as nonprofit associations, which makes the system of health care organisation too diverse. Even though all of these forms are more or less suitable for a hospital providing health care services, each of them has its good and bad sides. The optimal variant should be found here.

In certain cases, local government units have chosen the private legal organisational form without consideration of possible risks and threats. This is what has happened in the heating industry. Boiler houses and heat networks have largely been transferred to legal persons in private law formed by local government units (in general either public or private limited companies). Due to the loans taken, nonreceived debts and relatively low heat prices, which in their turn depend on customers with purchase power, some of these commercial undertakings have gone bankrupt or are on the verge of bankruptcy. This is an area determined by heightened public interest. Proceeding from the Local Government Organisation Act, the task of local government units is to organise residential and communal economy, therefore when the relevant commercial undertaking goes bankrupt, the local government unit shall not be released from the fulfilment of the task.

4.3. Assignment of Public Tasks to Persons in Private Law, Whereas the State or Local Government Unit Guarantees Fulfilment of and Supervision over the Task

This form is also called functional assignment of tasks.^{*29} The example that can be given here is the Public Water Supply and Sewerage Act^{*30}, pursuant to which the appropriate supply of customers with water from public water supply and drainage and treatment of waste water through public sewerage is provided by a water enterprise. The latter shall be appointed with a resolution of the council of local government on the basis of the Competition Act^{*31} (§ 7). Pursuant to the said act, a water enterprise has to guarantee the functioning and maintenance of the public water supply and sewerage according to the regulation on usage of public water supply and sewerage, which shall be approved by the council of the local government and the agreement made between the commune or town government and the water enterprise (§ 10 (1)). The law also prescribes that the price of the relevant service shall be approved by the council of the local government. Thereby the provision of the relevant service is guaranteed with the relevant provisions (obligation) of law, the regulations established by the local government unit, the concluded agreement and approval of the price of the service by the council of the local government unit. The second example that can be pointed out is the Public Transport Act.^{*32} Pursuant to the act, the public transport service is rendered by the transporter, who is an enterprise who holds the relevant license or a legal person in private law. A public service agreement shall be made between the transporter and the relevant state agency or local government agency (§ 10), with which the transporter shall enter into the obligation to organise public route transport for a monetary fee proceeding from its business interest in the volume and under the conditions

²⁷ Ülikooliseadus (Universities Act) – Riigi Teataja (the State Gazette) I 1995, 12, 119; 2000, 25, 140.

²⁸ Tervishoiukorralduse seadus (Health Care Organisation Act) – Riigi Teataja (the State Gazette) I 1994, 10, 133; 1999, 97, 860.

²⁹ H. P. Bull, p. 23.

³⁰ Ühisveevärgi ja -kanalisatsiooni seadus (Public Water and Sewerage System Act) – Riigi Teataja (the State Gazette) I 1999, 25, 363.

³¹ Konkurentsiseadus (Competition Act) – Riigi Teataja (the State Gazette) I 1998, 30, 410; 1999, 89, 813.

³² Ühistranspordiseadus (Public Transportation Act). – Riigi Teataja (the State Gazette) I 2000, 10, 58.

as ordered by the state or local government unit (§ 9 (1)). The price of one kilometre or the ticket price shall also be established by the relevant state or local government agency (§ 24). Supervision over provision of the public transport service, which is limited to supervision of legality, is also provided for in the said act.

The third example that can be mentioned here is the Waste Act.³³ Pursuant to the said act, the local government unit organises removal of household waste in the territory under its administration (§ 14 (1)), whereas it may fulfil this task itself or assign it to a waste removal company on the basis of a relevant agreement pursuant to the procedure provided for by law (§ 15 (1)). The local government unit has been granted the right to establish the waste regulation of the local government, whereas the local government unit may with its regulation establish conditions to the organised disposal of household waste, which deal with the relationships between the possessor of waste and the waste treatment enterprise, organisation of waste disposal and the regions covered with disposal of household waste (§ 21 (2)). On the basis of the right to discretion, the local government unit may establish the upper limit of the service fee charged for treatment of the waste covered with organised household waste removal (§ 23 (1)). Pursuant to law, the waste treatment enterprise is a person in private law who obtains the waste permit from the relevant state agency. The law also provides for supervision over fulfilment of the said task.

When we generalise the aforementioned regulations, it may be said that there is no uniform systematic treatment of legal regulation. Supervision also generally borders only on legal supervision, less attention has been paid to the quality of fulfilment of the task, the extent of supervision and the measures applied in the course thereof are also different.

4.4. Assignment of Public Tasks to Persons in Private Law and Subjecting of the Fulfilment of Tasks Entirely to Free Competition

What we have here is so-called material assignment of public tasks.³⁴ Influencing of the fulfilment of the task by the state is minimal. It may even be said that in the given case, the state relinquishes the tasks as public tasks. In the Estonian legal order, the said model has been used mostly for these state-owned enterprises whose tasks have been economic activities, *i.e.* earning income. However, this includes also such important units of infrastructure as mail, telecommunication, etc. Here, it is necessary to mention that after the Commercial Code³⁵ was passed in 1995, state-owned enterprises could be transformed into private or public limited companies or state institutions. Most of the state-owned enterprises were transformed into commercial undertakings of the state (private or public limited companies). Assignment of tasks according to the discussed model is done mainly by way of privatisation of the commercial undertaking of the state. Privatisation of the railway, Narva power stations and some other commercial undertakings of the state that are important from the standpoint of infrastructure is being discussed at the moment. One must regard the use of this model with caution, especially in case of tasks that are determined by heightened public interest. Assignment of public tasks can not proceed only from economic considerations and the wish to decrease the budget load, but the high quality fulfilment of the task must also be kept in mind.

5. Conclusions

Pursuant to the Constitution, the state has to fulfil its substantial tasks itself, which above all concerns exercise of administration of power. Here the assignment of public tasks to persons in private law is possible only to a certain extent. Fulfilment of tasks arising from the principle of social state need not necessarily be done by the state or local governments themselves, but they may be assigned to persons in private law much stricter than before, providing at the same time supervision over their fulfilment. The legality principle provided for in § 3 (1) of the Constitution presumes that assignment of the tasks of the state requires

³³ Jäätmeseadus (Waste Act) – Riigi Teataja (the State Gazette) I 1998, 57, 861.

³⁴ H. P. Bull, p. 23.

³⁵ Äriseadustik (Commercial Code) – Riigi Teataja (the State Gazette) I 1995, 26–28, 355; 1999, 57, 596.

authorisation of formal law and it may be done with law or on the basis of law. Local government may assign state obligations assigned to it and local government tasks made obligatory for it by the legislator to persons in private law also on the basis of the authorisation of formal law. Assignment of optional tasks of local government may be done on the basis of the resolutions of the local government itself. Selection of the legal models for assignment of public tasks should proceed from the principle that the fulfilment of the task and its quality should be provided. Supervision by state and the possibility of intervention by state should be stipulated upon assignment of public tasks determined by heightened public interest.

Estonian Municipal Law, Municipal Policy and Municipal Politics on the Threshold of Changes

Estonian municipal law is on the threshold of substantial reforms. Presently in Estonia, catch phrases such as administrative-territorial reform, administrative reform, etc. have emerged in the area of a local government. In essence, practically every day passes with the media presenting articles and viewpoints relating to reform. It has also been said that rather than talking about a reform, it would be more correct to refer to administrative reforms, the latter of which would include for example public service reform, administrative territorial reform, reform of management of ministerial areas of governments, reform of operations procedure, decrease in public sector, providing better public services to people, budget reform and a reform of inter-institutional management.¹ Be it as it may, reforming the system of the local government will not be feasible without reforming the municipal law. Thereby, the changes should embrace several pertinent laws. The aggregate of these changes would be targeted to the formation of local governments with adequate administrative potential. The latter follows also from the Constitution of the Republic of Estonia² and its articles about the social justice and the state based on the rule of law (§ 10). Municipal law in turn would create preconditions for the municipal policy setting its margins. The theoretical literature about the municipal law mentions that municipal policy is the product of the fact that elections take place in local governmental units, the political will on the local governmental level is formed, *inter alia*, by the parties and the sole responsibility to address the local issues lies with the local governments and the local governments associations. To carry out this function they have been provided with a broad range of possibilities facilitating the enforcement of the image of purposefulness (politics). Thus, whereas the municipal law provides a detailed explanation on the relation of the effective law and its interpretation, the area of law as it *is* (German: *Istbestand*) and as it *ought* (German: *Istzustand*), municipal politics is filling the gaps left by the legislator and the Constitution.³ Within the frames of the general term of municipal policy it is possible to distinguish local staff policy, financial policy, social policy, *i.e.* also the

¹ Ü. Madise. Kollegiaalne vastutus viib vankri kraavi. Haldusreformi eri valdkondade eest peaksid hoolitsema konkreetsed ministeeriumid (Collegiate Responsibility Will Take the Carriage off the Drive. Specific Area of the Administrative Reform Should be Governed by Appointed Ministries). – Postimees, 4 April 2000.

² Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia) – Riigi Teataja (the State Gazette) 1992, 26, 349.

³ R. Stober. Kommunalrecht in der Bundesrepublik Deutschland. 3., völlig neu bearb. Und erw. Aufl. Stuttgart, Berlin, Köln: Verlag W. Kohlhammer, p. 17

municipal politics. The latter represents a branch of law of the municipality that compares the positive municipal law to the existing socio-economic situation and also to the enforcement of the constitutional order. It is based on the distinguishing of the “is” and “ought” norms and it will establish the necessary targeting and amendments of the municipal law and will be beneficial to its elaboration. Municipal law is therefore nothing more than municipal politics in movement. The latter considers the dynamism of the municipal law and reflects several concepts of enforcement of the municipal legal order.^{*7*8}

The administrative reform of local governments being planned in Estonia is going to affect the broad spectrum of the municipal policy, including undoubtedly also the basic areas of municipal politics: order policy, structural policy and procedural policy.^{*9}

The frames of this article, but also the fact that a lot of essential issues has not been settled, *i.e.* the political decision is absent, would allow merely to outline the discussion points, thereby omitting several relevant issues like the organisational remedies for the reform, financing, etc.

It is clear that essential changes in the municipal law should be systematic and based upon firm conceptual foundation(s). The regrettable fact is that the conception^{*10} (hereinafter: Conception) elaborated by the Ministry of Internal Affairs pertaining to the administrative reform in the area of local governments, which is at the author's disposal, is relatively sketchy and leaves a lot of fundamental issues untouched. It is possible that this attitude is not *per se* inappropriate, as the Minister has announced the necessity of carrying out the reform dialoguing with people as much as possible. It is difficult to believe that any other attitude would have been acceptable. The Cabinet has discussed the Conception twice and has taken the following positions according to the media:

- Administrative-territorial reform commissions shall discuss the merger of the units of local county governments. All county governors shall submit a planning of their county to the Ministry of Internal Affairs, along with the new local government units' map, in the second quarter of 2001.
- As a result of the administrative reform, Estonia will remain with 60–80 local government units (alternatively up to 110), and corresponding borders should be fixed by spring 2001.
- As a general rule, each post-reform commune should have at least 3,500 residents, suburban communes 4,500 residents and cities with less than 10,000 residents shall have to merge its surrounding area.
- There will be no compulsory merger of counties, however, their merger will be accompanied by the extension of the borders, thus changing the area and in some cases the question of abolishing counties reduced to a critical extent may emerge.
- The state is not going to take the “coercive” role, rather its activity will be confined to counselling and consulting.
- The state will not offer merger rewards to local government units on the reason that such funds do not exist.^{*11}

The Conception has the general objective of the formation of a local government system that could be characterised as follows:

⁷ *Ibid.*, p. 18.

⁸ The coalition agreement of the parties in government (Estonian Reform Party, Pro Patria, Moderates) has expressed the following positions with regard to local government: greater concern to manage the operation of local governments, increase in the party system on the local governmental level; ensuring remedies for the constitutional right of citizens to receive information from the state and local governmental agencies and to enact the law on freedom with regard to information, elaboration of the public service system for more openness; joining inter-institutional communication system of local governments into one electronic system, making the functioning of the State Audit Office more effective and specification of its functions, adding to it a function to ensure the effective use of budgetary funds by the local governments and evaluation of the efficiency of the public sector; bringing the decision-making as close to the population as possible, *i.e.* to the level of the local governments. Increase in the role of the local governments and their empowerment, comprising: (1) changing proportions of the division of the state support to more and less wealthy local governments; (2) performance of the administrative-territorial reform on the basis of the systematic analysis and considering the specifics of each local governmental unit. Any scheme of joining the counties will be discussed only after the analysis of all of the relevant aspects; increase in the possibilities and enlargement of rights of local governments in distribution of the social benefits. The increase in the educational aids that is distributed through local governments for the purpose of ensuring the necessary minimum for purchasing of school lunches, textbooks and other school outfits for every family; the local government is responsible for municipal pre-school and basic education, while the state is responsible for the elaboration of the qualified upper secondary education in each region through an state county upper secondary schools' net, supporting the planning by local governments. Coalition agreement. – Available at: <http://www.gov.ee/valitsus/MIRkoal.html> (25 April 2000).

⁹ For a more detailed explanation of these terms, see: R. Stober (Note 3), p. 18.

¹⁰ Haldusreform kohaliku omavalitsuse valdkonnas. Kontseptsioon (The Administrative Reform in the Area of Local Governments. The conception). Available at: <http://www.riik.ee/siseministeerium/kora.htm> (25 April 2000).

¹¹ A. Ideon. Haldusreform koondab sadu ametnikke (Administrative Reform To Lay Off Hundreds of Officials). Most active persons of nearly 15,000 local officials may start their way to private business already earlier. – Postimees, 13 April 2000.

A. Ammas. Maavanemad muudavad vallapiire (County Governors Changing the County Borders). – Eesti Päevaleht, 25 April 2000.

- Democratic leadership and participation of residents in the decision-making on essential issues.
- Adequate level of legislative regulation and its unambiguity.
- Equilibrium of the tasks delegated to a local government, optimisation of means for their fulfilment and the parameters concerning the differences in the size of the county.
- Accessibility of public services to the population and their quality.

Thereby, the document foresees changes in the following areas:

- Organisational arrangement of a local government (preconditions: the changes in Local Government Council Election Act^{*12}, Local Government Organisation Act^{*13}, Government of the Republic Act^{*14} and other laws);
- Budgetary arrangement of the local government (preconditions changes in the Rural Municipality and City Budget Act^{*15}, Rural Municipality and City Budgets and State Budget Correlation Act^{*16}, Local Taxes Act^{*17}, State Budget Act^{*18}, Taxation Act^{*19} and other laws).
- Administrative-territorial arrangement of a local government (preconditions: the conception for administrative-territorial reform of local government and the draft of the Local Government Administrative-Territorial Reform Act^{*20} etc).

Paradoxically, functioning of local governments is not the issue of this document, it is briefly mentioned, that this area falls within the competence of the Ministry of Finance.

Pursuant to § 156 (1) sentence one of the Constitution of the Republic of Estonia, representative body of a local government is the council which shall be elected in free elections for a term of three years. Local Government Council Election Act^{*21}, which is a constitutional law, prescribes elections due to merger of local governments in addition to the regular elections (§ 1²). The Conception repeats the objective set out in the coalition agreement to be conducive with partyism in local councils. As this is implemented, the formation of a political will undoubtedly changes. The present legal regulation, pursuant to which the last local government council elections were executed, provides that a political party or an election coalition formed according to the prescribed procedure (it may be formed by political parties or Estonian citizens who have the right to vote) has the right to present candidates for registration. An independent candidate may be presented for registration by any Estonian citizen who has the right to vote, including a person who intends to run as a candidate himself or herself for a local government's council elections. However, such possibility is absent for election coalitions. It is known by now, that the Government of the Republic has taken a fundamental decision to complete the reform entirely by 2002.^{*22} The partyism in councils definitely has advantages – the most important could be considered as the solidification of the political responsibility as compared with the present often temporary election coalitions that fall apart soon after the elections.^{*23} Nevertheless, the author of this article sees the artificial and speedy coercive implementation of partyism on the local level as pushing the events ahead quickly. In reality, most of the councils of the local governments have no partyism with the exception of some bigger cities. For instance, candidates were

¹² Kohaliku omavalitsuse volikogu valimise seadus (Local Government Council Election Act) – Riigi Teataja (the State Gazette) I 1996, 37, 739; 38, 1999, 60, 618.

¹³ Kohaliku omavalitsuse korralduse seadus (Local Government Organisation Act). – Riigi Teataja (the State Gazette) I 1993, 37, 558; 1999, 82, 755. It is also possible to fix the necessary amendments in the new Local Government Act.

¹⁴ Vabariigi Valitsuse seadus (Government of the Republic Act) – Riigi Teataja (the State Gazette) I 1995, 94, 468; 1998, 1999, 95, 845.

¹⁵ Valla- ja linnaelarve seadus (Rural Municipality and City Budget Act) – Riigi Teataja (the State Gazette) I 1993, 42, 615; 2000, 7, 40.

¹⁶ Valla- ja linnaelarve ning riigieelarve vahekorra seadus (Rural Municipality and City Budgets and State Budget Correlation Act) – Riigi Teataja (the State Gazette) I 1995, 94, 1627; 1996, 87, 1542.

¹⁷ Kohalike maksude seadus (Local Taxes Act) – Riigi Teataja (the State Gazette) I 1994, 68, 1169; 1999, 101, 903. Alternative would be a new Local Taxes Act.

¹⁸ Riigieelarve seadus (State Budget Act) – Riigi Teataja (the State Gazette) I 1999, 55, 584; 92, 824. A draft of a new State Budget Act is under consultation. Available at: <http://www.fin.ee> (2 May 2000).

¹⁹ Maksukorralduse seadus (Taxation Act) – Riigi Teataja (the State Gazette) I 1996, 35, 714; 1999, 92, 826.

²⁰ Presently effective Territory of Estonia Administrative Division Act (Eesti territooriumi haldusjaotuse seadus – Riigi Teataja (the State Gazette) I 1995, 29, 356; 1999, 93, 833) is more suitable for the enforcement of few administrative-territorial rearrangements than a complex reform.

²¹ Subsection 104 (2) 4 of the Constitution provides *expressis verbis* that a majority of the membership of the *Riigikogu* passes and amends the Local Government Election Act.

²² Valitsuskabinet arutab teistkordselt haldusreformi (The Governmental Cabinet will Discuss the Administrative Reform for the Second Time). Available at: <http://www.riik.ee/siseministeerium/pressiteated/00-04-11-2.htm> (25 April 2000).

²³ See e.g. W. Gisevius on functions of parties and factions in local government. The policy of local government in the Federal Republic of Germany. Friedrich Ebert Foundation, 1996 pp. 70–73 and 83–87.

presented by parties or election coalitions by parties only in 99 communes or cities in 1996^{*24}, and thereby, those candidates often failed to obtain seats. For comparison, it has to be noted that at present there are 247 local government units in Estonia – 42 cities and 205 communes. This number was more or less the same in 1996. A proposal to consider for the purposes of financing not only the number of seats in *Riigikogu* but also representation in local councils, seems to be an effective remedy for increasing the interests of parties in participation in the local elections. The attempt to deny the participation of election coalitions in campaigns on the local level should be assessed more broadly. Namely, *Riigikogu* has already amended correspondingly the *Riigikogu* Election Act.^{*25} Accordingly, an independent candidate or a list of candidates may be presented by a party, and an independent candidate may be presented by an Estonian citizen with the right to vote.^{*26} The implementation of this principle would certainly benefit bigger parties on local elections.

The independence of a local government in resolving issues and managing is subject to limitation. In principle, the term “independently” in § 154 (1) of the Constitution of the Republic of Estonia is synonymous to the term “at its own responsibility” as used in the theory of a local government.^{*27} “Own responsibility” is defined as a right of a local government to resolve freely, *i.e.* without guidelines by the state and to manage the issues of local life (The audit of legality of local government acts does not conflict with this guarantee).^{*28} Independence is one element of the guarantee resting with a local government as a legal authority. In that context, it is worthwhile to note the judgement of the Constitutional Review Board of the Supreme Court of 4 November 1993 regarding the proposal by the President of the Republic pursuant § 107 of the Constitution of the Republic of Estonia for the declaration of the Taxation Act enacted by the *Riigikogu* on 28 September 1993 to be contrary to the Constitution of the Republic of Estonia (III-4/A-4/93).^{*29} It is said in the reasoning part of the judgement: “Pursuant to § 154 of the Constitution of the Republic of Estonia, local governments resolve local issues and manage and they shall operate independently pursuant to law. Subsections 7 (2) and (5) of the Taxation Act are contrary to the provisions of § 154 and § 157 (2) of the Constitution of the Republic of the Estonia, because determining the substance of a tax, its approval and registration by the Ministry of Finance and according to the procedure established by him or her, shall preclude the independent action for a local government in establishing taxes according to the law”^{*30}. It seems that the representatives of central administrative agencies have started to comprehend the above-mentioned principle, although opinions are expressed from time to time that it is hindering the effectiveness of the executive activity.

As mentioned above, it is possible to talk about diverse policies within the framework of the municipal policy. Within the context of the administrative-territorial reform, **staff policy** of a local government has emerged as a central topic. It relates to the staff power as one element in the catalogue of the spheres of responsibilities of a local government. Staff power, in a more broader sense, would empower a local government to resolve general staff issues (for example planning the seats, assignment to posts and promotion conditions, remuneration limits, etc.); staff power in a narrower sense allows a local government to resolve concrete staff issues at its own discretion. As a rule, only parts of this competence are regarded as local issues; as a rule, the state empowers a local government only to resolve concrete staff issues and considers general judgements (for example promotions and remuneration issues) to be national.^{*31} Pursuant to § 30 of the Constitution of the Republic of Estonia, offices in state agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These offices may, as an exception, be filled by citizens of foreign states or stateless persons, only in accordance with the law. In the context of the administrative-territorial reform, a drastic decrease in the number of public servants of a local government may be foreseen – it has been suggested that this may be as high as 50%

²⁴ See Kohaliku omavalitsuse volikogu valimised 20. oktoober 1996 (Elections of the Local Government Councils 20 October 1996). Tallinn, National Election Committee, 1997, p 328

²⁵ *Riigikogu* valimise seaduse §-de 8, 26, 27, 29, 38 ja 40¹ muutmise seadus (the Act of Amendment §§ 8, 26, 27, 29, 38 and 40¹ of the *Riigikogu* Election Act) – *Riigi Teataja* (the State Gazette) I 1998, 102, 1678.

²⁶ *Riigikogu* valimise seadus (*Riigikogu* Election Act) § 26 (3) – *Riigi Teataja* (the State Gazette) I 1994, 47, 784; 1999, 18, 22.

²⁷ R. Stober. Verfassungsrechtliche und verfassungspolitische Beurteilung der Bestimmungen über die örtliche Selbstverwaltung in der Verfassung der Republik Estland. Gutachten erstellt im Auftrag der Deutschen Stiftung für internationale rechtliche Zusammenarbeit e. V. für das Ministerium der Justiz Estland. Hamburg 1997, p. 12.

²⁸ Th. Maunz, G. Dürig. Grundgesetz. Kommentar. Band II. München: Beck, 1991, Art. 28, Rn. 66.

²⁹ *Riigi Teataja* (the State Gazette) I 1993, 72, 105.

³⁰ *Ibid.*

³¹ E. Schmidt-Aßmann. Kommunalrecht. – P. Badura u.a. Besonderes Verwaltungsrecht. 10., neubearbeitete Auflage. – Berlin, New York: Walter de Gruyter, 1995, p. 22, Rn. 23.

decrease. Using hereby the words of the present Minister of Internal Affairs: “In broad terms, the merger of four communes and cities will leave two surplus governments. On the one hand – social catastrophe. On the other hand – better use of better staff.”³² Irrespective of the reform schedules of the government, the restructuring of the management has commenced in Tallinn, the capital city. There also, broad lay-offs can be foreseen. And yet, the staff power is not merely for the resolving of lay-off issues and the Government of the Republic cannot prescribe the exact number of servants for local governments.³³ In any case, the judgements to be taken by merging communes/cities regarding the staff policy³⁴ will be more complex and very difficult for the participants, thus making it very likely that the results shall be diverse depending on, for example, the political powers represented in councils.

Local Financial Policy

This area is of especial importance to a local government and the necessity for its restructuring is beyond doubt. Legal frames for the local financial policy are provided by the municipal financial law; to mention hereby the State Budget Act, Rural Municipality and City Budget Act, Rural Municipality and City Budgets and State Budget Correlation Act, Local Taxes Act, specific tax laws, and specific laws assigning local governments the fulfilment of state obligations, that the state is obliged to finance from the state budget according to § 154 (2) of the Constitution of the Republic of Estonia. The provisions of the European Charter of Local Government should be added to this list.³⁵ Estonia has ratified the above mentioned Charter without reservations.

In order to clarify, hereby the formation of the revenue of the local budgets shall be presented. Commune and city budgets collect a certain percent of certain state taxes:

- 1) One hundred per cent of the land tax³⁶ (1999 – 255,000,000)³⁷;
- 2) Fifty-six per cent of the income tax paid by or withheld from a resident natural of the taxpayer’s residence³⁸ (1999 – 3,790,100,000);
- 3) Five per cent of the gambling tax payable for a gambling location if a game of chance, game of skill, betting or totalisator is organised.³⁹

The share of local taxes is nominal.

State Budget designates the following support and allocations to local governments:

- 1) From the Support Fund (support will be determined according to the city or commune revenue and population)⁴⁰;
- 2) Specific allocations for concrete investments⁴¹;
- 3) Additional support to local governments in exceptional geographical and economic conditions.

³² A. Ideon. Haldusreform koondab sadu ametnikke (Administrative Reform To Lay Off Hundreds of Officials). – Postimees, 13 April 2000.

³³ Avaliku teenistuse seadus (Public Service Act) – Riigi Teataja (the State Gazette) I 1995, 16, 228; 2000, 28, 167). Pursuant to § 11 (1) of the Act, the structure, staff and salary rates of public servants of local government administrative agencies shall be approved by the local government council.

³⁴ The question of how many local governments are there that could be addressed as having a meaningful staff policy, should be treated separately. The author of the present article does not have data of any relevant researches and on merely empirical grounds it could be ascertained that staff policy could mostly be attributed to cities (especially, bigger cities) and even that with reservations.

³⁵ Riigi Teataja (the State Gazette) II 1994, 26, 95.

³⁶ The rate of land tax shall be 0.5–2.0% of the assessed value of land annually. Exceptionally, until 31 December 2000, the rate of land tax for areas under cultivation and for natural grasslands and forest land shall be 0.3% to 1.0% of the assessed value of the land annually. (Maamaksu seadus (Land Tax Act) § 5 (1) and § 11 (1) – Riigi Teataja (the State Gazette) I 1993, 24, 428; 1997, 82, 1398). The tax rate is established by the local government council uniformly for both categories and may be amended only as of the start of the budgetary year.

³⁷ 2000. aasta riigieelarve eelnõu seletuskiri (Explanatory Note to the Draft of the State Budget of 2000). Available at: <http://www.riigikogu.ee/ems/index.html> (25 April 2000).

³⁸ Tulumaksuseadus (Income Tax Act) § 5 (1) – Riigi Teataja (the State Gazette) 1990, 101, 903.

³⁹ Hasartmängumaksu seadus (Gambling Tax Act) § 8 (1) – Riigi Teataja (the State Gazette) I 1995, 95, 1630; 1997, 11, 95.

⁴⁰ Valla- ja linnaelarve ning riigieelarve vahekorra seadus (Rural Municipality and City Budgets and State Budget Correlation Act) § 5.

⁴¹ Valla- ja linnaelarve ning riigieelarve vahekorra seadus (Rural Municipality and City Budgets and State Budget Correlation Act) § 6.

For instance, the present budget year foresaw budget allocations to city and commune budgets in the total amount of 950,300,000 (EEK) (1999 – 910,518,000).^{*42}

The revenue and support of local governments as of 29.02.2000, is the following^{*43}:

Local governments			
		Filled as of 29.02.00	
I	Total revenue and support (II+VII)	915.2	422.8
II	Total revenue (III+VI)	750.6	344.6
III	Current revenue (IV+V)	740.1	342.7
IV	Revenue from taxes	636.2	301.6
1	Income tax	619.7	291.1
1.1	Individual income tax	619.7	291.1
4	Ownership tax	11.7	8.3
5	Domestic taxes on goods and services	4.8	2.2
5.1	VAT tax	0.7	0.1
V	Nontax revenue	103.9	41.1
8	Revenue from enterprising and property	80.5	33.1
9	Administrative payments and remunerations, nonproductive and occasional sales	20.7	6.4
10	Fines	1.1	0.6
VI	Capital earnings	10.5	1.9
13	Sale of fixed assets	10.2	1.9
15	Sale of land and immaterial assets	0.3	0.0
VII	Supports	164.6	78.2
17	From abroad	1.7	1.7
18	From another governmental level	162.9	76.5

⁴² The distribution is as follows:

unspecified allocations to city and commune budgets:

1) allocations to the commune and city budgets' Support Fund, distributed according to the procedure provided in § 2 of the State Budget Act of 2000 (Seadus "2000. aasta riigieelarve" – Riigi Teataja (the State Gazette) I 2000, 1, 1) – 865,800,000 (1999 – 734,177,000);

2) allocations to the commune and city budgets' Support Fund, distributed according to the procedure established by the Government of the Republic – 3,000,000 kroons (including allocations to local governmental units in exceptional geographical and economic conditions – 3,000,000) (1999 – 60,000,000 kroons, including communal Support Fund 55,000,000 kroons and allocations to local governmental units in exceptional geographical and economic conditions – 5,000,000);

specified allocations to city and commune Support Fund, distributed according to the procedure established by the Government of the Republic – 81,500,000 kroons (1999 – 116,341,000).

For the purposes of investment, the commune and city budgets were allocated the total amount of 224,767,500 kroons (1999 – 433,035,000).

⁴³ Valitsussektori tulud ja toetused seisuga 29.02.2000 (Revenue and Subsidies of the Governmental Sector as of 29.02.2000). Available at: http://www.fin.ee/majandus/elarve/finantsstatistika/2000/vs_tulud_ja_toetused.htm (26 April 2000).

The real financial situation of local governments is characterized by the analysis of the budget revenue and expenditure of local government units executed by the State Audit Office.^{*44} The following conclusions can be made: § 154 of the Constitution of the Republic of Estonia is not followed. According to the data of local governmental units, at least 500 legal acts provide for state obligations, but in most of the cases, it has not been regulated as to how the resulting expenditure will be compensated in spite of the State Budget Act provisions. Local taxes do not serve their purpose. Their administration will cost more than the collected revenue. After all, imposing such taxes is unpopular, economically harmful and does not conduce to the local entrepreneurship. The share of local taxes in the structure of the revenue of local governmental units is nominal (circa 1% of the revenue) and its increase could not be foreseen. Nearly half of the natural persons' income tax is collected in North Estonia, therefore it has larger revenue basis than other regions. Only 9 local governmental units have revenue that exceeds expenditure, 245 local governmental units need state support. Therefore, the majority of local governmental units is not able to act effectively and provide their residents with the necessary public benefits. Local governments are not capable of supporting the development of neither the private sector nor society. Taking into account the Estonian conditions, it is not feasible to create a uniform revenue system that would guarantee all the local government units the 100 per cent coverage of expenditure with their own revenue. The cost of general administration per resident is high and differs in regions. Small revenue would not allow financing education or science on a necessary level.

No final decisions have been taken yet with regard to the structure of revenue of local budgets and changes in the mechanism of support by the state budget. However, the Ministry of Internal Affairs has proposed the following fundamental changes:

1) Establishment of two taxes independent of each other on the basis of the income tax of individuals; state tax on the basis of the share presently collected by the state budget and local tax (income tax collected by local governments) on the basis of the share of the income tax presently collected by local governments.^{*45} Thereby, the local government could be empowered to change the tax rate (increase or decrease within the limits of two per cent comparing to the estimated tax rate). To calculate the state support, the estimated tax rate will serve as a foundation and the application of the different tax rates will be implemented on the basis of income declarations.

In order to implement such changes, the taxation should be changed, while the right of local governments to change the tax rate would hardly give any positive effect. If, for instance, the Piriissaare commune collected income tax of more than 63,300 kroons in 1999^{*46}, then it will be of nominal meaning to the financial policy whether it will be 64,566 or 62,034. As a whole, such change in tax administration would be too costly and bureaucratic.

2) Collection of the motor vehicle tax and the entertainment tax in the local budgets and establishment of the limits to the tax by law; the local council will have the power to specify the tax.^{*47}

In fact, the motor vehicle tax and the entertainment tax are currently collected from within the local budgets (Local Taxes Act § 12 (4) and § 14 (3)). The motor vehicle tax could still be a state tax, because the tax object is not of local character. However, no commune or city has imposed the entertainment tax as it is.

3) The fee for mineral extraction is excluded from the revenue of a local government. The additional needs of the local governments that had used the basis of resource fees shall be excluded, the Support Fund of local governments shall increase accordingly and the resource fees will be converted to the specified allocation for the purpose of compensating the damages incurred on the natural environment (this change

⁴⁴ It was based upon the data in the Ministry of Finance regarding the collection of taxes in local governmental units as of 1997 and monthly reports of local governmental units about budget collection as of 01.01.1998 and the data regarding household accounting of population of communes as of 01.01.1997. See Peakontrolöri 18. jaanuari 2000. a. otsus nr. 70-13/008 Kohalike omavalitsüksuste eelarvete tulude ja eelarve kulude analüüs (Resolution No. 70-13/008 of 18 January 2000 of the Chief Auditor Analysis of the Budget Revenues and Expenditures of Local Governmental Units). Available at: http://www.sao.ee/Est/Tulemus/Otsus2000/Lc/70_13_008.html (26 April 2000).

⁴⁵ Two alternatives have been presented: 1) a new local taxes and payments act would determine the limits for the said taxes and the tax rates to compensate the removal of the state budget Support Fund. If this act does not fix the rates, it should be done in the Rural Municipality and City Budgets and State Budget Correlation Act; 2) the separation of the state and local income tax within the frames of Income Tax Act amending it considering the rules on imposing the land tax.

⁴⁶ Omavalitsuse eelarvetesse ülekantud tulumaks (Income Tax Remitted to Budgets of Local Governments). Available at: <http://www.ma.ee/statistika/omvtm.3shtml> (26 April 2000).

⁴⁷ Two alternatives have been presented: 1) both taxes would be the objects for a new local taxes and payments act; 2) both taxes would be established by separate laws as state taxes.

will mostly effect the communes in East-Viru county, on the territories of which the oil-shale resources are located).

This approach seems to be reasoned. Oil-shale (but not least) is the national asset of Estonia. It is also worthwhile to mention, that natural resources payments were collected in the local budgets in 1999 in the amount of 65,000,000 EEK.^{*48}

4) Elaboration of an act regulating new local taxes and payments is foreseen. It is surely necessary, but not within the frames of one legal act. For instance, in the area of payments a lot of arbitrary action is around.^{*49}

The next area influencing the municipal financial policy subject to reforms is planned to be the mechanism of state budget support to local budgets. Understandably, this area is facing remarkable tensions. A characteristic example is the extremely critical inquiry of the Estonian Local Government Associations' Union to the Prime Minister in respect of the distribution of operational appropriations to commune and city budgets contained within the state budget of 2000.^{*50} It has also been planned to complement the distribution mechanism from the state budget Support Fund to local budgets (to change the support distribution formula pursuant to the tax basis in a way to ensure the increase in base revenues including the support fund due to the higher level of tax income per resident; to base the calculated own revenue on a three-year period instead of a one-year period; the possible complementation of the distribution mechanism of the Support Fund with the criterion of expenditure needs); and amendment to the Rural Municipality and City Budgets and State Budget Correlation Act.

In the field of assets and investments of commune/city, the Conception elaborated by the Ministry of Internal Affairs proposes to implement the principle of depreciation for municipal real estate; to separate the budgets of local current budgets and investment budgets and to reform the system of municipal investment dividing the present state investments programme into two – state investment support (new construction and reconstruction) and repair fund (depreciation calculation of the revenue basis of local governments). The office of the Legal Chancellor has mentioned the need to elaborate and regulate by law the problem of division of the budget into cash and assets budget (although the latter is only emerging as an object of regulation).^{*51}

Corrective actions have been planned for the supervision of the financial liabilities of local governments and the local governmental units, which appear to be permanently insolvent. These would embrace the mechanism for the cases of insolvency of local governmental units and the implementation of sanction mechanisms in case of loans or other financial obligations of local governmental units; the complementation of the register of the liabilities of Local Governmental Units. It has already occurred, that a commune has virtually become bankrupt due to its own irresponsible financial policy (for instance Vormsi commune).^{*52}

^{*53} In prewar Estonia, such occasions were legally regulated. However this would not correspond to the European standards of today.^{*54}

The principle of the unitary state follows from § 2 (2) of the Constitution of the Republic of Estonia.^{*55} According to this principle, Estonia has an integral local government system. The issues of the local government organisation are comprised in the field of order policy, which in turn is the part of municipal

⁴⁸ 2000. aasta riigieelarve eelnõu seletuskiri (Explanatory Note to the Draft of the State Budget of 2000). Available at: <http://www.riigi.kogu.ee/ems/index.html> (25 April 2000).

⁴⁹ J. Liventaal, p. 17.

⁵⁰ EOÜ pöördumine peaministri poole (Estonian Local Government Associations' Union's inquiry to the Prime Minister). Available at: <http://www.ell.ee/discus/messages/59/433.html> (25 April 2000).

⁵¹ J. Liventaal, p. 17.

⁵² See A. Ammas. Pankrot: Vormsi ähvardas pankrotti minna, kuid sai kontrollid kaela (Bankruptcy: Vormsi Threatened to Go Bankrupt, but was Subjected to Auditors). – Eesti Päevaleht, 11 December 1997.

⁵³ Legal regulation of the loan policy for communes is in Valla- ja linnaeelarve seadus (Rural Municipality and City Budget Act) § 8.

⁵⁴ For instance, pursuant to § 204 of the 1937 Vallaseadus (1937 Commune Act – Riigi Teataja (the State Gazette) I 1937, 32, 310), the Government of the Republic could stop the activity of the commune council on the proposal by the Minister of the Internal Affairs, if the solvency problems had reached the extent of not being capable of the fulfilment of its obligations. In case of the stop in the activity of Commune Council, the tasks of the elected commune government and council were delegated to the governor appointed by the Minister of the Internal Affairs. The Minister of the Internal Affairs could also appoint assistants to the governor. The decisions of the appointed governor in the matters that were subject to council decision-making, were presented to the corresponding local government except the decisions that had to be approved by a Minister or Agency by law. If the local government appointed in such way had re-established order in the management of the local government, the Government of the Republic would decide on the proposal by the Minister of the Internal Affairs whether to allow the regular agency to return.

politics. This field is presently regulated by the Local Government Organisation Act and the draft of a new Local Government Act, now in the proceedings in the *Riigikogu*.⁵⁶ The Conception foresees the reorganisation of the commune and city governments; the main content of it would be the following:

- A government shall be formed of council members and representatives of coalition not belonging to the council. According to the Statutes of a commune/city, the members of the government will retain their seats in the council or give up the seat thus allowing the replacement candidate to fill the seat;
- A rural municipality mayor/city mayor manages the work of the council and the government and shall form the government;
- Agency shall be managed by a commune/city director, appointed by the Government with the term of office of 4 to 8 years according to the Statutes of the commune/city;
- The agency of the commune/city will be named as commune/city office. An existing office will be incorporated as a department.

In fact, the postulates above set out no extraordinary news. In many states, the government would branch out through commissions of the council⁵⁷, the posts of the chairman of the council and the governor had been merged in Estonia at an earlier date.⁵⁸ Nevertheless, the author of this article could not identify the reasons and analysis to discard the structure of the present executive structure of local government.

According to the Conception, public law local government associations of counties would be formed comprising all of the local governmental units of that county. Due to the intention to examine this topic more closely, it shall not be discussed in further detail here.

In summary, it is possible to say that political decisions intended to implement reformation at the level of local government will radically change the municipal laws that are currently in effect. Whether these changes prove to be fully rationalised is not yet clear. In the context of the excessive dynamism inherent in the municipal law, it would not be superfluous to remember the old Estonian proverb: “take measure nine times and make a cut once”.

⁵⁵ See R. Maruste. Põhiseadus ja selle järelevalve. Võrdlevad selgitused. Kommentaarid. Tekstid (The Constitution and its Supervision. Comparative Explanations. Commentaries. Texts). Tallinn: Avatud Eesti Fond, 1997, pp. 81–82.

⁵⁶ Kohaliku omavalitsuse seaduse eelnõu (Draft of the Local Government Act). Available at: <http://riigikogu.ee/ems/index.html> (2 May 2000) (in Estonian).

⁵⁷ See for example S. Häggroth, K. Kronvall, C. Riberdahl, K. Rudebeck. Swedish Local Government. Traditions and Reforms. – The Swedish Institute, 1993, pp. 57–65. A review of Danish local government. Danish–Estonian seminar. 8–10 January 1992, editor M. Kaldmäe pp. 54–67.

⁵⁸ See § 6 (7) of Eesti Nõukogude Sotsialistliku Vabariigi kohaliku omavalitsuse aluste seaduse (The ESSR Local Government Fundamentals Act) § 6 (7) – Eesti NSV Ülemnõukogu ja Valitsuse Teataja (the ESSR Supreme Council and Government Gazette) 1989, 34, 517; 1991, 27, 324.

Codification of Environmental Law.

Major Challenges and Options

On 21 and 22 February 1995, an international conference dedicated to the issues of codification of environmental law took place in Ghent.¹ The reports presented at the conference showed that many European countries have undertaken major reorganisation of environmental law. The common feature in the reorganisation process is the codification of environmental law. According to the conference reports, environmental law is being codified in Sweden², the Flanders³ and Walloon regions⁴, Germany⁵, Netherlands⁶, Denmark⁷, and France.⁸ The list could be continued with *e.g.* Poland, where the respective draft was submitted to the government in 1997.

One should not forget that the repeatedly used English term “codification” is not in full accordance with the traditional approach to the concept of codification in the continental European legal tradition.

Every student of the Faculty of Law knows that codification means the collection of all legal material regulating one area of law into a single code.⁹ The German *Creifelds Rechtswörterbuch* defines codification as the collection of legal norms in an area of law into a comprehensive code. This is supplemented by the principle that codification should comprehensively regulate one area of law and exclude other sources of law.¹⁰

¹ The conference was triggered by submission of the Draft Decree on Environmental Policy to the government of Flanders by the inter-university committee set up for reorganisation of the Flemish environmental law.

² The Environmental Code. A Summary of the Government Bill on the Environmental Code. Stockholm: Ministry of the Environment, 1998.

³ See H. Bocken. The Inter-university Commission for the Revision of Environmental Law in the Flemish Region: Objectives and Procedures. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 3–10.

⁴ See M. Paques. Codification of Environmental Law in Walloon. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 51–70.

⁵ See M. Koepfer. On the Codification of German Environmental Law. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 87–100.

⁶ See P. Gilhuis. Experience and Perspectives with Regards to the Codification of Environmental Law in the Netherlands. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 101–114.

⁷ See P. Pagh. Experience of and Plans for the Codification of Environmental Law in Denmark. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 143–156.

⁸ See G. J. Martin. French Experience of the codification of Environmental Law. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 115–126.

⁹ R. Narits. *Õiguse Entsüklopeedia* (Encyclopaedia of Law). Tallinn: Õigusteabe AS Juura, 1995, p. 27.

¹⁰ *Rechtswörterbuch*. H. Kauffmann, K. Weber (Hrsg.). 14. Aufl., München: Beck, 1997, p. 713.

English dictionaries, however, usually define the word “codify” as follows – if you codify something, you arrange it according to a system, so that all the rules and procedures are clearly stated.^{*11} Black’s Law Dictionary defines “codification” as follows: “the process of collecting and arranging systematically, usually by subject, the laws of a state or country, or the rules and regulations covering a particular area or subject of law or practice”.^{*12} In English, we can thus even talk about the codification of billiard rules.

The problem becomes even more complicated when we include the French term “*codification a droit constant*”, meaning thematic systemisation of legal norms contained in various legal acts without changing the essence of the norms.^{*13}

So, in English terminology, the concept of codification includes what is understood as incorporation in continental Europe.

In Estonia, codification is defined as “the creation of a systemised, summarised and common code that does not contain discrepancies and seeks for exhaustive regulation of one or several areas of law as intended by the legislator for regulative purposes”.^{*14} Incorporation is the collection of existing legal norms, although it can be systematic and even seek to eliminate discrepancies.^{*15} The main difference between codification and incorporation is the innovative nature of the former – codification is modification.^{*16}

Literature distinguishes between “authentic” codification and “consolidation-codification” (or “simple” codification). The former pertains to renewal of substantive law while the latter only pertains to inventory and classification of the existing law.^{*17}

It can thus be said that the attempts of most European countries to reorganise environmental law are related to systemising the existing law or incorporating environmental law. Codification of environmental law in the exact sense of the word takes place in Sweden^{*18}, Flanders and Germany. Estonia with its first attempt to substantially reform environmental law has now also added itself to this list of countries.

Another characteristic feature of codification is its exhaustiveness and, as was mentioned, the exclusion of other sources of law. The environmental code can probably never meet these criteria, as environmental law consists of a multitude of technical norms, standards and lists of hazardous substances and activities, the inclusion of which into a single code is not possible mainly due to the volume of such norms and standards, but also because the technical norms are often amended and replaced to adjust to new scientific and technical achievements and make environmental quality requirements stricter.

The discussion on codification of environmental law should focus on the following main issues:

- a) Why is the codification of environmental law necessary and what are its benefits?
- b) What goal to set for the codification of environmental law?
- c) What should the scope of the environmental code be?
- d) What are the dangers of codification of environmental law?

Answers to these questions form the conceptual basis for the environmental code and enable to develop a methodology for preparation of the draft code and identify the structural and essential cornerstones (main principles) of the future code. The reports presented at the above conference were also largely dedicated to these issues.^{*19}

The following is an attempt to answer the above questions in view of the current situation and future outlook of the Estonian environmental law.

What are the reasons for codification of environmental law and what are the benefits for Estonia?

¹¹ Collins Cobuild English Language Dictionary. London, 1990, p. 263.

¹² Black’s Law Dictionary. Sixth edition. St. Paul, 1990.

¹³ Environmental code: draft (*Umweltgesetzbuch – UGB*). – Ministry for the Environment, Nature Conservation and Nuclear Safety of the Federal Republic of Germany (ed.) Prepared by the Independent Expert Commission on the Environmental Code at the Ministry for the Environment, Nature Conservation and Nuclear Safety of the Federal Republic of Germany. Berlin: D&H, 1998, p. 42.

¹⁴ M. Luts. Kodifikatsioon ja õigusreform (Codification and Legal Reform). – Eesti kriminaalõiguse arenguteedest. Artiklite kogumik (On Developments in Estonian Criminal Law. Compilation of Articles). Ed. J. Sootak. Tartu: Juristide Täienduskeskus, 1997, p. 58.

¹⁵ *Ibid.*, pp. 59

¹⁶ S. Golab. Theorie et Technique de la Codification. Melanges del Vecchio, p. 296.

¹⁷ See G. J. Martin, p. 116.

¹⁸ The environmental code of Sweden – *Miljöbalk* – entered into force on 1 January 1999.

¹⁹ See e.g. E. Rehinder. Points of Reference for a Codification of National Environmental Law. – The Codification of Environmental Law. Proceeding of the International Conference in Ghent, February 21 and 22, 1995. Kluwer Law International, 1996, pp. 157–166.

1. The present Estonian environmental legislation is made up of a large number of legal acts adopted at different times and often based on different principles. The activities of a specific person – “the polluter” – that affect the quality of the environment are usually regulated by several different legal acts.^{*20} If there is no connection between those acts, it is difficult for performers of activities, public administrators and supervisory and court bodies to get an overview of the regulating structure.

2. As said, the problem is not only the clumsiness of the system of environmental legislation, but also its conflicting nature. Sometimes each legal act separately is adequate for achieving its goal, but together with other acts it becomes vague or the simultaneous application of the norms of different acts turns out to be impossible.^{*21} The existence of such conflicts has not been fully revealed in our legal order yet, because environmental legal practice (court practice) is rather modest and superficial.

3. The development of environmental law, as any other area of law, should be based on certain fundamental principles. Such fundamental principles have an indispensable systemising and organising effect. Unfortunately, the present course of development of legal control of environmental risks does not point to the existence of such a fundamental legal basis. Many basic principles of environmental law have so far been formulated as political rather than legal categories.^{*22}

4. Environmental law is a branch of law at the touching point of public law and private law. The historical development of environmental law suggests that the discipline of law in its archaic form originates from private law, namely from law of adjoining properties, the institute of property law. Later, regulation concerning pollution control caused a sharp turn toward public law. Regulation in public law is mainly expressed in direct regulation, *i.e.* restrictions, prohibitions and obligations, and it is realised with the direct intermediation of the state. Assessment of the situation in our existing legal order shows that public law regulation dominates by 90–95%. Developed countries are known to have tried to find new, flexible means of controlling environmental risks.^{*23} This is best revealed in the attempt to employ market mechanisms and apply the respective economic stimuli and antistimuli in the control of environmental risks. The above change is chiefly caused by two reasons. Firstly, direct orders, prohibitions and restrictions have proved to be ineffective in many cases. Secondly, the application of direct means of regulation requires large public expenditure. The advantage of private law methods (such as those related to consumer protection and civil liability) is that control of environmental risks is effected by exercising the subjective rights of persons (injured parties) in private law. The experience of other countries shows that the risk of environmental civil liability can be an effective means of forcing industrial enterprises to identify the environmental impacts of their activity and take precautionary measures to prevent or minimise pollution and thus their potential liability.^{*24} This does by no means imply that environmental law should in future become fully private law. It should find the equilibrium between private and public law regulation and eliminate the present disproportion between those two elements. In conclusion, it should again be stressed that the goal is not to exclude different methods or attach too great importance to any of them, but to combine them appropriately.^{*25} Environmental protection is and will remain a chiefly public law area, while private law has to be employed better than before to prevent environmental damage. Environmental protection cannot be extracted from the context of market economy. A basis for finding an adequate combination of regulation methods should be the principle requiring as little as possible disturbance of spontaneous market mechanisms and the application of direct regulation means particularly in those areas where market mechanisms “fail”.

²⁰ For example, the oil shale industry has to take account of regulations concerning pollution of ambient air, use and protection of subsoil and ground water, waste requirements, pollution charges, charges for the right of use of natural resources, etc.

²¹ The multiplicity of types of charges for the use of the environment is a good example. There are currently seven types of such charges, beginning from charges for the right to use natural resources and pollution charges, and ending with mandatory insurance under the Chemicals Act. The system lacks the necessary consistency and common grounds.

²² See *e.g.* of *Säästva arengu seadus* (Sustainable Development Act) § 3 (2) (Riigi Teataja (the State Gazette) I 1995, 31, 384): “The freedom to dispose of one’s property and be a trader shall be restricted on grounds of the need to protect nature as the common heritage of mankind and national wealth”, or § 3 (3) of the same Act: “Diminishing pollution of the natural environment and the use of natural resources in quantities that preserve the natural balance are the basic requirements for economic activities”.

²³ See *e.g.* the V Environmental Programme of the European Union – Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development – A European Community programme of policy and action in relation to the environment and sustainable development. Official Journal No. C 138, 17/05/1993 pp. 0001–0004.

²⁴ Liability for Environmental Damage. Washington, 1995, pp. 8.

²⁵ R. V. Percival *et al.* Environmental Regulation. Law, Science and Policy. Boston: Little, Brown and Company, 1996, pp. 131–138.

5. In the 1990s, a shift from sectorial protection of the environment to the protection of the environment as a whole took place.^{*26} The environmental risk control system effective in Estonia is structured by areas of environmental protection – nature conservation, protection of the aquatic environment, protection of ambient air, etc. The environmental code allows to unify different areas where necessary and create links between different regulations. The focus of regulation of environmental protection should be reoriented from the former sectorial approach to environmentally hazardous activities, products, substances and organisms; the aim of regulation should be overall control of impacts on the environment as a whole.

6. The success of environmental law largely depends on the integration of environmental protection considerations in other policies and areas of law. Article 6 of the Treaty Establishing the European Community stresses that environmental protection requirements must be integrated into the definition and implementation of other Community policies specified in article 3, particularly in view of the promotion of sustainable development. This is a major environmental definition of the EC Treaty and it is subjected to the control of the Court of Justice.^{*27} A primary task of the environmental code is to contribute to this integration. It has to be ensured that environmental protection requirements are taken account of in environmentally sensitive areas such as energy, agriculture, tourism, etc.

7. The preparation of an environmental code ensures the stability essential for environmental law. Environmental law is quite a young area of law and its development has been uneven. At times, it has been tried to quickly react to issues that have deserved special public attention, or to follow the periodically changing fashion trends of environmental law. There have been periods in the development of environmental law when excessive importance was attached to certain means of regulation (on account of other means), such as “command and control” means, environmental civil liability^{*28} and, lately, economic means and deregulation. Time has shown that dedication to single, currently fashionable means of regulation has not justified itself. Environmental law is a discipline of law that has an important socio-political component. Different development periods have been characterised by the different placement of environmental protection among policy priorities; periods of remarkable political support have been replaced with periods when environmental protection is seen as an obstacle to economic development and environmental regulation is softened.^{*29} Preparation of the Environmental Code alleviates the effect of political instability to environmental protection.

8. Many of the activities that may have a substantial impact on the environment seem to be not quite adequately regulated now. Examples are port, railway and road construction, as well as the energy sector. The environmental code enables similar basic environmental requirements to be applied to all activities that affect the environment.

9. Environmental regulation has so far focused on large stationary sources of pollution, and has been successful in that respect. Now is the time to switch to solving the environmental problems caused by many small sources that are negligible separately but whose cumulative effect constitutes a substantial risk – such as pollution from agriculture or road transport. Handling these pollution problems requires new solutions by combining various means of regulation – norms, planning of land use, pollution charges, etc. The environmental law system created by the environmental code contributes to such combined solutions.

The options for setting the goal for restructuring environmental law are the following^{*30}:

- to limit the incorporation of the existing law, covering the transposition of EC law and international environmental law;
- incorporation on the level of the highest present standards, *i.e.* to adjust the uneven environmental requirements of different sectors of environmental protection at a high level;
- to restructure environmental law in depth – to create essentially new law.

As we saw, different countries have taken different paths. The choice probably depends mainly on two factors:

- firstly, how a country is satisfied with the presently applicable law, and

²⁶ The best example of this approach is Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control. Official Journal L 257, 10/10/1996, pp. 0026–0040.

²⁷ L. Krämer. EC Environmental Law. Fourth Edition. London: Sweet & Maxwell, 2000, pp. 14–15.

²⁸ M.-L. Larson. The Law of Environmental Damage. Liability and Reparation. Kluwer Law International & Norstedts Juridik, 1999, pp. 22–23.

²⁹ There has been much debate lately in Estonia to stop the rise of the singularly low pollution charges. The argument is the need to preserve the competitiveness of our economy, especially oil shale energy.

³⁰ See E. Reh binder, pp. 161–162.

- secondly, the placement of environmental issues in the policy priorities of the state.

Considering the shortcomings of our environmental law as mentioned above, we apparently have to choose the last of the three options, *i.e.* codification in its literal meaning. The task is thus to create new content, not just to adjust the existing structure.

It has to be kept in mind in the codification of the Estonian environmental law that although this area of law has made relatively fast development in our conditions in the recent times, the legal system of environmental risk control in Estonia is still rather primitive when compared to those of countries of developed environmental law.

The development of modern environmental law can be divided into three stages (generations). The division is rather conditional as the time scale is too short for making far-reaching conclusions – hardly 30 years.^{*31} The following division is based on the environmental protection ideology that dominated during different periods and the respective legal means and priorities of environmental risk control.

Environmental law of the first generation was orientated not so much to preventing environmental damage, but to indemnification for the consequences of environmentally harmful activities and the domination of direct regulation in public law (administrative law).

The second generation sources set the target at prevention of environmental damage and the application of suitable precautionary measures, integral protection of all components and factors of the environment, improvement of the former administrative regulation and its partial replacement with various economic stimuli and antistimuli, the pollution trading and means of informing the consumer.

The introductory sources of the third generation of environmental law include the Aarhus Convention.^{*32} This stage is characterised by the addition of a new, “personal” dimension to the legal control mechanism of environmental risks. Environmental protection is more than ever before switched to the sphere of private goods. The condition (quality) of the environment was earlier always viewed as a public good. By using the rights defined in the Convention, a person (owner of immovable property, consumer, nongovernment environmental organisation, etc.) can, through enforcing their subjective rights (right to information, right to participate in decision-making or the right of access to justice), not only protect their private interests, but also protect public interest, *i.e.* a clean environment. A clean environment is all the more a public interest considering that the consequences of pollution usually concern not only individuals or their property, but the general public in the affected area, country, or even in the world.

The implementation of environmental policy in the 1990s has more than earlier concentrated on various market mechanisms that more or less rely on the choices of consumers in the market and the market signals behind those choices. Such regulation mechanisms based on consumer behaviour are known to be effective only if the consumer is adequately informed and aware to take environmentally favourable decisions.^{*33} The rights defined in the Aarhus Convention can thus be said to contribute to ensuring the effect of other regulation methods, or even constitute the essential preconditions for these.^{*34}

Environmental protection through the subjective rights of persons is also reasonable in the context of law and economics, as the goals of environmental law and policy can be achieved with smaller public expenditure, *e.g.* by saving on account of state supervision.

The importance of the Aarhus Convention is certainly not limited to the area of environmental protection – the Convention has a much broader function. The goal is to contribute to the implementation of open society principles and to ensure possibilities to control the activities of the state, local governments, and persons in private law who perform public functions. Exercising the rights defined in the Convention increases the responsibility of competent agencies and other person in decision-making, while the decisions made this way are clearer and better understandable as appropriate for open society. The greater awareness of the public and the possibility to participate in decision-making contribute to the implementation of the basic principle of today's environmental law, which requires the full integration of environmental considerations to all policies and decisions on all levels.

³¹ Today's environmental law is considered to have begun in 1972 when the UN Environment Conference was held in Stockholm.

³² Convention on access to information, public participation in decision-making and access to justice in environmental matters. Aarhus, 25 June 1998.

³³ See R. V. Percival *et al*, p. 133.

³⁴ J. H. Jans. *European Environmental Law*. Kluwer Law International, 1995, p. 288.

The keyword for the third generation of environmental law is thus “the right to a clean environment”. It should be mentioned that many countries made reservations when signing the Aarhus Convention, since the essence and content of the right to a clean environment is not quite unanimously interpreted. The complexity of the problems is illustrated by the fact that even Germany, a country with a high level of environmental protection, had (and has) serious problems joining the Convention.^{*35}

When we assess the placement of Estonian environmental law in this development scheme of global environmental law, the following basic conclusion can be made. The environmental law applicable in Estonia largely fits to the context of the environmental law of the first generation. The “command and control” method of solving environmental problems dominates in Estonia. However, harmonisation of the Estonian environmental law with that of the EC has by now added some features of environmental law of the II generation, such as guidance from the precautionary principle and the goal of achieving integral protection of the environment instead of the former sectorial regulation.^{*36}

The third main question asked in the discussion on codification of environmental law concerns the scope of application of the environmental code.

Mainly two problems arise here.

- Firstly, as opposed to the majority of other countries, regulation of the use of natural resources – forest use, fishing, hunting, excavation of mineral resources, water use, etc. – is included in the scope of environmental law in Estonia. It would be correct not to give up this approach. In this respect, Estonia would even set a positive example for other countries, since the inclusion of nature use in the scope of environmental protection is a precondition for the protection of the environment as a whole – especially in view of sustainable development.
- Secondly, the requirement to integrate environmental protection requirements to all other policy areas (and areas of law) raises the problem of the relations of the environmental code with other areas of law, including other codes. It has to be decided whether all environmental regulation in areas such as agriculture, energy or transport should be contained in the environmental code or included in the legislation regulating the respective area. One could agree with the authors who support the idea that the codification of environmental law should not be too “imperialistic”.^{*37} It would be reasonable to include all basic environmental regulation in substantive law in the environmental code, but to leave or include in legislation regulating specific areas the norms referring to appropriate environmental requirements specified in the code.

The risks related to codification should also be taken into account in the preparation of the environmental code. The main risks are:

- The above-mentioned stability achieved by codification may, in certain cases, become an obstacle to the further development of environmental law and to rapid reaction to new environmental risks. If the system being created becomes too rigid, the inclusion of new components in it will be difficult.
- The partial replacement of the former particular and sectorial environmental requirements with abstract and largely generalised environmental norms and normative principles may cause problems in the interpretation and application of environmental law. The problem is partly psychological, as people are used to very specific and technical requirements in this area.
- The rapid but chaotic development of EC environmental law (presuming that Estonia will become a member of the EU) may bring confusion to the national codified system of environmental law.^{*38}

Another question that arises in Estonia in the context of codification of environmental law concerns the time span of the process and the organisational aspects of drafting the code. The experience of other countries shows that it will be a time consuming and complicated work. The same process has lasted more than 10 years in Germany.^{*39}

Estonia now clearly lacks preconditions for the preparation and enforcement of the entire environmental code at once, which means that gradual preparation and enforcement is unavoidable. One of the lacking preconditions is the uneven development of different areas of environmental protection in Estonia. Some

³⁵ See e.g. Environmental groups meet German minister on refusal to sign new convention. Available: <http://www.mem.dk/aarhus-conference/NGO/groups.htm> (28 April 2000).

³⁶ The two main expressions of this development are the draft law on environmental impact assessment and environmental auditing and the draft law on integrated pollution prevention and control. In computer network. Available at: <http://www.envir.ee>.

³⁷ See e.g. E. Rehbinder, p. 163.

³⁸ *Ibid.*, pp. 160–161.

³⁹ Environmental code (Note 13), pp. 57–58.

areas are still in the formative stage, while others are already on the level of development required for codification or are nearing this level. The codification of environmental law is a new quantitative stage in the development of environmental law and it has to rely on a firm foundation and prior development. Besides, a gradual approach is also justified by the scarcity of intellectual resources. Similar methods are known to have been used in Estonia in other areas of law, particularly in the preparation of the Civil Code, and they have proved to be successful. Gradual approach to the reformation of environmental law has been used in many other countries.^{*40} But besides its positive aspects, the lengthy process of preparation of the environmental code also has its negative sides – such as the possible political changes and the fact that the parts of environmental code already prepared in the spirit of legal innovation will be applicable together with the “old-fashioned” legislation, which may cause complicated legal conflicts.

The provisional structure of the Estonian environmental code has now been completed. Working groups have been set up – one to prepare the General Part of the Environmental Code Act and the other to prepare the Nature Conservation Act of the Environmental Code. The first working group has prepared a provisional draft version of the Act that has been distributed for wider discussion.

The task of the General Part of the Environmental Code Act is to set out the general principles of environmental law, including to define the scope of application of the environmental code and the goals of environmental protection, and to define the basic principles of environmental law, the fundamental rights and duties of persons in the protection of the environment, the bases for management of the environmental protection and the system of legal means of environmental risk control. The General Part Act thus defines the legal framework for environmental law and policy and is the basis for further systemisation and codification of environmental law.

In the structure and content of the General Part of the Environmental Code Act, the components should be pointed out where the goal of codification – renewal of the existing law – is the most apparent. These components are:

- formulation of the environmental rights and duties of persons;
- legal defining of the basic concepts of environmental law;
- providing the bases for organisation of environmental protection;
- defining the economic instruments of environmental protection.

In setting out environmental rights, the draft General Part of the Environmental Code takes guidance from the principles of the Aarhus Convention. The main rights set out in the draft Act are the right to live in an undamaged environment that meets the norms and the right to require the discontinuation, termination, and adjustment to norms of activities that impair the condition of the environment (rights to a clean environment), the right to receive information on the condition of the environment, natural resources, and factors that may have an impact on the environment (the right to environmental information), and the right to be involved in making decisions that may have a significant impact on the environment and to participate in drafting general legislation concerning the environment through environmental organisations (right to participate). In the preamble to the Aarhus Convention (indent 7), the right to a clean environment is defined as follows: “every person has the right to live in an environment adequate to his or her health and well-being”. The definition is rather vague and can be interpreted in many ways. The common theoretical position is that the right to a clean environment is a right to which no clearly defined duty of any specific person can be *a priori* linked. In this respect, the right to a clean environment is similar to the right to work, which does not imply the obligation of any specific employer to employ any person (naturally, the right to be free of discrimination has to be taken into account here). The author of this article cannot fully agree to the above position concerning the right to a clean environment. Section 53 of our Constitution says: “Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her. The procedure for compensation shall be provided by law.” It is very likely that the right to a clean environment and the duty to avoid causing damage can conflict within a single legal relationship. There is also the general duty of a country (especially a member country of the EU) to ensure a high level of environmental protection and to establish the relevant legal, financial and institutional guarantees.^{*41}

One of the goals in the preparation of the draft General Part of Environmental Code Act was to formulate the basic duties of persons concerning the environment, including the duty to be informed of the potential

⁴⁰ See P. Gilhuis, pp. 101–102.

⁴¹ Article 2 of the Treaty Establishing the European Community stipulates “a high level of protection and improvement of the quality of the environment” as one of the main tasks of the Community (and thus its member states).

environmental impact of certain activities or using certain substances, the duty to choose for their activities the most environmentally suitable place, the duty to take precautionary measures and the duty to use the best possible technology. These duties apply to all persons who plan or carry out activities that have a significant impact on the environment. Such an approach enables the supplementation of the single duties specified in the present specific laws by general rules of acting that define the limits of human activities in view of environmental protection interests.

The lack of legal definitions for many basic concepts of environmental law in the currently applicable legislation is very obvious and is apparently a source of conflicts. The concepts are defined in the draft General Part Act from the practical rather than the theoretical aspect (taking into account the needs related to application of the act). For example, it is practical to define the concept of "environment" from the aspect of the scope of application of the Act, and not to provide a scientific definition. The concept of environment is defined by the same method used in property law to define the scope of immovable property.^{*42} The environment is defined as an integral system functioning in the cumulative effect of various natural resources and environmental factors, the separation of the components of which is artificial and unreasonable in respect of environmental protection. The former definitions of the concept of the environment are deficient namely because they try to list the various components of the environment.^{*43} The physical scope of the environment is determined by the scope of public interest in controlling environmental risks. The scope of public interest that the state has to consider in establishing regulations is in turn determined by the goal to protect the environment as a whole on a high level and by the principles of sustainable development as laid down in international^{*44} and national law.

The draft law defines the use of the environment not only as the use of natural resources, but also as the pollution and impairment of the environment. The disposal of contaminants and waste in the environment and other affecting activities are also defined as use of the environment. The concepts of pollution and impairment of the environment are based on analogies from various international conventions (such as the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area^{*45}). Pollution of the environment is defined as the release of substances or energy (*i.e.* practically any objects or effects) into the environment that damage the environment and/or human health through the environment, or cause the risk of such damage. The last definition, causing risk, arises directly from the precautionary principle. Pollution of the environment also includes activities that result in the violation of the environmental rights of other persons, such as damage caused to fishers through destruction of fish resources by pollution of water, or damage caused by damaging the aesthetic values of the environment. While environmental pollution is mostly related to the release of substances or energy in the environment, impairment of the environment includes activities such as forest cutting, altering of landscape, damaging or removal of soil, etc. Estonia has adopted the principle that in theory, the disposal of any waste of human activity can be viewed as environmental pollution. Thus, environmental pollution cannot always be *a priori* prohibited or condemned, otherwise economic activities would be completely impossible. However, the environment may be polluted, as a rule, only when holding an appropriate permit and in accordance with the conditions prescribed in it. Environmental permits are naturally not required if the environmental impact of an activity is negligible.

Our poor administrative capacity has been pointed out in the negotiations between Estonia and the European Union. It is necessary not only to provide a normative framework that complies with the EC law, but also to ensure the actual implementation of environmental requirements through an effective environmental management system. Organisation of the environmental protection system should be based on the social partnership principle that requires the active participation of all sectors of the society, especially the state, local governments and enterprises.

The organisation of environmental protection is ensured in the General Part of the Environmental Code Act by:

⁴² Asjaõigusseadus (Law of Property Act) § 127 – Riigi Teataja (the State Gazette) I 1993, 39, 590.

⁴³ See *e.g.* Convention on civil liability for damage resulting from activities dangerous to the environment (Lugano, 21.06.1993) Article 2 (10).

⁴⁴ Article 3 of the Convention on Biological Diversity (Rio de Janeiro 1992) defines the general principle: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

⁴⁵ Convention on the Protection of the Marine Environment of the Baltic Sea Area – Riigi Teataja (the State Gazette) II 1995, 11, 57.

1. outlining the development of all areas of life; the basic instruments here are strategies, development plans, projects and programmes. These are the main means of implementing the integration principle;
2. defining the scope of use of the environment; this is effected through environmental permits, licences, type approvals and conformity certificates on the basis of the principle that the environment may be used only under the right of use;
3. preserving natural heritage through providing state protection to species, habitats, single natural objects, landscapes or cultural heritage and ensuring such protection;
4. improving the quality of the environment through regulating activities that have an impact on the environment and through prognosis and assessment of such impacts. It means the establishment of environmental protection quotas and supervision and enforcement of their implementation;
5. accounting for natural resources, the aim of which is to collect reliable information on environmental condition and to plan and implement environmental protection measures on that basis.

Economic instruments play a larger role than ever among the environmental protection measures in the 1990s.^{*46} As mentioned above, there are several reasons for this. The objective is to promote environmentally sustainable production and consumption by using various economic stimuli and antistimuli and the requirement to convert the external expenses on the use and pollution of natural resources into internal expenses (to internalise the externalities).^{*47}

The General Part of the Environmental Code Act provides for the following economic means:

1. Loans and subsidies – in accordance with the principle of limitation of state aid and by requiring that state aid may not cause arbitrary, disproportionate or discriminating distortion of competition.
2. Guarantees for compensating for environmental damage – the purpose of which is to prevent environmental damage and ensure compensation for damage or the performance of other mandatory activities.
3. Insurance against environmental risks – including the scope of mandatory insurance.
4. Charges for use of the environment – the aim is to implement the “polluter pays” principle and thus to contribute to the means of sustainable use of the environment and prevention of damage.
5. Means of informing the consumer – such as the ecolabel, certification, conformity verification of products.
6. Compensation for damage caused by environmental protection limitations – this contributes to the effective application of environmental protection measures and alleviates the social strain brought about by control of environmental risks.

When discussing the goal of the General Part of the Environmental Code Act, we cannot ignore the problems of transposition the EC environmental law to our legal order. The EC environmental law (the main source of which are directives) does not replace national law, but acts through it. Therefore, national law has to be organised for adequate adoption of the EC law – discrepancies, repetitions and gaps need to be eliminated. The harmonisation process requires the passing of a large number of new legal acts in a relatively short time. This cannot be achieved without a framework law on environmental protection that would provide a framework for such mass production of legal acts. The draft provides for many fundamental principles of EC environmental law – the “polluter pays” principle, the precautionary principle, the best possible technology principle, etc. – that absolutely need to be taken into account in the transfer of the goals and requirements of single directives to our legal order.

The General Part of the Environmental Code Act defines the environment as national wealth to which the requirement of sustainable use applies. Many international conventions go even further and regard natural resources as the common heritage of mankind.^{*48} This principle is the basis for subjecting private interests to public interests and for the establishment and implementation of related restrictions. Proceeding from the principles of international law, every country has sovereignty to use its environment, but must avoid from damaging the interests of other countries (the common interests of mankind). The establishment of environmental regulation is thus not only the right of a country, but also an international duty.

A frequently asked question in Estonia is whether the establishment of high environmental requirements in view of Estonia’s liberal economic policy is an advantage or a disadvantage to our enterprises, and thus our society. It is obvious that the codification of environmental law is unfavourable for activities (including

⁴⁶ A. Kiss, D. Shelton. *Manual of European Environmental Law*. Cambridge University Press, 1997, pp. 127–128.

⁴⁷ See A. Reinvald. *Keskonnaseisundi reguleerimine majandusmeetoditega (Environmental Regulation by Economic Methods)*. Tartu, 1992, pp. 7–9.

⁴⁸ See A. Kiss, D. Shelton. *International Environmental Law*. Transnational Publishers, Inc. & Graham & Trotman, 1991, pp. 9–18.

economic activities) that do not comply with internationally accepted environmental requirements. The General Part of the Environmental Code Act is guided by the principle that economic development cannot take place on account of environmental condition and human health. In the long term, the establishment of strict environmental requirements will certainly have an organising, *i.e.* positive effect on our economy and competitiveness in the world market.

Theories of Punishment and Reform of Criminal Law

(Reform as a Change of Mentality)

Theories of Punishment as the Basis for Legitimation of Criminal Law

It is a commonly accepted concept that theories of punishment represent the basis of legitimation for the state's criminal punishment procedures. Different theories of punishment – absolute, relative, and mixed theories – explain in different legal philosophical and legal theoretical ways the nature of punishment and, via the objectives of punishment, the goals of the state's interference in criminal law.^{*1} The theories of punishment and the objectives of punishment formulated on their basis have at all times been the subject matter of scientific debates, discussions in comparative law included.^{*2} Besides, the theoretical bases and preferences of punishment recognised by a particular state condition the definition of the grounds in the Criminal Act on which penalties are imposed and ultimately the state's policies and practices of punishment.

In this article the author treats the issue of punishment theories against the background of Estonian criminal law reform. Hopefully, the issue of the exact theoretical basis of punishment which should underlie the development of our criminal law as a whole – an issue that is of paramount importance to Estonia as it continues to undergo reforms – and the law of sanctions and the bases of imposing penalties will attract the attention of scientific communities.

Estonian legal reform as a whole and, consequently the reform of Estonian criminal law aspire to disembark the totalitarian Soviet law and mould a European legal system that matches the current level of jurisprudence.^{*3} The matter, however, does not just involve the dogmatic review of certain problems but also concerns the legal philosophical and legal political bases of the reform of criminal law. Thus, the reform makes the jurisprudence and legislators face several tasks which can be solved only provided that besides

¹ About the purport of the State's punitive authority and theories of punishment, including the most recent trends of development in theories of punishment, see *e.g.* H.-H. Jescheck, T. Weigend. *Lehrbuch des Strafrechts. Allgemeiner Teil*. Berlin, 1996, pp. 60 *et seq.*; C. Roxin. *Strafrecht. Allgemeiner Teil Bd 1*. München, 1994, pp. 36 *et seq.*; J. C. Müller-Tuckfeld. *Integrationsprävention. Studien zu einer Theorie der gesellschaftlichen Funktion des Strafrechts*. Frankfurt/Main, 1998; W. Kargl. *Integrationsprävention. – Rechtstheorie*, 1999, No. 30, pp. 371–381 (includes criticism of J.C. Müller-Tuckfeld's monograph); N. Walker. *Why punish. Theories of punishment reassessed*. Oxford University Press, 1999.

² See *e.g.* B. Schünemann (Hrsg). *Positive Generalprävention. Kritische Analyse im deutsch-englischen Dialog*. Heidelberg, 1998.

³ About the general bases and objectives of the reform of Estonian criminal law, see *e.g.* J. Sootak. *Stand und Tendenzen der Strafrechtsreform in Estland. – Von totalitärem zu rechtsstaatlichem Strafrecht*. Freiburg, 1992, p. 75–85; P. Pikamäe, J. Sootak. *La réforme du droit pénal estonien: la voie vers l'indépendance. – Revue Pénitentiaire et de Droit Pénal*, 1999, No. 2, pp. 193–216.

the availability of answers to legal theoretical and legal philosophical questions the legal mentality will also change.*⁷

The problem is aggravated and interest increased by the fact that the current Estonian criminal law, derived from the Soviet criminal law, ignores or offers just a moderate treatment of the issue of punishment theories. Consequently, in the course of the reform we must understand which thought models and legislative solutions stem from a totalitarian state's law, which are simply outdated, which should be transferred to the new legal system for the sake of nurturing traditions and stability of the legal system, which should be taken over from other countries, and which we should devise ourselves.

Position of Punishment Theories in the System of Criminal Law

The problem of punishment theories in view of the objective of a punishment is *per se* one of the oldest legal philosophical problems, on top of it being the focal one. Historically, the idea behind the punishment can be reduced – albeit in retrospective – to the dilemma of **retribution** or **prevention**, *i.e.* to the question whether the punishment is a vehicle of visiting fitting retribution upon the offender for what they have committed, or whether the public authority in which the right to exercise punishment is vested should be proactive and try avoiding similar offences in the future? The definition of the antimony of punishment theories can with a natural limitation be even traced back to Seneca who, using Plato as a middleman, cited what Protagoras was believed to have said: “...*nemo prudens punit, quia peccatum est, sed ne peccatur...*”.*⁸

The development of the problem of punishment theories can be observed throughout the history of criminal law, both during the Middle Ages and during the Enlightenment, both in the natural law codification and the criminal law philosophy of Italian positivist rebellion, and in the disagreements of different schools at the turn of the 19th and 20th centuries. What interests us now, however, is the problem of when the theories of punishment ceased to just justify the objectives of punishment and started occupying a much more important position within the system of criminal law – they grew into the legitimation basis of criminal law.*⁹

Obviously, criminal law needs to be legitimated only at a certain level of development, primarily at the point when criminal law intervention collides with the principle of human dignity. This is the position where criminal law intervention must justify itself in a state ruled by law. It is clear that an esoterically operating criminal law built on the absolute theory of punishment does not face such problems even though it may recognise the guarantees provided to an offender in a state ruled by law.

In this respect, the problem of legitimacy of criminal law arose acutely during the disagreement of the schools as it was then that the issue of whether a punishment should have objectives and if yes, which, became the subject of disputes.*¹⁰

To this date the theories of punishment with a sociological edge reproach the theory of absolute punishment because of its esotericism and evasiveness of the problems facing society. For instance, W. Hassemer believes that criminal law should look beyond its goals because there are phenomena outside the criminal

⁷ See *e.g.* M. Luts, J. Sootak. Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe. – Juristenzeitung, 1998, No. 8, pp. 401–403.

⁸ About the history of punishment theories, see *e.g.* H.-H. Jescheck/T. Weigend (Note 1), pp. 66 *et seq.*

⁹ True, the purport of punishment (*Sinn der Strafe*) can be distinguished as the legitimation basis of criminal law and the theories of punishment as its various options. See *e.g.* H.-H. Jescheck/T. Weigend, p. 70. But even in this case, the theories of punishment still remain the basis of substantiating the punitive authority of the State, *i.e.* the variants of the purport of punishment. About arguments pro the difference of the objectives of punishment and the theories of punishment, see *e.g.* C. Roxin (Note 1), p. 39 including the reference to H.-P. Callies (*ibid.*, p. 39 Note 1) who, however, believes that such a distinction serves no purpose and calls criminal law the “concretised constitutional law” (“*konkretisiertes Verfassungsrecht*”).

¹⁰ As an example of the status of discussion at the beginning of the 20th century, see *e.g.* K. Binding. Strafrechtliche und strafprozessuale Abhandlungen. Erster Band. Leipzig, 1915, p. 70 (“With an absolute theory the offender always occupies a higher place than the innocent does with a relative /theory/”); F. v. Liszt. Lehrbuch des Deutschen Strafrechts. 23. Aufl. Berlin, Leipzig, 1921, pp. 20–21 (“When the State Criminal Code entered into force in 1870, the building of the classical school was completed. /---/ He believed to see the justification of punishment in a principle that was beyond the State and law, be it a divine world order or a categorical imperative...”). The German science of criminal law was of course already familiar with theories of punishment and in later writings they have been treated in very different dispositions. See *e.g.* A. Berner. Lehrbuch des Deutschen Strafrechts. Leipzig, 1857, pp. 6–35, but *cf.* *e.g.* R. v. Hippel. Lehrbuch des Strafrechts. Berlin, 1932, Kap IV (“Die Wirksamkeit des Strafrechts”, §§ 16–18).

law systems which function just like criminal law and which also determine whether the goals of criminal law have been attained. Therefore, criminal law must redefine itself within the general.*¹¹

This issue is important in the context of Estonian criminal law reform for the very reason that as of now we have to redefine criminal law. Currently the priority is not which punishment theory to choose or which theoretical standpoints to prefer. We must go farther than that – both the jurist and the legislator need to wake up to the problem of legitimation of criminal law as a whole. As can be seen below, it requires a substantial change in the legal consciousness of Estonian jurists as far as their mentality is concerned.

Below I will make an attempt to demonstrate that in the course of Estonian criminal law reform, the concepts of the legitimacy of criminal law and punishment theories should be introduced to the jurisprudence and legal awareness. The issue is not so much in just introducing the concepts to law or dogmatics. Such an introduction of concepts does imply the redefinition of criminal law in the minds of society. The problem is further complicated by the fact that although the Soviet criminal law and criminal jurisprudence recognised the concept and goals of punishment, they did not recognise the concept of punishment theory. The problems of the justification of punishment and the legitimacy of criminal law were just as unfamiliar.

Russian and Estonian Criminal Law in the First Half of the 20th Century

There is no doubt that the criminal laws of Germany and France substantially influenced the criminal laws of Tsarist Russia and the first Republic of Estonia.*¹² However, the uniqueness of Russian criminal law should also be taken into account; for instance one of the leading criminal jurists of Russia, N. Tagantsev, based his treatment of the topic purely on normativist ideas.

The concept of crime was explicated by Tagantsev to be a legal relationship between an individual and society. Crime is dangerous because it creates relationships between the offender and society and between the offender and injured party that differ from the legal order. Crime and punishment as legal phenomena represent the object of criminal law. Thus, crime is directed against a legal norm.*¹³ But Tagantsev does not analyse the bases of punitive power in terms of criminal law, which were at that time acknowledged in German criminal law as a substantial abstraction.*¹⁴ Tagantsev treats the punitive power of the State only within the framework of the theory of punishment although he did so with extreme thoroughness. He differentiates between the bases of the State's penal law (*karatelnoye pravo*) and the purport and goals of the State's punitive actions. Tagantsev treats the theory of moral and spiritual characteristics of human nature, the theory of divine origin, the theory of contract, the idea of law, etc. as the bases of the punitive power.*¹⁵ Tagantsev views material retribution (Kant), dialectic retribution (Hegel), utilitarianism (Bentham), prevention (Grolman), protection of society (Liszt), etc. as the goals of the state's punitive actions.*¹⁶

Russian criminal law as reflected in the work of its leading scholar did not contemplate punishment theories or the general concepts of punishment objectives as abstractions. This also explains why the 1903 Russian New Punitive Code and the 1929 Republic of Estonia Criminal Code modelled on it lacked provisions on the bases of imposing penalties or the objectives of punishment.

The theory of punishment and the objectives of punishment, and the issue of legitimation of criminal law did not occupy a significant place in the works of Estonian criminal law jurists after the country achieved independence in 1918. H. Kadari speaks about punishment theories as "legal political doctrines of

¹¹ W. Hassemer. Einführung in die Grundlagen des Strafrechts. München, 1990, p. 316. W. Hassemer. Einführung in die Grundlagen des Strafrechts. München, 1990, p. 317

¹² For instance, A. Berner's textbook (2nd edition: Sankt-Petersburg, 1865–1867) and F.v. Liszt's textbook (12th edition: Moskva, 1903–1905) had been translated into Russian. Their impact on Russian jurists was obvious. About the impact of German criminal law on the Russian criminal law and about the impact of Russian and Soviet criminal law on Estonian criminal law, particularly in relation to the issue of crime theory, see J. Sootak. Verbrechensbegriff und Tatbestand: Erfahrungen der russisch-sowjetischen Strafrechtswissenschaft und deren Ausstrahlungen in Estland. – Ost-Europa Recht, 1998, No. 1, pp. 57–67, *ibid.* The Concept of the Crime and Estonian Criminal Law Reform. – Juridica International. Law Review. University of Tartu, I, (Tartu), 1996, pp. 55–61.

¹³ N. Tagantsev. Russkoye ugolovnoye pravo. Lektsii. Obstchaya tshast. Tom 1. Sankt Peterburg, 1902, p. 7, 18, 34.

¹⁴ See Note 7.

¹⁵ N. Tagantsev, vol. 2, pp. 856 *et seq.*

¹⁶ N. Tagantsev, vol. 2, pp. 880 *et seq.*

punishment” in the part of his textbook dedicated to the punishment doctrine.^{*17} K. Saarmann treated “theories of punitive law” in conjunction with the concept of criminal law but groups them with indeterminism and determinism as “trends in the science of criminal law”, thus not at all as the bases of the State’s punitive power.^{*18}

Soviet Criminal Law: the Concept and Objectives of Punishment in Criminal Law

Obviously the Soviet Russia that emerged and developed as a totalitarian power did not need to justify intervention in criminal law or the imposition of penalties. Doubting the state’s right to apply criminal liability did not even occur to anyone.

All these problems were solved by a provision that treated the tasks of criminal law in general. Thus, § 1 of the 1926 Russian SFSR Criminal Code cited the task of criminal legislation as “the protection of the socialist state of workers and farmers and the law and order thereof ... by applying the means of social protection prescribed in this Code”.

Under § 9 the objectives of punishment were to prevent people who have once committed crime from commissioning new crimes, influence insecure members of society and adjust offenders to the society of the working people’s country. Such a wording rather clearly insinuated special prevention and negative general prevention (or deterrent prevention) which quite understandably was clad in the ideology of class struggle. Already then, the special preventive goal was set up as the priority and as we see later it remained the very cornerstone of Soviet criminal law’s punishment theory and penitentiary doctrine. The general preventive goal was, to some extent, hoped to be achieved with the unstable hostile classes and other insecure elements.^{*19} We should also mention that in terms of structure, the code did not differentiate between the theory of crime and that of punishment as all the related provisions were compiled in Division 3 “Fundamentals of Russian SFSR criminal politics”.

Literature on criminal law emphasised another task of punishment – repression or suppression of the resistance of hostile ranks.^{*20} As the socialist order is secured and the hostile element liquidated, the repressive content of punishment remains in place but not as a means of class struggle but rather as the nature of punishment. Consequently, two categories evolved within the Soviet doctrine – the concept and objectives of punishment. At the same time, elements considered as an independent institute are formed within the criminal law, not directly connected with the objectives of punishment.

For instance the 1939 draft of the Soviet Union Criminal Code provided that the objectives of punishment are to punish the criminals (!), reform the criminals, prevent new crimes by persons who have committed crimes and prevent the possibility of other persons’ committing crimes (§ 25). The circumstances to be taken into account in imposing the penalty – seriousness of the crime, aggravating and extenuating circumstances and the personality of the offender – were set forth under separate provisions (§§ 46–48).^{*21}

The same system was preserved in the 1955 draft Soviet Union Criminal Code which, however, defined punishment as a “coercive means of the state applied by a court in respect of a person convicted in crime” (§ 4). What is extraordinary though is that this provision was inserted into Chapter 1 (“The Bases”) immediately after the sections on the tasks of the Criminal Code (§ 1), the concept of crime (§ 2) and the basis of criminal liability (§ 3).^{*22}

The concept of punishment theory cannot be found in any textbooks of that time; neither did special literature contain any charts or guidelines for judges on how to blend the special and general preventive goals of punishment on the one hand and the circumstances to be taken into account upon imposing the penalty on the other hand.

¹⁷ H. Kadari. *Kriminaalõigus. Üldosa* (Criminal Law. General Part). Tartu, 1939, pp. 204 *et seq.*

¹⁸ K. Saarmann. *Kriminaalõigus. Üld- ja eriosa* (Criminal Law. General and Special Part). Tartu, 1935, p. 2.

¹⁹ About the then debate and the development of the system of sanctions within the Soviet criminal law in general, see U. Schittenhelm. *Strafe und Sanktionensystem im sowjetischen Recht*. Freiburg, 1994, (pp. 138 *et seq.*).

²⁰ See *e.g.* *Ugolovnoye pravo. Obschaya tshast*. Moskva, 1939, p. 270.

²¹ *Proyekt ugolovnogo kodeksa SSSR*. Moskva, 1939.

²² *Ugolovnyi kodeks SSSR. Project. Sine loco*, 1955.

The reform of the Soviet criminal law did not add anything substantial though to some extent it did concretise criminal law as a whole. The following system developed both in the 1958 Fundamentals of the Soviet Union and Soviet Republics' Criminal Legislation and the criminal codes of the Soviet republics (e.g. the 1961 Estonian SSR Criminal Code):

- a) Tasks of criminal law: the protection of the Soviet order, socialist property, the character and rights of citizens and the entire social law and order. For the purpose of performing these tasks, the Code defines crimes and punishments (§ 1).^{*23} The provision can be found in Chapter 1 ("General Provisions") of the general part.
- b) The concept and goals of punishment: punishment is not just a repression, but aims to reform and re-educate the convicted offender in the spirit of honest attitude towards work, verbatim adherence to laws and respect of the rules of the socialist way of life, as well as the prevention of new crimes by the convicted offender or any other persons (§ 20). The provision is placed in Chapter 3 ("Punishment") of the general part.
- c) General provisions related to the imposing of sentence: courts are guided by socialist legal conscience and take into account the character and level of danger to society, the character of the offender and the extenuating and aggravating circumstances (§ 36). The provision can be found in Chapter 4 ("Imposition of Penalty") of the general part.

As we see, the dogmatic ways of Soviet criminal law solve the issue of legitimacy of criminal law in a way that principally differs from the conceptions adopted in Europe. The tasks of criminal law are given as the first provision of the Code, which *per se* represents a sufficient basis both for defining a crime and imposing the sentence (a).^{*24} Thereafter the concept and goals of punishment are defined, which contain both the repressive content of punishment and prevention (b). In Soviet criminal law the legal definition of punishment is a comprise which attempts, using a peculiar technique of negative definition ("punishment is not just a repression ..."), to soften the repressive purport of punishment.^{*25} The bases of imposing a sentence (c) do not however depend on the concept or objectives of punishment, or on prevention, and there are no models that would bring together the goals and prevention of punishment and the bases of imposing a sentence.^{*26} The concept of punishment theory remained unknown in the Soviet criminal law doctrine; it was not even used in treatments criticising "bourgeois theories".^{*27}

As we know, the issue of punishment objectives has been solved differently in European criminal law conceptions. The issue of punishment theories is a part of criminal policies or the bases of criminal law and belongs, with the material definition of crime, in the beginning of the text of law.^{*28} On the basis of scientific analysis of theories of punishment and criminal political considerations, the bases of imposing a penalty are formulated in the sanctions part of the criminal code. For instance, under § 46 of the German *StGB*, the guilt of a person is the basis of imposing a penalty. Thereafter, the impact that the punishment may have on the convicted offender's future life in society should be taken into account (*i.e.* special preventive prognosis in a very cautious formulation). Special preventive prognosis must however be taken into account when applying conditional deprivation of liberty (§ 56 I and II), as well as general prevention (§ 56 III), etc. The French *Code penal* does not speak about prevention. Under articles 132-24, only the elements of the crime and the character of the offender are taken into account in imposing the penalty. The circumstances aggravating the penalty are outlined in articles 132-71–132-75.

²³ Here references are made to sections of the Estonian SSR Criminal Code as an example of the Soviet criminal law.

²⁴ E.g. the Democratic Republic of Germany Criminal Code too provided for several provisions on the protection of the socialist law and order and society (§ 1), the bases of criminal liability (§ 2), the protection of dignity and rights of man (§ 4), the guarantees of the justice and legality of jurisdiction (§ 7), etc. The Code specified "the exercise of the principle of socialist justice" (§ 61 I) as the basis underlying the imposition of penalty. See *Strafrecht der DDR. Kommentar zum Strafgesetzbuch*. Berlin, 1987.

²⁵ In special literature, several essential features of punishment have been outlined such as the coercive means of the state which causes losses and restrictions for a convicted offender, the negative assessment of a crime by the state, public condemnation, etc. See e.g. I. Rebane. *Nõukogude kriminaalõigus. Üldosa. Õpetus karistusest. I osa* (The Soviet Criminal Law. General Part. Doctrine of Punishment. Part I). Tartu, 1971, pp. 3 *et seq.*; *Kurs sovetskogo ugolovnogo prava. Tshast obschaya. Vol 2*. Leningrad, 1976, pp. 193 *et seq.*

²⁶ The monographs are structured according to the same scheme. E.g. M. Shargorodski does analyse "bourgeois" theories that treat the concept and objectives of punishment but does not do so within the conceptual system of punishment theories. See M. Shargorodski. *Nakazaniye. Yego tseli i effektivnost*. Leningrad, 1973, pp. 110–160.

²⁷ See e.g. M. Shargorodski. *Nakazaniye po ugolovnomu pravu ekspluatatorskogo obschestva*. Moskva, 1957, pp. 71 *et seq.* True, the Estonian scholar of criminal law Ilmar Rebane approaches at one point bourgeois theories of punishment, mentioning absolute, relative and mixed theories. See H. Kadari, E. Raal, I. Rebane. *Nõukogude kriminaalõigus* (The Soviet Criminal Law). Tallinn, 1963, pp. 275–277.

²⁸ See e.g. C. Roxin (Note 1), § 3, in Chapter 1 ("The Bases"). True, for instance H.-H. Jescheck/T. Weigend (Note 1) under § 7 the issue of punishment theories is contained in the part treating the criminal law (General Part I – Criminal Act), but in essence the talk is about the justification of a punishment which forms the basis of the state's punitive authority.

In the reform of the Estonian criminal law we obviously had to pick up a model to follow – whether we should continue with the old system or subscribe to a new one. However, it should be clear from the above review, that the lawyers who operated during the twenty years of independence and the following fifty years of the Soviet occupation were only superficially aware, or not at all aware of the theory of punishment. Therefore, it is no wonder that for the lawyers of the newly independent Estonia the problem of theories of punishment and the legitimization of the state's penalising authority did not exist and the goal of punishment was mostly seen in reforming the offender.

Before we proceed with the problems of the criminal law reform of the re-independent Estonia, we will take a brief look at the choices made by some other countries as they may serve as possible examples for Estonia.

The Reform of Criminal Law in East European Countries: Russia, Latvia, Poland

The 1996 Russian Criminal Code follows the traditions of the Russian SFSR, as the first thing it does is to specify the tasks of the Russian Federation Criminal Code (§ 2 whose content and structure is similar to § 1 of the Russian SFSR CrC and § 1 of the Estonian SSR CrC).

Similarly to § 20 of the Russian SFSR (*cf.* above ESSR CrC § 20), § 43 of the Russian Federation CrC (Part 3 “Punishment”, Chapter 9 “Concept and Goals of Imposing a Penalty. Types of Punishment”) sets forth the concept and goals of punishment. Under the provision punishment is a “coercive means of the state imposed by a court order”. Punishment means the deprivation or restriction of the rights and freedoms of the convicted offender as prescribed by the Criminal Code (§ 43 I).

Section 43 II defines the goal of punishment as the restoration of social justice, reformation of the convicted offender and the prevention of new crimes. The goal of restoring social justice arises out of the fact that a crime violates the justice by damaging the rights of the injured party (individual, society or the state). Social consciousness foresees the restoration of justice by means of punishment. The goal of preventing new crimes is seen, in terms of special prevention, as the prevention of new crimes by the convicted offender, and in terms of general prevention, directly as a threat to apply the punishment and ingenuously – as the enforcement of a sentence.^{*29}

The exact concept of the special preventive goal has not taken shape in Russian criminal law literature. Thus, in furnishing meaning to the concept reference is made to the explanation of the 19 October 1971 Soviet Union Supreme Council Plenum according to which the reformation of a major or minor convicted offender is demonstrated respectively by his or her honest attitude to work or studies.^{*30} It has also been claimed that a person is reformed from the moment he or she no longer poses a danger to society.^{*31} With reference to J. Andenaes it has also been said that a punishment has consummated its special preventive goal when the previous punishment that has been experienced prevents the commission of a new crime.^{*32}

Under the general preventive goal of punishment the educational effect of punishment is provided for. The impact of the punishment on the general public means thus stimulating the law abidance of members of society. Nevertheless, it has been concluded that such a construing of general prevention is overly comprehensive. The general preventive effect of punishment should be targeted at insecure members of society who, due to relations with the criminal environment, bad upbringing, etc., have a distorted idea of social values.^{*33} Thus, Russian science of criminal law is still at the level of A. Feuerbach's deterrent prevention and the conception of positive general prevention is still completely unknown.

²⁹ V. Radtshenko (red). *Kommentarii k Ugolovnomu Kodeksu Rossiiskoi Federatsii*. Moskva, 1996, § 43 comment 4.

³⁰ *Ugolovnoye pravo Rossiiskoi Federatsii*. *Obschaya tshast*. Moskva, 1996, p. 347.

³¹ N. Belyayev. *Ugolovno-pravovaya politika i puti yeyo realizatsii*. Leningrad, 1986, p. 46.

³² *Ugolovnoye pravo* (Note 27), p. 349. J. Andenaes's book (*Punishment and Deterrence*. University of Michigan Press, 1974) was one of the few treatments of criminal law by a Western author which was translated into Russian, substantially influencing the Soviet scholars of criminal law. It is only symptomatic that the work of an author originating in the Scandinavian legal system which is sociologically and punitive-theoretically oriented towards special prevention and not of an author representing the classical direction of criminal law and in a legal system built on an absolute theory of punishment was chosen to be translated. See I. Andenes. *Nakazaniye i preduprezhdeniye prestuplenii*. Moskva, 1979.

³³ *Ugolovnoye pravo* (Note 27), p. 350.

Section 60 I sets out justice as the general basis of imposing a penalty (Chapter 10 “Imposition of Penalty”). Under § 60 III, the character and degree of danger to society of a crime, character of the offender, extenuating and aggravating circumstances, as well as the impact of the punishment on the reformation of the convicted offender, and the living standard of his or her family are taken into account in imposing a penalty. Here however the justice of punishment is not understood as social justice but as legality and justification of punishment that in turn is expressed in taken into account the circumstances provided for in subsection 3.^{*34}

The concept of just punishment was not unfamiliar to Soviet criminal law theory although it was declaratory: every court order must be lawful and justified while the punishment must be just; the meeting of the goals of punishment is the best secured by a just punishment.^{*35} Literature, however, does not show the balance between the two difference concepts of justice – social justice as the content of punishment (§ 43) and just punishment (§ 60). Therefore, the new criminal law of Russia has adopted the concept of just punishment from the Soviet criminal law doctrine but the new doctrine still does not explicate the essence of it.

We see that the differences between the Russian Federation and Russian SFSR criminal codes are not big. In essence the previous triad system has been preserved (see above indents 3 a)-c)), while the special preventive goal of punishment is stressed both in the context of the concept of punishment and the bases of imposing a penalty. The special preventive goal – reformation of the offender – is the priority; deterrent prevention serves as general prevention.

The Russian penitentiary doctrine is in agreement with material criminal law. The Soviet theory of punishment deemed the reformation and re-education of the convicted offender to be one of the main goals of punishment. Labour was seen as the basic tool for reforming and re-educating the inmates of prisons. It is no wonder that the Soviet law and legal theory did not know the concept of *criminal enforcement law*. Instead, there was the concept of *law of punishment with labour*, which corresponded to the purport of the legal branch. The Russian Federation Criminal Enforcement Code entered into force on 1 July 1997, consequently the legal branch no longer bears the name of law of punishment with labour. However, the substance has changed relatively little as labour continues to be the main tool in reforming a convicted offender under the new code and the reformation of the convicted offender is the main goal of fulfilling the custodial sentence. The administration must carry out educational work with convicted offenders.^{*36}

Of the Baltic countries, only Latvia has adopted a new criminal code – The Criminal Act.^{*37} The Act has abandoned the formulation of the tasks of the Criminal Act as was customary in the codes of Soviet republics and as it still stands in § 2 of the Russian Federation Criminal Code.

In other respects, the provisions treating the issue of punishment theories do not substantially differ from earlier regulations. So for instance § 35 II of the Act provides for goals of punishment to be the punishing of offenders for the crime committed and the goal of achieving observation of laws by the offender and other people and refraining from the commission of new crimes. This translates as repression^{*38}, but also as special and general prevention.

Section 46 II of the Act sets out the general principles of imposing a penalty which the court must take into account as the character of the criminal act and the damage incurred, the character of the offender, the extenuating and aggravating circumstances.

The new criminal code of Poland (*Kodeks karny*)^{*39}, however, does not contain provisions on the tasks of the code, the concept or objectives of punishment. On the other hand, the bases of imposing a penalty are exposed in detail. *E.g.* article 53 § 1 sets out that a court shall in particular keep in mind that the restriction

³⁴ Radtshenko (Note 26), § 60 comment 1.

³⁵ I. Rebane (Note 22), p. 138 with a reference to the guideline regulation of the Soviet Union Supreme Council plenum of 30 June 1969.

³⁶ See *e.g.* A. Mihlin, V. Seliverstov, I. Shmarov. Kontseptualnye problemy novogo Ugolovno-ispolnitelnogo kodeksa Rossiiskoi Federatsii. – Gosudarstvo i pravo, 1997, No 8, pp. 69 *et seq.*

³⁷ Adopted on 17 July 1998, entered into force on 1 April 1999. The author of this article used the Russian version: Ugolovnyi zakon. Riga, 1998.

³⁸ In the Russian translation of the Code *pokaraniye*; in the Russian legal language *kara* denotes the repressive purport of a punishment, *i.e.* the repression. *Ibid.*: I. Rebane (Note 22), p. 26.

³⁹ Adopted on 6 June 1997 and entered into force on 1 September 1998. The author of this article used the German version of the bilingual publication: Das polnische Strafgesetzbuch. Zweisprachige Ausgabe. Freiburg, 1998.

resultant of the punishment (*Übelzufügung*) should not exceed the degree of guilt. The degree of damage incurred to society by the act, the preventive and educational impact of the punishment on the convicted offender and the needs of shaping the legal conscience of society must be considered. In imposing a penalty on a minor or adolescent, the court must be primarily guided by educational considerations (article 54 § 1).

As we see, a system of prevention has been formed through defining the goals of punishment. The system is built on a certain punishment theoretical conception under which the extent of guilt determines the maximum punishment while other criteria rule the determination of the lowest punishment – the danger posed by the act to society and the prevention.

No doubt that the new criminal law of Poland has waived negative or deterrent prevention and deems positive general prevention as a goal of punishment. Punishment is a vehicle that helps stabilise the feeling of right and wrong and trust in legal rules and norms on the part of society.^{*40} The maximum of punishment must not be greater than the fault even if the crime is recurrent (articles 65, 65), although in such cases the stricter punishments are substantiated by general preventive considerations.

Corpus Juris

The penal provisions introduced for the protection of European Union financial interests, *Corpus Juris*^{*41}, are important stages in the development of European criminal law. Estonian jurists have found that many standpoints expressed by *Corpus Juris*, which represent the common part of European criminal law, have also been expressed in the draft Republic of Estonia Penal Code (e.g. the three degrees of intent, differentiation between factual error (*Tatbestandsirrtum*) and juridical error (*Verbotsirrtum*), etc.).^{*42} Notwithstanding, the provisions of *Corpus Juris* related to the imposing of penalties are not very fortunate.

The imposition of penalties is regulated by article 15 which proceeds from the principle of proportionality and attempts, as the authors have claimed, to represent “the synthesis of national legal cultures”^{*43} whilst taking into account the unique features of different countries. In this, they largely rely on the dogmatic style of French criminal law, where to date the individualisation principle applied upon punishing an individual has been developed into the principle of personalisation so that it could be applied to punishments of legal persons. Under article 15, the penalties applicable to offences are to be imposed in accordance with the seriousness of the act, the individual fault of the offender and the extent of his participation in the offence. In particular the previous life of the accused, any previous offences, his character, his motives, his economic and social situation, and his efforts to make amends for the damage caused will all be taken into account. The authors believe that theirs was an attempt to combine the two major approaches in imposing penalties – the explicate inheritance of the German, Austrian and Portuguese law and the implicitness that dominates in the Italian and Spanish law.

The provision on the imposition of penalty is, however, not good at all; instead of synthesis there is an eclectic set of features which do not in the least alleviate the antimony of punishment objectives. The definition does not include the requirement of the European Court of Justice according to which a sanction must be effective, proportionate to the seriousness of the act and deterrent; in choosing the type and extent of a sanction, it must be taken into account that the sanction should not be more lenient than the sanction applicable to a similar violation under domestic law.^{*44} The content of the first and second sentence of the provision are contradictory to each other.

The critics have also stressed that the ambiguity of the provision essentially denotes the lack of a mechanism for imposing penalties, which in turn is contrary to the principle of legality.^{*45} Naturally we have to admit

⁴⁰ E. Weigend. Das neue polnische Strafgesetzbuch von 1997. – Zeitschrift für die gesamte Strafrechtswissenschaft, 1998, No. 110, pp. 114 *et seq.*

⁴¹ Published in German and French: M. Delmas-Marty (Hrsg). *Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union*. Köln, 1988; published in French and English: M. Delmas-Marty (ed). *Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*. Paris, 1997.

⁴² J. Ginter. *Corpus Juris* ja Eesti kriminaalprotsess (*Corpus Juris* and Estonian Criminal Process). – *Juridica*, 1999, No. 4, pp. 184 *et seq.*; J. Sootak. *Corpus Juris* ja Eesti kriminaalõigus (*Corpus Juris* and Estonian Criminal Law). – *Juridica*, 1999, No. 4, pp. 176 *et seq.*

⁴³ *Corpus Juris*, art 15 comment 3.

⁴⁴ F.N. Heise. *Europäisches Gemeinschaftsrecht und nationales Strafrecht*. Bielefeld, 1998, pp. 19–31; about the law of sanction as a whole, see M. Böse. *Strafen und Sanktionen im Europäischen Gemeinschaftsrecht*. Köln, 1996.

⁴⁵ P. O. Träskman. *Rules of Corpus Juris for Sanctions. Analysis of the specifications*. Trier, 1999, p. 3.

that the problem of antinomy of punishment objectives is complicated. But the German *StGB* and the new Polish *Kodeks karny* demonstrate that it can be solved. The draft Estonian Penal Code also attempts at putting together a more concrete system.

Estonian Version: Discussion Between Mentalities

The Criminal Code of the Estonian SSR applicable until the criminal law reform in 1992 represented a system typical of the Soviet criminal law, contained in the provisions concerning the concept and objectives of punishment and circumstances to be taken into account in the imposition of penalty (*cf.* paragraph 3, indents a-c above). The reform aimed at making the most essential changes in the applicable criminal law, leaving the drafting of new criminal law to the future.^{*46}

This kind of amendments was also made to provisions concerning the imposition of penalty. Section 1 of the code was changed (*cf.* subparagraph 3a above) by omitting the list of protected benefits such as the Soviet social order, the socialist property, etc. and essentially only defining criminal law – the code determines which acts are crimes and which penalties or other sanctions are applied. The new draft Penal Code^{*47} does not contain such a provision and the text of the code begins with a section expressing the principle *nullum crimen nulla poena sine lege*. The authors of the draft have been reproved for the opening section not saying anything about the objectives of the code.^{*48}

After the reform of 1992, § 20 defining the concept and objective of punishment remained, but in a considerably different form (*cf.* subparagraph 3b above). Subsection 1 provides the definition of punishment (punishment is applied on the basis of a court judgement and it consists in the restriction or deprivation of the rights of the convicted offender). Subsection 2 stipulates that penalty expresses public condemnation and induces the convicted criminal and other persons to restrain from further crimes. The wording reflects denouncement of Soviet rhetoric, but the code still contained the pointless textbook-like provision providing the definition of penalty (§ 20 (1)). Limitation of the special and general preventive objective of punishment to the prevention of further crimes was important though, particularly concerning special prevention. By this amendment, the criminal law reform of the time clearly stated that the criminal law of a state governed by the rule of law could not assume the role of an ideological reshaper or a schoolteacher of people.

The new draft Penal Code does not contain such a provision at all. The draft does not define the concept of punishment and transfers the issue of the objective of punishment to the bases for imposition of penalty (*cf.* below). This change has caused objections. It is found that the omission of the concept and objectives of punishment from the code and shifting the stress away from reforming the convicted offender means “ignoring the humane goals of punishment and the progressive imprisonment system created over years of intense work”.^{*49}

A statement could not be clearer. The mentality of lawyers indeed conforms to a system and to models of thinking developed over many years, it is just that these many years were not led by ideas attributable to a state governed by the rule of law. The understanding that criminal liability need not reform anyone, that the state cannot undertake to reshape its citizens, that the reforming of a convicted offender is not humane, that the progressive system of serving custodial sentence is out-dated, etc., is difficult to implement.

The bases for imposition of penalty are regulated by § 36 of the applicable Criminal Code (*cf.* subparagraph 3c above). According to the wording of § 36 (2) applicable before 1992, the dangerousness of the act to the society and the degree of crime had to be taken into account in imposing a penalty. The reform renounced the provision, as dangerousness to the society as a characteristic feature of a crime was omitted from the entire code. According to the new wording, the court has to take into account the seriousness and type of the crime.

The relevant provision of the new draft Penal Code (§ 59 (1)) does not contain this requirement either. The seriousness and type of crime are vague general terms, expressed one the one hand in the punishment

⁴⁶ Sources concerning the reform: Note 3 and Note 9 in this article.

⁴⁷ The general part of the draft code together with a justification has been published: M. Ernits, P. Pikamäe, E. Samson, J. Sootak. Karistusseadustiku üldosa eelnõu. Eelnõu lähtealused ja põhjendus (Draft General Part of the Penal Code. Sources and Justification.). Tallinn–Tartu–Kiel, 1999. The draft is currently in the *Riigikogu* (Parliament of Estonia).

⁴⁸ K. Kimmel, U.-P. Rahi. Mõtteid Karistusseadustiku eelnõust (Thoughts about the Draft Penal Code). – *Juridica*, 1997, No. 9, p. 448.

⁴⁹ *Ibid.*, p. 449.

framework provided in the general and special part^{*50}, but also reflected in the extent of the fault of the criminal and other circumstances.

Subsection 59 I regulating the imposition of penalty is currently worded as follows in the draft:

“The basis for punishment is the fault of the person. Upon imposition of penalty by court or by an official, account shall be taken of mitigating and aggravating circumstances, the type of intent and negligence upon committing the crime, as well as the possibility to incline the criminal to restrain from further crimes and the interests of protecting legal order.^{*51}”

As we see, the provision is rather similar to § 53 (1) of the new Polish *Kodeks karny* (cf. paragraph 4 above). There is also similarity with § 46 I of the German *StGB*, but as opposed to the latter, the Polish code and the Estonian draft code contain general prevention in the general provision of imposition of penalty.^{*52} The draft thus tries to resolve the problem of antinomy of objectives of punishment and to form a system of bases of imposition of penalty: first the extent of fault, then general and special prevention. In the opinion of the authors of the draft code, degrees of intent and negligence and mitigating and aggravating circumstances (the latter are separately provided in the draft code) should express the extent of fault.

Another question is whether there will be a model for taking account of the extent of fault and objective of punishment, and what the model will be like – will it be a summarising or dialectical mixed theory, point punishment theory (*Theorie der Punktstrafe*) or *Spielraumtheorie*, etc.? Such schemes cannot, of course, be established by legislation – their implementation in the knowledge of judges is a lengthy process.

The requirement to take account of the person of the criminal is left out of the bases for imposing penalty. This, like the omission of the objectives of reforming the criminal, is the result of lengthy and difficult discussions. The authors of the draft have, at least so far, been able to defend their position that automatic taking account of the person of the criminal is contrary to the principles of the criminal law of offence a state governed by the rule of law. The concepts of the criminal law of offence and the criminal law of the offender are also new to our legal thinking, but one of the goals of the reform – to renounce the totalitarian criminal law – also implies denouncement of person criminal law or offender criminal law. Just as the criminal law of a state governed by the rule of law does not criminalise acts arising from the lifestyle of a person (parasitism, prostitution, etc.), such criminal law does not consider reformation of a person and changing the lifestyle of a person its tasks.

The new Estonian Imprisonment Act also corresponds to material criminal law.^{*53} According to § 6 I of the draft act, the enforcement of imprisonment has two objectives: to direct the imprisoned person to law-abiding behaviour, and to protect legal order. The authors of the act proceed from the assumption that circumstances that are taken into account in imposing penalty, including objectives of punishment arising from punishment theory, must be kept apart from the objective of enforcing punishment.^{*54}

Hence, the Imprisonment Act provides not reformation of the criminal, but direction of the criminal to law-abiding behaviour as the objective of enforcing punishment. Punishment is enforced in order to direct the prisoner to such a lifestyle after release that he or she should be able to behave so as not to commit crimes. By this relatively weak wording of enforcement of punishment the Estonian Imprisonment Act wants to stress that the task of the state is not to reshape a person, but the activity of the state must be limited to directing the person to law-abiding behaviour.^{*55}

The second objective of enforcing punishment is to protect legal order. It is not clear yet how the Estonian penitential doctrine will provide essence to this objective. Legal order may be protected general-preven-

⁵⁰ The concept of *punishment framework* is also new to our legal terminology and requires implementation. About the meaning of the concept, cf. e.g. H.-H. Jescheck/T. Weigend (Note 1), p. 872.

⁵¹ In German: “Als Grundlage für die Zumessung der Strafe gilt die Schuld des Täters. Bei deren Festlegung berücksichtigt das Gericht oder der Beamte die die Schuld des Täters mildernden und erschwerenden Umstände, die Art des Vorsatzes und der Fahrlässigkeit, als auch die Möglichkeit, den Verurteilten künftig von der Begehung der Straftaten abzuhalten sowie Interessen des Schutzes der Rechtsordnung.“ The Ministry of Justice of the Republic of Estonia has the unpublished translation into German.

⁵² It is also our position that general prevention should be regarded as positive general prevention, although this is more clearly expressed in the Polish code.

⁵³ Vangistusseadus (Imprisonment Act), passed 14.06.2000 – Riigi Teataja (the State Gazette) I 2000, 58, 376.

⁵⁴ We here rely on the limitation in accordance with the status and situation decision theory (*Statusentscheidung* and *Gestaltungsentscheidung*) common in German theory. For details: M. Walter. *Strafvollzug*. Lehrbuch. Stuttgart, 1991, p. 68.

⁵⁵ One has to fully agree with the position of the German Constitutional Court (*Bundesverfassungsgericht*), that the state cannot assume the task of reforming a person, but it has to limit itself to the task of preventing further crime. For details: G. Kaiser *et al.* *Strafvollzug*. Eine Einführung in die Grundlagen. Karlsruhe, 1974, p. 50.

tively, namely the enforcement of imprisonment has an automatically frightening effect on other members of the society, *i.e.* it prevents further crime and protects the legal order. Providing general-preventive essence to this goal of enforcement in the sense of not only negative, but also positive general prevention is basically not excluded. Like imposition of penalty, serving imprisonment conforms to the validity of the norm and the public's faith in legal order.

The objective of protecting legal order should also be provided specific preventive essence. The society is protected against the potential crimes of a criminal during his or her imprisonment. If we include further crimes after release from prison, the two objectives of enforcement coincide. However, it is believed in literature that in such an event, this pertains to the first objective of enforcement (to direct the convicted criminal to a lifestyle of not committing crimes in future), and that the objective of protecting legal order or the so-called assurance clause is applicable to the time of imprisonment.^{*56}

Conclusions

To sum up, we should stress that currently two discussions are held within the framework of Estonia's reform of criminal law. One of them represents the subject matter of this article – legal political bases of the reform which are often expressed in the mentality. Declaratory provisions, which at the first glance seem to be of secondary importance (the tasks of the code, the concept of punishment, the ranking of punishment objectives), may become the main points of the reform ideology.

The authors of the draft Penal Code have been reproached for their attempt of planting into our society models that derive from quite another society and legal order. Though this is not the main issue – it is true that neither the draft Penal Code nor the reform of criminal law as a whole can be transferred to a legal and social environment alien to them. But the real issue is whether our legal and social environment is alien to the criminal law of a state governed by the rule of law. Hopefully the ten years of independence have managed to change our mentality so that we are ready for a new legal system.

As for the second discussion, it concerns legal dogmatism and is relatively simple – despite the complicity of dogmatic action. The introduction of a neutral in terms of the ethical dogmatic action of crime concept is not just a matter of mentality.

⁵⁶ Again we rely on the German penitential doctrine. *Cf. e.g.* K. Laubenthal. *Strafvollzug*. Berlin, 1998, p. 66.

Criminal Policy Choices and the Reform of the Estonian Criminal Law

Historical Background

During the occupation period of 1940 to 1991, major criminal policy choices for Estonia were made in Moscow.^{*1} The criminal policies for this time were similar throughout all former socialist countries. “The criminal justice systems under the socialist regime had the dual categories for application of law because the criminal justice was subjected to the socialist party. While the party leaders and officials hardly were subjected to the criminal investigation, the most of citizen was frequently subjected to harsher criminal sanctions. As a result the most of citizen lost the belief and respect for the law which functioned under socialist regime.”^{*2}

The reformation of Estonia’s criminal policy started in 1991, immediately after having regained its independence.^{*3} In 1992, the Criminal Code was subjected to major reform: the articles of criminal law which had functioned as safeguards for socialism were repealed, the sanction system was reformed towards a more human approach, and the use of capital punishment was restricted to cases involving the most aggravated violent crimes.^{*4} Unfortunately, the inadequate basic structure of the old Criminal Code was not changed by the 1992 reform. Hence, the preparation for a new, more comprehensive reform started immediately following the adoption of the 1992 version of the Criminal Code.

¹ In 1961, the Supreme Soviet of the Estonian SSR adopted Criminal Code of the Estonian Soviet Socialist Republic, but the main principles of the code were laid down already by the Foundations of the Criminal Law of the USSR and the Union Republics adopted by the Supreme Soviet of the USSR.

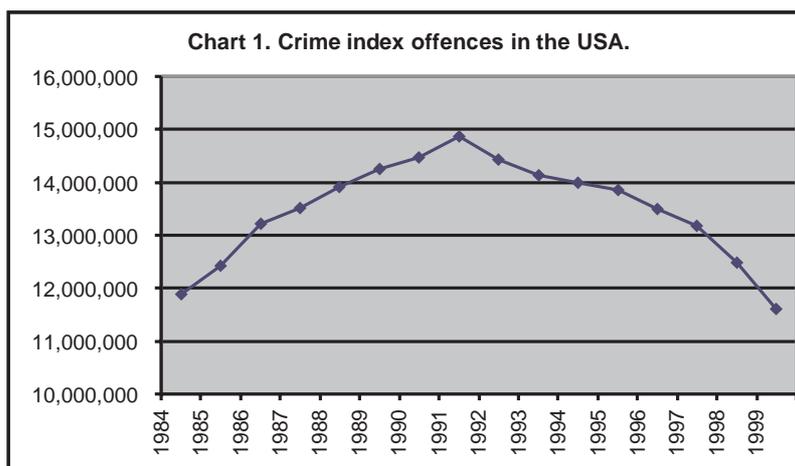
² Ki-Hun Lee, Kun-Ho Lee. *Crime Trends and Criminal Policy of Eastern European Countries in Transition to Democracy*. Available at: <http://www2.kic.re.kr/documents/abstracts/97lkh.htm> (April 9, 2000).

³ Some aspects of the criminal policy reform have been remarkably successful, even so that *e.g.* Open Society Institute and the UK Foreign and Commonwealth Office in partnership with the International Centre for Prison Studies organised a study visit for officials from Georgia to Estonia to see the effects of the transfer of the prison system from the Ministry of Interior to the Ministry of Justice (See, PRI in Central and Eastern Europe and Central Asia. Available at: <http://www.penalreform.org/english/central.htm>.)

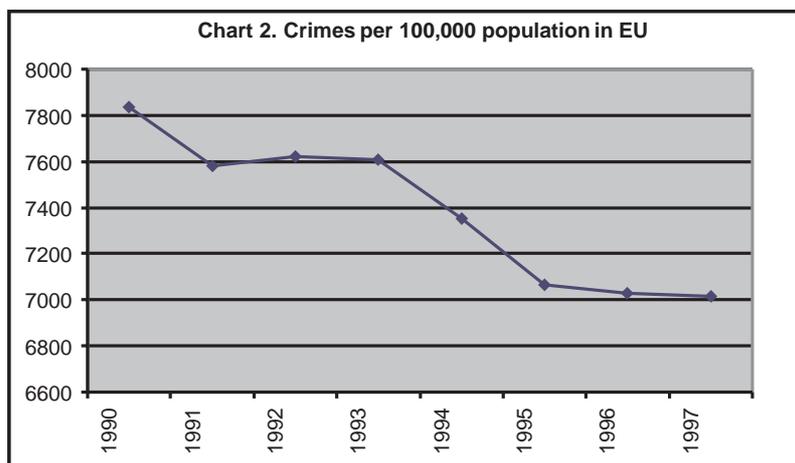
⁴ However, since 1991 none of them were executed.

External Conditions for the Criminal Law Reform of 2000

The most important external condition for the Estonian Criminal Law reform is that in the majority of the developed countries throughout the 1990s, the global crime trends have reversed. “Since the 1950s, crime has become a global problem for the majority of developed countries; the crime rate has been growing at a very high speed (even in comparatively calm Northern European countries the number of crimes has increased more than 4 times)”.⁷ In the USA the crime rate (per 100,000 population) **increased** from 1,887 in 1960 to 5,500 in 1987; in Germany the crime rate increased from 3,071 (in 1951) to 7,269 (in 1987); in the United Kingdom from 1,094 (in 1950) to 7,421 (in 1987) and in France from 3,254 (in 1972) to 5,712 (in 1987). At the same time the crime rate in Japan (not including traffic offences) **decreased** from 2,000 (in 1948) to 1,291 (in 1987).⁸



The crime trends reversed in the 1990s. The crime rate in the United States steadily decreased throughout the 1990s (see Chart 1). The initial decline can be attributed to the “get tough on criminals” policy. The United States criminal policy has increasingly become oppressive, the prison population has been steadily growing, reaching new peaks year after year. Concurrently, the crime rate has been shrinking, resulting in extremely favourable publicity for supporters of harsh criminal policies.

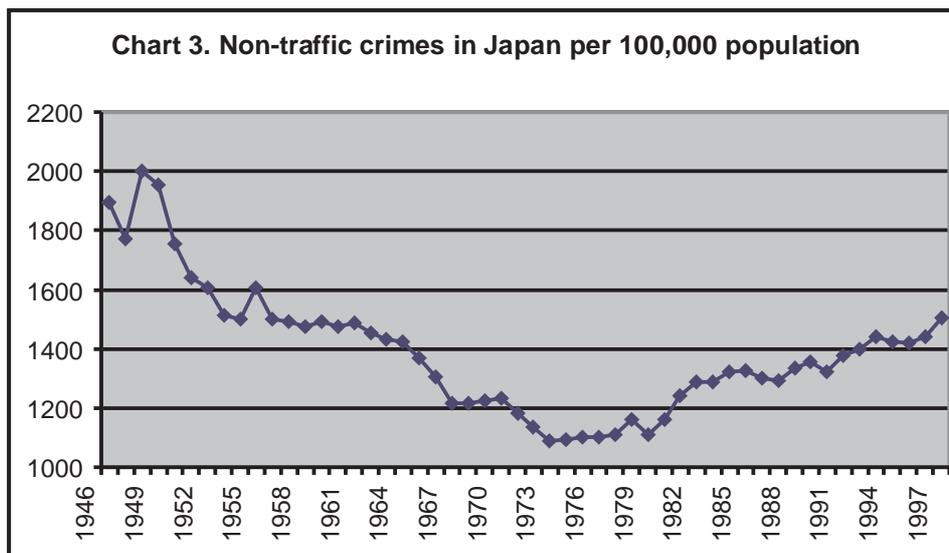


Subsequently, the 1990s have seen similar success in European Union countries, where the crime rate has decreased as well (see Chart 2).

⁷ Russian Criminal Policy in the Context of International Experience. Available at: <http://www.prison.org/English/probruss.htm> (12 April 2000).

⁸ Crime Trends. – Criminal Justice Systems at Work, 1998. Available at: <http://www.jcps.ab.psiweb.com/sc1.htm> (24 January 2000).

Furthermore, there has been no increase in prison populations or other severe criminal punishments in the EU countries. Hence, the decline in crime rates in the United States may have other causes beside harsh sentencing. The indication has not been well received by advocates of severe criminal policy.

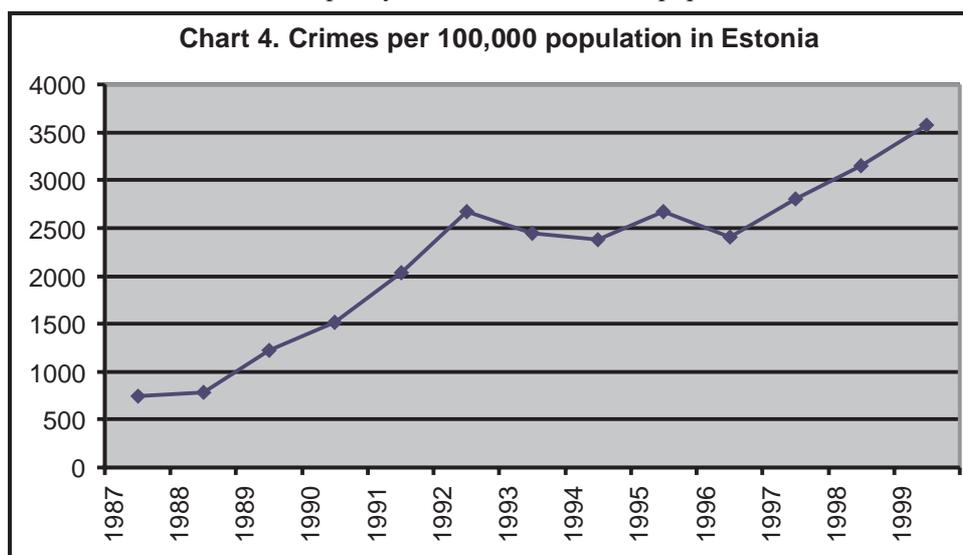


At the same time in Japan, the traditional example of a country with an unconventional decline in crime rate, crime trends have also reversed. Japan has seen an increase in criminality, which began in the later half of the 1970s and continued through the 1980s and 1990s (see Chart 3).

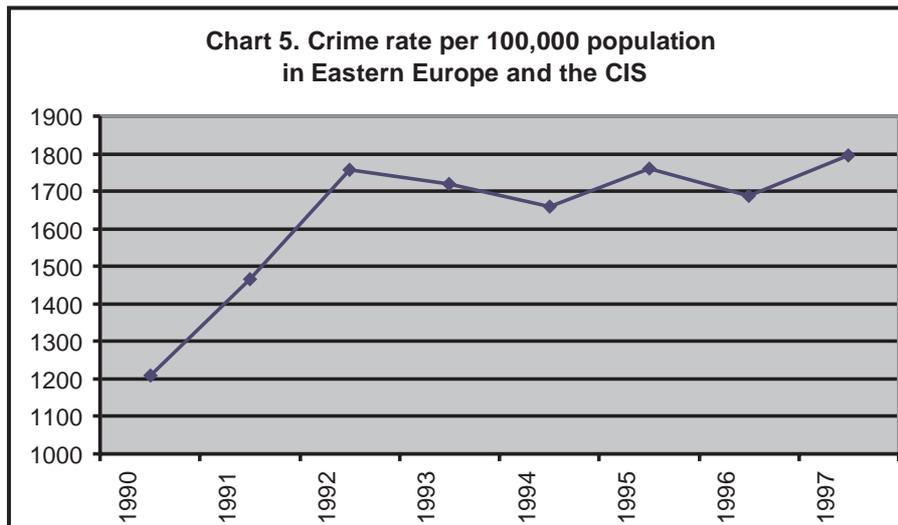
Consequently, these indicated controversial trends have hindered the emergence of a commonly agreed upon criminal policy for developed countries. There are proponents of rigid criminal policies, which refer to the story of success in the United States, as well as opponents, referring to the successes of other countries' reduced crime rates.

Internal Conditions for the Criminal Law Reform of 2000

The most important internal condition for the Criminal Law reform in Estonia is the manifest increase of crime rate that the Estonian criminal policy-makers and all of the population have observed since 1989.



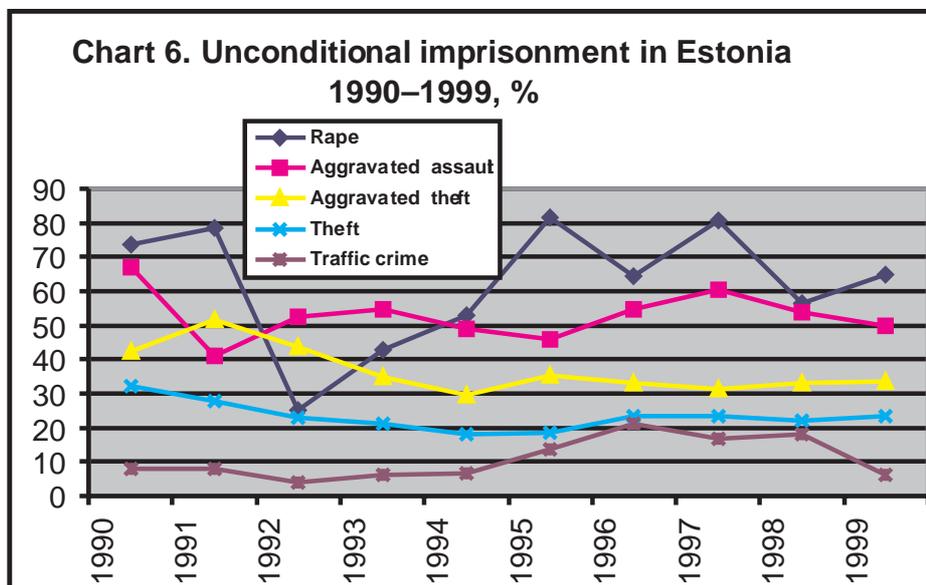
The crime rate more than tripled in the four years, period of 1989–1992. This period radical increase was followed by a four-year period, which had no clear trend, and a period of steady increase starting in 1996 (see Chart 4).



The increased crime rate in the 1990s has been common for all post-socialist countries of Central and Eastern Europe (see Chart 5).

At such a time when crime rates radically increase, people typically become more inclined to favour longer, harsher punishments. Therefore, it may not be surprising that according to public opinion surveys, the public overwhelmingly supported keeping the death penalty as a possible punishment. At the end of 1995, 72% of those surveyed wanted capital punishment to be retained.⁷ Criminal policy-makers succeeded in convincing the *Riigikogu* (the Estonian parliament) to abolish the death penalty⁸, but it would be naïve to assume that this success will be easily repeated in making the prison sentences shorter as well.

The task to elaborate the Estonian criminal policy has been assigned to the Estonian Council for Crime Prevention.⁹ The task to analyse, design, direct, coordinate and make prognoses of criminal policy for the prevention, stopping and clearing offences by the Ministry of Interior Affairs and its departments is assigned to the Ministry of Interior Affairs. Neither Council for Crime Prevention nor the Ministry of Interior Affairs has proposed a clear criminal policy to be followed.



There are not many signs suggesting the existence of a consistent penal policy in Estonia. The most common indicator, used to assess the penal policy in Estonia, has been the percentage of unconditional prison sentences. The imprisonment rates for different crimes show no unambiguous trends (see Chart 6). The

⁷ UNDP, Estonian Human Development Report, 1997. Available at: [http://www.coesin.ee/undp/nhdr97/eng/chap6.html#Penal policy](http://www.coesin.ee/undp/nhdr97/eng/chap6.html#Penal%20policy).

⁸ The death penalty was abolished in 1997.

⁹ Estonian Council for Crime Prevention is a commission assembled by and working for the Estonian Government. *Riigi Teataja* (the State Gazette) I 1994, 93, 1578 (in Estonian).

only general trend seems to be that the imprisonment for theft (both for aggravated^{*10} and simple theft) has become less often employed (the most lenient approach being in 1994^{*11}). The imprisonment rate for traffic crimes increased sharply after 1994, but as in 1999 the rate decreased to the same low as in 1994 and earlier, it is difficult to make any conclusions about the possible future trends.

The penal policies of single courts have indicated even larger sudden changes; e.g. Kohtla-Järve District Court was famous for its extremely harsh sentencing so that in 1997–1998 even convicted teenagers were mostly (60.3%) sentenced to imprisonment. In 1999, the Court changed its sentencing policies abruptly and the percentage of unconditional prison sentences for teenagers dropped by more than a half, to 27.9.

The inconsistencies in criminal policies have been so apparent that the 1996 UNDP Estonian Human Development Report concluded that in Estonia “important decisions are made relying on superficial information without any actual knowledge of the essence and scope of the problem. For example, there is insufficient information about the essence and scope of economic crime, the illegal alcohol trade, problems relating to the use of drugs and drug trafficking, and the efficiency of methods used by the police, etc. To date there has been no coordinated approach of crime prevention that combines the efforts of different social institutions.”^{*12}

Choices in the Draft Penal Code^{*13} of 2000

The draft Penal Code of 2000 is a major step forward to establishing a consistent criminal policy in Estonia. In the Criminal Code of the Soviet period and in some earlier drafts the aims of punishment have been expressed in a way suggesting that the convicted persons should be subjected to punishments that are strict enough to prevent further crimes by the convicted persons and also by other people. Fortunately no regime took these expressions as rigid as they sounded.^{*14} But, of course, these expressions served as grounds for subjecting convicted people to long prison sentences. In the new Draft there are no indications of such aims.

The Draft is slightly less oriented on relative penal theories^{*15} although the drafters of the Code suggest that the Code be elaborated based on relative penal theories.^{*16} The influence of absolute penal theories can be traced analysing the features that according to the Draft should be considered in sentencing. The most important feature determining needed punishment is guilt (*Schuld*). And only after the guilt (*Schuld*) the other features: (1) opportunities to induce the guilty person to refrain from committing further offences (*i.e.* special prevention) and (2) interests of protecting legal order (*i.e.* positive general prevention).^{*17}

If the guilt (*Schuld*) is the primary determinant of penalty, then it is impossible to assert that the Draft is founded solely on the relative penal theories.

Relying on the absolute penal theories and slight opposition to deterministic approach may be more manifestly noticed in the list of aggravating circumstances that may be taken into account on sentencing. **The list does not include such commonly recognised aggravating circumstances as committing a crime by a person who has earlier committed crime and committing a crime by a group of persons in conspiracy.**^{*18}

According to the Draft these aggravating circumstances can influence sentence only if these circumstances are recognised as aggravating in the Special Part of the Draft Penal Code. The need to punish repeat offenders more severely has been almost unequivocally recognised by criminologists. It is extremely difficult to find a criminologist that would abruptly deny the possible positive effects of selective

¹⁰ The aggravated theft is theft in the conditions that the thief knows that his (her) theft is perceived at the time of his (her) act by some other person as a theft (distinguished from robbery by the provision that no force endangering life or health or threat of use such force was utilised).

¹¹ After 1994 the imprisonment rate for theft has not decreased, but it has not substantially increased neither.

¹² UNDP, Estonian Human Development Report – 1996. Available at: [http://www.ciesin.ee/undp/nhdr96/eng/chap7html#Crime prevention](http://www.ciesin.ee/undp/nhdr96/eng/chap7html#Crime%20prevention).

¹³ Draft Penal Code is available at: <http://www.just.ee> (in Estonian).

¹⁴ It is hard to believe that any regime even could stick unequivocally to these expressions, because so long even the harshest punishments have never been able to prevent all other people from committing further crimes.

¹⁵ The Criminal Code of the Soviet period had almost no signs of recognising the contentions of the absolute penal theories.

¹⁶ M. Ermits, P. Pikamäe, E. Samson, J. Sootak. The Draft General Part of Penal Code. Foundations and reasons, Tallinn-Tartu-Kiel, 1999, p. 130.

¹⁷ *Ibid.*, pp. 129–130.

¹⁸ *Ibid.*, pp. 132–133.

incapacitation and the most common tool serving to accommodate selective incapacitation is recognising committing a repeat offence an aggravating circumstance.

Therefore, the drafters should seriously consider not moving too far in favouring absolute penal theories and the possibility to include the committing of a repeat offence in the list of aggravating circumstances.^{*19}

In the choice between more lenient and harsher penal policies the Draft more often favours the more lenient penal policies. A very welcome example of this tendency is introducing community service as a sentence for criminal offences. The only doubts that the new sanction arises are about the relative punitive effect the sanction has. According to the Draft, community service may be a substitute for imprisonment of up to two years. And **one hour of community service** has been proposed to be able to substitute **two days of imprisonment**.^{*20}

It seems to be an overestimation of the punitive effect of community service. According to the Draft three months of community service (four hours of service per day) may be substituted for two years of imprisonment. To prevent the possible risk that community service may be completely rejected, the drafters should consider possible increases of community service hours that can be substituted for imprisonment.

¹⁹ The need for more severe punishments for repeat offenders has been recognised also by the Estonian Council for Crime Prevention.

²⁰ M. Ernits *et al.*, p. 143.

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Estonian Code of Criminal Procedure as Legal Political Decision

Introduction

All larger Estonian political parties agreed that Estonia needs a new Code of Criminal Procedure (hereinafter: CCP). A commission consisting of Estonian lawyers and three foreign experts was formed by the Ministry of Justice, which had to formulate all the most important options related to the new CCP for the politicians and explain the consequences arising from the selection of different variants. The commission completed its work in three months and forwarded the catalogue of options to the politicians, who then made their choices and started preparing the code... Unfortunately, it has to be said that no such systematic and planned work as described above has actually occurred in Estonia.*¹ Subsequently, the draft of the Estonian CCP may undoubtedly be called a certain option (or sum of options) if one so wishes, but as a participant in the working group*² that prepared the draft, I have to admit that since there was no legal political order for development of a catalogue of options, there was no substantial theoretical discussion of the main conceptual issues of the draft. This does not mean that the persons who prepared the draft did not rely on the standpoints of special literature, or did not try to follow the contemporary tendencies in the law of criminal procedure and solutions from the practice other states have in the creation of laws. Despite this, many choices in the work group were made as a result of voting and sometimes they were rather intuitive than anything else. Therefore, it may be said that to a large extent, the drafts of the CCP have been designed by the great magician, chance.*³ In my opinion, one of the reasons why accidental factors have actualised that could be mentioned above all is knowledge of foreign languages (for example, the opinion of a person

¹ The most recent variant of the CCP was sent on the "coordination round" in the end of May 2000 and the government hopes to pass it as an act in spring 2001. See Ministry of Justice. *Arengustrateegia aastani 2003* (Development Strategy until 2003). Tallinn: 2000, p. 61.

² Obviously I should also mention here that two supreme court judges and a lecturer of criminal procedure belonged to the working group that prepared the original variant of the draft; the working group that prepared the final variant of the draft included one supreme court judge from the working group that prepared the original variant and two justice officials who had just graduated from university. But this was not the entire circle of people who came in touch with the preparation of the law. Both the original as well as the final variants were discussed with members of the so-called expert group. This group consisted of representatives of the most important institutions of legal protection (courts, prosecutor's office, the bar, police).

³ Valdur Mikita has written on the back cover (!) of his book that deals with the signs of language and culture: "There are many possibilities for creating things. Maybe the two most interesting ones are emergence through chance and emergence as a result of failure of something." See V. Mikita. *Äparduse rõõm* (The Joy of Failure). Greif, 2000. When it may be assumed on the basis of the above that chance and failure are opposites, then one may hope that a draft that has emerged with the help of accidental factors may turn into a law that is not a failure.

who speaks only Swedish is that no issue can be solved better anywhere else than in Sweden): the opinion that some regulation seems to be “too Soviet” and therefore a completely different solution should be used; the standpoint that “I have treated this issue so thoroughly in my scientific articles that my *de lege ferenda* proposal simply must become law”; the understanding of practising lawyers that “how come things are suddenly like this when they have always been otherwise”⁷, etc. At the same time one may assume that the described situation in the preparation of the draft of the Code of Criminal Procedure is not exceptional in the creation of laws in Estonia (maybe even in all of the so-called former Eastern bloc countries). For example, in his treatment of the problems related to the effect of legal acts, A. Kasemets has pointed out that in the creation of laws after Estonia regained her independence, the possible social, psychological, economic, foreign and security political, institutional-economical, cultural, etc. effects and consequences of new laws have usually not been analysed.⁸ In the described situation, it may even be good when the finished draft is left pending for a somewhat longer time.

The first work group who prepared the draft of the CCP handed the draft over in 1993. Even though it was not passed as a law, many of the draft’s institutes or norms have actually been passed as amendments to the valid Criminal Procedures Act, which could also be treated as legal experiments preceding the introduction of the innovations to the draft. When we consider the aforementioned amendments to the valid Law of Criminal Procedure (hereinafter: LCP), we could mention acknowledgement of the solutions of the *Riigikogu* (Estonian parliament) as sources of justice in criminal procedures in such issues, which have not been resolved in other sources of criminal procedure or which have arisen at the application of law (§ 1 (4) of the LCP)⁹; simple procedure (Chapter 33 of LCP)¹⁰; principally new regulation for initiation of criminal procedure (Chapter 8 of LCP). But all this is just introductory talk, as can be seen from the subheading. The actual objective of this article is to try to describe some of the most important situations of choice, which in the opinion of the author could arise in the compilation of contemporary law of criminal procedure, also whether they actually arose in the compilation of the draft of the CCP and what was done in these situations of choice.

Competing and Noncompeting Criminal Procedure

There is no other branch of law where the conflict between the two main contemporary legal systems – continental European and Anglo-American – is as acute as in the law of criminal procedure. It is true that in contemporary systems of lawmaking, this conflict tends to be solved mainly in one direction – by introducing different elements from the competing criminal procedure in the continental criminal procedure.¹¹ The issue of the “competing/noncompeting” model arose also in the preparation of the Estonian Code of Criminal Procedure, but it did not happen in its classical form, because no one in Estonia has wanted to introduce American criminal procedure, at least not loudly enough. It has obviously also been caused by the fact that historically there have been no arbitration courts in the territory of Estonia. Without these, purely American criminal procedure would be unthinkable. The authors of the draft were rather interested in states that had introduced elements of competition in their traditional criminal procedure. Above all, we looked towards Italy. Evidently there were some people responsible for creation of laws,

⁷ When we talk about the standpoints of practising lawyers, we have to consider that there are hardly any other laws besides the law of criminal procedure, which would evoke interest in so many different institutions that often have relatively conflicting interests.

⁸ A. Kasemets. Mõttevalik seaduseelnõude sotsiaalsete, majanduslike, institutsionaalsete jm mõjude analüüsimise teemal (Selected Thoughts on the Subject of Analysis of the Social, Economic, Institutional, etc. Effects of Drafts of Law). – Riigikogu kantselei MSI (Economic and Social Information Office of the *Riigikogu*). Tallinn, 1997, p. 3. Referred to through the following source: M. Kiviorg. Õigusakti mõju ja rakendamise analüüs (Analysis of the Effect and Application of a Legal Act). In: K. Merusk, M. Kiviorg *et al.* Õigusriigi printsiip ja normitehnika (Principle and Normative Techniques of a State Based of the Rule of Law). Tartu: Eesti Õiguskeskus, 1999, p. 34.

⁹ Let us emphasise that this is the first and so far the only case in Estonian law when a court precedent is directly accepted as source of justice.

¹⁰ This is a special procedure similar to the American plea-bargaining. For more, see: E. Kergandberg. Expedience of Arrangement in German and Estonian Criminal Care. – *Juridica International. Law Review. University of Tartu*, II, 1997, pp. 76–90; M. Sillaots. Arrangement – From Procedure Based on Guilty Plea and Presumption of Guilt?. – *Juridica International. Law Review. University of Tartu*, 1998, pp. 76–84.

¹¹ As is the case with American film art or McDonald’s, it is difficult to distinguish actual goodness from the purposefully created impression of goodness, it is actually rather difficult (not to say impossible) to justify the advantages of “American criminal procedure”. On the contrary, the American court soaps that flood from our television should actually force us to ask at some point whether the fate of a person can really depend only on the verbal talent of the lawyer! But we have to admit that the main question/reproach of the Americans to continental criminal procedure is equally rhetorical and as impossible to answer. And their question is, do you actually believe yourself that with this inquisition-like procedure, you can always ascertain the objective truth that you search for?

who wanted to establish the Law of Criminal Procedure of that state in full.^{*12} Finally, the opinion that prevailed in the work group was that the new law of criminal procedure of Italy will only be used as a background system in order to achieve more exact determination of the functional roles of the court and the parties of a criminal procedure in the future criminal procedure of Estonia. This means that whether the accused is convicted or not should first and foremost depend on the success of the work of the prosecution or the defence. But at the same time it also means that at least the first-degree judge should decide on the basis of what happens in the courtroom rather than the criminal file prepared during preliminary investigation. According to the draft (after the example of Italy), the so-called system of two files will be introduced into Estonian criminal procedure. This means that when investigation of a criminal case by simple procedure (which has three subtypes) is excluded after pre-trial investigation, the criminal file created as a result of the pre-trial investigation will be divided in two. The material that is neutral in its essence (crime notice or other documents on the basis of which the criminal case was initiated; extract from the conviction register; prosecution deed; list of persons who the prosecution and defence want to summon to court) will be collected into the so-called court file that will be sent to court and which will allow the judge to manage the session, but the examination of which provides no grounds for the judge to develop any preliminary decision. The other materials collected as a result of pre-trial procedure (above all, evidence collected during pre-trial investigation) will remain in the other, the so-called prosecutor's file. The draft understandably also regulates in which exceptional cases it will be permitted to disclose materials from the prosecutor's file at court investigation. Discussions in court will generally run in a rather competing manner and classical principles of cross-examination will be used. When compared to the original variant of the draft, the final variant is much more radical about guaranteeing the neutrality of the judge. According to the original variant (based on the Scandinavian model), it was not considered necessary to "cut" the criminal file. It was sought to achieve the neutrality of courts by the way that the first degree judge was to proceed in the procedure from the prosecution deed prepared by the prosecutor and ... the defence summary prepared by the defence lawyer. The prosecutor was supposed to bring the criminal file to the court only when arriving for the session. At the same time the authors of the original variant thought that the second-degree court could have the criminal file on the table while discussing the case...

Corpus Juris and Estonian Code of Criminal Procedure

Development of the draft of the Estonian Code of Criminal Procedure occurred at the time when *Corpus Juris* (hereinafter: *CJ*)^{*13}, probably the most ambitious model of supra-criminal procedure of all times, was completed. As we know, *CJ* is a draft developed by the working group formed at the initiative of the Council of Europe and led by acknowledged French professor Mireille Delmas-Marty, which was completed in 1997, and the explanations thereto. The draft includes criminal law protecting the economic space of the EU as well as the provisions corresponding to its law of procedure, and it has often been declared the first step in the creation of a common European criminal welfare system (*i.e.* a system that unites criminal law and criminal procedure). However, not all opinions of the future of the *CJ* and the possibility of European criminal welfare are too optimistic. Obviously there are only a few such theoreticians at the present time who would deny the necessity to integrate European criminal procedures.^{*14} At the same time, there is also the understanding that since the factors that prevent frequent and substantial cooperation between the states in the area of criminal procedure can not be eliminated in the nearest future, then the policy of "small steps" should rather be used, *i.e.* it should be sought to harmonise single institutes of the law of criminal procedure

¹² I have heard the opinion expressed by many officials of justice that simply taking over the law of another state would exclude the occurrence of problems in Estonian court practice, because these problems have already been solved in the court practice of the relevant state...

¹³ *Corpus Juris*. Portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne (Introducing penal provisions for the purpose of the financial interests of the European Union). Sous la direction de M. Delmas-Marty. Paris: Economica, 1997.

¹⁴ With regard to this, one of the most acknowledged specialists of international criminal law, Prof. Ulrich Sieber, has written that "considering the contemporary level of European integration, especially standardisation of the guarantees of criminal procedure that has occurred due to the European Human Rights Convention, the situation, where the judgements made by judges in Brandenburg or Hessen are acknowledged in Bavaria and those made by their colleagues in Austria or Luxembourg are not, must be considered anachronistic." See U. Sieber Einführung ins Buch: *Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union*.... Cologne; Berlin; ...: Heymann, 1998, p. 3. Walter Perron has also emphasised the need for European criminal procedure when writing about the future of European pre-trial procedure. See W. Perron. Auf dem Weg zu einem europäischen Ermittlungsverfahren. ZStW 112 (2000), Heft 1, p. 204.

and eliminate unjustified impediments.*¹⁵ It has to be said that considering the rather vague situation described, the work group did not consider it possible to consider the standpoints presented in the *CJ* too seriously and so to say, conceptually.*¹⁶ At the same time I think that one of the aspects of the “policy of small steps” that strengthens cooperation between states could be the provisions in § 60 of the CCP, pursuant to which “evidence collected in a foreign country pursuant to the laws of that country shall be used in Estonian criminal procedure, unless this is contrary to the principles of Estonian criminal procedure.” In a somewhat paradoxical manner, the circumstance that the Constitution of Estonia basically allows the extradition of a citizen of Estonia to a foreign state should also be considered a positive small step. Constitutional prohibition of extradition of the state’s own citizens has been considered one of the most serious impediments to legal cooperation between states.

Legality and Opportunity

One important purposeful option that the CCP is based on is decision in favour of the selection of the introduction of the principle of opportunity (or more exactly, on expansion of the effect of the said principle). Above all, this means (mostly after the example of the German Code of Criminal Procedure, *StPO*) provision of the opportunity to terminate criminal procedure on the consideration of practicality.*¹⁷ But agreement procedure is undoubtedly one manifestation of the said principle in Estonian criminal procedure.*¹⁸ There is also no doubt that we have to agree with the statement that making the principle of opportunity legal does not mean that this principle will take root in actual criminal procedure. How everything will look like in reality depends largely on the attitudes of the prosecutor’s office and the national criminal policies.

Structural Choices or Necessity of the General Part and Permissibility of Definitions

There is no doubt that some choices related to structure have to be made in case of every draft.

Unfortunately, weakness of the institutions that deal with the creation of law did not allow raising of the question about whether Estonia (like Sweden, for example) could have a law of procedure which at the same time would cover all provisions containing court procedures. However, I think that raising this or a similar question is not hopelessly late. Even when we decide in favour of separate codes of procedure, it would be reasonable to standardise the regulation of several institutes (parties of procedure, deadlines, documents, evidence, etc.).

From the very beginning, preparation of the draft proceeded from the wish “to put something before the brackets”, therefore from the understanding that the Code of Criminal Procedure must have both the general as well as the specific part. According to the original version of the draft, the general part consisted of four chapters: the chapter of general provisions covering the sources and principles of law of criminal procedure; the chapter dealing with the subjects of criminal procedure; the chapter dealing with activities of criminal procedure; the chapter dealing with documents, deadlines and costs of procedure. As we know, only the theory of procedure had formerly dealt with classification of activities of procedure. The persons who prepared the original variant of the draft found that giving a thorough list of the subclasses of the activities of procedure in the general part of the code would help to better understand the essence of every single activity of procedure. This is why the relevant chapter of this variant of the draft began with the statement that activities of procedure are the substance of criminal procedure:

¹⁵ See W. Perron, p. 211.

¹⁶ It is difficult to consider the *CJ* a serious “conversation partner” also because it changes too much. I have heard that it is planned to give a new version of the *CJ* for discussion to the persons concerned. See e.g. W. Perron, p. 203.

¹⁷ The bases for termination of criminal procedure by consideration of practicality in the draft of the CCP have been thoroughly analysed in a BA thesis defended in the Faculty of Law of the University of Tartu in spring 2000. See T. Ploom. Oportuniteedi ehk otstarbekuse põhimõte (Principle of Opportunity or Practicality). BA Thesis. Tartu: 2000.

¹⁸ Agreement procedure means “renaming” and further development of the simple procedure functioning in Estonian criminal procedure today. See also Note 7 in this article.

- 1) submission of application for procedure;
- 2) submission of complaint of procedure;
- 3) making the decision of procedure;
- 4) proving and collection of evidence;
- 5) guarantee of criminal procedure.

However, the traditional path has been chosen again in the later version of the draft and the former heading of the relevant chapter of the general part “Activities of Procedure” has been replaced with a new and, it could be said traditional heading “Proving”. The reasoning behind this, in my opinion, regrettable choice is that “let us leave the issue of activities of procedure an issue of theory”.

According to the initial version of the draft, it was purposely sought not to avoid definitions, even though everyone was aware of the risks of defining. Therefore the draft tries to determine what is criminal procedure, who is the subject of criminal procedure, what is evidence, etc. The issue of how definable could/should laws be is definitely one worthy of separate discussion. One question that could be asked is why refuse to define, if the legislator agrees or would agree with the relevant definition at the given time? In any case, I do not think that refusal to define can be justified only with the statement that the relevant definition is missing in the laws of some other state. The number of definitions is minimal in the later version of the draft and I hope that this has opened possibilities for the science of law to prosper.

The choice about how detailed the regulation of certain activities of procedure should be in the law should obviously also be regarded as a problem of structure. When the Code of Criminal Procedure of Latvia was discussed, West European experts criticised the draft because the regulation of how to conduct cross-examination, present line-ups for recognition or an experiment of investigation and what should be specified in the protocol of the relevant activity of procedure was too detailed. For example, the German expert thought that such details should be regulated (of course after the example of the *StPO*) in guidelines prepared by the Ministry of Justice. It has to be said that the regulation of activities of procedure may be too detailed in the Estonian CCP (and thereby probably increases the share of pre-trial investigation too much) and different from the depth of detail of the remaining regulation. At the same time the authors of the draft were not too convinced by the standpoint that “let us regulate half of cross-examination in the law and leave the rest of regulation to the Ministry of Justice”.

Choices in Proving

But the differences in the original and last versions of the CCP are not only in the amendment of the heading of one chapter. Treatment of proving and evidence has also become significantly shorter and less defining.^{*19} The principle according to which a court may in making its judgement rely on the circumstances proven by the judge as well as on generally accepted circumstances has been preserved in the text of the draft (§ 55 of the CCP).^{*20} But unlike in the original variant, evidence is regrettably no longer determined through use of the categories of substance, form and source of evidence. According to the last version of the CCP, evidence is testimony of the suspect, the accused and the witness, conclusion of expertise, material evidence, protocol of investigation activity, court session and surveillance or any other document, also photo, film or any other technical recording of information. But pursuant to subsection 2 of the relevant section, evidence not listed above can also be used to prove circumstances of criminal procedure. The main disputes (which have actually not been resolved by today) have concerned evidence obtained through experts and as a result of surveillance.

According to the present text of the draft, only the conclusions fixed by the expert in writing and concerning the questions asked in the expertise regulation continue to be regarded as evidence. This means that what the expert says in court does not have independent meaning of evidence. At the same time there are relatively many persons who think that the expert (like the witness) could also testify in court. Obtaining evidence by surveillance has been discussed in no less than twenty sections of the draft. According to the present text of the draft, it is allowed to use surveillance for collection of evidence only when first-degree crimes

¹⁹ About treatment of evidence in the original version of the CCP, see E. Kergandberg. The Bill concerning the Estonian Criminal Procedure Code and the Construction of Evidence as an Institution. – *Juridica International. Law Review*. University of Tartu, I, 1996, pp. 69–75.

²⁰ The following text of the draft (§ 57) shows, however, that declaration of something proven and generally accepted are not equal alternatives for the court. The said section stipulates that all “classical” circumstances of a crime must be proven.

are being proceeded and when the principle of *ultima ratio* is followed (*i.e.* only when collection of evidence with other activities of procedure would be excluded or considerably more complicated).

Another thing that could be mentioned here is that by changing the valid regulation to some extent, the draft provides that by an application of the prosecutor, the witness may be made anonymous when first-degree crimes are investigated.^{*21} But unlike the current regulation, an anonymous witness will not have the right not to appear in court. Pursuant to the draft, an anonymous witness is examined in court via telephone and voice-changing equipment is used when necessary.

Choices Related to Subjects of Criminal Procedure

Among the choices related to the subjects of criminal procedure, the one that should be mentioned first is that according to the draft the plan is to introduce the institutes of preliminary investigation and executive judge. The idea is that these judges are ordinary first-degree judges to whom relevant tasks have been assigned with a work division plan. I think that such a solution may help the state save money, but does not offer a substantial solution to the problem and therefore does not reflect a principal choice. My standpoint is that in the current situation of Estonia, additional positions for judges of preliminary investigation should be created, because the enormous workload of existing judges does not allow to change any of them into judges of preliminary investigation.

Due to legal political reasons, it has been very difficult to specify the character of the prosecutor and the investigator and the relationships between them in the preparation of the draft of the CCP. In the determination of the role of the prosecutor in Estonian criminal procedure, it was considered to proceed from the role of the prosecutor in German criminal procedure. But not only *de jure*, also *de facto*. According to the official concept of German criminal procedure, the prosecutor should be the so-called “master of investigation”^{**22} (*Herrin des Ermittlungsverfahrens*) in pre-trial procedure. The idea is that the prosecutor should be the leader of the entire investigation. But not only the leader. As soon as the prosecutor becomes aware of the characteristics of a crime, he or she should also investigate it – find out about the circumstances in favour and against the suspect, collect evidence, apply to the judge to restrict the principle rights of the accused, etc. In the final stage of the investigation, the prosecutor should decide whether to conclude the procedure or apply for suing the accused. According to the idea of German criminal procedure, the police should basically act as the “extension of the hand” of the prosecutor. *De facto*, the situation is completely different. In practice, the actual subject of investigation is the police, who forward the materials to the prosecutor only when “the case has basically been investigated”^{**23} and the role of the prosecutor in criminal procedure borders mainly on legal supervision over the investigation. According to H.-H. Kühne, prosecutors only become aware of such circumstances in the course of the investigation that the police allow them to know.^{*24} What was just described is justified with the circumstance that the development of police equipment and their specialisation gives them an informational lead.^{*25} It has to be admitted that German legislators have tried to oppose the exclusion of wider and wider areas of pre-trial investigation from under the actual control of the prosecutor. But the steps of the legislator with which the competence of the prosecutor was increased to some extent (*e.g.* it was stipulated in § 161a of the *StPO* that the prosecutor has the right to independently appoint expertise and summon and cross-examine witnesses) did not change the situation too much: the legal master of pre-trial investigation still remained in the shadow of his servant in the actual landscape of criminal investigation.

Considering this situation, the commission that deals with reforming the German criminal procedure made the proposal that let us finally be honest and sincere and regulate the actual situation in law: let us establish independent police investigation and turn the prosecutor’s office into just an institution of prosecution also

²¹ Practising lawyers who have examined the draft insist strongly on allowing witnesses to remain anonymous also in case of some less serious catalogue crimes and not only of first degree crimes.

²² One should not be bothered about the fact that the Germans use the term “investigation” for their pre-trial procedure. This is not the lower form of pre-trial procedure known from Soviet criminal procedure, but the same homogenous pre-trial procedure which we now call preliminary investigation.

²³ H.-H. Kühne refers to the data of the research conducted by Blankenburg, etc., pursuant to which in 90% of cases, the prosecutor enters the criminal procedure only after police investigation has been completed, when the police have done their work. See H.-H. Kühne. *Strafprozesslehre*. Heidelberg: Müller Jr. Verl., 1988, p. 32.

²⁴ *Ibid.*, p. 30.

²⁵ *Ibid.*, p. 29.

in the law! As was expected, this proposal evoked stormy discussions that have produced no results and have still not been concluded. In a rather irritating manner, that actually deserves to be noted also in the situation in Estonia, H.-H. Kühne has noted that if we want to preserve the role of the prosecutor as the master of investigation, or actually when we want to give this role to the prosecutor, we have to give the prosecutor the relevant training, especially teach him or her criminalistics.*²⁶ Somewhat conditionally, it may be said that what is *de facto* with the status of the prosecutor in criminal procedure in Germany, is now *de lege lata* in Estonia and in my opinion could also be *de lege ferenda* with some corrections. This means that considering, *inter alia*, the actual situation in Germany, we have no need for making the prosecutor the master of investigation by force, even though opinions in this direction have been presented here. It seems more practical to differentiate first – let us say – the initial period and final period of investigation. In the initial period, we could let the investigator do his or her interesting investigation work in peace and hopefully also objectively in order to specify the circumstances of the crime. This hope may be naïve, but I really do believe that it is possible to legislatively create the situation where the investigator clarifies with equal interest both the accusing as well as the acquitting circumstances. Of course the condition precedent is that the investigator should be well trained, motivated in the work (also in terms of money) and not harassed by statistics. In the initial period of pre-trial procedure the prosecutor could only have the role of the legal supervisor and, in my opinion, it is not necessary to give the prosecutor any independent investigative competence (the right to independently conduct investigation).*²⁷ The initial period of pre-trial procedure (and together with this, the period of life under the supervision of the prosecutor!) could end when the investigator has completed his or her work, prepared a summary of the pre-trial investigation that is as objective as possible and submitted the file to the prosecutor. Now, in the final period of pre-trial investigation, the prosecutor should enter in order to fulfil his or her substantial task in the criminal procedure – the function of prosecution. To be more specific, the prosecutor should now decide on the basis of the collected material whether there are sufficient grounds for launching the function of prosecution. But the level of modern crime rather forces the prosecutors to take the so-called dispatcher's role in the said situation, which is a role where they have to hold themselves back in the fulfilment of their substantial task, where room has to be made on account of the principle of legality to the principle of opportunity that proceeds from considerations of purpose. As the dispatcher, the prosecutor should decide whether to close the proceeding of a criminal case, return it to the investigator to improve the file, refer the criminal case to some simple procedure or whether the criminal case should be discussed in a full-scale procedure. It would probably be sensible to let the prosecutor who is in the role of the dispatcher to conduct some activities of investigation within a limited extent – first and foremost cross-examinations. Such competence of the prosecutor would no longer be interference with the work of the investigator and undermining the prestige of the latter, but at the same time it would help the prosecutor to find inner conviction and avoid unjustified return of the criminal case to the investigator. The competence of the prosecutor has been specified in a somewhat similar way in the draft of the CCP. The only exception to that described is that according to the draft, the prosecutor may at any time; therefore also in the initial period of pre-trial investigation, conduct independent investigation. I tend to believe that such a solution does not favour optimal relationships between the investigator and the prosecutor.

The choice made in the draft of the CCP to reduce the rights of the victim as compared to the current extent should be considered very serious. The need to accelerate the criminal procedure and the understanding that the prosecutor can represent the interests of the victim with legal competence in public criminal cases has been proceeded from in the reduction of the rights of the victim. Therefore the role of the victim has in public criminal cases been reduced only into the role of a civil plaintiff with regard to his or her “right of claim”. And we have to admit that such an amendment is rather contrary to the tendency in changing the legal status of the victim.

²⁶ Let us recall that, presumably due to the correction of the Soviet curriculum, criminalistics is no longer a compulsory subject in its whole extent in our higher schools of law. Actually it has to be said that also in Germany, Friedrich Geerds is one of the few who has actually fought for the (re)introduction of criminalistics in the curricula of faculties of law.

²⁷ Therefore I do not consider the amendment made in § 120 (1) 1) of the CCP on 13 May 1998 justified, because according to this the prosecutor now has the right to “conduct single procedural activities in the criminal case proceeded by the detective when necessary”. It is impossible to say what “when necessary” means, it is hard to prohibit single procedural activity to become double and in conclusion, unnecessary tension between the detective and the prosecutor may be predicted.

Some Choices Related to Pre-trial Procedure

The decision that in the future, surveillance conducted in the interest of criminal procedure should be regulated in the CCP, should be considered probably the major choice concerning pre-trial procedure. Currently all surveillance is regulated with the Surveillance Act (hereinafter: SA).^{*28} In the circles related to creating of laws in Estonia, the understanding that currently dominates is that the SA in its present form should be eradicated. They think that the so-called criminal procedural part of the SA should be transferred to the new CCP. The remaining part of the SA should be regulated with the Security Institutions Act (hereinafter: SIA). In the explanatory note to the SIA, the necessity of this law is justified with the need to increase the efficiency of protection of principle rights. What is meant here is that pursuant to the SA, the person with regard to whom surveillance was used, may never learn about it. But this obligation of the state to inform could freely be fixed in the SIA and there is no need to create a new law just for this reason. The other reason discussed in the explanatory note to the SIA is obviously more important: decrease of the number of existing security institutions and thereby reduction of the excess expenses of the public sector. However, I share the understanding that it is actually not bad when such a sensitive field as surveillance is fully regulated in an independent act. It seems to me that in such a case this complicated field is more or less entirely in sight and in principle, it should help to better organise optimal civil control of surveillance. Only such surveillance the result of which could be obtaining evidence have been incorporated in the draft of the CCP from the valid SA. Three new forms of surveillance have been added: undercover surveillance, cross-usage of databanks and use of undercover investigator.^{*29} Undercover investigator has been included in the draft according to the example of the German Code of Criminal Procedure and its objective is to fight organised crime better. Basically, an undercover investigator is a police officer, whose task is to use changed identity or a legend to penetrate criminal organisations in order to collect evidence. Evidence in criminal procedure is testimony of the undercover investigator, which means that his or her further inclusion in the criminal procedure takes place on the same bases as a witness, *i.e.* an undercover investigator may also be declared an anonymous witness.

Here it would be appropriate to continue with the statement that one of the major choices that has unfortunately not been made in the preparation of the draft of the CCP is related to the permissibility of the restriction of principle rights in criminal procedure. The issue here is not that the necessity of such a choice is not known. The issue is the absence of a sufficiently acceptable criterion. In his article published a few years ago, Jürgen Wolter has admitted that both criminal sciences as well as the constitutional court have not too seriously dealt with the creation of a standard procedural and constitutional theoretical system, which would allow uniform solutions to be offered to different problems of procedural law. What are missing here to an equal extent are approaches from the aspect of principle rights and comparative science of law, also the human rights and the European starting point for criminal procedure that would simultaneously guarantee efficient protection and protection of principle rights. Therefore, the common foundation is sought in vain and with modes results from the Constitution and the constitutions of other states, the human rights conventions of Europe and America and the entire culture of the western world. In Germany, there is no discussion of values that considers law of criminal procedure, there is no coeffect of such disciplines as law of the state, law of the police and law of criminal procedure, there is no joint commission of scientists and practitioners that would deal with reforming criminal procedure suitable for the 21st century.^{*30} Unfortunately, what J. Wolter says about German criminal procedure, applies manifold also to Estonian criminal procedure. This means that we also lack a complete system (criteria), which among other things would allow to solve the problems related to the permissibility of restriction of principle rights in criminal procedure.

²⁸ For more about this act, see E. Kergandberg. *Legal Regulation of Surveillance de lege lata and de lege ferenda: Constitutional and Criminal Procedural Aspects.* – *Juridica International. Law Review.* University of Tartu, IV, 1999, pp. 68–75.

²⁹ Actually only the undercover investigator is completely new. Undercover surveillance and cross-usage of databanks are basically possible also pursuant to the SA.

³⁰ J. Wolter. *Zur Theorie und Systematic des Strafprozessrechts.* Neuwied; Kriftel; Berlin: Luchterhand, 1995, pp. 267–268.

Choices Related to System of Right of Recourse to Court

The disputes that arose in the preparation of the CCP concerning right of recourse to courts were not too serious, because it was considered right to preserve the current situation with just a few improvements.^{*31} A more serious amendment is that the draft of the CCP no longer contains procedure for correction of court errors. The other principle amendment concerns special procedure. According to the draft, all orders of the court can be disputed under special procedure when the possibility of such complaint is not directly excluded in law. Another thing that can be mentioned here is that the issue of whether discussion of more serious criminal cases could be in second degree court in Estonia has been raised here on different levels, also whether it would not be practical to introduce the so-called possibility of jumping reversal also in Estonian criminal procedure. But at least now, such discussions have got tangled in constitutional restrictions.

Choices Related to the Third Sector

And finally, about one more choice that was actually not made in the preparation of the draft of the CCP, but the making of which is not late yet. One of the leading principles in launching contemporary criminal procedure is the principle of legality (regardless of the principle of opportunity that keeps correcting it more and more), pursuant to which when characteristics of a crime appear, the state takes upon itself the obligation to investigate the crime regardless of the will of victim or any other person. It is hard to overestimate the importance of this principle that ends the age of vendetta in contemporary criminal procedure. But the downside of this principle is being discussed more and more these days. Namely, this principle could create and has actually created such a socio-psychological climate according to which ordinary citizens, the civil society, or the so-called third sector have not much business in fighting crime. Since this is not a field that is too pleasant emotionally, the modern emancipation aspirations and desire to participate of the third sector have not affected criminal procedure too much. The absence of such possibility to participate (or its insufficiency) creates difficulties in making the decisions adopted in criminal procedure legal (or in other words – creates mistrust about whether such decisions are right and fair). Obviously such possibility of participation should also be created and strengthened in parallel with the introduction of the CCP.

³¹ About contemporary topical problems of Estonian right of recourse to courts, see *e.g.* E. Kergandberg. Fundamental Rights, Right of Recourse to the Courts and Problems Connected with the Guaranteeing of the Right of Recourse to the Estonian Criminal Procedure. – *Juridica International. Law Review.* University of Tartu, IV, 1999, pp. 122–132.

Supreme Court Judgement as Source of Estonian Criminal Procedural Law

A law was adopted in Estonia on 13 May 1998 according to which certain judgements of the Supreme Court of Estonia were included in sources of criminal procedural law by an amendment to § 1 of the Code of Criminal Procedure (hereinafter: CCP). By this law, the Estonian legislator took a step that is perhaps not the most ordinary in the context of continental European legal tradition. The use of court precedent as a source of law is mainly attributable to the Anglo-American legal system^{*1}, while the Estonian legal order has belonged and does belong to the legal system of continental Europe.^{*2}

It should also be pointed out that the Estonian legislator has never before expressly recognised the judgements of the Supreme Court as a source of law in any area of law, although court precedent as a potential source of law has been a topic for discussion in Estonia for many years.^{*3}

There is still no reason to claim that the Estonian legal order lacked any preconditions for the creation and factual functioning of *Richterrecht*.^{*4} No Estonian law prohibits the legislative activities of courts. On the contrary, many laws have provided relatively good preconditions for this.

¹ For more details, see R. Narits. *Õiguse entsüklopeedia* (Encyclopaedia of Law). Tallinn, 1995, pp. 32–34.

² See R. Narits. *Õigusteaduse metodoloogia I* (Methodology of Law I). Tallinn, 1997, p. 5.

³ See R. Maruste. Kohtureform – kas lõpu algus või alguse lõpp? (Court Reform – Beginning of the End or End of the Beginning?). – *Juridica*, 1994, No. 5, p. 104; R. Maruste. Kohtupretsedendist (On Court Precedent). – *Juridica*, 1994, No. 5, pp. 116–117; R. Narits. Kohtupretsedendist (On Court Precedent). – *Juridica*, 1995, No. 9, pp. 380–382; M. Sillaots. Kohtunikuõiguse võimalikkusest ja vajalikkusest kontinentaal-euroopalikus õiguskorras (On the Possibility and Necessity of *Richterrecht* in the Continental European Legal Order). Tartu, 1997; M. Sillaots. Kohtunikuõigus (*Richterrecht*). – *Juridica*, 1998, No. 5, pp. 238–241. The issues of court precedent are more or less touched on in the discussion on the formation of legal methods teaching in Estonia, see E. Kergandberg. Kohtunikuõigusest Saksamaal (On *Richterrecht* in Germany). – *Juridica*, 1993, No. 3, pp. 58–59; R. Narits. Tõlgendamise: teadus või seadus? (Interpretation: Science or Law?). – *Juridica*, 1994, No. 9, pp. 228–230; R. Narits. Jurisprudentsi põhijoontest (On the Main Features of Jurisprudence). – *Juridica*, 1995, No. 9, pp. 378–380; M. Luts. Õiget õigust otsimas (In Search of the Right Law). – *Juridica*, 1996, No. 1, pp. 41–43; M. Luts. Lünga vastu tõlgendamise või analoogiaga? (Diskussioonist juriidilises meetodiõpetuses) (Interpretation or Analogy Against the Gap? (On the Discussion on Legal Methods Teaching)). – *Juridica*, 1996, No. 7, pp. 348–352; R. Narits (Note 2); R. Narits. Eesti õiguskord ja väärtusjurisprudents (Estonian Legal Order and Value Jurisprudence). – *Juridica*, 1998, No. 1, pp. 2–6; M. Luts. Õigusnormide tõlgendamise meetoditest ja teooriatest (On the Methods and Theories of Interpretation of Legal Norms). – *Juridica*, 1998, No. 3, pp. 111–114.

⁴ *Richterrecht* here implies legal rules created by interpretation that complements law in the course of solving a specific case by a judge or as the result of legislative activities by filling the gaps in legal regulation. For different definitions of *Richterrecht* see H. W. Kruse. Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts. J. C. B. Mohr (Paul Siebeck). Tübingen, 1971, p. 10; F. Müller. Richterrecht. Berlin: D&H, 1986, pp. 9, 26, 43; R. Christensen. Richterrecht – rechtsstaatlich oder pragmatisch?. – *Neue Juristische Wochenschrift*, 1989, No. 50, p. 3197; B. Rüthers. Die unbegrenzte Auslegung. 4. Aufl., Heidelberg: C. F. Müller Juristischer Verlag, 1991, p. 458.

For example, § 9 (2) of the Code of Civil Procedure of Estonia provides that in the absence of a provision of law regulating a procedural relationship, the court shall apply a provision which regulates a relationship similar to the relationship under dispute. In the absence of such provision, the court shall take guidance from the general principles of law.

Subsection 4 (1) of the General Part of the Civil Code of Estonia provides that in the absence of a provision regulating a legal relationship, a provision which regulates relationships similar to the legal relationship applies. In the absence of such provision, the general purpose of the Act shall be the basis. Subsection 4 (2) contains the provision that in the absence of an Act regulating a legal relationship, the general purpose of law shall be the basis.

Subsection 5 (1) of the Code of Administrative Procedure of Estonia provides that in matters not regulated by the Code of Administrative Procedure, the administrative court shall take guidance from the provisions of civil procedure. By this provision, the legislator has given administrative courts the possibility to apply analogy of law.

The Estonian legislator has thus given courts the chance to develop law in various areas of law, without specifying the implication of judgements that contain the results of the legislative activities of the courts for future court judgements. It can be said though that judgements of the Supreme Court of Estonia that contain *Richterrecht* are a factual example and carry regulative meaning for lower courts in practice.

On the Implications of Including Supreme Court Judgements in Sources of Criminal Procedural Law

CCP § 1 (4) prescribes that judgements of the Supreme Court in issues which have not been settled by other sources of criminal procedural law, or which arise in the application of law, are a source of criminal procedure.

The implication of this provision is that, firstly, it basically gives the Supreme Court a formal authorisation to resolve matters that are not settled by other sources of criminal procedural law or have arisen in the application of law. Secondly, the law specifies the implication of such Supreme Court judgements for future court judgements.

It has been stated in special literature that court precedent will have a peripheral role in the methodological works of continental European law, although at least legal practitioners have no doubt in their importance and the simple subsumption models of court judgement have increasingly fewer supporters.^{*7}

The Estonian legislator included judgements of the Supreme Court in sources of criminal procedural law most likely in view of the legal reality and the needs of practical administration of justice. The practice of administration of justice has convincingly shown that the existing legal regulation has no answers to many essential criminal procedural questions, or if it does, the answers are incomplete, ambiguous or controversial. For a smooth administration of justice, these shortcomings have to be eliminated in the course of resolving specific cases. The judge cannot wait until the legislator corrects the shortcoming. The legislative activities of judges have to be regarded as unavoidable in the practical administration of justice. The inclusion of judgements of the Supreme Court in the sources of criminal procedural law should encourage judges of the Supreme Court in their legislative activities. It can also mean an additional guarantee to the unification of court practice and the avoidance of hasty changes in the present court practice.

On the Limits of Competence of the Supreme Court Concerning Legislative Activities

To define the limits of competence of the Supreme Court concerning its legislative activities, we should first try to gain a better insight into the meaning of the provision of CCP § 1 (4).

⁷R. Wagner-Döbler. *Rechtsprechung und Präjudizien im deutschen Körperschaftssteuerrecht 1950 bis 1992. – Rechtstheorie* 24 (1993), Berlin: D&H, p. 331.

According to the wording of CCP § 1 (4), the sources of criminal procedural law include judgements of the Supreme Court in issues which have not been settled by other sources of criminal procedural law, or which arise in the application of law.

Let us ask first what the issues that have not been settled by other sources of criminal procedural law are. These would include the legal issues for which no legal norms exist in other sources of criminal procedural law. In other words, there is a gap in legal regulation that needs to be filled.

Let us ask then what the issues that arise in the application of law are. Apparently, these are issues that may arise where the law contains a norm that should probably regulate the particular legal issue, but is incomplete, ambiguous in its wording, unclear, or controversial. It may also be that the text of an existing norm contains concepts (e.g. *Generalklausel*) whose specific meaning is revealed only in the definition of the judge. These are, thus, mainly the issues related to interpretation of law.

It should be noted that the provision of CCP § 1 (4) should not be construed so as to imply the permissibility of any legal policy activities of the Supreme Court. The provision does not grant the Supreme Court the competence of the legislator. Arising from the principle of separation of powers, the competence to take legal policy decisions is vested in the legislator. This *inter alia* implies that no additional restrictions on fundamental rights or no additional procedural coercive measures may be imposed through judgements of the Supreme Court. An important measuring stick in determining the gap in the regulation of criminal procedural law should be all laws providing for criminal procedure, as well as the Constitution of the Republic of Estonia, the generally accepted principles and norms of international law, and the international agreements binding for Estonia. One should proceed from the understanding that the task of the court is not to free legislative drafting, but the drafting of norms related to legal acts and law.*⁸

The principle of separation of powers also limits the authority of the Supreme Court in its legislative activities in the sense that a Supreme Court judge must, in his or her legislative activities, be limited to that which is necessary for resolving a particular case. The legislative activities of judges are permissible only in relation to the application of law in the resolving of specific cases. The application of law should be understood here in a broad meaning so as to include the interpretation and further development of law (making additions to legal provisions and filling gaps).*⁹

The Bindingness of Supreme Court Judgements

Let us ask if the provisions of CCP § 1 (4) imply the legal policy intention of the legislator to somehow come closer to the legalisation of precedent law or even the *stare decisis**¹⁰ principle known in the Anglo-American legal tradition. May one presume that through the provisions of CCP § 1 (4), the Supreme Court has been authorised to create binding norms of *Richterrecht*?

To find an answer to this question, we should begin from the fact that it is probably impossible to change legal culture merely by the adoption of a law that would include the principle of the bindingness of court judgements. In view of the legal culture of continental Europe, such an act would be a direct obstacle to legislative development.*¹¹

The use of *Richterrecht* as a mandatory and binding source of law would not correspond to the continental European legal traditions. It is interesting to note here that for example Germany has in many cases been reluctant to recognise *Richterrecht* as an independent formal source of law. The allegedly common opinion in Germany does not attribute the quality of a source of law to *Richterrecht*.*¹² It has been claimed that *Richterrecht* may become a source of law only when *Richterrecht* becomes common law.*¹³ However, this

⁸ B. Rüthers. *Rechtstheorie: Begriff, Geltung und Anwendung des Rechts*. München: Beck, 1999, p. 487.

⁹ See M. R. Deckert. *Effizienz als Kriterium der Rechtsanwendung*. – *Rechtstheorie* 26 (1995), Berlin: D&H, p. 117.

¹⁰ About the *stare decisis* doctrine, see D. Blumenwitz. *Einführung in das anglo-amerikanische Recht*, 3. Aufl., München, 1987, pp. 22–23; J. Burke. *Kohtuniku roll Ameerika õigussüsteemis (Role of Judge in American Legal System)*. – *Juridica*, 1993, No. 3, p. 60.

¹¹ See R. Narits. *Kohtupretsedendist (On Court Precedence) (Note 3)*, p. 382.

¹² G. Robbers. *Einführung in das deutsche Recht*. 1. Aufl., Baden-Baden: Nomos Verl.-Ges., 1994, p. 23; B. Rüthers (Note 6), p. 133.

¹³ See R. Vossen. *Tarifdispositives Richterrecht*. Berlin: D&H, 1974, p. 25; D. Olzen. *Die Rechtswirkungen geänderter höchstrichterlicher Rechtsprechung in Zivilsachen*. – *Juristenzeitung*, 1985, No. 4, p. 159; R. Weber. *Richterrecht als Rechtsquelle*. – *Zeitschrift für Rechtspolitik* 1990, No. 9, September, p. 358.

is not the only approach common in Germany. According to the second approach, *Richterrecht* is a special kind of a source of law.^{*14} The quality of *Richterrecht* as a source of law in Germany is thus arguable. But the legal practical importance of the dispute is allegedly small, as even opponents to the source of law of *Richterrecht* proceed from the factually binding nature of the judgements of the court of last instance.^{*15}

In Estonia, the legislator has concluded discussions over whether Supreme Court judgements are a source of law, at least as concerns criminal procedural law. This, however, does not solve the issue of the nature of the new source of law, the Supreme Court judgements.

The wording of the legal provision suggests that in certain cases, judgements of the Supreme Court are an “additional” source besides the Constitution, laws, the generally accepted principles and norms of international law and the international agreements binding for Estonia. This means that a judgement of the Supreme Court as a source of criminal procedural law can be considered only after no other sources listed in the Act have provided an answer to the matter to be resolved. At the same time, the law includes Supreme Court judgements as sources of criminal procedural law in issues that arise in the application of law. The wording of the provision does not contain any hints as to the bindingness of the Supreme Court judgements that serve as a source of criminal procedural law.

Apparently, the fact that certain judgements of the Supreme Court have been included in the sources of law *per se* is not a reason to assume the mandatory bindingness of these Supreme Court judgements.^{*16}

The Supreme Court itself in its interpretation of CCP § 1 (4) does not regard its judgements as a binding source of criminal procedural law.^{*17}

However, this does not imply that Supreme Court judgements as a source of law should be disregarded or the positions contained in them easily deviated from. If we admit that administration of justice is not related to the legal rules created by the Supreme Court and expressed in its judgements, we also have to accept that a judge who develops law in the course of resolving a specific case need basically not even examine the legal rules created as the result of the legislative activities of the Supreme Court. The result of this might be that the judge will not have regard to an important argument in the resolving of a case or he or she might make a judgement that without justification differs from an earlier judgement. Hence the danger of damaging the unity of administration of justice. Considering the above and with a view to unity and the stability of legal order, it is important that legal rules created in the interpretation of law in the course of resolving cases or filling gaps in law have regulative meaning also for the future.

It should be mentioned that a popular argument for the necessity of the bindingness of *Richterrecht* (court precedent) in the continental European legal order is the alleged necessity to ensure legal certainty.^{*18} Legal certainty is undoubtedly a valuable benefit.^{*19} But it must be said that legal certainty is not the absolute, highest principle of law, but only one among many.^{*20}

Without challenging the importance of the principle of legal certainty in the Estonian society, the principle cannot be regarded as important enough to consider Supreme Court judgements mandatorily binding in order to ensure this principle.

But what would the bindingness of *Richterrecht* be in the Estonian legal order?

It should be noted first that in the Estonian legal order, similarly to the continental legal order, courts are strictly bound by law, not court precedent. Pursuant to § 146 of the Constitution of the Republic of Estonia, courts shall administer justice in accordance with the Constitution and the laws.

Therefore, in accordance with the continental legal tradition, a judge should consider a legal rule contained in an earlier court judgement (*Richterrecht*) not so much due to the formal aspect but rather the material

¹⁴ See H. W. Kruse; H. Coing. Zur Ermittlung von Sätzen des Richterrechts. – Juristische Schulung 1975, H. 5, pp. 277 and 278; D. Olzen, p. 159.

¹⁵ B. Rüthers (Note 6), p. 133.

¹⁶ However, pursuant to § 66 of the Code of Criminal Court Appeal and Cassation Procedure, the positions set out in a judgement of the Supreme Court on the application of the law are obligatory for the court conducting a new hearing of the matter. The provision was effective already before Supreme Court judgements were included in sources of law by law.

¹⁷ See Judgement of the Criminal Law Chamber of the Supreme Court of 27 April 1999 (3-1-1-42-99) in the charges of V.V. – Riigi Teataja (the State Gazette) III 1999, 16, 161.

¹⁸ See F. Bydlinski. Hauptpositionen zum Richterrecht. – Juristenzeitung, 1985, H. 4, p. 152; G. Orrù. Das Problem des Richterrechts als Rechtsquelle. – Zeitschrift für Rechtspolitik, 1989, H. 12, p. 443.

¹⁹ E. Picker. Richterrecht oder Rechtsdogmatik – Alternativen der Rechtsgewinnung. – Juristenzeitung, 1988, No. 2, p. 73.

²⁰ R. Weber (zu Orrù ZRP 1989, 44 ff), p. 358.

aspect of bindingness. This means that the bindingness of *Richterrecht* should not be based on the fact that the Estonian legislator has attributed the meaning of a source of law to positions presented as Supreme Court judgements, but rather due to the convincingness of the justified legal rule contained in this form, based on the acceptability of the legal principle behind this legal rule and the accordance of the rule with the applicable legal order in Estonia.

Thus, although certain Supreme Court judgements are the source of criminal procedural law in Estonia, we cannot speak of legalisation of the Anglo-American principle of *stare decisis*. As the Estonian legal order is a continental one, we should rather speak of the presumptive bindingness (*präsumtive Verbindlichkeit*)*²¹ or subsidiary bindingness (*subsidiäre Verbindlichkeit*)*²² of Supreme Court judgements.

According to the approach of M. Kriele, presumptive bindingness of court judgements means that the court may not deny a court precedent, but may discuss it in detail and deviate from it where this is justified. At the same time, the court bears the load of argumentation (*Argumentationslast*)*.²³ Deviation from a court precedent would require detailed explanation and indication of the reasons of deviation. In case of doubt, court precedent should be adhered to.*²⁴

According to the approach of F. Bydlinski, subsidiary bindingness of court precedent means that a court precedent is binding unless another judgement that does not adhere to the existing precedent can be proved to be in better accordance with the legal order, or if another solution would be “similarly justified” (“*gleich vertretbar*”).*²⁵

By summarising the above, Estonian Supreme Court judgements as sources of law can be said to lack strict bindingness. However, the fact that the legislator has established certain Supreme Court judgements as a source of law suggests that lower courts (as well as the Supreme Court itself) should not disregard Supreme Court judgements as sources of law in the resolving of similar cases in future. This does not imply that those judgements as sources of law (or rather, the legal rules fixed in these) may not be deviated from where this is justified.

The bindingness of Supreme Court judgements is relevant only insofar that a judge should not disregard the positions expressed in those judgements. A judge subjects to law. Consequently, when the law establishes Supreme Court judgements as a source of law, a judge should not disregard the positions expressed in a Supreme Court judgement even if he or she desires to deviate from it on justified grounds. This means that a judgement deviating from an existing court precedent should contain a counterargument to the existing court precedent.

Dependence of the Source of Law Status of Supreme Court Judgements on the Will of the Supreme Court

When discussing the issues of Supreme Court judgements as a source of law, we have to ask if the Supreme Court could have or should have the right to state, through its judgements, that certain Supreme Court judgements will be a source of law for other courts in future, while others will not, although the latter may contain the results of the legislative activities of the Supreme Court.

The above question is mainly triggered by a specific example from the Estonian court practice. The example is related to the right of the Supreme Court laid down in § 39 (4) of the Code of Criminal Court Appeal and Cassation Procedure (hereinafter: CCCACP) to regard other violations of the rights of the participants in a proceeding or violations of other rules of criminal procedure which hindered or could have hindered the comprehensive, thorough and objective investigation of a criminal matter and the making of a lawful and reasoned court judgement.

²¹ See M. Kriele. *Theorie der Rechtsgewinnung*. Berlin: D&H, 1967, pp. 248 and 254.

²² See F. Bydlinski, p. 155.

²³ M. Kriele (Note 19), p. 253.

²⁴ See M. Kriele. *Recht, Vernunft, Wirklichkeit*. Berlin: D&H, 1990, p. 529.

²⁵ See F. Bydlinski, p. 154.

Through this provision, the legislator essentially expressly gives the Supreme Court the power to develop law, including creating *Richterrecht*. Of course, the Supreme Court can only create *Richterrecht* under CCCACP § 39 (4) through resolving particular cases.

Before the entry into force of CCP § 1 (4), by which Supreme Court judgements were specified as a source of law, the legal rule created by the Supreme Court under CCCACP § 39 (4) did not have the meaning of a source of law for other courts in court practice. Earlier, only the Supreme Court could, in the resolving of a particular case, regard violations other than those listed in CCCACP § 39 (3) as material violations of the law of criminal procedure for that particular case. In several judgements, the Criminal Law Chamber of the Supreme Court had expressed the position that only the Supreme Court has the right to regard violations other than those listed in CCCACP § 39 (3) as material violations of the Code of Criminal Procedure, while circuit courts did not.

The principle according to which circuit courts were not authorised to regard some violations of the law of criminal procedure as material violations or to regard as material violations in a particular criminal case the violations that the Supreme Court had already stated to be material violations in another criminal case, was actually derived by the Supreme Court in its legislative activities (creation of *Richterrecht*). The law did not prohibit circuit courts from regarding violations other than those listed in CCCACP § 39 (3) as material violations of the law of criminal procedure based on a judgement of the Supreme Court as a subsidiary source of law. Essentially, the Criminal Law Chamber of the Supreme Court stated through *Richterrecht* that certain rules of *Richterrecht* (particularly, the legal rules created by the Criminal Law Chamber of the Supreme Court under CCCACP § 39 (4)) may not be applied by circuit courts with recourse to the respective judgements of the Criminal Law Chamber of the Supreme Court as subsidiary sources of law. By establishing such a restriction, the Criminal Law Chamber of the Supreme Court may have tried to limit the powers of circuit courts to refer criminal cases to a court of first instance for a new hearing. Namely, under CCCACP § 33, a circuit court may refer criminal matters to a court of first instance for a new hearing if material violation of the law of criminal procedure is established which unavoidably brings about the annulment of a court judgement. According to the position of the Criminal Law Chamber of the Supreme Court, a circuit court could refer a criminal case for a new hearing only if any of the material violations of the law of criminal procedure specified in CCCACP § 39 (3) were established.

Whether or not such restriction of the powers of circuit courts by the Supreme Court is necessary, the relevant question here is whether, and on what bases, the Supreme Court should have the right to restrict the possibilities of lower courts to recourse to Supreme Court judgements as sources of law in which positions in certain issues of law have been expressed that are not laid down in other sources of criminal procedural law. The question is particularly relevant in the context of CCP § 1 (4). It is true that with the establishment of CCP § 1 (4) the situation has changed so that circuit courts can now annul the judgements of courts of first instance by reference to CCCACP § 39 (4) and a Supreme Court judgement. Regardless of this, let us ask in a broader sense (not only in the context of CCCACP § 39) if the Supreme Court could take the position that a particular judgement of the Supreme Court is a source of law in the meaning of CCP § 1 (4) while another judgement of the Supreme Court is not.

The law does not provide a direct answer to this question. The law of criminal procedure does not set out any dependence of the source of law status of Supreme Court judgements on whether the Supreme Court desires to see its particular judgements as sources of law or not. Even if the Supreme Court makes a judgement in a matter that has not been settled by other sources of criminal procedural law or that has arisen in the application of law, without referring to CCP § 1 (4), such a judgement of the Supreme Court should be a source of criminal procedural law within the meaning of the law. If CCP § 1 (4) were interpreted otherwise, distinction should be made between those Supreme Court judgements that are a source of criminal procedural law in the formal sense (*i.e.* in the meaning of CCP § 1 (4)) and in the factual sense (*i.e.* their factual applicability in court practice) and those that are a source of criminal procedural law only in the factual sense. Sources of law in the factual sense should be mentioned mainly because other courts are not prohibited from taking guidance in their judgements from the Supreme Court judgements as a subsidiary source of law even if the Supreme Court judgements do not refer to CCP § 1 (4).

It might be asked here, why should those Supreme Court judgements that are not referred by the Supreme Court to CCP § 1 (4) to be a source of criminal procedural law be regarded as a source of criminal procedural law?

The problem is that there is apparently no reasonable or convincing justification why the source of law status of Supreme Court judgements should depend on the will of the Supreme Court. It is rather difficult to find legal criteria by which the Supreme Court could only regard some of its judgements as sources of criminal procedural law in the meaning of CCP § 1 (4). Each judgement of the Supreme Court through

which *Richterrecht* is created should be so comprehensively and substantially reasoned that it may serve as a source of law in the meaning of CCP § 1 (4) for other courts.

Moment of Making Supreme Court Judgement as the Factor Determining Its Recognition as a Source of Law

In its judgement of 27 April 1999 (3-1-1-42-99) in the charges of V.V.^{*7} the Criminal Law Chamber of the Supreme Court has *inter alia* stated: “The above judgement of the Criminal Law Chamber of the Supreme Court was made after entry into force of the law^{*8} and regards failure to prosecute as material violation of procedural norms not as a single case in the charges of H.L. and P.P.^{*9}, but as a general material violation in criminal procedure.”

The fact that the Criminal Law Chamber of the Supreme Court in its judgement of 27 April 1999 considered it necessary to mention that the judgement of the Chamber of Criminal Law of the Supreme Court was made after entry into force of the law (*i.e.* the law pursuant to which judgements of the Supreme Court are a source of criminal procedural law in certain cases), raises the question of whether only the Supreme Court judgements made after entry into force of the above law can be a source of law in the meaning of CCP § 1 (4).

The wording of the judgement of the Criminal Law Chamber of the Supreme Court of 27 April 1999 suggests that according to the position of the Criminal Law Chamber of the Supreme Court, the moment of making a Supreme Court judgement has an important role for the moment of entry into force of the law with respect to whether the judgement of the Criminal Law Chamber of the Supreme Court regards the material violation of procedural norms as a single case or as a general material violation in criminal procedure. If we assume that a Supreme Court judgement as a source of law has a general meaning, we can conclude from the position expressed in the judgement of the Criminal Law Chamber of the Supreme Court of 27 April 1999 that a source of law in the meaning of CCP § 1 (4) can be viewed in the context of whether the judgement of the Criminal Law Chamber of the Supreme Court was made before or after entry into force of the law by which Supreme Court judgements are included in the sources of law.

It seems though that the provision of CCP § 1 (4) should be interpreted so as to regard as a source of law all judgements of the Supreme Court in matters not settled by other sources of criminal procedural law or arising in the application of law. This includes Supreme Court judgements made before entry into force of the law that includes Supreme Court judgements in sources of law on 13 May 1998. Therefore, all Supreme Court judgements in which the Supreme Court has expressed its position in matters not settled by other sources of criminal procedural law or arising in the application of law should become sources of law in the meaning of CCP § 1 (4). But naturally, Supreme Court judgements should be used as sources of law only in the making of the judgements made after entry into force of the law.

One should not forget that factually, Supreme Court judgements have been a subsidiary source of law earlier too (before amendment of the law in question). References have been made to Supreme Court judgements and the positions contained in them earlier, and judgements have been reasoned by them.

If we regard as sources of law in the meaning of CCP § 1 (4) only the Supreme Court judgements made after entry into force of the law by which Supreme Court judgements were included in the formal sources of criminal procedural law, then Supreme Court judgements should be divided into two categories depending on the time they were made. Such distinction seems to have no reasonable explanation. It is difficult to find essential and convincing criteria for making such distinction. It can hardly be considered

⁷ Riigi Teataja (the State Gazette) III 1999, 16, 161.

⁸ The law by which the wording of § 1 of the Code of Criminal Procedure was amended by adding certain judgements of the Supreme Court to sources of criminal procedural law. See Riigi Teataja (the State Gazette) I 1998, 51, 756.

⁹ Reference to the ruling of the Criminal Law Chamber of the Supreme Court of 1 December 1998 (3-1-1-118-98) in the charges of H.L. and P.P. (Riigi Teataja (the State Gazette) III 1999, 2, 23). In its ruling, the Criminal Law Chamber of the Supreme Court found that failure to make a ruling on prosecution of the accused prevents the lawful hearing of the matter in court, as pursuant to CCP § 215 (1), the court is not competent to hear criminal cases concerning persons not prosecuted. The Supreme Court declared this violation of procedural norms a material violation under CCCACP § 39 (4).

reasonable that the Criminal Law Chamber of the Supreme Court as well as lower courts cannot be guided in their judgements by the Supreme Court judgements made before 13 May 1998 in which the Criminal Law Chamber has expressed its position in matters not settled by other sources of law or arising in the application of law.

For example, it is difficult to find a reasonable justification in order to not use as a source of criminal procedural law the ruling of the Criminal Law Chamber of the Supreme Court of 28 January 1998 (3-1-1-21) in the charges of M.V.*¹⁰ In this ruling of the Supreme Court, the Criminal Law Chamber of the Supreme Court has, through application of analogy of law, taken the position that the placement of a person in a medical institution for inpatient examination under CCP § 159 (1) or (2) can be viewed as a criminal procedural coercive measure analogous to taking into custody, the essence of which is substantial restriction of the freedom of movement of the person. Considering this, the position of the Criminal Law Chamber of the Supreme Court is that the right of a person to whom the coercive measure is applied, as well as that of the defender of such a person, to appeal against the ruling in a court must be ensured in accordance with § 15 (1) of the Constitution.

Thus, although the above example concerns a ruling of the Criminal Law Chamber of the Supreme Court made before entry into force of the law by which Supreme Court judgements are included in sources of law, the ruling and all other judgements of the Supreme Court that contain the result of legislative activities should be regarded as a source of law in the meaning of CCP § 1 (4).

Obiter dictum in the Estonian Court Practice

The notion of *obiter dictum* is known in the Estonian court practice. It is something similar to the Anglo-American *obiter dictum*.¹¹ The phrase *obiter dictum* signifies the part of a judgement that is not directly necessary for the judgement.

An example is the judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996*¹², in which the Criminal Law Chamber of the Supreme Court made a remark concerning CCCACP § 36 (2) by way of *obiter dictum*.

CCCACP § 36 (2) provides that in the new hearing of a criminal matter in the court of first instance, it is permitted to aggravate the punishment or apply a provision of law which prescribes a more serious criminal offence only if, after the annulment of the court judgement, facts which prove that the accused at trial committed a more serious criminal offence are established in the court hearing of the matter, or if one of the grounds for the annulment of the judgement was the allowing of an appeal by the victim, his or her representative or the prosecutor on grounds of leniency of the punishment.

The judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996 was made in a criminal case in which the prosecutor contested the judgement of acquittal made by the court of first instance solely on grounds of material violation of the Law of Criminal Procedure, *i.e.* the judgement of acquittal as such was not contested. With a view to this situation, the Supreme Court judgement of 24 September 1996 stated that after the new hearing of a criminal case, the court of first instance is not entitled to convict a person in respect of the same charges in which he or she was earlier acquitted. When reasoning this position, the Supreme Court found that the conviction of a person in the charges in respect of which he or she was earlier acquitted cannot be regarded as conviction in a more severe offence. The above is the bearing part of the judgement in question, or the *ratio decidendi*.

At the same time, it is stated in the judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996 by way of *obiter dictum* that if the prosecutor, the victim or his or her representative had contested the essence of the judgement of acquittal made by the court of first instance, the court of first instance could have, after the second hearing concerning the case, convicted the accused in the charges with respect to which he or she was earlier acquitted. In reasoning this approach, the Supreme Court relied on the understanding that the essential contestation of a judgement of acquittal by the victim, his or her

¹⁰ Riigi Teataja (the State Gazette) III 1998, 10, 106.

¹¹ On the relations and essence of *ratio decidendi* and *obiter dictum*, see D. Blumenwitz (Note 8), pp. 31–34; R. Narits. Kohtupretsedendist (On Court Precedence) (Note 3), pp. 381–382.

¹² Judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996 in the charges of A.J. and others pursuant to CCP § 139 (3) 1) – Riigi Teataja (the State Gazette) III 1996, 26, 346.

representative or the prosecutor can be viewed as a case of contesting the leniency of punishment in the meaning of CCCACP § 36 (2).^{*13}

In this case, the Criminal Law Chamber of the Supreme Court expressed its legislative position in a matter that did not constitute a bearing rule for resolving the criminal case before the Supreme Court. Although the position had an explanatory meaning for the criminal case being resolved then, it is rather a description of a presumptive situation and a potential legal evaluation of the situation. The talk is about an explanatory note of the Supreme Court by which the Supreme Court announces how it intends to resolve eventual future cases. In a later judgement, the Supreme Court has called the presumptive explanation in question a remark made by way of *obiter dictum*.^{*14}

Although the distinction of *ratio decidendi* and *obiter dictum* is not very important in the Estonian legal order from the viewpoint of the bindingness of court judgement, a certain relevance of such distinction cannot be denied now that Supreme Court judgements have been included in sources of law. Such distinction allows to determine the part of a Supreme Court judgement as a source of law (*ratio decidendi*) that the Supreme Court or others courts should not disregard in future from the part (*obiter dictum*) that need not necessarily be so important.

Naturally, the issue of *obiter dictum* concerns the issues of the scope of authorisation of the court to engage in legislative activities. Or rather, the question of whether and to what extent the Supreme Court would be authorised to use judgements on particular matters for declaring its intentions of regulation. The advance declaration of future legal principles is not a usual activity of judges. It should be stressed that the function of a judge is to adjudge specific cases and he or she is not authorised to develop law in view of potential future cases.^{*15}

Supreme Court Judgements as a Source of Criminal Procedural Law: a Limitation of the Legislative Activities of Other Courts?

If we ask whether the inclusion of Supreme Court judgement in sources of law is a limitation for other, lower courts in their legislative activities, a single answer is difficult to find. The danger remains that other courts will take guidance of the positions expressed in Supreme Court judgements rather uncontrollably as these are sources of law recognised by the legislator, and will maybe give up any legislative activities themselves. Judges who take strict guidance from the positions expressed in Supreme Court judgements concerning the application of law may even move away from law as the primary source of law. But as not all Supreme Court judgements can be regarded as mandatorily binding sources of criminal procedural law, lower courts will still have the chance to deviate from the positions expressed in Supreme Court judgements where this is justified. The obligation of a judge is to adjudge at his or her own responsibility. It can be said that if the judge of a lower court has serious arguments to deviate from the positions expressed in Supreme Court judgements, he or she should be ethically obliged not to take guidance from the position of the Supreme Court. Of course, the judge would have to reason the deviation from the position of the Supreme Court in his or her judgement. This way the judge would have the possibility of examining the position of the Supreme Court.

¹³ See Judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996 (3-1-1-99-96) in the charges of A.J. and others on grounds of CCP § 139 (3) 1 – Riigi Teataja (the State Gazette) III 1996, 26, 346; see also Judgement of the Criminal Law Chamber of the Supreme Court of 18 January 2000 (3-1-1-7-00) in the charges of M.O. on grounds of CCP § 141¹ (3) 1 – Riigi Teataja (the State Gazette) III 2000, 5, 48.

¹⁴ See Judgement of the Criminal Law Chamber of the Supreme Court of 18 January 2000 (3-1-1-7-00) in the charges of M.O. on grounds of CCP § 141¹ (3) 1 – Riigi Teataja (the State Gazette) III 2000, 5, 48.

¹⁵ For this principle, see E. Picker. Richterrecht und Richterrechtsetzung. – Juristenzeitung, 1984, H. 4, p. 154.

Conclusions

The inclusion of certain judgements of the Supreme Court in sources of criminal procedural law should not be regarded as the legal policy step of the Estonian legislator toward legalisation of the Anglo-American precedent law or the related *stare decisis* principle. Rather, it is quite an adequate reaction of the legislator to legal reality. Several judgements of the Supreme Court have already had the meaning of a factual supplementary source of law in real court practice. The provision of law by which certain judgements of the Supreme Court are included in sources of criminal procedural law should be interpreted in the context of continental European legal culture. This means that judgements of the Supreme Court are not strictly binding. If a judge is convinced that a judgement deviating from the existing judgement of the Supreme Court as a source of law would be in better accordance with the applicable legal order he or she should make a reasoned judgement that deviates from the existing one.

Although the Supreme Court is authorised to engage in legislative activities in certain cases, it is not competent to make legal policy decisions. A judge of the Supreme Court should be limited in his or her legislative activities to that necessary for resolving a particular case.

Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia

1. Periods of Development of Estonian New Private Law

Estonia regained its independence in August 1991; the Constitution was passed in June 1992 by referendum. A precondition for the survival and functioning of an independent state is the existence of an effective legal system. At the time Estonia became independent in 1991, the Soviet legal system was valid, but it was no longer possible to actually apply a large part of it due to the changed conditions, because both state administration and economic principles were radically changed. The drafting and establishment of all the necessary new laws was a primary task. The task was the largest and most complicated in the creation of new private law. It was also the most urgent task, because the former norms either conflicted new principles¹, or there was no regulation or regulation was incomplete in many areas.² The drafting of new private law can be divided into the following periods:

1. 1988–1991: preparatory period for the creation of Estonia's own legal system. The goal toward restoration of an independent state and law was set, but account had to be taken of restrictions due to the fact that Estonia was still a Soviet Republic.
2. 1992–1993: period of decisions and choices. This was the most important period in choosing the private law system and model – legal policy decisions could be taken independently without potential interference by Moscow. The main choices were made in this period. The passing of the Law of Property Act³ and its entry into force on 1 December 1993 was the cornerstone.
3. 1994–2000: this is a period of implementation of earlier decisions and choices, during which the majority of private law legislation was drafted and passed.

We can thus speak of three periods in the creation of Estonian private law – preparatory period (1988–1991), choosing period (1992–1993) and implementation period (1994–2000). Of course, this division as any division in time is conditional, since the periods are not clearly distinguishable. For example, the preparatory period did not only cover preparations, but also actual decisions and drafting, and implementation of choices, *i.e.* intensive legislative drafting was already going on in the choosing period, and continuous

¹ For example, contract law in the Soviet civil law was mostly based on state planning principles and freedom of contract was not recognised; land was not in civil use but was fully owned by the state, etc.

² For example, competition and insolvency were not regulated at all.

³ Asjaõigusseadus (Law of Property Act), passed on 9 June 1993 – Riigi Teataja (the State Gazette) I 1993, 39, 590; 1999, 44, 509.

deciding and choosing in single issues also characterise the implementation period when the drafting of new laws was primary.

Decisions have been made and implemented in all three periods, but the periods are distinguished according to which the primary task was at the time.

The following is a description and analysis of the development of Estonian private law in the three periods – why and due to which circumstances the particular legal policy decisions were taken in the development of private law.

2. Preparatory Period (1988–1991)

Preparation of the so-called Self-Sustained Estonia (*Isemajandav Eesti*, IME) concept⁷ began in 1988. The objective and content of the concept was to search how Estonia could organise its state and social development independently of the central Soviet power. The IME concept also provided for the creation of a legal system independent of the USSR legal system. In private law, it meant the passing of legislation that would allow for the development of market economy. As the freedom to act was also limited as regards legal drafting since Estonia was a Soviet Republic, the task was not yet set at the changing of the entire civil law system. Only amendments were planned to be made in the applicable civil code to enable market economy regulation.

The period 1988–1991 can thus be characterised from the aspect of development of private law as a period of orientation to the drafting of single new laws to enable the development of market economy, but systematic reorganisation of the entire private law was not a reality yet. The main code of private law remained to be the civil code of the Estonian SSR.

However, many important legal policy decisions that affected private law were already taken during this period to create preconditions for private law reform.

The main legal policy decisions during this period were the passing of the Principles of Ownership Reform Act⁸ (hereinafter: PORA) and its entry into force on 20 June 1991, and the passing of the Land Reform Act⁹ and its entry into force on 1 November 1991. It was understood by this time that the transition to market economy principles and the restoration of the independence of the country were not possible without major reforms in the society. The main owner during the Soviet period was the state – the state was the sole owner of all land and owned most production means (buildings, facilities, equipment, machinery, transport, etc.) through state enterprises. The Enterprise Act¹⁰ passed on 17 November 1989 established the freedom of enterprise and provided legal basis for the establishment of enterprises based on private property. The founding of public limited companies began after establishment of the “Statutes of Public Limited Company”¹¹ in autumn 1989, but the main production means were still owned by the state and it was not easy for the new public limited companies to compete with state enterprises. There were two options of giving new enterprises an actual possibility to operate: to privatise state enterprises and to attract as much as possible foreign investments to Estonia.

A major problem was that of the land. One of the new laws was the Farm Act¹² passed on 6 December 1989. The Farm Act was rather radical at the time – it was the first law in the Soviet Union that allowed private traders (farmers) to employ labour other than themselves. Land was granted for perpetual use under the Farm Act, which enabled private farms to be set up side by side with the former collective farms.

⁷ The fact that Estonia was the first of the Soviet Republics at the time to take decisive, practical steps toward independence, has given Estonia the reputation of a progressive and bold reformer in the world. This reputation was strengthened by the following steps toward independence and carrying out reforms.

⁸ Omandireformi aluste seadus (Principles of Ownership Reform Act), passed on 13 June 1991 – Riigi Teataja (the State Gazette) 1991, 21, 257; I 1997, 27, 391.

⁹ Maareformi seadus (Land Reform Act), passed on 17 October 1991 – Riigi Teataja (the State Gazette) 1991, 34, 426; I 1997, 81, 1363.

¹⁰ Ettevõtteseadus (Enterprise Act) – ENSV Ülemnõukogu ja Valitsuse Teataja (the ESSR Supreme Council and Government Gazette) 1989, 36, 551.

¹¹ Aktsiaseltsi põhimäärus (Statutes of Public Limited Company), passed on 22 November 1989 – ENSV Ülemnõukogu ja Valitsuse Teataja (the ESSR Supreme Council and Government Gazette) 1989, 37, 573.

¹² Taluseadus (Farm Act) – ENSV Ülemnõukogu ja Valitsuse Teataja (the ESSR Supreme Council and Government Gazette) 1989, 39, 611.

The return of lands nationalised in 1940 also became topical in the beginning of the 1990s but the Farm Act was not sufficient to solve this issue.

Two main questions required legal solutions in the beginning of the 1990s:

- 1) to provide legal bases for new forms of enterprise (public limited companies, private limited companies) and to allow people to act as sole proprietors;
- 2) to create legal bases for privatisation of state property and decide the restitution matters, to return land to the former owners insofar as possible.

Solving of these issues enabled to create a basis for freedom of contract and private autonomy, which were the source principles of new private law.

As mentioned above, the Enterprise Act and the Statutes of Public Limited Company created the legal basis for new forms of enterprise besides cooperatives – public limited companies and private limited companies, but also “experimental” intermediate forms such as collective enterprises and leased enterprises, which had only temporary importance.

The second one of the above problems was basically solved by the passing of PORA in 1991. The following principal decisions arose from PORA:

- 1) it was determined which unlawfully expropriated property (mainly land and buildings) was to be returned or compensated for and under which conditions;
- 2) it was decided to carry out a large-scale privatisation of state property and to leave to the state only the property necessary for performing its functions.

The decisions related to the ownership reform were radical – it was decided to return or compensate for unlawfully expropriated property to a wide circle of entitled subjects, and state property was decided to be privatised on a very large scale.

The passing of PORA and the Land Reform Act was logically followed by the addition of the Agricultural Reform Act^{*13} in 1992 and the Privatisation Act in 1993.^{*14} These and all other reform acts are based on the ideology and decisions of PORA. PORA and the other reform acts based on it also opened up the possibility for foreign investments to Estonia. Foreign investors were further reassured by the Foreign Investments Act^{*15} passed in September 1991.

In conclusion for the first period in the development of Estonian private law: the preparation of laws necessary for reforms and hence the creation of preconditions for a new private law were primary.^{*16} Choice of the private law model was not yet topical and the old civil code applied. The laws that ensured freedom of enterprise and regulated various forms of enterprise were relatively simple and were passed mainly for the practical purpose of enabling alternative forms of enterprise besides state enterprise. If we assess the reform laws that reflected the legal policy decisions of the time, they can be regarded as successful. Implementation of these laws was successful and made civil use of property, which is a characteristic feature of market economy, possible for Estonia. The civil use of land is especially important because it enabled collaterals through mortgage and greatly helped to develop the credit system. Preconditions were created for a significant widening of the circle of owners.

3. Period of Decisions and Choices (1992–1993)

At least two important circumstances became decisive for the development of Estonian private law since 1992, or even the end of 1991:

- 1) Estonia’s regaining her independence in August 1991;
- 2) the passing of PORA in June 1991 and the Land Reform Act in October 1991.

Independence of the state allowed to organise legislative drafting and build a legal system without having regard to restrictions from the outside. It was now possible and necessary to take principal decisions on the passing of laws of permanent meaning.

¹³ Põllumajandusreformi seadus (Agricultural Reform Act), passed on 11 March 1992 – Riigi Teataja (the State Gazette) 1992, 10, 143.

¹⁴ Erastamiseseadus (Privatisation Act), passed on 17 June 1993 – Riigi Teataja (the State Gazette) I 1993, 45, 639. The Privatisation Act of 1993 was preceded by various laws on privatisation in 1990–1992; privatisation in Estonia already began in 1990, but a clear and comprehensive legal basis for this was provided with PORA and the 1993 Privatisation Act.

¹⁵ Välisinvesteeringute seadus (Foreign Investments Act) – Riigi Teataja (the State Gazette) 1991, 31, 376.

¹⁶ For comments on the main laws passed in 1990–1992, see P. Varul, V. A. Lappalainen. Viron kauppallista lainsäädäntöä. Eesti Kaubanduse seadused. Estonian Law of Business. Lakimiesliiton Kustannus. Helsinki, 1992.

PORA and the Land Reform Act set the pace – the laws provided for land ownership, while the civil code did not provide norms for real property. It was necessary to quickly establish legal regulation for real property and other, restricted real rights. Otherwise, the lack of property law norms would have prevented reforms and the formation of normal economic relations. However, the establishment of property law norms was not possible without knowing what private law as a whole should be like. The preparation of an essential part of private law, property law, required an exact idea of the private law model as a whole to answer the question: as a part of what kind of legal system should property law be drafted.

The first main problem to be solved was that of the choice of legal system and family of law. The goal could not have been the creation of an original private law for Estonia – in today's intensive harmonisation and unification of law, this would have been unreasonable and impractical. The goal was to create private law suitable for a democratic, market economy orientated state.

However, in the situation where Estonia was at the end of 1991, the possibility of not following any established model or existing legal system had to be analysed and an attempt made to build a structure combined from various models by selectively transferring rules and principles from different systems. In Estonia, this possibility was considered thoroughly, but it was concluded that one family of law has to be chosen to avoid eclecticism, while examples and solutions from other families of law can be considered for its different fundamental subcomponents. Mutual influences and the intertwining of different families of law are common. The legal system of the Nordic countries has been influenced by the continental European system (Romanistic-Germanic legal system), especially by the Germanic family of law and also by common law countries, but is still distinguishable as a separate legal system. The civil codes of the state of Louisiana and the province of Quebec are based on the Romanistic family of law, but are significantly influenced by the common law environment. One of the newest civil codes, the civil code of the Netherlands, which is also based on the Romanistic family of law, is significantly influenced by other legal systems and incorporates many innovative and original solutions.^{*17}

The main method used for private law in today's legislative drafting is the comparative method. The source material includes not only the laws of other countries, special literature and court practice, but also internationally harmonised legislation – both officially applicable legislation, such as the Vienna Convention on Contracts for the International Sale of Goods^{*18} and recommended acts, such as the Principles of European Contract Law^{*19} (hereinafter: PECL) and Principles of International Commercial Contracts^{*20} (hereinafter: PICC), and of course the directives and decisions of the European Union.

The choice of a particular legal model does thus not mean transfer of the private law of the countries that use that model, but only guidance by certain principles. What were the options?

K. Zweigert and H. Kötz distinguish between eight major legal systems in the world (1) Romanistic family, (2) Germanic family, (3) Nordic family, (4) common law family, (5) socialist family, (6) Far Eastern systems, (7) Islamic systems, and (8) Hindu law.^{*21}

Estonia could choose between the first four of these.

The Germanic family of law was chosen as the basis and Estonia can thus be said to belong to the Germanic family of law now. This does not imply the copying of German law in Estonia, but guidance by the bases characteristic to the private law of Germany, Switzerland, Austria and other countries belonging to the Germanic family of law.

K. Zweigert and H. Kötz have proposed criteria for distinguishing one family of law from another:

- 1) its historical background and development;
- 2) its predominant and characteristic mode of legal thinking;
- 3) especially distinctive institutions;
- 4) the kind of legal sources it acknowledges and the way it handles them; and

¹⁷ See A. S. Hartkamp. *Civil Code Revision in the Netherlands 1947–1992*. New Netherlands Civil Code. Deventer, Boston: Kluwer Law and Taxation Publishes, 1990. Preparation of the Netherlands Civil Code took a long time which enabled thorough analysis and innovative solutions. The preparation time in Estonia was only a few years and therefore many ready solutions had to be adopted from other countries.

¹⁸ United Nations Convention on Contracts for the International Sale of Goods: Vienna, 1980 – Riigi Teataja (the State Gazette) II 1993, 21/22, 93.

¹⁹ The Principles of European Contract Law. Available at: <http://itl.irv.uit.no/trade-law/doc/EU.Contract.Principles.1997.preview.html>.

²⁰ Principles of International Commercial Contracts, Rome: UNIDROIT, 1994.

²¹ K. Zweigert and H. Kötz. *Introduction to Comparative Law*. Oxford: Clarendon Press, 1992, p. 75.

5) its ideology.*²²

The criteria help to explain Estonia's choice of the Germanic system, or rather, the criteria served as a reason for the choice.

3.1. Historical Background and Development

When Estonia was part of Tsarist Russia, the Baltic Private Law applied from the year 1865.*²³ The author of the law was professor Georg-Friedrich Bunge of the University of Tartu. The Baltic Private Law also applied in Estonia in 1919–1940 when Estonia was an independent state. The Baltic Private Law is a code based on the pandect system, containing the general part, property law, family law, law of succession and law of obligations parts, and can be classified as belonging to the Germanic family. The preparation of Estonia's own civil code began in the beginning of the 1920s. The civil code was ready for adoption in 1940, but was not passed. The draft civil code belongs to the Germanic family of law and is mainly based on the norms of the Baltic Code of Private Law, BGB, the Swiss civil code and the Austrian civil code. A leader in the preparation of the draft civil code, Professor Jüri Uluots, has pointed out the special influence of the Swiss civil code.*²⁴

There were thus two facts that played an important role in the choices made in 1992:

- 1) the Germanic legal model had been applied in Estonia until 1940;
- 2) the draft civil code prepared by 1940, which also belonged to the Germanic family of law, was a good source for preparing new drafts.

According to the Land Reform Act, former landowners and their heirs have the right to claim the land property nationalised from them. In view of historical consistency, it was useful to apply the same land register regime to returned lands.

Another important factor in the choice of a model was the urgency of passing the Law of Property Act. Law of property is a relatively more static part of the civil code when compared to *e.g.* contract law. The draft of 1940 was well suited for use in the preparation of the Law of Property Act, since relatively few changes had taken place in property law since 1940. But when the draft civil code was decided to be the major source of the new property law, it implied that private law will be based on a codified code with a pandect system, *i.e.* the Germanic model.

3.2. Distinctive Mode of Legal Thinking

The continental European legal system – the Romanistic and Germanic families of law – is characterised by a very precise formulation of the text of the law and the intention to provide rules in an abstract form. This is particularly apparent in the pandect system in the formulation of the general part norms.

Common law countries are characterised by a more descriptive style. The style difference arises from the two major differences between the Romanistic and Germanic law and common law:

- 1) in the civil law, large areas of private law are codified. Codification is not typical of the common law;
- 2) the civil law was strongly and variously influenced by Roman law. The Roman law influence on the common law was far less profound and in no way pervasive.*²⁵

Due to the above-described historical background, the style of Estonian lawyers is abstract, arising from codification. An important, though not decisive factor is that the system of the civil code of the Estonian SSR was also close to continental European law. The Soviet civil law cannot in its entirety be classified as belonging to the continental European private law, but the civil code of the Estonian SSR has many similarities to Romanistic and Germanic codes. The system of the civil code is more similar to the Germanic model, being close to the pandect system. Family law was not a part of the civil code – the family code was

²² *Ibid.*, p. 69.

²³ The Baltic Private Law means Volume 3 of the Baltic Provincial Code: Provincialrecht der Ostseegovernements, Dritter Teil: Privatrecht. – Liv-, Est- und Curlaendisches Privatrecht.

²⁴ Explanation to the Draft Civil Code. Tallinn, 1940.

²⁵ A. T. von Mehren, J. R. Gordley. *The Civil Law System: An Introduction to the Comparative Study of Law*. Little, Brown and Company, 1977, p. 3.

an independent law; property law did not exist and the less regulative ownership law existed in its stead. Contract law was significantly influenced by planned economy and the freedom of contract was restricted.

While the civil code of the ESSR was more similar to the Germanic model with regard to its system, it was more similar to the Romanistic model with regard to its content – for example, the abstraction principle was not applied.

It had to be taken into account in 1992 that the civil code could be passed in parts – as five separate laws in accordance with the pandect system. This allowed for flexibility, the ready parts could be established more quickly without waiting for the next parts to be ready. Separate laws took the place of the respective chapters of the civil code, while the old chapters not yet replaced remained in force for a certain period of time. The fact that private law could only be renewed gradually caused the necessity to take account of the old law that was still applicable, at least as regards the system and structure. Under this criterion – distinctive mode of legal thinking – Estonia had basically two options, either the Romanistic or the Germanic system. The mode of thinking of Estonian lawyers in 1992 was closer to the Romanistic system, while historical background influenced the choice toward the Germanic system.

3.3. Certain Legal Institutions

Every legal system is characterised by certain specific legal institutions, whereas their existence is dependent on each other. An important choice that triggered many of the following preferences was the selection of a so-called strong land register maintained by courts where all real rights concerning real estate are recorded. A strong land register requires the application of the abstraction principle, by which the voidness of an obligation contract does not in itself render a disposal contract or real right contract void. A strong land register in turn should ensure legal certainty and contribute to economic development and stability.

The application of the abstraction principle to real property in turn caused it to be applied to movable property and claims, which attributes our private law an important characteristic of the Germanic family of law. The choice of the abstraction principle as an important principle of private law caused the establishment of the unfair enrichment institute as it exists in Germany.

3.4. Sources of Law

Due to historic tradition, the sources of law in Estonia have been law and customs. This is one of the reasons why common law was not chosen. Still, court practice, particularly judgements of the Supreme Court, have played an important role in the interpretation of law in Estonia since court reform in 1992–1993. Court judgements are also very important for legislative drafting in a situation where laws are incomplete and important parts of them are not yet established. This particularly applies to law of obligations – as the law of obligations act has not yet been passed, the respective provisions of the civil code are still applied, but due to the incompleteness of these provisions, courts have interpreted them to a great extent and applied analogy of law. Court judgements have been a basis for the preparation of the draft Law of Obligations Act.

3.5. Ideology of a Legal System

When Estonia separated itself from the Soviet Union and took the task of restoring and building up its own state and legal system, it passed the ideologies of Anglo-Saxon, Germanic, Romanistic and Nordic families of law, which are essentially so similar that the families can basically only be distinguished by other criteria.

As stressed above, the goal in the development of private law was not the creation of an original private law, but the establishment of rules already passed and tried in the West, in order to have an effective national law and enable Estonia to participate in international cooperation.

The choice made in 1992–1993 did not imply a decision to copy the law of any particular country; it was rather a choice of a system or a type of basic model and did not exclude the use of examples from other families of law in the preparation of separate parts of the system structure. The countries whose examples were used were the Netherlands, Denmark, France, Italy, the state of Louisiana, the province of Quebec, and other countries of the Romanistic and Germanic family, as well as Nordic countries.

The choice of the model of a legal family meant a decision to codify civil law on the basis of a pandect system – the civil code was to be the core of private law. The Commercial Code was planned to be the second basic act of private law, but not similar to the example of Germany and Austria where commercial codes also regulate trade transactions. Taking guidance from today's developments of contract law, the Principles of European Law and the Principles of Commercial Contracts, we did not follow the dualism characteristic to the Germanic family of law, according to which trade transactions are regulated separately from the civil code by trade codes. In Estonia it was decided to regulate all transactions by the Law of Obligations Act, whereas the most general norms for transactions are provided in the General Part of the Civil Code Act.^{*26} The civil code and the commercial code were to be the fundamental, codified codes of private law. Other laws regulating the area of private law were planned to be passed as single laws.

The content of the decisions made in the choosing period was chiefly determined by the proposals and positions of jurists. An expert committee for civil law consisting of jurists was set up in 1990 and continued from 1992 as the chief committee for the civil code and the commercial code. The committee has taken all the major decisions concerning the preparation and development of private law, and has been an expert committee for drafts prepared by working groups.

An important, and eventually decisive factor in the making of decisions was political will that was primarily targeted at the restoration of the state and its legal order.

In 1992, the Supreme Council of the Republic of Estonia passed the decision that the preparation of the legal system had to be guided by the principles applicable in Estonia before the year 1940.^{*27} For private law, this implied guidance mainly by the principles characteristic to the Germanic family of law.

4. Implementation of Decisions and Choices (1994–2000)

The urgency of passing the Law of Property Act was due to the need to ensure that reforms are carried out. The part laws of the Civil Code were therefore passed in an illogical order. It would have been logical to pass the General Part first.

After establishment of the Law of Property Act in 1993, the order of preparation of other parts of the Civil Code was determined: general part, family law, law of succession, law of obligations. The preparation and content of these parts of the Civil Code and the Commercial Code reflect the main characteristic features of the development of Estonian new private law. The following analysis therefore focuses on the decisions made during processing of these draft laws.

4.1. General Part of the Civil Code Act

Preparations for the General Part of Civil Code Act (hereinafter: GPCCA) began immediately after passing the Law of Property Act. GPCCA was passed on 28 June 1994 and entered into force on 1 September 1994.^{*28}

The main institutes of the general part are persons and transactions, but also the exercising of civil rights and the main methods of their protection, including lapse of action. The general part also includes the norms of international private law as a separate part. International private law was very superficially regulated in the civil code of the ESSR – this was due to the political trend to restrict communications between natural and legal persons and persons of other countries as much as possible. The new norms for legal persons had a very important meaning. The treatment of legal persons as it was in the Soviet period was not suitable for the new conditions. In the Soviet law, legal persons were divided into two groups:

²⁶ The General Part of the Civil Code provides the definitions of transaction and declaration of intention, the grounds for voidness and contestability of transactions, and norms for the forms of transactions.

²⁷ Eesti Vabariigi Ülemnõukogu otsus 6. juulil 1992 Eesti Vabariigi pankrotiseaduse rakendamise kohta (Decision of the Supreme Council of the Republic of Estonia of 6 July 1992 concerning the Implementation of the Republic of Estonia Bankruptcy Act) § 7 (7) – Riigi Teataja (the State Gazette) 1992, 31, 404.

²⁸ Tsiiviilseadustiku üldosa seadus (General Part of the Civil Code Act) – Riigi Teataja (the State Gazette) I 1994, 53, 889.

- 1) legal persons that owned their property;
- 2) legal persons that were not owners.

A typical example of the first group was a cooperative society, and of the second group, a state enterprise that was a legal person, but administered property belonging to the state. The state itself was not considered to be a legal person. Local governments were not regarded as owners at all, although they administered state property too. The picture was very much unclear concerning legal persons in the beginning of the 1990s. Different kinds of new legal persons were set up, including leased enterprises and collective enterprises; very different state and municipal bodies were regarded as legal persons. The legal basis for founding legal persons was not clear – should it always be the law, or may other legal persons not prescribed by law also be founded? The situation was greatly changed already by the Law of Property Act, but mainly by the GPCCA in 1994. The general rules for legal persons provided in the GPCCA reflected the most important of the decisions taken in the preparation and passing of the GPCCA with regard to the further development of private law, particularly with regard to legislation concerning legal persons. The GPCCA laid down the general rules for legal persons: legal persons are either legal persons in private law or legal persons in public law. Legal persons in private law could be established only on the basis of a law regulating the particular type of legal persons. Legal persons in public law were the state government and local governments; other legal persons in public law could be established only on the basis of a law regulating the particular legal persons.^{*29}

Already the Law of Property Act laid down the rule that every legal person can be an owner. The provisions of GPCCA became the basis for further development of legal persons. State agencies and local governments were no longer regarded as legal persons; they only represented the state or local governments. Separate laws were passed regarding legal persons in private law – the Commercial Code^{*30} (public limited company, private limited company, general partnership, limited partnership), the Nonprofit Associations^{*31} and the Foundations Act.^{*32} The Associations Act^{*33} had already been passed earlier; the draft of a new commercial associations act has been prepared now to replace it and will be passed this year.

A clear classification of legal persons was thus formed on the basis of GPCCA after its passing and the respective laws were prepared.^{*34} The categories of legal persons in private law have been established by now – these are:

- a) commercial undertakings: public limited company, private limited company, general partnership, limited partnership and commercial association^{*35};
- b) nonprofit associations; and
- c) foundations.^{*36}

The need to renew the GPCCA arose in the preparation and implementation of other parts of the Civil Code. A new draft GPCCA has been prepared by now^{*37}; it is currently in the legislative proceeding of the *Riigikogu* (parliament) and will be adopted at the end of 2000.

The new draft is an elaboration of the 1994 act. The main changes concern natural persons, transactions, and lapse of action. Choices and decisions have been greatly influenced by the so-called model laws – PICC and PECL, as well as the civil codes of other countries. The civil code of the Netherlands as the newest

²⁹ Legal persons in public law are, under their own laws, the University of Tartu, the Bank of Estonia, the National Opera “Estonia”, the National Library, etc. Single legal persons in public law may be added, but their number cannot grow much larger – legal persons in public law are established in areas where the state transfers some of its functions, allowing for a greater autonomy of organisations that have gained the status of a legal person in public law, particularly the possibility to be an owner.

³⁰ *Äriseadustik* (Commercial Code), passed on 15 February 1995 – *Riigi Teataja* (the State Gazette) I 1995, 26–28, 355; 1998, 91–93, 1500.

³¹ *Mittetulundusühingute ja nende liitude seadus* (Nonprofit Associations and Unions Thereof Act), passed on 23 March 1994 – *Riigi Teataja* (the State Gazette) I 1994, 24, 425. The Act was replaced by a new act in 1996: *mittetulundusühingute seadus* (Nonprofit Associations Act), passed on 6 June 1996 – *Riigi Teataja* (the State Gazette) I 1996, 42, 811; 1998, 96, 1515.

³² *Sihiasutuste seadus* (Foundations Act), passed on 15 November 1995 – *Riigi Teataja* (the State Gazette) I 1995, 92, 1604.

³³ *Ühistuseadus* (Associations Act), passed on 27 August 1992 – *Riigi Teataja* (the State Gazette) 1992, 36, 477; I 1998, 95, 1513.

³⁴ On legal persons in this period see A. Vutt. *Legal Persons in Estonian Law*. – *Juridica International. Law Review*. University of Tartu, 1996, pp. 84–85.

³⁵ Commercial undertakings will be discussed further in the text in connection with the Commercial Code.

³⁶ There are several subclasses of nonprofit associations regulated by separate laws, such as the *Korterühistu seadus* (Apartment Associations Act) passed on 27 June 1995 – *Riigi Teataja* (the State Gazette) I 1995, 61, 1025; 1999, 42, 498. The disputed issue is the classification of churches and congregations as legal persons. The *Churches and Congregations Act* (*Kirikute ja koguduste seadus*) is currently applicable: passed on 20 May 1993 – *Riigi Teataja* (the State Gazette) I 1993, 30, 510, according to which churches and congregations are a subcategory of nonprofit associations. They could also be classified as a separate class of legal persons.

³⁷ Available at: <http://www.just.ee> (in Estonian).

civil code has been especially important, and the German and Swiss civil codes, as well as those of the province of Quebec, the state of Louisiana, Italy, Austria and Russia, were analysed for comparison. While the main changes in 1994 concerned the regulation of legal persons, the most important ones in the new act concern natural persons. The concept of active legal capacity was altered – all minors below the age of 18 have restricted active legal capacity, whereas the court may increase their active legal capacity from the age of 16. The mentally ill and mentally retarded who cannot adequately comprehend the meaning of their actions and cannot control their actions also have restricted active legal capacity. While under the current GPCCA, the court declares a person as having restricted active legal capacity or divests a person of active legal capacity, then under the new draft, the court may only establish the existence of restricted active legal capacity. This change of regulation should better protect those persons who permanently cannot comprehend their acts due to mental disorder – presently, their acts can only be contested after the court has divested them of active legal capacity, but the new regulation allows to contest the acts of mentally ill and mentally retarded persons retroactively. Relevance is given to the mental condition of persons at the time of concluding a transaction, and not to whether the court has earlier restricted their legal capacity or not. As a general rule, a person with restricted active legal capacity may enter into transactions with the consent of their legal representative; the consent can also be given after the transaction. The Civil Code discards the institute of complete incapacity. Presently, children under the age of 7, mentally ill and mentally retarded persons divested of active legal capacity by court have no active legal capacity whatsoever. Active legal capacity can no longer be restricted on the grounds of a person having placed his or her family in an economically dire situation through consumption of alcohol or drugs or by squandering.

While changes in the approach to active legal capacity mainly serve the interests of persons with restricted active legal capacity, the question remains of how such changes affect legal certainty – it may come as a surprise for the other party of a transaction that the representative of the first party can contest the transaction on grounds of the party having restricted active legal capacity.

The main change regarding transactions concerns the procedure for contestation of transactions. According to the present GPCCA, a transaction can be contested in court on grounds such as fraud, error, threat, etc., and the court may declare the transaction void on these grounds. According to the new draft law, a notice of contestation is sent to the other party to the transaction if grounds for contestation exist, and the transaction is deemed to be void. This provides better protection of persons whom the grounds for contestation concern – persons who were deceived or threatened, who made an error, etc.

The limitation periods for actions are also changed. The general limitation period for actions is currently 10 years after the person became or should have become aware of the infringement of his rights. The limitation period applies both to breach of contractual obligations and causing of noncontractual damage. The draft law provides 3 years as the limitation period for actions arising from a transaction and also 3 years as the limitation period for actions arising from causing damage. In the former case, limitation is calculated from the moment of breach of a contractual obligation, in the latter case from the time when the entitled person became or should have become aware of the damage or of the person obligated to compensate for the damage. The law also provides for limitation periods different from the general ones – for example, the limitation period for actions arising from family rights or inheritance rights is 30 years after the date on which the action could have been filed. The new system is more flexible, excluding long limitation periods where possible, by extending the limitation periods in cases where it is important to ensure long-term protection of infringed rights.

An important change is the stipulation and following of the principle of negative mandatory capacity in the draft act. Although negative mandatory capacity is characteristic of the present Estonian civil law, it is restricted – an agreement of parties deviating from the law is allowed only if it arises out of legal norms. Such restricted negative mandatory capacity also means a restricted freedom of contract. The draft sets out the negative mandatory capacity in the reversed way – by agreement of parties, the provisions of law may be deviated from, unless the law provides or suggests that deviation is not allowed. Deviation from law is not allowed when it contradicts public policy or good morals. Such an approach to the negative mandatory capacity principle in the preparation of the text of the law and its application must ensure the freedom of contract required for a democratic state based on market economy, and allow the private autonomy principle to be applied.

The draft International Private Law Act has been separated from the new draft GPCCA.^{*38} This separation is due to the need to regulate the area of international private law more extensively and in greater detail. The law will probably be passed in spring 2001.

4.2. Family Law Act

The Family Law Act^{*39} was prepared at the same time with the GPCCA. It was passed on 12 October 1994 and entered into force on 1 January 1995. The Family Law Act replaced the former marriage and family code. The main change was that the Family Law Act became a part of the Civil Code, while the former marriage and family code was separate from the civil code. As a part of the Civil Code, the GPCCA became applicable to the Family Law Act. When compared to the other parts of the Civil Code, there was no need to make urgent radical changes in the new Family Law Act. The Family Law Act was therefore largely based on the former marriage and family code, although substantial amendments and corrections were made to it. The main change concerned the regulation of the proprietary relations of spouses. The former single main rule was that all property acquired during marriage was the joint property of spouses, except their personal belongings and property received by gift or succession. Property acquired prior to marriage was the separate property of spouses. The Family Law Act provided for the possibility to enter into a marital property contract to specify a procedure for determining joint and separate property different from that arising from the law. Where no marital property contract is concluded, the provisions of law apply – the principle of joint property remained to apply to property acquired during marriage.

A marital property contract (Family Law Act §§ 8–13) may be concluded prior to marriage or during marriage. A marital property contract may specify which property belonging to a spouse before the marriage remains the separate property of the spouse and which property becomes joint property of the spouses, and which of the property acquired or to be acquired during the marriage is joint property and which is separate property. A marital property contract may also specify how to possess, use and dispose of joint property of the spouses, how to divide joint property of the spouses, the mutual maintenance duties of the spouses during the marriage and upon termination of the marriage, and other mutual proprietary rights and obligations of the spouses that they consider necessary.

Marital property contracts are entered in the marital property contract register. A marital property contract not entered in the register is valid in the relationship of spouses when it is notarised. The proprietary rights of a spouse arising from a marital property contract are valid with respect to third persons if an entry concerning the marital property contract is made in the marital property contract register before the claim of the third person arises. The marital property contract register is maintained pursuant to procedure provided by law in a land registry of a court.^{*40}

Other important changes were also made to the Family Law Act. Deciding on adoption was placed in the competence of courts – earlier, adoption was decided pursuant to administrative procedure. Regulation concerning parentage was also elaborated, the procedure for divorce was somewhat simplified – while divorce was earlier in the sole competence of courts, it is now possible to divorce pursuant to administrative procedure if there are no disputes. Regulation of maintenance obligations was made more exact.^{*41}

The Family Law Act in its present form has performed its functions quite well and no insuperable problems have arisen in practice, but when compared to other parts of the Civil Code and similar laws of other countries, our Family Law Act is relatively less regulative. A new draft Family Law Act is being currently prepared. Its purpose is not a family law reform, but to improve the degree of regulation of the law, especially concerning adoption, maintenance obligations, the proprietary rights and obligations of spouses, but also guardianship and parentage. The new Family Law Act also has to be adjusted to the new GPCCA prior to the establishment of the former. The new Family Law Act will hopefully be passed at the end of 2001 or in the first half of 2002.

³⁸ *Ibid.*

³⁹ *Perekonnaseadus (Family Law Act) – Riigi Teataja (the State Gazette) I 1994, 75, 1326.*

⁴⁰ *Abieluvararegistri seadus (Marital Property Contract Register Act), passed on 9 November 1995 – Riigi Teataja (the State Gazette) I 1995, 87, 1540.*

⁴¹ A thorough review of the Family Law Act is provided in: E. Salumaa. *The Family Law Act. – Juridica International. Law Review. University of Tartu, I, 1996, pp. 94–98.*

4.3. Law of Succession Act

Law of succession was paid relatively little attention in the Soviet period, since the right of ownership of natural persons was limited. A natural person could not own land or hold shares; he or she could own only one house, etc. The Law of Property Act and GPCCA provided for equal passive legal capacity, including the capacity to be an owner, for all persons. This in turn greatly increased the importance of the right of succession, because any property could now be estate.

The new Law of Succession Act^{*42} was passed on 15 May 1996 and entered into force on 1 January 1997.

When compared to the law of succession contained in the former civil code, the new Law of Succession Act is much more regulative. Law of succession, like law of property, is relatively more static than, for example, contract law. This means that the 1940 draft Civil Code could be used as source material similarly to the preparation of law of property. Law of succession in the Civil Code of 1940 was greatly influenced by the German BGB, but also by the Swiss, Austrian and Italian civil codes. Quite a lot has been transferred from the Baltic Private Code. The new Law of Succession Act was largely based on these and also the civil code of the Netherlands.

The group of intestate successors was significantly extended. The placement of the spouse among successors changed – while the spouse was formerly a first order successor, he or she now succeeds together with all other successors (Law of Succession Act § 16). The possibility to succeed by testamentary contract was provided besides the will. The form of will was made more liberal. Domestic will is recognised besides a notarial will (Law of Succession Act §§ 23–26).^{*43} The reciprocal will of spouses was introduced. The procedure for succession – the management, acceptance and renunciation of estate – as well as the rights and obligations of successors and liability upon succession were specified in much greater detail than before. A basic problem was whether to choose the acceptance of estate or renunciation of estate system. The choice was made in favour of the acceptance system, mainly due to the influence of the 1940 draft Civil Code. The fact that the acceptance system is somewhat simpler and less expensive in its legal structure was decisive. In this regard, the Law of Succession Act differs from its main example, the BGB, and is close to the regulation of Austrian and Italian civil codes. The establishment of a succession register in the Tallinn City Court was a new development.^{*44}

4.4. Law of Obligations Act

The Law of Obligations Act is the largest part of the Civil Code. Preparation of the draft Law of Obligations Act began immediately after establishment of the GPCCA in 1994. When compared to other part laws of the Civil Code, there were more difficulties in choosing the source materials. It became clear that the initial idea to use the 1940 draft Civil Code as the source similarly to property law and law of succession was not justified. The draft of 1940 was outdated when compared to new developments and was no longer suitable as the main source material.

The main source materials for the Law of Obligations Act were the Principles of European Contract Law, Principles of International Commercial Contracts and the 1980 Convention on International Sale of Goods, and also the civil codes of Germany^{*45}, Switzerland, the Netherlands, Quebec, Louisiana, etc. and the contract law directives of the European Union.

Important source principles of the Law of Obligations Act are the negative mandatory capacity and freedom of contract principles also contained in the new draft GPCCA and the Law of Obligations Act, as well as the principles of reasonability and good faith. The Law of Obligations Act is by and large more regulative than the present obligations act which is the only part of the old civil code still applicable. The Law of Obligations Act consists of two parts – general part and special part. The latter in turn is divided in two –

⁴² Pärmissaadus (Law of Succession Act) – Riigi Teataja (the State Gazette) I 1996, 38, 752.

⁴³ An example of the influence of the civil code of the Netherlands is the rule provided in § 25 of the Law of Succession Act, by which a domestic will becomes invalid if six months have elapsed from the date of its making and the testator is alive at the time.

⁴⁴ On the development of law of succession in Estonia related to the passing of the Law of Succession Act, see U. Liin. On Reform of Estonian Succession Law. – *Juridica International. Law Review*. University of Tartu, III, 1998, pp. 105–109.

⁴⁵ Proposals to BGB were used besides and even more than BGB.

one contains special types of contracts, the other is dedicated to compensation for damage, unfair enrichment, and norms on administration without mandate and public permission of remuneration.^{*46}

When compared to the present law of obligations, several important regulations are changed or new ones established – for example, the new law established the principle of *culpa in contrahendo*; liability is not related to fault like in the present law, but liability may be excusable only; means of legal protection in case of breach of contract are specified in great detail; the institution of unfair enrichment is given new content; liability of risk is stipulated; termination of contract is provided for through withdrawal from contract and rescindment of contract. New quality is given to protection of the rights and interests of the consumer – the use of standard terms is provided for in Estonia in accordance with EU Council Directive 93/13/EEC. From the aspect of the interests of the consumer, deviation from the freedom of contract and negative mandatory capacity principles through regulation of standard terms is justified to protect the consumer as the “weaker party”. Differently from the general rule for interpretation of contracts, objective interpretation of standard terms is provided for – they are interpreted from the aspect of the understanding of a reasonable person, and where disagreement arises, to the detriment of the user of the term (Law of Obligations Act § 27). New for Estonia are the norms on door-to-door contracts and contracts concluded by means of communication, based on EU Council Directives 85/577/ECC and 97/7/EEC and aimed at additional protection of the consumer in these contracts. The list of provisions of the Law of Obligations Act that are new for Estonia could be continued, as the Law of Obligations Act will be the largest law in Estonia, containing more than a thousand sections.^{*47}

Together with the new GPCCA, the Law of Obligations Act is the most thoroughly prepared and modern part of the Civil Code. The Law of Obligations Act has not been passed yet, but is likely to be passed by the end of 2000.^{*48}

All parts of the Civil Code should thus be passed by the end of 2000, and a systematic and relevant Estonian Civil Code should be thereby created.

4.5. Commercial Code

The other basic code of private law besides the Civil Code is the Commercial Code. The Commercial Code was passed on 15 February 1995 and entered into force on 1 September 1995. The Commercial Code regulates the foundation, activities and dissolution of commercial undertakings and sole proprietors. According to the Commercial Code, commercial undertakings are: public limited company, private limited company, general partnership and limited partnership. Differently from the traditional approach, general partnerships and limited partnerships are legal persons under the Commercial Code. Still, as opposed to public and private limited companies, general partnerships and limited partnerships are not capital undertakings, but associations of persons, hence the differences in their foundation, management, and liability when compared to public and private limited companies.

In analysing the general partnership in the Commercial Code, M. Vutt reaches the conclusion that the “concept of a general partnership established by the Estonian Commercial Code lies somewhere between German and French law, and although the Estonian general partnership is a formal unit similar to a private limited company or a public limited company, the relations between partners are to a very large degree determined by the partners themselves. The fact that a general partnership is a legal person, does not decrease the importance of the personal aspect or change the nature of the corresponding commercial understanding”.^{*49}

⁴⁶ The Law of Obligations Act is closest to the BGB in its structure: *see* N. Horn, H. Kötz and H. G. Leser. German Private and Commercial Law: an Introduction. Oxford: Clarendon Press, 1982, pp. 66–67.

⁴⁷ The Law of Obligations Act is so large that it cannot be analysed comprehensively in this article. For the draft Law of Obligations Act, *see e.g.* I. Kull. Effect of Harmonisation of European Civil Law on Development of Estonian Law of Obligations. – *Juridica International. Law Review. University of Tartu*, III, 1998, pp. 98–102; I. Kull. Legal Remedies Provided in the Estonian Draft Law of Obligations Act for Breach of Contractual Obligations. – *Juridica International. Law Review. University of Tartu*, IV, 1999, pp. 147–159.

⁴⁸ The draft Law of Obligations Act is available at: <http://www.just.ee> (in Estonian).

⁴⁹ M. Vutt. The General Partnership in Estonia. – *Juridica International. Law Review. University of Tartu*, I, 1996, p. 88.

For the Commercial Code as a whole, the main examples were the respective laws of Sweden and Germany, as well as the EU Directives on corporate law.^{*50}

Public limited company and private limited company are typical limited liability capital undertakings under the Commercial Code for which capital requirements are prescribed by law. The new development in the Commercial Code was the establishment of commercial registers in courts.^{*51} The Estonian commercial register is generally based on the principles of the German commercial register. Estonia is divided into four commercial register regions. Reform of commercial undertakings took place in 1995–1999 through establishment of the Commercial Code that amended requirements for the foundation of commercial undertakings and prescribed regulation of their activities which were much stricter than before, and through introduction of the commercial register. From 1 September 1995, commercial undertakings could be founded only by entry in the commercial register. All undertakings founded earlier than 1 September 1995 had to be entered in the commercial register by 1 September 1997; from 1 September 1999, the share capital of all public and private limited companies had to comply with the minimum size prescribed by law – 40,000 kroons^{*52} for private limited companies and 400,000 kroons for public limited companies. Commercial undertakings that did not comply with these requirements by 1 September 1997 and by 1 September 1999 were subject to compulsory liquidation.

A register of nonprofit associations and foundations was set up after the commercial register.^{*53}

A great number of new commercial undertakings were founded in Estonia in the first half of the 1990s, particularly private and public limited companies, but also other legal persons such as nonprofit associations and foundations. Due to the gaps in legislation, the requirements for these undertakings were not adequately formulated^{*54} and there was no overall and exact record of legal persons in the country. This made various kinds of malpractice possible. Owing to the passing of the Commercial Code, establishment of the commercial register and the register for nonprofit associations and foundations, and compulsory liquidation of noncomplying legal persons, only registered legal persons that comply with the requirements of law are now acting.

4.6. Other Areas of Private Law

Alongside with the basic codes of private law – the Civil Code and the Commercial Code – the majority of other necessary private law laws were passed and implemented in the 1990s.

In the area of intellectual property, the main laws have been passed and the major international conventions joined.^{*55} The Copyright Act^{*56} was passed on 11 November 1992 and entered into force on 12 October 1992. Other new laws included the Patent Act (1993)^{*57}, Utility Models Act (1994)^{*58}, Industrial Design

⁵⁰ See A. Vutt. Harmonisation of Estonian Company Law: Pre-Conditions in Existing Law. – *Juridica International. Law Review*. University of Tartu, II, 1997, pp. 100–102; A. Vutt, M. Vutt. Defending the Rights of Minority Shareholders in Estonia. – *Juridica International. Law Review*. University of Tartu, IV, 1999, pp. 160–165.

⁵¹ See A. Vutt. Problems in Harmonisation of Acts Regulating Commercial Register Entries. – *Juridica International. Law Review*. University of Tartu, III, 1998, pp. 103–104.

⁵² 1 euro = 15.65 Estonian kroons as of 1 July 2000.

⁵³ The Nonprofit Associations Act passed in 1996 provided for the establishment of a register for nonprofit associations and foundations. The registrars are the registrars of the commercial register. All nonprofit associations and foundations had to be registered by 1 October 1998 (with the exception of political parties, for which the deadline was 1 March 1999). Nonprofit associations and foundations that did not comply with this requirement were subject to compulsory liquidation.

⁵⁴ For example, it was possible to found a public limited company with the share capital of 300 kroons; the members of the management board were not entered in the public register, etc.

⁵⁵ See H. Pisuke. Developments in Estonian Intellectual Law: Some Issues Concerning Copyright and Related Rights. – *Juridica International. Law Review*. University of Tartu, IV, 1999, pp. 166–171.

⁵⁶ *Autoriõiguse seadus* (Copyright Act) – *Riigi Teataja* (the State Gazette) 1992, 49, 615; I 2000, 16, 109. The Copyright Act was the first law in the area of intellectual property, a new draft Copyright Act is being prepared now.

⁵⁷ *Patendiseadus* (Patent Act), passed on 16 March 1994 – *Riigi Teataja* (the State Gazette) I 1994, 25, 406; 1998, 74, 1227.

⁵⁸ *Kasuliku mudeli seadus* (Utility Models Act), passed on 16 March 1994 – *Riigi Teataja* (the State Gazette) I 1994, 25, 407.

Protection Act (1997)^{*59}, Protection of Layout-design of Integrated Circuit Act (1998)^{*60}, Trade Marks Act (1995).^{*61}

In the Soviet period, the area of intellectual property was only regulated by three chapters of the civil code that contained relatively few norms on copyright, right of discovery and right of invention. The principles that served as the basis for the preparation of the Civil Code were important in the preparation of these new laws separate from the Civil Code, but the influence of foreign and international conventions is dominant. As the area of intellectual property is more internationally unified and harmonised than many other areas of private law, we can speak about the influence of general international development on the Estonian legislation without stressing the differences between families of law.

Important new laws not contained in the Soviet system were the Bankruptcy Act^{*62} and the Competition Act.^{*63} Both were hurriedly passed in 1992 and in 1993. In view of the complete lack of own experience in these areas, the task was set at preparing a new wording of these acts after a few years, taking into account Estonia's own practice and international experience. The Bankruptcy Act was substantially amended and added to at the end of 1996^{*64}; the new Competition Act was passed in 1998.^{*65}

5. Conclusions

A private law corresponding to the European requirements for a democratic state has been developed in Estonia during the last 10 years. This has happened due to the hard work of Estonian jurists and the good will of politicians. The role of foreign experts in the preparation of our laws has been of great importance. Contacts with German and Dutch jurists and law experts, as well as those of other countries, have been the closest. Expert opinions and consultations in private law have been provided in the course of preparation of laws and making fundamental decisions by Professors G. Brambring, P. Schlechtriem, B. Grunewald, K. Schmidt, W. Rolland, S. von Lewinski, H.-W. Eckert, F.-J. Semler, N. Reich and G. Hager from Germany, E. Gras, A. F. Salomons, A. L. Mohr, P. Abas, H. van Zijst, H. W. Wiersma, I. H. H. van Erp, H. de Groot and A. van Plateringen from the Netherlands, T. Wilhelmsson, J. Liedes and J. Peltonen from Finland, E. Nerep, B. Westlund and G. Karnell from Sweden, H. Fontain from Belgium, A. N. Yiannopoulos and J. Ginsburg from USA, B. Stauder from Switzerland. The list could be continued. Of foreign organisations, the German Foundation for International Legal Cooperation has provided the greatest help. The hard preparation work has distinguished a number of Estonian jurists who had the historical chance to be among the creators of the new legal system – V. Kõve, A. Zeno, M. Käerdi, A. Vutt, I. Kull, H. Pisuke, M. Seppik, A. Glikman, J. Ikla, P. Pärna, H. Mikk, E. Silvet, I. Mahhov, J. Odar, M. Kingissepp, M. Vutt, M. Kairjak, R. Sõlg, etc.

The choices and decisions made have justified themselves until now. A new challenge for lawyers will be the implementation of the new Law of Obligations Act. Now that the intensive period of legislative drafting of private law is becoming to an end, complementary training of lawyers and quality education in law is primary, because successful implementation of new laws is not possible without it. Little legal literature has been written by Estonian authors.^{*66} This is understandable, because most of their time and energy has been spent on the preparation of legislation. The emphasis in the forthcoming years will be on the preparation and publication of comments to laws and other scientific literature.

⁵⁹ Tööstusdisaini kaitse seadus (Industrial Design Protection Act), passed on 18 November 1997 – Riigi Teataja (the State Gazette) I 1997, 87, 1466.

⁶⁰ Mikrolülituste topoloogia kaitse seadus (Protection of Layout-design of Integrated Circuit Act), passed on 25 November 1998) – Riigi Teataja (the State Gazette) I 1998, 108/109, 1783.

⁶¹ Kaubamärgiseadus (Trade Marks Act), passed on 27 August 1992 – Riigi Teataja (the State Gazette) 1992, 35, 459; I 1998, 15, 231.

⁶² Pankrotiseadus (Bankruptcy Act), passed on 10 June 1992 – Riigi Teataja (the State Gazette) 1992, 31, 403.

⁶³ Konkurentsiseadus (Competition Act), passed on 16 June 1993 – Riigi Teataja (the State Gazette) I 1993, 47, 642.

⁶⁴ Pankrotiseaduse muutmise seadus (Bankruptcy Act Amendment Act), passed on 18 December 1996 – Riigi Teataja (the State Gazette) I 1997, 5/6, 32; 18, 302. On the development of bankruptcy law in Estonia see: P. Varul. On the Development of Bankruptcy Law in Estonia. – *Juridica International. Law Review. University of Tartu*, IV, 1999, pp. 172–178.

⁶⁵ Konkurentsiseadus (Competition Act), passed on 11 March 1998 – Riigi Teataja (the State Gazette) I 1998, 30, 410; 1999, 89, 813.

⁶⁶ Quite a lot of articles have been written on private law, but the number of larger studies, comments on laws and monographs is small – I. Kull. *Lepinguõigus I (Contract Law I)*. Tallinn, 1999; P. Pärna, V. Kõve. *Asjaõigus: Kommenteeritud väljaanne (Law of Property: Commented Publication)*. Tallinn, 1996.

The Estonian legislative drafting has been substantially influenced by the goal to become a member of the European Union. As Estonia is a candidate member to the European Union, the requirements of EU directives have been taken into account in the preparation of legislation. In the area of private law, this mainly concerns corporate law, contract law, competition law, consumer protection, and intellectual property. This gives a certain advantage – when we become a member of the European Union, we will not need to make major changes to our laws, as they are already adjusted to the EU law.

Last but not least – what is the future direction of development of Estonian private law? The five part laws of the Civil Code could be codified into a single code. Though, such a codification is not absolutely necessary, because the part laws function as a single code.^{*67} The idea of compiling the five part laws into a single text could be the additional revision of the entire material to ensure the fluent functioning of all parts without any contradictions. The development of Estonian private law is undoubtedly influenced by the international harmonisation of law, particularly in the framework of the European Union. The carrying out of the idea of the European civil code is highly interesting. The European civil code has certainly had a major impact on the national legislation of European countries. There should also be an opposite influence – in preparing the European unified codes, it is important to learn from the latest codification experience, *i.e.* that of the East European countries.^{*68}

⁶⁷ Examples of parts of a code existing as separate laws can be brought from elsewhere – for example, the Swiss Federal Code of Obligations is a part of the Swiss Civil Code; the Netherlands Civil Code also consist of separate laws with a separate numeration of sections.

⁶⁸ See E. H. Hondius. European Contract Law: The Contribution of the Dutch. *Europäisches Vertragsrecht: Referate und Sitzungsbez.* – Baden-Baden, pp. 52–53.

Legal Integration and Reforms – Innovation and Traditions

The goal of European legal integration is common civil law that would eliminate discrepancies between legal systems and ensure a common legal culture throughout Europe. Both international organisations and national legislative drafters have extended and intensified their activities in the name of bringing legal cultures closer together. International organisations have a growing impact on national law, as assimilation and adjustment of their developments to national law undoubtedly requires certain efforts from every legal order. Amendments to the codified legal sources of civil law in Europe also have their impact. Research into the laws of other countries and their use in the development of national laws have become unavoidable in performing the different tasks of unification.*¹

Since regaining its independence, Estonia has had to rewrite its entire civil law. Legal political decisions have been made concerning which legal systems are suitable to serve as models in the preparation of laws. “Loans” from other countries are the most common method of legal exchange and unification of legal regulation. Legal systems have had and will have mutual effects through different channels. The loaning of an entire codification from another country can have a particularly large impact on the legal system.*² In the development of its own legal system, Estonia has borrowed ideas and regulations from several countries. The choices have been largely technical, without consideration to the social background. Regard was given to the available court practice of the respective countries and the actual application of various provisions.

Integration-orientated changes in the legal system imply legal reforms for Estonia. Reform means reconstruction, improvement of the bad or wrong, correction.*³ In making improvements, account was taken of the effective laws of Western Europe as well as new ideas and theoretical solutions that have not been reflected in the legislation of any country. Parts of these are certainly innovative for the whole European civil law. However, the majority of changes are innovative only for Estonia’s own civil law.*⁴ No significant attention has been paid to issues such as the social consequences of innovation and its impact on the

¹ See G.-R. de Groot. European Education in the 21st Century. The common law of Europe and the future of legal education. Ed. B. de Witte, C. Forder. Deventer, 1992, pp. 7–9.

² See P. de Cruz. Comparative Law in a Changing World. London, Sydney, 1999, pp. 485–486.

³ See H. C. Black. Black’s Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern. 6th edition, Minnesota: West Publishing Co, 1990.

⁴ The effect of Finland’s joining the European Union on legal culture and legal traditions was *inter alia* discussed at the international conference “From Dissonance to Sense” at Porvoo in 1997.

formation of legal culture or changes in it. Any change can be effective only if it assimilated into the deeper structures of law and the social life structures of the particular jurisdiction that constitute a unique part of legal culture.*⁷

Legal innovation in a particular jurisdiction blends into it through legal traditions. As innovation finds its place in the new legal culture and is understood against the background of traditions, it can become a part of legal traditions and the legal system. One could agree with the position that we should begin not from innovation, but from mapping the existing traditions in order to harmonise law and have any success with it.*⁸

The problems of legal traditions and legal culture are becoming topical for the Estonian society. There was no social demand for this kind of discussion earlier, because everyone sensed the need to adopt new laws as quickly as possible to reflect the changed social order and ensure the efficiency of the economy. It was a popular belief that all social problems would be solved and an effective market guaranteed by the passing of laws. It was not acknowledged that law is not simply a normative text boiling down to formally defined acts. It has been said that the period of legal positivism has passed, which implies expansion of the concept of law and giving it a fresh consideration.*⁹

What is the unique legal culture of the Estonian jurisdiction, whose structures should accept the entirely foreign and little-known norms and rules of behaviour contained in new laws? Estonia has practically no tradition or experience in free market economy. Many market economy terms acquired substance only 3–4 years ago. Court practice, too, has been uncertain, as it has to rely on the Civil Code from 1965 and apply norms that are clearly not in accordance with the changed relations in society. How should law be developed, how should legal analogy be put to practice and by what arguments should the already established interpretation of norms dating back to the 1960s and 1970s, whose application has been similar for nearly 20 years, be questioned? It is not easy to find answers. The Supreme Court has assumed a role that the courts are not yet accustomed to, but the necessity for which is undoubtedly perceived – the role of developing law in issues where the effective law can no longer be applied in the old way, as this would cause judgements to contradict the principle of good faith.*¹⁰

The rapid changes in the Estonian legal system have made a substantial contribution to the reorganisation of the economy and society and ensured the efficiency of reforms. However, the implementation of new laws has already raised the issue of the functions of law in today's society. A broad approach to law enables to determine the permanent basic functions of law as a normative regulation system. These functions include preventive influencing of behaviour and reorientation to avoid conflicts, organisation and harmonisation of activities within groups of humans, and satisfaction of group specific interests and common goals.*¹¹ The task of law is thus to react to the needs of society and to have, above all, a regulative function for various groups. Law reflects the social values of the society and depends on them, while it controls the forms of economic and political activities in today's society (rule of law).*¹²

In socialist society, law did not exist apart from administrative and political control and planning. The task of law was to plan and organise the economic and social structures of the country.*¹³ A feature of socialist law was prerogativity, as opposed to the normativity common to Western legal systems.*¹⁴ To what extent, if at all, have the legal traditions formed in such a legal system been abandoned during a decade, and how many legal traditions does a new society have to offer to replace the discarded ones? Socialist law certainly does have its common features with the Western legal systems. The bases of the civil legislation of the Soviet Union and the related civil codes were largely based on the examples of the German BGB, the Swiss code of obligations and the French civil code.

⁷ S. Paasilehto. Challenges for Legal Cultural Change: Innovations and Traditions. From Dissonance to Sense. International Conference in Porvoo, Finland. August 28–31, 1997.

⁸ *Ibid.*, p. 10.

⁹ C. Varga. European Integration and the Uniqueness of National Legal Cultures. The common law of Europe and the future of legal education. Ed. B. de Witte, C. Forder. Kluwer, 1992, p. 721.

¹⁰ See I. Kull. Võlaõiguse areng kohtupraktikas (Development of Law of Obligations in Court Practice). – *Juridica*, 1999, No. 9, p. 444.

¹¹ R. Cotterrell. *The Sociology of Law. An Introduction*. 2nd ed., Mutteworth, 1992, p. 80.

¹² G. Chievely. The Future of the Common Law. The Wilberforce Lecture 1997. *International and Comparative Law Quarterly*. Vol. 46, Oct., 1977, pp. 759–760.

¹³ R. Cotterrell, pp. 84–85.

¹⁴ P. de Cruz, p. 186.

In the classical division of legal systems where all legal systems are, as a rule, divided into five categories^{*15}, Estonia lost its former place among socialist legal systems after disintegration of the socialist bloc. The placement of a legal system provides certain orientation in specific areas of law, especially when the formation and differences of legal systems are studied comparatively.^{*16} As our laws are largely based on the example of German law, we have to look for the characteristic features of the orientation of changes in the German pandects system. The pandects system is characterised by concentric systematism and the large relative importance of general principles.^{*17} The functioning of general principles in a society can be determined when the cultural, moral and ethical values that comprise the environment in which law functions are researched.

Legal tradition has been defined as a set of deeply rooted, historically formed attitudes to the nature of law, its role in the society and political ideology, the organisation and functioning of the legal system.^{*18} According to Merryman, while a legal system is a functioning set of legal institutions, procedures and rules, legal tradition puts the legal system in cultural perspective. He makes a sharp distinction between legal system and legal tradition. Based on legal traditions, jurisdictions have been divided into families of law. Jurisdictions are usually divided into legal systems or families of law on the basis of certain legal traditions, the characteristics of which correspond to the characteristics of the given legal system. Nowadays, however, we have to take account of the possibility that a legal system can have the characteristics of all traditional legal systems.^{*19}

The issue of to what extent society has overcome the era of traditions has also been raised. The loss of traditions does not essentially imply the end of the impact of traditions, but rather their transformation and renewal, as the changed society invariably calls for new traditions.^{*20}

When we try to find something in common for all today's legal systems, it would certainly be the use of sources of law. The use of court judgements as sources of law has grown in countries of civil law together with an expansion of the use of laws in countries of general law.^{*21} For example, § 1 of the Estonian draft General Part of the Civil Code Act prescribes that the sources of civil law are law and custom.

The approximation of developments in various particular branches of law does not unanimously support the convergence of legal systems or the related formation of a common European law in the near future. Economic cooperation between European countries may accelerate the harmonisation process, but this would be only a small step toward unity. The main obstacles are the differences in ideology, political orientation, social and economic policy, moral values and philosophy, attitude to law and legal structures, and executive and administrative capacity.^{*22} Weighty arguments can be found in defence of the peculiarities and traditions of European families of law and jurisdictions. Pierre Legrand convincingly shows that law is the expression of traditions that are hundreds of years old and it cannot be changed without social impact. The convergence of legal systems ensures the universality of rules and the protection of economic and business interests, but law does not consist of positive norms only.^{*23} Although Estonia adopts the major institutes and regulations of the German legal system, the adopted laws cannot be guaranteed to be interpreted in the same way as they are in their country of origin or the regulations to work effectively apart from administration of justice.

Civil law has always been politically neutral and formal in the legal systems of continental Europe, thus being the former and carrier of traditions. Private law as a traditional area of law is thus a less active supporter of unification. Any interference with the established traditions of civil law can be viewed as a

¹⁵ K. Zweigert, H. Kötz. *An Introduction to Comparative Law*. 2nd revised ed., Oxford, 1987.

¹⁶ C. Bollen, G.-R. de Groot. *The Sources and Background of European Legal Systems. Towards a European Civil Code*. Ed. A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. E. du Perron, J. B. M. Vranken. Dordrecht/Boston/London, 1994, p. 97.

¹⁷ See K. Zweigert, H. Kötz. *An Introduction to Comparative Law*. 2nd revised ed., Oxford, 1992, p. 150.

¹⁸ P. de Cruz, p. 31.

¹⁹ N. K. Zweiger and H. Kötz divided families of law as follows: general, Roman, German, Northern countries, socialist, Far-East, Islamic, and Hindu family of law. There are other classifications, but the above legal systems can be traditionally found in the classifications made by various authors. The socialist legal system is not contained in the classification, but legal systems characterised by the features of socialist legal orders will certainly continue to exist for a long time. The majority of today's legal orders have the characteristics of mainly one legal tradition. P. de Cruz, p. 32.

²⁰ If Estonia were a welfare society, Estonia would be characterised by the traditions attributable to a welfare society, which are based on areas regulated by law – family, job, education, health care, etc., *i.e.* traditions based on solidarity policy. S. Paasilehto, p. 5.

²¹ P. de Cruz, p. 36.

²² *Ibid.*, p. 40.

²³ P. Legrand. *Against a European Civil Code*. *The Modern Law Review*, 1997, Jan., Vol. 60, p. 425–428.

violation of intellectual independence.*²⁴ For members of the European Union, directives regulating the areas of private law bring about the need to amend the applicable codes and established theories. The borrowing of law may accelerate the development of civil law like a bloodless revolution.*²⁵ Court practice relying on the draft Law of Obligations Act is already forming in Estonia, which can be viewed as a certain fortification of traditions by court practise. How the innovation originating from different legal traditions will function in future is more difficult to predict.*²⁶

Classical contract law carries the idea of freedom of contract. Civil law mainly tried to ensure freedom and equality. Every citizen had to be free in the formation of legal relationships. Control of contractual justice was given up. The freedom of contract can no longer be regarded as the core idea of the legal system today, because no actual freedom and equality of participants in civil relationships exists. Today's regulations rather carry the principle of contractual justice.*²⁷ Courts have the right to hold invalid the contractual provisions that impair the balance of the obligations and rights of the parties to the disadvantage of one party and conflict good morals.*²⁸ The model of the person participating in contractual relationships has changed. The model entails a responsible person who is aware of the consequences of his or her acts, can assess them, and knows better than anyone else what is best for him or her.

In a welfare society, the freedom of contract has to be replaced by contractual justice. It is essential to use more effective means in the protection of the interests of those who are not able to protect their interests themselves and subject themselves to obligations that do not correspond to their actual will. An effective means of defence is the distribution of risks between contracting parties. The right to contest contracts, the application of protective means, liability, etc. are largely based on the distribution of risk.

The contract is certainly a most unified institute.*²⁹ At the same time, major changes have taken place in the legal regulation of entry into contracts, based on changes in doctrines *inter alia*. The scope of contractual law has significantly expanded today. An important innovation for the Estonian civil law is the major expansion of the circle of persons protected by law. This is an area where practically no traditions exist. The handsel institute that was in force before the year 1940 was a means by which the parties could enforce their positions in performing their contractual obligations. The civil code effective since 1965 contains no provisions to oblige the parties to act in good faith during negotiations and contractual relation. The General Part of the Civil Code Act § 108 (1) that entered into force on 1 September 1994 prescribes the obligation to exercise civil rights and perform civil obligations in good faith. The lawful obligation to act in good faith has thus already been in effect for 6 years. The provision has been referred to in the Estonian court practice only since 1998. The tradition of negotiations and the tradition of fair business relations in a wider sense have not yet developed.

In the draft Law of Obligations Act, the relations forming in the course of negotiations are also subjected to legal regulation. Subsection 12 (1) of the Law of Obligations Act prescribes that persons who hold pre-contractual negotiations or otherwise prepare for the conclusion of a contract must have reasonable regard to each other's interests and rights. The obligation to communicate objective data to each other during negotiations is particularly noted. The draft General Part of the Civil Code Act also contains a regulation providing for the grounds for contesting transactions due to errors and fraud.

The draft General Part of the Civil Code Act allows a transaction to be contested if a substantial error was caused by circumstances revealed by the other party or failure to reveal any circumstances, where revealing such would have been in accordance with the principles of good faith or where the other party was or had

²⁴ S. Paasilehto, p. 9.

²⁵ P. de Cruz, p. 487.

²⁶ I keep in mind attempts to unify the European civil law in sources such as UNIDROIT Principles of Commercial Contracts (PICC; 1994), Principles of European Civil Code (PECL), prepared by the Commission on European Contract Law, chairman Ole Lando; UN Convention on the International Sale of Goods (CISG) 1980. The importance of sociological elements in the harmonisation of law based on his US experience was discussed by Melvin E. Eisenberg in his article "Why is American Contract Law so Uniform?". – National Law in United States. Europäisches Vertragsrecht. H.-L. Weyers (Hrsg.). Referate und Sitzungsbericht der Arbeitssitzung der Fachgruppe Zivilrecht der Gesellschaft für Rechtsvergleichung auf der Tagung vom 20.–22. März 1996 in Jena. Baden-Baden, 1997, pp. 23–43.

²⁷ European Contract Law. H. Kötz, A. Flessner. Vol. 1: Formation, Validity, and Content of Contracts; Contracts and Third Parties. 1997, p. 11.

²⁸ Control of content also means the right of courts to interfere with the private autonomy of parties, by checking whether voluntariness and the completeness of information in the expression of will has been ensured in contractual relations. See S. A. Smith. Future Freedom and Freedom of Contract. – The Modern Law Review, 1996, Vol. 59, No. 2, p. 173.

²⁹ The comparative study of the concept of contract and entry into contracts by P. Schlesinger convincingly demonstrated this. See P. Schlesinger. Formation of Contract, A Study of the Common Core of Legal Systems. 2 vols., 1968.

to be aware of the error and the leaving of the erring party in error conflicts with the principles of good faith. The person who concluded the transaction may not contest the transaction, if it bore the risk of erring under the circumstances and in accordance with the nature of the transaction or if its error would not be excusable considering the circumstances. The provisions concerning errors were based on the respective provisions of PECL.^{*30}

An innovation that deserves special attention is the provision in the draft General Part of the Civil Code Act regulating the bases for establishing the duty to disclosure. Namely, regard has to be given to all circumstances in establishing the duty to disclosure, particularly circumstances that have obvious importance for the other party, the holding of special knowledge by the parties, the reasonable opportunities of the other party to receive the respective information, and the expenses of the party on receiving the information. These circumstances in assessing the duties to disclosure are not yet recognised by the civil laws of Europe. However, there is nothing new in it for the court practice of Western countries. It is usual practice in the courts of Western countries to have regard to the special knowledge of persons.^{*31}

Regulation of the duty to disclosure by the Law of Obligations Act means that the pre-contractual negotiations stage is covered by contract law. When the obligation to present only truthful information that is clearly in the interests of the other party is imposed by law, then violation of this obligation has legal consequences. It is possible here to interpret the pre-contractual violation of the duty to disclosure as a delict followed by liability under the delict law. Claims on the grounds of violation of the duty to disclosure can be filed under the error and fraud regulation of the General Part of the Civil Code Act. The pre-contractual duty to disclosure can thus be subjected to provisions of contract law or delict law, or those regulating the contesting of transactions. Will the Estonian court practice recognise the obligations whose performance can be demanded through a court?^{*32} These are questions to be finally answered only after the draft Act has been passed and entered into force. The establishment of the duty to disclosure by law has its economic consequences, but those should be the subject of a separate study.^{*33}

For the Estonian court practice, this would be an innovation of major interest. While the law established the obligation to reveal information important to a negotiating party, it has not been studied what the actual traditions, norms and practice of business transactions are.

With a view to economic efficiency, courts should interfere where the protection of the interests of the parties is not an effective or sufficient insurance of the efficiency of economy. Where the persons participating in economic relationships do not find it necessary to give a binding nature to the expressions of will that give the other party reasonable grounds to believe that it was a legally binding commitment, then courts should interfere in the administration of justice.^{*34} The current court practice, however, shows an opposite tendency. Parties are often permitted to derogate from their promises on the grounds that the effective laws lack provisions under which such promises could be regarded as binding. Courts have repeatedly stated in their judgements that preliminary agreements are not binding, since the effective law does not provide for the legal protection of such agreements. Preliminary agreements are a widely practised method in economic activities to strengthen one's position and ensure the keeping of promises.^{*35}

There is much innovation yet much that is traditional in the future of law and legal systems. Legal integration and reforms can be successful only if regard is given to the social aspects of innovation. It is not enough to modernise doctrines if modified social institutions do not support this.

³⁰ UNIDROIT, Principles of international Commercial Contracts. Available at: <http://www.unidroit.org/english/principles/contents.htm>.

³¹ The respective Estonian court practice may be influenced by the model to be chosen or already chosen in the conclusion of contracts in economic activities. The Anglo-American legal system is rather sceptical about imposing such a general duty to disclosure. *See e.g.* Good Faith and Fault in Contract Law. Ed. J. Beatson, D. Friedman. Oxford, 1995, pp. 107–108. For a comparative study in duty to disclosure in today's major legal orders, *see* A. M. Musy. Disclosure of Information in the Pre-contractual Bargaining. A Comparative Analyses. Available at: <http://www.gelso.unitn.it/card-adm/Review/Contract/Musy-1995/musy1.htm>.

³² *See* Precontractual Liability. Reports to the XIIIth Congress of International Academy of Comparative Law, Montreal, Canada, 18.–24. Aug. 1990. Ed. E. H. Hondius. Deventer, Boston, 1992; A. S. Hartkamp, M. M. M. Tillema. Contract Law in the Netherlands. The Hague, London, 1995, p. 78.

³³ For respective research in the United States of America, *see* A. M. Musy. Disclosure of Information in the Pre-contractual Bargaining. A Comparative Analyses. Available at: <http://www.gelso.unitn.it/card-adm/Review/Contract/Musy-1995/musy1.htm>.

³⁴ *See* S. A. Smith. Future Freedom and Freedom of Contract. The Modern Law Review, 1996, Vol. 59, No. 2, p. 173.

³⁵ *See e.g.* judgements of the Tartu Circuit Court in civil cases II-2-385/97 and II-2-317/98. Available at: <http://www.tarturk.just.ee/1997/tl/t/385.HTM> and <http://www.tarturk.just.ee/1998/lt/t/317.HTM> (in Estonian).

The Position of Labour Law in the Private Law System.

The Past, Present and Future of Estonian Labour Law

There is no reason to deny that the division of law into two larger branches – private and public law – is acknowledged and as a result, legal systems have been constructed on that basis. A place has to be provided for the most important branches of law in this classification. However, a classification need not always be final. Every classification includes elements which do not allow unambiguous deciding whether the notions belong to one or another category.

Such division of law is not problem-free, but it is largely a matter of agreement under which larger subject one or another branch of law should be treated.

One of the branches of law whose status within the domain of private and public law cannot be determined indisputably is labour law. Nobody doubts that law of obligations belongs to private law. There is also no doubt that administrative law is a part of public law. However, with labour law, the parties to a discussion are no longer sure whether this is private or public law. The problem is not new but once in a while, a question about the status and the regulation of labour law relations crops up.

Although in Estonian it has been resolved by legal and technical means that labour relations will not be regulated through law of obligations, the problem has remained undecided.

Private and Public Law in Labour Law

The development of labour law remains in a large part in the period when industrial production was introduced. The formation and development of factory legislation is regarded as the seed of the creation of labour law. Several authors have though claimed that the legal regulation of labour relations does not originate solely from the development of factory legislation but the modern labour law has several connections with Roman private law and the modern employment contract has, in fact, evolved as a result of the classification of contracts found in Roman law.*¹

For the purposes of distinguishing between private and public law, analyses has always focused primarily on three different options, the first of which goes back to the ancient Roman times, whereas the other approaches are more modern. In some cases, approach motivated by interest as used by Roman jurists has been employed. The state is always interested in maintaining order in the relationships between people.

¹ For the historical development of labour law, see T. Mayer-Maly. *Römische Grundlagen des modernen Arbeitsrechts. – Recht der Arbeit*, 1967, No. 8/9, pp. 281–286; T. Mayer-Maly. *Vorindustrielles Arbeitsrecht. Recht der Arbeit*, 1975, No. 1, pp. 59–63; R. Trinker. M. Wolfer. *Modernes Arbeitsrecht und seine Beziehungen zum Zivilrecht und seiner Geschichte. – Betriebs-Berater*, 1986, No. 1, pp. 4–9.

Thus, one could claim that any legal regulation is public law as all provisions enforced by the state express in their final stage the state's clear interest in establishing particular rules in the respective field, the observance of which would ensure order in relationships between people.^{*7} One may, however, proceed from the fact that interest for the regulation of which attempts are made, determines how and through which methods the relationships between people should be regulated.

The main question is whether the target of the attempts is, in a more limited manner, in the interests of a private person, or in the interests of the public (state). If the private interest is predominant, one may assert on the basis of Roman jurists' relevant viewpoint that the regulation concerned belongs to the domain of private law. However, when the emphasis is, above all, on the interests of the state, it is public law.

On the basis of the theory of the subject, the distinction between private and public law is, first and foremost, related to the question whether one of the parties to the relationship has the authorisation of the state authority. If one of the parties to the relationship has the authorisation of the state authority, the relationship belongs to the domain of public law. When the subject of the relationship lacks the authorisation of the state authority, the relationship is between private individuals and consequently the matter belongs to the realm of private law.

The third approach which supplements the theory of the subject claims that problem solving belongs to the field regulated by public law, when one of the subjects has the authorisation of the state authority and when it also exercises the authority. At the same time, one cannot overlook the fact that if a particular branch of law belongs to the domain of private or public law, the realisation of the relationship between the parties in that relationship is also predetermined – it is done either with regard to subordination or coordination. If the problem belongs to the domain of public law it is presumed that a relationship of power and subordination exists between the parties.

On the basis of these theories it is only generally possible to determine where a branch of law belongs. The classification does not provide a concrete basis for the classification. There are various situations, where one of the parties to the relationship does have the authorisation of the state authority, but the relationship nevertheless falls under private law. At the same time, there are situations, where there is a power and subordination relationship between the parties, but the branch belongs to the domain of private law.

Such classification into private and public law provides an opportunity to distinguish between the branches of law, above all, in case of classical branches of law such as civil law, criminal law and constitutional law. More problems arise, however, in the case of newer branches of law that have evolved recently whose status cannot be determined in a uniform manner due to that. Such newer branches of law include, for example, labour law, intellectual property law, commercial law, etc. In case of all these newer branches of law, both public and private law approaches have intermingled. Uniform classification of these branches of law is impossible and thus one may only talk about their tendency to fall within one or another branch of law.

Labour law is a unique branch of law in which various development stages can be clearly identified. Having commenced, above all, due to the fact that freedom of contract failed to guarantee to employees sufficient protection in their relationships with employers, labour law came to be increasingly related to public law, and starting from 1930–1940 it is considered public law.^{*8} However, in 1950–1960, the private law component of labour law was more and more emphasised and one could not uniformly determine whether it related to public or private law. It is a rather wide-spread approach that due to embracing both public law and private law provisions, labour law is located somewhere in between.^{*9}

However, at present one must admit that labour law is increasingly treated as judicial matter falling under the realm of private law.^{*10} The private law status of labour law is not unequivocal because people are used to speaking of a special status of labour law in private law. The separate status of labour law in private law as a whole is conditioned both by internal and external characteristics. The external characteristics include, first and foremost, the existence of a separate code, a separate court system. The internal characteristics, in their turn, are related to the fact that besides private law provisions there are very many public law

⁷ Similar thereto is the standpoint of an Estonian jurist A.-T. Kliimann, who claimed that although a distinction was made between private and public law, the entire modern law was public law by nature. See Haldusõigus, haldusprotsessiõigus ja tööõigus. Koostanud vastavalt eksaminõutele P. Rängel (Administrative Law, Administrative Procedure Law and Labour Law. Compiled according to examination requirements by P. Rängel). Viljandi, 1934, p. 20.

⁸ See A. T. Kliimann. Õiguskord (Legal Order). Tartu: Akadeemilise Kooperatiivi kirjastus, 1939, p. 145; P. Rängel (Note 2), p. 75.

⁹ A. Hueck, H. C. Nipperdy. Lehrbuch des Arbeitsrechts. 7. Aufl., Berlin und Frankfurt am Main: Franz Vahlen GmbH, 1963, Bd. I, p. 4.

¹⁰ A. Söllner. Grundriss des Arbeitsrechts. 12. Aufl., Vahlen, 1998, p. 5; W. Dütz. Arbeitsrecht. 4. Aufl., München: C. H. Beck, 1999, p. 1; H. D. Schmid. P. Trenk-Hinterberger. Grundzüge des Arbeitsrechts. 2. Aufl., Vahlen, 1994, p. 3.

restrictions which do not allow the parties to an employment relationship to decide themselves on the working conditions that they choose to apply in that particular working relationship.

In determining the position of labour law in the legal system as a whole, three approaches are prevalent. According to one approach, labour law falls within civil law, constituting there a section of property law relationships.^{*11} Another classification places labour law between public and private law without assigning thereto a more particular position in the classification of law. The third approach views labour law as a part of private law – however, it is a special area of private law.^{*12} The general private law consists of contract law, law of property, inheritance law, family law and the general principles.

All the three approaches have also been reflected in Estonia. The prevalent approach is that labour law is a section of private law, but taking into account the essential role of public law provisions in regulating labour relations, labour law also possesses, on a considerable scale, public law characteristics.^{*13}

Position of Labour Law in Estonian Private Law System

Classification of law into private and public law has not had a long history in the Republic of Estonia after it regained its independence. The classification of law into private and public law was recognised in the Republic of Estonia from 1918–1940.^{*14} After the establishment of Soviet power, the former classification of law lost its meaning and the legal system was developed according to the concepts of the jurisprudence of Soviet Russia. After Estonia regained its independence, the classification into private law and public law has been adopted. As a result, the determination of the status of labour law is crucial.

The legal system applicable in Estonia in 1918–1940 had been, in a large part, taken over from the former Russian legal system. This arrangement was particularly valid with regard to labour law. Estonia did not enact its own labour acts at first. In regulating labour relations, the second part of the XI volume of the Russian collection of laws was used, which contained, *inter alia*, the Industrial Work Act that governed primarily the protection of workers employed in factories through public law means.^{*15} The Baltic Private Law Act regulating the working conditions of particular workers was simultaneously in force in Estonia.^{*16} Although the division of law into private law and public law was recognised already at that time, labour law was increasingly treated as public law according to Estonian jurists.^{*17} By the middle of the thirties, one could perceive that labour law had largely become public law. The very agreement between the parties had been rendered relatively inconspicuous; the respective German law rendered labour law state-centred; in Soviet Russia, labour law was commonly public law because legislation provided for all important conditions in employment relationships and the parties did not have a chance to agree upon any other conditions.

The respective Estonian legislation did not regulate all working conditions in detail. In 1936, the Workers' Labour Relations Act was adopted, containing provisions for the conclusion of, amendments to and termination of employment contracts. In addition to that, a number of other acts existed, which provided to the parties to the employment relationship an opportunity to agree upon working conditions.

In 1940, the moulding of Estonian labour law ended and the respective legislation of the Russian Federation was introduced. As a result, development continued with an inclination that labour law was public law by nature, where the state protected the workers' interests, and the parties to employment contracts actually did not need to establish supplementary conditions.

¹¹ J. Baumann. Einführung in die Rechtswissenschaft – Rechtssystem und Rechtstechnik. 8. Aufl., München: C. H. Becksche, 1989, pp. 30–32; R. Narits. Õiguse entsüklopeedia (Encyclopaedia of Law). Avatud Eesti Fond, 1995, p. 25.

¹² T. Mayer-Maly. Einführung in die Rechtswissenschaft. Springer, 1993, pp. 98–99.

¹³ G. Tavits. The Nature and Formation of Labour Law. – Juridica International. Law Review. University of Tartu, II, 1997, pp. 103–110.

¹⁴ This act was not considered sufficiently convincing. See P. Rängel (Note 2), p. 20.

¹⁵ Tööstulise töö seadus (Industrial Work Act). H. Evert; J. Pöllupüü, 1926.

¹⁶ Svod" grazdanskikh uzakonenij gubernij pribaltijskikh" s" prodolzheniem" 1912–1914 i s" razyasneniyami. V 2 tomakh. Sostavitel' V. Bukovskij. Tom II soderzanij Pravo trebovanij. Riga, 1914. It is important to note here that the principle of subsidiariness was recognised according to the Baltic Private Law Code. The general conditions governing employment contracts proceeded from BPLC, but the specific provisions derived from the Industrial Work Act (Note 10), See p. 1819.

¹⁷ A.-T. Kliemann, p. 145.

Here it must be pointed out that in Soviet legal theory a standpoint prevailed that larger individual branches of law exist separately and classification of law into private and public law were not recognised. As a rule, labour law was viewed together with administrative law, not as a part of civil law, which actually constituted general private law. The clearest expression of the public law nature was the fact that although a employment contract may have been concluded with a worker, the recruitment of a worker was formalised on the basis of a letter of appointment. A labour relation was deemed to be established from the moment of formalising the letter of appointment.*¹⁸

In addition to that, the trade unions and negotiations between a trade union and the administration of a company carried a rather formal meaning. The administration is, however, a term mainly used in administrative law.

The existence of disciplinary punishments that the administration of the company might impose on a worker was a characteristic feature of labour relations, which clearly demonstrated the public nature of this branch of law. It was, to a large extent, an administrative procedure, the rules of which were specified rather precisely.

The public nature of labour law in the contemporary system was also caused by a shortage of employers. The state, state-owned enterprises or respective agencies were the only employers. The existence of private employers in this system was impossible. There were collective farms acting as cooperative associations that could also serve as employers, but these were not subject to general labour law regulation. Neither was it clearly determined in labour laws, whether the general principles of civil law extended to labour relations or not. However, particular principles of civil law had to be applied this way or the other, *e.g.* the principles of representation, definition of a legal person, etc. Despite that, labour law was not regarded as a part of civil law, even less as a part of law of obligations.

Another reason for the public nature of labour law at that time was the fact that the parties to an employment contract did not actually have anything to agree upon, as the working conditions had been regulated by laws or secondary legislation, and as a result, it was difficult to agree upon any other supplementary conditions.*¹⁹

The state of affairs changed after Estonia regained its independence. The division of law into public and private law was once again recognised. This gave rise to the necessity to clearly determine the position of labour law within that system. According to the development concept of labour law completed during that period, individual acts governing the respective areas of labour law were to be prepared first and after that stage, a separate independently existing labour code was to be developed.

Since 1992, a continuing process of renewing labour acts and abandoning of concepts characteristic of Soviet labour law has been in progress. All the most essential acts laying down the rights and obligations of the subjects involved in labour relations have been adopted.*²⁰

The employment contract regulation is the most important section of labour law where the private law element is most clearly manifested. Here the parties can in fact agree on such conditions as they themselves see fit. Freedom of contract is one of the most significant characteristics featuring private autonomy of the parties. Just as in case of other contracts, so also in the case of employment contracts there is freedom of choice with whom and under what conditions a contract is concluded. However, it is obvious that absolute freedom of contract does not exist in labour relations. Freedom of contract is represented in labour relations only in a limited form. The provisions established by state are generally necessary for ensuring protection to employees in an employment relationship. This feature is one of the most important features on the basis of which labour law acquires an independent status in the legal system as a whole. These conditions have been established by the state and their violation imposes on the employer liability according to the respective public law provisions. However, the question whether all types of violations of requirements are followed by imposition of public law liability is an entirely different matter. Each type of violation of an employment relationship does not necessarily entail public law liability. Such liability may arise from labour laws.

In case of Estonian labour laws, one may detect a number of provisions characterised by public law nature. The existence of such provisions is caused, above all, by the fact that the economic conditions were

¹⁸ In fact, such provision also exists in the Labour Code of the Russian Federation at the moment. See § 18, Kommentarij k kodeksu zakonov o trude Rossiskoj federatsij po sostoyaniyu na 1 yuliyu 1996 goda, Moskva: Prospekt, 1996.

¹⁹ A similar state of affairs is presently prevalent in public service, particularly in the legal regulation of the service relationships of officials. In public service, the conditions of service of officials have been prescribed by law and they cannot be generally disregarded.

²⁰ I.-M. Orgo. Labour Law Reform in Re-independent Estonia. – Juridica International. Law Review. University of Tartu, I, 1996, pp. 99–108.

continually unstable during the first stage of labour law reforms and the regulation of all important working conditions by laws was unavoidable in order to ensure social protection of employees and this had to be ensured to a significant extent on the basis of public law provisions.

Public and Private Law in Applicable Labour Law

In case of the development of Estonian labour law to date, it must be kept in mind that a uniform labour code has not been compiled yet and various provisions concerning the field of labour relations have been regulated with individual acts.

What provisions in the applicable labour law could be classified as public law or private law provisions? It is impossible to determine it uniformly as there are many such provisions. In this case, a couple of aspects related to the existence of such provisions could be pointed out. According to § 28 (1) of the Republic of Estonia Employment Contracts Act, employers shall conclude an employment contract in a written form. If the employer violates the requirement of a written form of the employment contract, he or she shall be liable under public law provisions. On the basis of § 28 (3) of the Employment Contracts Act, employers shall bear administrative liability, if they fail to formalise the employment contract in writing. The failure to formalise an employment contract in writing shall not entail any consequences with regard to private law. If the employment contract is not formalised in writing, this does not mean that the contract is void. According to § 28 (2) of the Employment Contracts Act, an employment contract shall be considered concluded even when the employee is permitted to commence work. In such case, the employment contract shall be formalised subsequently with the terms that actually applied. If the employer even then fails to formalise the employment contract according to the prescribed procedure, the employer shall be liable for the failure to perform these conditions according to public law provisions.

Upon conclusion of an employment contract, the parties shall take into account that each employment contract contains mandatory conditions provided for by law. In addition to the mandatory conditions prescribed by law, the parties may agree upon any other conditions, provided that these do not aggravate the employee's position in comparison with the provisions provided by law.

The public law characteristics of the provisions of labour law lie in the fact that in many cases, a permission or consent of a labour inspector is required for performing particular acts. Thus, according to § 68 of the Employment Contracts Act, a permission of the labour inspector shall be obtained for establishing part-time working time or sending an employee on a holiday with partial pay. Unless such permission is obtained, the imposition of such conditions on employees shall be illegal.

In individual labour law, the private law principles have been pushed aside to a considerable extent in case of the termination of an employment contract. Termination of an employment contract on the initiative of the employer has always been the most complicated procedure for employees, because in this the employer's opportunity to take unilateral steps as well as the significance of the employer as the economically stronger party is most clearly evident. In order to prevent the arbitrary termination of employment contracts by the employer, the Employment Contracts Act provides for cases, when employment contracts cannot be terminated and also restrictions to be followed in the case of one or another basis for terminating the employment contract.

One of the distinctive features of termination of an employment contract due to the wrongful behaviour of the employer in Estonia is the fact that the employer has to prepare a document for imposing disciplinary punishment. The failure to formalise a document concerning disciplinary punishment or its incorrect formalisation may lead to unlawful termination of an employment contract. Formalisation and imposition of disciplinary punishments in Estonian legal order are characterised to a high degree by public law nature. These provisions are not dispositive. Neither the employee nor the employer can deviate from the provisions provided for by the Employees' Disciplinary Punishments Act, not even for the benefit of the employee. The situation is further complicated by the fact that even if the employee violated the duty of employment, whereas the employer violated the formal requirements for the procedure established for imposing a punishment, the court or labour dispute committee need not discuss the subject matter of the case but examine the compliance with the requirements for formalising a punishment. Unless these requirements are met, the termination of an employment contract may be deemed to be unlawful.

The distinction between private and public law in collective relations plays an important role. Two classes of conditions are distinguished with regard to collective agreement. The first are conditions under law of obligations, the others are normative conditions. The part under law of obligations presumes those provisions that are used for determining the relationships between the parties, how amendments are made

to the conditions of the contract and what the sanctions are, if one of the parties fails to adhere to the conditions of the contract concluded. The normative conditions are concerned with actual working conditions that the parties have agreed upon. The conclusion of a collective agreement is also an act under private law because, in the case of a collective agreement, one party first has to make a proposal for concluding an agreement, and when the other accepts the proposal, negotiations for the conclusion of a collective agreement will commence. A particular feature of a collective agreement is the fact that the agreement establishes legislative or regulatory provisions for third persons. Consequently, a more important status has already in advance been assigned to a collective agreement than to an individual employment contract.

In the case of a collective agreement, the public law nature is manifested in the fact that the parties have recourse to the Public Conciliator, if they fail to reach an agreement concerning the conditions of the collective agreement. Thus, it is in the interests of the state that obligation to refrain from striking is maintained between a body of employees and employers. The conclusion of an individual employment contract, however, does not foresee interference by the Public Conciliator. In case of an individual employment contract, the parties have more freedom and opportunities to conclude a contract. If the parties do not reach an agreement concerning the conditions of the contract, the other party cannot be forced to conclude the contract by means of strikes or other measures.

After Estonia regained its independence, there has been no discussion on what the position of labour law should be in the legal system as a whole, if it indeed should have a position at all. The main assertion has been that labour law belongs to private law and constitutes a separate branch of private law. To date, the contemporary analyses of Estonian labour law have not regarded this as public law. Consequently, there is no doubt that labour law in Estonia falls within the area of private law. The main problem in developing Estonian labour law lies in the question of whether labour law could be regulated with the law of obligations.

Discussion – Is Employment Contract a Contract Under Law of Obligations or Not?

In 1996, the second stage of the labour law reform commenced in Estonia, the main purpose of which was to develop a uniform labour code. In relation to the preparations for the labour code, the question of whether the general principles of labour relations, particularly the regulation concerning the employment contract, should be exercisable within the framework of contract law or the employment contract can be regulated outside the framework of contract law immediately emerged. Such formulation of the proposition for the Estonian labour law was new. Until that time, the view that employment contracts were not governed by civil law and that all the main rules in labour law had to be regulated by labour laws had dominated. People were accustomed to the fact that the regulation of labour relations was independent and that this regulation had nothing in common with the general principles of contract law. Although it was claimed that labour law was private law, the main assertion was that an employment contract was a contract in private law, but taking into account the aspect of social protection present in an employment relationship, it acquired a special position in the contract law system as a whole. Such discussion never led to a clear-cut final solution. Although it is legally and technically possible to govern employment contracts both within the framework of law of obligations and with a separate labour code, the main questions of whether employment contracts were contracts under law of obligations and whether labour law can serve as a special area of law of obligations remains yet unsolved for Estonia.

It has been asserted in particular analyses that labour law is law of obligations and as a result, an employment contract also stands among the contracts subject to law of obligations.⁷ Thus, labour law does not serve as a separate area of law, but it is a branch of private law without having a special status in this system. In the case of this approach one cannot agree to a statement that labour law as a whole serves as a special area of law of obligations. This could be claimed only when we focus on the regulation of the employment contract. In addition to the regulation of employment contracts, there are several other areas that need to be regulated, whereas these areas have to be regulated by using provisions other than the special area of law of obligations. Thus, the provisions concerning the protection of employees are in a large part those that cannot be governed by law of obligations in full, *e.g.* working time and rest period, holiday, etc. So it is obvious that besides

⁷ W. Dütz. *Arbeitsrecht*. 4. Aufl., München: C. H. Beck, 1999, p. 1.

regulating employment contracts under law of obligations, the existence of other provisions – public law provisions above all – regulating the status of an employee in a work relationship as a whole is also unavoidable and necessary.*⁸

A question concerning the amendments to the main principles governing employment contracts as well as employment relationships emerged primarily in relation to the fact that at the time when preparations for the labour code commenced, preparations for drawing up the Law of Obligations Act were launched too. The main argument in regulating the principles of labour relations in one or another code is the desire for an integrated whole. On the one hand, positioning the main principles of labour law in the labour code shall ensure an integrated regulation of labour relations in one particular act. On the other hand, when subjecting the general principles of employment contracts and collective agreements to law of obligations, uniformity would be ensured in the contracts system, according to which all contracts, including employment contracts, would be governed by one act.

It is obvious that the employment contract is one of many contracts, and thus it is entirely justified that the general principles of contract law extend to employment contracts. As a result of historical development, the status of employment contracts with regard to private law is primarily determined by the fact that employment contracts derive from civil laws and are subject to the principles of freedom of contract and other principles arising from contract law. Thus, employment contracts are undeniably characterised by contractual nature. The institute of employment contracts in labour law as a whole plays an extremely important role. It is difficult to imagine a situation where labour relations would apply without the conclusion of an employment contract. A labour law relationship is not created unless an employment contract is concluded, and unless an employment contract is concluded, the guarantees provided for by labour laws will not extend to the person performing the works, without employment contracts we have no employees and neither can workers' organisations be founded.

The separation of the employment contracts regulation from the contractual regulation as a whole leads, due to its nature, to a situation where separate principles have to be developed in labour law for the conclusion of contracts, vitiation of contracts, resolving of issues related to representation and subjects, etc. The development of independent provisions for labour law is not reasonable, if substantial differences from the general contract regulation cannot exist in labour relations regulation. Although the employment contracts regulation falls within contract law, labour law cannot be considered as contract law for that reason only. It is here that the proliferation of public law provisions determining the different status of labour law in private law performs an essential role.

When speaking about the position of labour law in the public law system as a whole, one has to examine the position of other institutes of labour law. At this point, we can discuss the legal regulation of working time and rest period, holidays, collective agreement, settlement of collective labour disputes and salary. With regard to these institutes of labour law, one must also take into account that it is impossible to determine uniformly which of them are public law and which private law. In all these areas, provisions exist enforced by the state in order to ensure stability in labour relations. Thus, a number of rules inevitably relate to public law, *e.g.* national standard working time is eight hours per day, forty hours per week, the minimum length of holiday is 28 calendar days; if a person works full time, remuneration of the employee at least within the limits of minimum wage established by the state shall be guaranteed. The parties cannot disregard these provisions but are compelled to follow them.

At the same time, one must concede that not all provisions in labour law are imperative by nature. The parties to an employment relationship may deviate from the provisions for which the state has not provided a uniform regulation and here the parties to the labour relationship have an opportunity to exercise freedom of contract secured to them. Consequently, in the above-mentioned areas of labour relationships, the party in private law is represented and the parties to the labour relationship have an opportunity to establish by mutual agreement such working conditions as they consider necessary. At the same time, a more significant proportion of conditions are certainly established by collective agreement than by individual employment contract. A collective agreement allows establishment of working conditions for a larger number of employees and thus, the potential for agreement is more extensive and wider than it is in the case of an individual employment contract.

⁸ According to the view of the German jurist D. Reuter, an employment relationship is a relationship under law of obligations in such cases where the objective of the performance of the contract is not working in a group of employees. See D. Reuter. *Die Stellung des Arbeitsrechts in der Privatrechtsordnung*. Joachim Jungius-Gesellschaft der Wissenschaften, Hamburg, 1989, pp. 30–31.

Subsections 6 (1) and (2) of the Collective Agreements Act⁹ set out a number of issues on which the parties may agree, but they may, in fact, agree on any issue if this can be done under law. Thus, the principle of freedom of contract applies to a collective agreement and proceeding from that, assignment within private law has been determined.

At present, Estonian labour law includes very many public law provisions. Nearly all essential conditions have been provided by law and if the parties lack excellent negotiation skills or cannot use them, it is also possible for the parties to conclude an employment contract by agreeing only on the work function. All the other working conditions emerge from the factual compliance with the employment contract as well as from law. In the light of such state of affairs it is understandable that the trade unions assert their unwillingness to support the regulation of labour relationships by means of law of obligations as this is accompanied by excessive liberalisation of labour relationships and deterioration of the condition of employees.

In order to determine the position of labour law in Estonian legal order the Constitution of the Republic of Estonia should also be analysed. The Constitution of Estonia does not enumerate precisely the existing branches of law but provides a set of principles without which one or another area of law cannot be constructed. The Constitution of Estonia does not contain a direct reference to whether labour law as a separate branch of law has to be developed, whether it exists and whether it can be constructed as a separate branch of law at all. When identifying the principles of labour law, an important position is taken by § 29 of the Constitution, on the basis of which the essential principles for the development of labour relationships are provided.

According to the Constitution, freedom to freely choose a place of work, sphere of activity and profession is secured to everyone. The conditions for exercising this freedom are prescribed by law. Consequently, also restrictions may be imposed on this freedom by law. Another important principle arising from the Constitution is the principle that working conditions are subject to state supervision. This principle gives rise to several questions for which the Constitution provides no answer. Does the above-mentioned provision mean that the state regulates all conditions necessary for employment relationships by establishing a new branch of law therefore in the form of labour law, or this is only a limited provision providing for the state an obligation to impose sanctions and public law restrictions with regard to using the working capacity of another person?

We are of the opinion that the above-mentioned provision of the Constitution must be interpreted on a wider scale. The state supervision over working conditions does not only mean that the state acquires an opportunity to impose sanctions and restrictions but it also means that the state must enforce a framework of rules for establishing working conditions. By means of these rules, the state regulates the behaviour of the parties who have entered an employment relationship. According to § 29 (1) of the Constitution, these conditions may only be established and applied by law. The requirement that working conditions be under the state supervision does not concern only those working conditions established by law, but the working conditions on which the parties, using their freedom of contract, have agreed are also subject to supervision. The state supervision is not exercised solely through appropriate actions of the legislative and executive power; it is exercised also through the respective activities of judicial power. In the course of a particular action, the court examines whether the conditions arising from law, employment contract or collective agreement have been complied with. In case of failure to comply with these conditions, an opportunity has been provided both to the court and labour inspectors to punish the person who failed to comply with the requirements.¹⁰ In such a case, the party on whom the punishment is imposed need not be the employer; it may also be the employee. The Code of Administrative Offences also proceeds from the grounds that the guilty party need not always be the employer.¹¹

Consequently, § 29 of the Constitution contains a requirement that the state must provide the necessary framework for establishing working conditions and at the same time, it must exercise supervision over the compliance with working conditions. In case of this provision, one cannot proceed in a limited manner only from occupational health and safety conditions, as the term “working conditions” covers all conditions necessary for working. Thus, the Constitution of Estonia contains an indirect obligation for the state to establish labour law.

⁹ Kollektiivlepingu seadus (Collective Agreements Act) – Riigi Teataja (the State Gazette) I 1993, 20, 353; 2000, 57, 372.

¹⁰ Töölepingu seadus (Employment Contracts Act) § 38 – Riigi Teataja (the State Gazette) 1992, 15, 241; I 2000, 51, 327; Haldusõiguserikkumiste seadustik (Code of Administrative Offences) § 36 – Riigi Teataja (the State Gazette) 1992, 29, 296; I 2000, 55, 361.

¹¹ Haldusõiguserikkumiste seadustik (Code of Administrative Offences) § 36¹.

Section 29 of the Constitution also secures free membership of employees and employers in associations and unions. The associations and unions of employees and employers may uphold their rights and lawful interests by means which are not prohibited by law. The conditions and procedure for the exercise of the right to strike are provided by law. The procedure for the settlement of labour disputes shall be provided by law.

Proceeding from the above-mentioned principles, the Constitution also defines the bases for developing collective labour relationships as well as for ensuring the settlement of labour disputes.

In relation with the intention to adopt the Law of Obligations Act in Estonia, a discussion has commenced about what the actual nature of the Estonian private law system should actually be and what should the position of employment contracts and labour law as a whole be in this system. The proposition derives from the question whether Estonia should proceed from a classical pandect system or the changes already occurred in the legal system should be taken into account. The classical pandect system involves five areas of law:

- 1) general principles of private law;
- 2) law of obligations;
- 3) law of property;
- 4) family law, and
- 5) law of succession.

Such a classical pandect system has been later accompanied by branches of law that can no longer be placed within the framework of the pandect system, but are still adjacent to the pandect system. The first more extensive branch emerging next to the pandect classification is commercial law. In Estonia, the complex of provisions typical of this legal system are included in the Commercial Code. It has been argued that recognition of commercial law as an independent branch of law outside law of obligations marked abandonment of the private law system consisting of five units.^{*12} Labour law, including conditions of employment contracts and laws governing the procedure for the conclusion thereof, has been pointed out as another essential branch. Although the general bases for concluding employment contracts derive from civil codes, they have gradually withdrawn from the general private law in the course of time. In addition to them, there are several other classifications of law, which cannot be included in the five-unit pandect system. The new branches of private law are referred to as the special areas of private law.^{*13} Such a change has been considered to be an important structural transformation in the European private law – several new branches have been added to the former five branches of law.

From the perspective of the legal system in Estonia, the debate concerns making of distinction between law of obligations and contract law. There is a contract of obligations which serves as one of the subcategories of contracts. The notion of the contract, however, does not fit in the contract of obligations because the notion of the contract is wider. This assertion aims, *inter alia*, at pointing out that employment contracts and *e.g.* leases are not contracts of obligation. It has been claimed that presently a massive number of various private law contracts exist, upon the conclusion of which the category of obligations does not have any significant importance. As such an approach has been followed further, the understanding of the nature of employment contract has altered. If contracts of obligations and employment contracts are subcategories of contract law, it means, among other things, that a part of employment contract is governed by contract law, whereas the other part of the contract by labour law. There is, however, no relation to law of obligation. The binding effect of law of obligations is different in the case of private law. Law of obligations does not comprise other special branches of private law. It falls partly under contract law. Proceeding from this, it has been concluded that the worst option for Estonia would be the attempt to restore a pandect system covering the entire regulation of contracts in private law or even all the branches of material private law – that is, labour law, lease law, etc.^{*14} The use of law of obligations should be discontinued and the general approach to contract law should be introduced.^{*15} Finding a resolution to the relationship of contract law and the acts regulating material private law is considered a question of principles. What provisions governing employment contracts should be included in contract law, what in the acts under contract law? Is it possible to assemble all provisions governing employment contracts in labour laws, on condition that one proceeds from the general provisions of contract law provided in the general principles section of

¹² U. Mereste. Missugune peaks olema Eesti eraõiguse süsteem (What should be the Estonian Private Law System Be Like)? – Riigikogu toimetised, 2000, No. 1, pp. 1–21.

¹³ T. Mayer-Maly (Note 7), pp. 98–99.

¹⁴ U. Mereste, pp. 16–17.

¹⁵ *Ibid.*, p. 17.

contract law in the case of labour laws.^{*16} The abandoning of implementation of pandect law of obligations would put an end to the necessity to answer such troublesome questions as “In what aspect is employment contract a contract under law of obligations?”, “Who is the debtor, who is the creditor in employment contracts?” etc., to which it is impossible to provide absolutely reasonable and unambiguous answers that are in conformity with the legal conscience of people.^{*17}

This treatment involves some more disputable standpoints to which one cannot agree without reservations. The assertion that new branches have emerged beside private law, which cannot be located within the former private law system can be regarded as correct. The number of such branches may increase in the future, but this does not render the connection with the general private law nonexistent and provides no grounds for claiming that they should be separated from private law. It is disputable whether employment contracts are contracts under law of obligations or not and there will most probably be upholders for both views. The discussion about what contracts under law of obligations are does not possess any significant meaning because the question is rather how people have used to refer to such thing in a national legal order. The question is, in fact, whether the renaming of law of obligations as contract law or vice versa involves any changes with regard to the contents of the provisions that are to be used when regulating contracts.^{*18}

What are the actual consequences inflicted upon labour law in this discussion? Irrespective of the name that will denote the law regulating contracts, the outcome for labour law will be the same – it will remain a branch of private law and employment contracts will be a part of contracts and as such, they can be regarded as contracts under law of obligation. Nobody will obviously argue against the fact that the provisions contained in the general private law have to be taken into account in employment contracts in one way or another. The establishment of the pandect system will not impair the position of labour law in the private law system as a whole, and neither will it cause confusion in developing labour relations. In the case of employment relationships and employment contracts, above all, it is not essential to provide reasons for the validity of the principles of civil law, but it must be proven that these principles are not valid with regard to employment contracts. Consequently, the fact whether the law regulating contracts is referred to as contract law or law of obligations does not affect the position of employment contracts and labour law in the legal system as a whole.

Future of Estonian Labour Law

It is necessary to change and update the Estonian labour law and labour law acts. As in Estonia the majority of the acts regulating labour relations have been adopted in 1992–1994, they are obsolete to date and need significant improvement. On the one hand, this is caused by changes in economy and the development of the legal system. On the other hand, the integration of Estonia into the European Union is also important.

The general trends of development in labour law cannot be left aside concerning the development of the Estonian labour law either. Although labour law is a part of private law and labour relationships are based on contracts, the development of labour law on the level of an individual entails more and more provisions of mandatory nature from which the parties cannot digress. The increase in the importance of such provisions can also be felt on the supranational level.^{*19}

The last decades have also seen the increase in the significance of the issue of the equal treatment of men and women imposing restrictions on employers upon conclusion of employment contracts. Nevertheless, one may perceive that more emphasis is laid on the collective level. An important part is played here by the relevant provisions of the European Union representing actually collective agreements to which an overall mandatory status has been assigned by the directive.^{*20} Thus, the opportunity to regulate contracts decreases on the individual level and increases on the collective level. The increase in the impact of the

¹⁶ *Ibid.*

¹⁷ U. Mereste, pp. 17–18.

¹⁸ There may be several names, e.g. there is *Schuldrecht* in Germany, but Switzerland and the former Soviet Union have, e.g. *Obligationenrecht* and *obyazatel'stvennoye pravo*.

¹⁹ See e.g. the European Union directives on collective redundancies No. 98/59/EC; on protection of employees in the event of the insolvency of their employer No. 80/987, amended by directive 87/164/EEC; on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses No. 77/187/EEC, amended by directive No. 98/50 EC.

²⁰ See e.g. directive No. 97/81/EC on part-time work.

contractual regulation on the collective level also means that the regulation by the state has to decrease, whereas the volition of the parties and freedom of contract on the collective level gain momentum.

In Estonia, it is also essential to take into account the increase in the significance of collective agreements and collective negotiations. To the greater extent the labour relations are regulated on the collective level, the less significant is the necessity for regulating labour relations on the individual level. That, in its turn, decreases the opportunity to negotiate on the individual level – after the working conditions have been regulated on the collective level, there is no need for supplementary regulation on the individual level. Insofar as a considerable level of regulation has been achieved on the collective level, it is important that the regulation on the level of acts provide sufficient guarantees to employees, be those provisions in public or private law.

Irrespective of the relationship between public and private law in the future, labour law will continue to be a special area of private law. Employment contracts undoubtedly serve as the basis for the establishment of labour relationships. The fact whether the contract is concluded in a written form or not is not crucial. Even if the contract is not concluded in writing, the contract shall be deemed to be concluded, if the employer is permitted to commence work. Freedom of contract, consideration of the persons' volition upon the establishment and development of employment relationships will be essential.

The private law approach will continue to exist in other areas of labour law, such as working time, holiday, wages, occupational health and safety, etc. These areas express most clearly employers' obligation to attend to the health and welfare of employees. The latter duty directly arises from the employment contract regulation.*²¹

Regulation of employment contract and labour relations under law of obligations or outside it is not a legal and political decision. Rather, it is a question of legislative technique. However, the question whether employment contracts should be bound to the principles of contracts under law of obligations or whether employment contracts and the regulation of labour relations should be excluded therefrom is a legal and political issue.

When providing an answer to this question, it has to be taken into account that the European Union experts have provided for the separation of labour law and the inclusion of labour relationships and protection in labour relations against the risks under civil law as one way to develop labour law.*²² One reason for such approach has been the fact that until this moment, labour law has been largely shaped by production methods characteristic of the Ford period. In the current economic condition, these production methods are no longer effectual. Labour relationships have become more unstable, the number of employees holding part-time positions has increased, the proportion of women in the workforce as a whole has experienced an increase.

Proceeding from the above-mentioned, it is evident that Estonia also has to take into account that consideration of the principles of contract law when regulating labour relationships is unavoidable. The transformation of the current system must give rise to flexibility in labour relations, but it must, by no means, cause the deterioration of the protection of employees.

²¹ See Töölepingu seadus (Employment Contracts Act) § 49 (4) according to which employers are required to secure working conditions to employees. See also F. Bydlinsky. *System und Prinzipien des Privatrechts*. Springer, 1996, pp. 539–540.

²² Transformation of Labour and Future of Labour Law in Europe. Final report, European Commission, June 1999, p. 90.

About the Regulation of Termination of Employment Contracts in Draft Employment Contracts Act

Introduction

The need for reorganisation of the Estonian legal system and preparation of the draft Law of Obligations Act has given rise to heated discussions in the Estonian society. It is not clear as to whether the regulation of employment contracts should be included in the Law of Obligations Act, or whether the relationships created on the basis of employment contracts should be regulated separately.^{*1} During the three previous years, several draft acts for regulating employment relationships have been prepared on the initiative of the Ministry of Social Affairs and Ministry of Justice, whereas some of them presume that employment contracts will be regulated by the Law of Obligations Act; however, in one instance, adoption of a separate Employment Contracts Act serves as a prerequisite. The adoption of an independent employment contracts act does not mean that the regulation of employment contracts should not be related to the general principles of the law of obligations. These principles can and, in the case of particular issues, have to be taken into account even if the relevant regulation is not included in the Law of Obligations Act. The main problem in preparing drafts has not been the association with law of obligations but, rather, the extent of the regulation, its clarity, and the proportion of restrictions in public law. As the author of this article has enjoyed the opportunity to participate in preparation of several draft acts, as well as the discussion of relevant problems, the author has experienced that the representatives of trade unions require detailed and thorough formalisation of employment contract relationships on the level of legislation. Therefore, the main reason is the very limited proportion of employees who are parties to collective agreements. Nonetheless, the representatives of employers are of the opinion that the new regulation of employment contracts should abolish several guarantees provided for employees by law, and leave more space for agreement between the parties. During the discussion of draft acts, people have suggested that the currently applicable and relatively detailed labour laws inhibit the conclusion of collective agreements, as there is no need for employees to fight for the conclusion of collective agreements. Without denying the necessity to increase the importance of collective agreements for determining the working conditions, the impact of which on employment relationships is constantly increasing in developed countries^{*2}, we can not, however, create presently a

¹ See *The Position of Labour Law in the Private Law System: the Past, Present and Future of Estonian Labour Law* by G. Tavits in this issue.

² *The Employment Contract in Transform Ring Labour Relations*. Edited by L. Betten. Hague, London, Boston, 1995, p. 42.

situation where the laws do not establish guarantees necessary for employees, where there are no collective agreements either. The guarantees established for Estonian employees by legislation allow for a wider application – they even set conditions for the conclusion of collective agreements and establishment of supplementary benefits – because when compared to the guarantees provided for in many other states, our employees are protected to a considerably lesser extent. Thus, for example, in several EU member states, employees receive much higher benefits upon redundancy than in Estonia.^{*7} The importance of collective agreements has to increase, above all, with regard to determining the wage conditions. The modest proportion of collective agreements has not been caused by the higher level of protection provided to employees but, rather, by the lower level of organisation among employees and, frequently, also by the fact that employers lack potential for the establishment of additional benefits.

As mentioned above, attempts have been made to regulate employment contracts in several manners. By the time the article is printed, the working group formed by the Ministry of Social Affairs and headed by the Minister will have completed the preparation of another draft Employment Contracts Act, to which amendments and adjustments will probably be made in the course of reading; however, the conditions should remain the same with regard to the most important issues concerning termination of employment contracts.

The purpose of this article is to discuss the procedure for termination of employment contracts according to the new draft act. Problems are not likely to arise associated with the termination of employment contracts by agreement between the parties, upon expiration of the term, and as a result of the deaths of either the employee or employer, which has been regulated in a similar manner in most states; therefore, the following discussion will focus on the termination of employment contracts in regular and extraordinary cases, and on the consequences of illegal termination of employment contracts.

1. Regular Termination of Employment Contracts

1.1. Terms for Giving Notification of Regular Termination

The principle of equality of the parties to an employment contract presumes that an employee and employer are in an equal position upon termination of an employment contract. A reasonable period of time shall be ensured to an employee for finding a new job; however, an employer also needs sufficient amount of time for finding a new employee. In many states, the same terms have been established both for employees and employers for regular termination of employment contracts, *i.e.* in Germany a common term for both parties for giving notification of regular termination of an employment contract is four weeks. If an employee has worked in a company for two or more years, the term for giving notification of termination shall be extended for both parties, which, depending on the time employed by the same employer, can total up to seven months.^{*8} The terms may be amended by a collective agreement and by agreement of the parties, but no longer term of giving notification of termination may be applied to an employee, than as to an employer.^{*9} When agreeing upon the terms for giving notification of regular termination of an employment contract in Estonia, the determination was made to establish the same terms for both parties. One draft of the act provided the terms for giving notification of termination depending on the length of employment in one company from one to four months, whereas starting from the tenth year of employment, both an employee and employer would be responsible for giving notification of termination of an employment contract at four months in advance.

This draft act would have introduced critical changes to the current condition of employee's. Section 79 of the applicable Employment Contracts Act^{*10} (hereinafter: ECA) provides to an employee an opportunity to terminate an employment contract by giving the employer only one month's advance notice of termination thereof. Thus, the persons working for the benefit of an employer over a longer period of time would have been in a less advantageous position. In case of such a regulation, changing of jobs would have become very problematic for an employee whose length of employment was longer. There are few

⁷ Employment Observatory. *Tableau de bord 1996*. Brussels, Luxembourg, 1996, pp. 38–39.

⁸ W. Däubler. *Das Arbeitsrecht: Leitfaden für Arbeitnehmer 2*. Hamburg: Rororo Aktuell, 1990, p. 508.

⁹ M. Weiss. *Labour Law and Industrial Relations in Germany*. Deventer, Boston: Kluwer Law and Taxation Publishers, 1995, pp. 89–90.

¹⁰ Töölepinguseadus (Employment Contracts Act) – Riigi Teataja (the State Gazette) 1992, 15/16, 241; I 200, 25, 144.

employers who are ready to wait four months until an employee is released from the previous job, particularly in the case of a shortage of work. If we examine the procedures applicable in other states, it is evident that in many of them, shorter terms for giving notice of regular termination of an employment contract have been assigned to employees, if compared to employers^{*11}, whereas the differentiation has been usually made proceeding from the length of employment.

Long terms of giving notice of termination have been eliminated in the last version of the draft act. An employee may give notice of the termination of an employment contract, concluded for an unspecified term, by notifying the employer thereof in writing. The terms for giving notice of the termination of an employment contract shall depend on the continuous length of employment of an employee with that employer:

- less than one year – at least 14 calendar days;
- 1–5 years – at least 21 calendar days;
- 5–10 years – at least one month;
- over 10 years – at least two months.

In many states, employers are obliged to follow the long terms of giving notice of termination imposed on them, even if the reason for termination is the behaviour of an employee (offence) or the employees unsuitability for a position, because the term for giving notice does not depend on the cause of termination. Long terms for giving notice of termination by all means protects the employee's interests^{*12}, but a question arises whether more emphasis should not be laid on employers' interests. It can be argued that there is little benefit for the employer in keeping an employee on the job who is violating the duties of employment, in an employment relationship for five or six months, while knowing that the employment contract of the employee would terminate upon expiry of that term? It would be difficult to expect that in such a case any employment duties would be performed in an efficient manner. The same problem arises in case of unsuitability of an employee for the job or position to be filled.

In the draft ECA, the terms for giving notice of termination of an employment contract provided to employees have been differentiated according to the causes of termination. If an employment contract is terminated due to the redundancy of an employee, the term for giving notice will depend on the continuous length of employment of the employee with that employer. An employee working under one year shall be given notice of termination of the employment contract at least one month in advance, an employee working for 1–5 years at least two months, an employee working 5–10 years at least three months and an employee working over 10 years at least four months. If the reason for termination of an employment contract is unsuitability of an employee for the duties or position of the employee or an offence by the employee, the employer need not give notice to the employee longer than one month in advance. If the unsuitability of an employee becomes evident during the probationary period agreed on by the parties, the employer would be obliged to give notice to the employee of termination of the employee's employment contract at least five calendar days in advance.

According to the draft act, an employee shall be obliged to describe the causes for termination of the employee's employment contract in the notice concerning the termination and indicate the date for terminating the employment contract. Unlike the practice of several other states, where an employment contract is terminated by the 15th date or end of a month^{*13}, an employment contract may be terminated by any date according to the Estonian draft act. An employment contract shall not terminate by giving notice thereof if an employee and employer agree upon continuation of the employment relationship in writing after giving notice of termination of the employment contract. If the work terminates before the expiration of a term prescribed for giving notice of regular termination of an employment contract, the employer shall be obliged to pay to an employee compensation in the amount of the employee's average daily wages for each working day short of termination of the employment contract. Estonia has not opted for the way of establishing long terms of giving notice as in several European Union states, where the term for giving notice of termination may extend even 6–7 months or more.^{*14} Changes in the economy will not allow for the establishment of a long term for giving notice.

¹¹ R. Blanpain. *Labour Law in Belgium*. The Hague, London, Boston: Kluwer Law International, 1996, pp. 150–151; O. Hasselbalch, P. Jakobsen. *Labour Law and Industrial Relations in Denmark*. The Hague, London, Boston: Kluwer Law International, 1999, pp. 139–141; A. J. Suviranta. *Labour Law in Finland*. The Hague, London, Boston: Kluwer Law International, 2000, p. 74.

¹² A. Adlercrutz. *Sweden*. *Encyclopedia for Labour Law and Industrial Relations*. The Netherlands: Kluwer Law International, 1998, p. 102.

¹³ W. Däubler, p. 508.

¹⁴ Employment Observatori. *Tableau de bord*. Employment & social affairs. Brussels, Luxembourg, 1996, pp. 38–39.

1.2. Compensation Paid Upon Termination of Employment Contracts

According to the draft act, the amount of compensation shall depend on the causes for terminating the employment contract. If an employment contract is terminated due to termination of a legal person, termination of the work of an employer who is a natural person, redundancy of employees, or due to the age of an employee, an employer shall pay to a person working less than one year the employee's average monthly wages for a period one month, to a person working 1–5 years average monthly wages for a period of two months, an employee working 5–10 years shall get three average months wages, whereas four average months wages are paid to an employee who has worked over ten years. In case of unsuitability for duties or position, the amount of the compensation shall be a month's average wages. If an employment contract is terminated due to an employee's offence or unsuitability that became evident during the probationary period, no compensation shall be paid to the employee. According to the draft act, compensation shall be modest, as the majority of employers could not endure the imposition of larger amounts.

1.3. Bases for Regular Termination of Employment Contracts Concluded for Unspecified Term by Employer

The draft act sets out that an employer shall have the right to terminate an employment contract on a regular basis upon termination of a legal person, termination of the work of an employer who is a natural person, redundancy of employees, in case of unsuitability of an employee for the duties or position of the employee, due to an employee's offence, and an employee's age.

The regulation concerning the redundancy of employees always demands specific attention, as this is the main cause for terminating employment contracts. It is essential to determine the particular selection criteria, from which an employer is obliged to proceed when giving notice of termination of an employment contract. In various states the most frequent criteria taken into account upon selecting employees to be made redundant are the length of employment, appropriate qualifications, efficiency, and the employees' age. These criteria are often combined with other indicators, such as the number of dependants an employee has, performance of the representative functions of an employee, existence of a disability, etc.*¹⁵

According to the draft act, redundancy may be caused by a decrease in work volume or reorganisation of work. An employer shall be obliged to offer to an employee, if possible, another position in the same company the work of which the employee is capable of performing, taking into account the employee's professional training, abilities, skills and health. A representative of employees and chairman of the board of the trade union shall have a preferential right to remain at work. When making a selection among the remaining employees, the employer shall provide an opportunity to continue work to those who have better performance results and who have performed their duties in a more efficient manner. Thus, the principal criteria upon giving preference shall be qualifications and skills. In order to make a selection an employer shall be obliged to compare employees within the limits of the same profession or area of specialisation or posts in the company where they work. If an employer so wishes, the employer may compare the employees of different enterprises belonging to the employer; however, this is not mandatory. In the case of equal performance results, preference shall be given to employees who have contracted an occupational disease or received a work injury by the fault of the employer, in whose family there are no other members receiving regular income, who have worked for the employer longer, who have less than five years left until retirement age, and who are developing their professional skills and expertise in an educational institution which provides special education. As such, all the previously listed criteria shall be equal. In case of equal performance results, an employer shall hear the opinion of a representative of employees on who should be given preference according to the secondary criteria and not to terminate the employment contract. For example, in Sweden, should the necessity to make employees redundant arise, one takes into account, above all, how long an employee has worked with this employer according to the principle "last in, first out," and if several equal employees fall within that indicator, preference is given to senior employees. In comparison with such regulation, one may say that the redundancy rules in the Estonian draft ECA proceed principally

¹⁵ R. Blanpain, C. Engels. *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*. VIth and revised edition. The Hague, London, Boston: Kluwer Law International, 1998, p. 285.

from the interests of an employer. In Sweden, the priority rules do not take into account employees' abilities and utility for the company.^{*16} As well, in Germany the social aspect is highly important in case of a redundancy caused by economic grounds. With regard to retaining of employment, preference shall be given to socially weaker employees who would suffer more as a result of redundancy.^{*17} When making people redundant in Estonia, it is not possible to take into account the social aspect, the age of an employee and length of employment, but rather the necessity to ensure to employers a supply of the most capable and efficient employees. Prevalence of the social aspect would weaken employers to a significant extent because there are quite a few economically less well-founded companies that are employers. The social aspect becomes relevant only in the case of equal work performance.

The draft act presents a detailed regulation of giving a collective notification of termination of an employment contract, notification of the representatives of employees thereof, the conducting of consultations and, as well, the notification of the Labour Inspectorate thereof and its rights in this procedure. In case of giving a collective notification of termination, an employee shall also be obliged to notify the employment office thereof. The relevant European Union directives have been observed when entering these provisions in the draft act. The draft act also provides sanctions for cases when an employer ignores the obligation to notify the representatives of employees or refuses to conduct consultations according to the prescribed procedure. In such cases, the employer shall pay to each employee one more average monthly wages in addition to ordinary compensation.

Proceeding from the draft act, an employer shall be obliged to re-employ a redundant employee, registered with the local employment office as a person seeking work, if the employee so wishes, and conclude a new employment contract, if new positions are created or vacated within six months of the termination of the employment contract, so long as the position is suitable to the employee's professional training and qualifications and state of health. In the Nordic countries, employers are subject to the obligation to re-employ redundant employees for even longer than six months after redundancy.^{*18} Unfortunately, the draft act fails to provide an answer to the question of what the consequences of violating this provision will be. It would be reasonable to provide for the payment of compensation to an employee in Estonia, as in Finland.^{*19}

The draft act provides a rather detailed regulation of the giving of notice of regular termination of an employment contract due to unsuitability of an employee. Unsuitability must be expressed, above all, by inadequate professional skills. However, on the same basis, a notice of termination of an employment contract may be given to an employee whose proficiency in official or foreign language does not conform to an agreed level and hinders the performance of employment duties. An employee's inadequate communication skills shall be considered equivalent to the lack of professional skills if the job presumes continual communication with subordinates, clients, consumers or business partners, as well as teaching. If an employee needs to acquire additional knowledge or skills, the employer shall provide to the employee reasonable time for the acquisition thereof. A permanent health disorder, hindering the performance of duties, may also serve as a cause for unsuitability. Upon giving notice of termination of a contract, an employer shall notify an employee in writing, in what the employee's unsuitability for work manifests itself.

In Estonian court practice, the issue of attestation of unsuitability has proved to be problematic. Thus, the Supreme Court has adopted a position that an employer is to determine what facts indicate whether the abilities, knowledge and skills of an employee conform to the work to be performed. In case of a dispute, the employer shall attest only these circumstances due to which the employee is unsuitable for the work to be performed.^{*20}

Giving notice of termination of an employment contract due to offence has also been regulated in detail. An employment contract may be terminated due to offence if an employee has breached the duties of the employee, an employer has lost trust in an employee or when an employee has behaved in an indecent manner. Termination of an employment contract due to offence shall be justified according to the draft act, if it is in conformity with the gravity of an offence.

¹⁶ T. Peijpe. Employment Protection under Strain (Sweden, Denmark, the Netherlands). *Bulletin of Comparative Labour Relations* 33 – 1998. Boston: Kluwer International, 1998, p. 84.

¹⁷ M. Weiss, p. 93.

¹⁸ N. Bruun, B. Flodgren, M. Halvorson, H. Hyda. *The Nordic Labour Relations Model*. Dartmouth, 1992, lk 103; A. J. Suviranta, p. 108.

¹⁹ A. J. Suviranta, p. 108.

²⁰ I.-M. Orgo. *Töövaidluste lahendamine (Settlement of Labour Disputes)*. Juura, Õigusteabe AS. Tallinn, p. 32.

An employment contract may be terminated due to loss of trust. If an employee has, by breach of the duties of the employee, caused a deficit in the property of the employer, endangered the preservation of the property of the employer, or caused distrust of the employer by consumers, clients or business partners, which may be unfavourable to the economic situation of the employer, may result in the termination of an employment contract. An employment contract of a person engaged in maintaining, marketing or issue of property may be terminated due to loss of trust in the employee even if the employee committed a criminal offence against property outside the performance of the employee's duties. Termination of an employment contract may also be caused by deception of an employer.

Indecent behaviour shall serve as a cause for terminating an employment contract only in case of employees whose duty is to teach or educate youth or organise the work of their subordinates. This behaviour that is contrary to the generally recognised moral standards or which discredit an employee or employer shall be indecent. Indecent behaviour also constitutes the basis for termination of an employment contract if it is committed outside of the performance of duties.

Termination of an employment contract due to the breach of duties by an employee presumes a prior written warning to the employee of an earlier breach. A warning shall be effective for a year, starting from the moment it was given. In case of loss of trust and committing of an indecent act, prior warning is not required; however, the gravity of the offence shall certainly be taken into account.

An employer shall be obliged to issue to an employee, upon termination of an employment contract, a written note concerning the description of the circumstances of the offence(s) committed by the employee, indicating the time when the offence(s) was (were) committed. Regular termination of an employment contract due to an offence is not permitted, if more than one year has passed since the offence was committed, unless in case of an offence proved by the findings of an inventory, review, audit, etc., if more than two years have passed. An employer shall give notice of the termination of an employment contract and terminate thereof within two months of becoming aware of reasons for dismissal.

The age may serve as a cause for terminating an employment contract starting from the moment when an employee attains 65 years of age. The draft act does not prescribe any other circumstances in the case of this cause.

The causes for terminating employment contracts are not usually regulated so precisely as it has been done in the draft act under inspection. An employer shall have a weighty reason for terminating an employment contract.^{*21} The Swedish Employment Protection Act^{*22} sets out that an employer may dismiss an employee due to objective circumstances without specifying the circumstances. Termination of an employment contract by an employer is generally justified either due to economic reasons, or reasons arising from the personality and behaviour of an employee.^{*23} It is for court practice to determine when termination of an employment contract by an employer is justified. This general regulation undoubtedly has its positive aspects. In case of disputes, courts are more free to decide whether the termination of an employment contract was justified or not, whether there was a weighty and sufficient reason therefor. In the course of preparing the draft act, tendency towards a more general regulation of terminating employment contracts was considered. It was strongly opposed by the leaders of trade unions, according to whom employees and employers had to be competent to decide without mediation of the court when and according to what procedure an employment contract might be terminated and what consequences this would entail. The main cause therefor lies in the fact that the parties to an employment relationship are accustomed to a detailed regulation and its abolition by a new act would give rise to very serious conflicts and particular confusion also in court practice. Equally, many employers are not interested in a general regulation either.

2. Extraordinary Termination of Employment Contract

An employee shall have the right to terminate an employment contract concluded for both an unspecified and specified term due to a good reason, if continuation of work with the same employer can not be assumed.

²¹ A. J. Suviranta, p. 107.

²² Employment Protection Act (SFS 1982:80).

²³ M. Weiss, p. 92; A. Bernstein. Labour Law in Switzerland. Kluwer Law and Taxation Publishers, 1994, pp. 119–123.

The draft act also lists the principal cases of extraordinary termination. The latter can not be presumed in case of a permanent deterioration of an employee's capacity for work, need to care for a family member who is ill or disabled, if continuation of work is related to an actual danger to the life and health of the employee, if the employee violates the terms of the employment contract and it ends in a significant deterioration of the working conditions of the employee. Also, rude handling of an employee may serve as a cause for the extraordinary termination of an employment contract, as well as the fact that the employee forces the employee to commit acts that are contrary to law or generally accepted practices. An employee shall be obliged to notify the employer of the cause for terminating an employment contract in writing. If the termination of an employment contract is caused by the indecent behaviour of an employer, the latter shall pay to the employee compensation in the amount of two average wages of the employee.

An employer, in turn, may extraordinarily terminate an employment contract without giving notice thereof, but notifying the employee of the cause for the termination in writing. Such extraordinary termination is permitted upon declaration of bankruptcy of an employer, in case of the long-term incapacity for work of an employee, committing of an offence, and emergence of circumstances hindering continuation of work. A trustee in bankruptcy shall have the right to extraordinarily terminate the employment contract of an employee, if continuation of the employment contract would violate the creditors' interests. In such cases, compensation shall be paid to an employee in the same amount as upon the redundancy of an employee.

A long-term incapacity for work shall serve as a cause for an extraordinary termination of an employment contract, if an employee who has worked with that employer less than for one year is absent from work due to incapacity for work for over 60 days. An employment contract may be terminated with an employee who has worked for more than one year, if the employee has been absent due to incapacity for work for 120 successive days or for the total of 150 calendar days per year. A position shall be retained for 240 calendar days for employees who have contracted tuberculosis. An employer shall maintain the job of an employee who is temporarily incapacitated for work due to a work injury or occupational disease until the employee's recovery or determination of the employee's disability, if the work injury or occupational disease has occurred by fault of the employer.

Although absence from work due to incapacity for work is not usually accompanied by permanent deterioration of capacity for work, which would hinder performance of duties after the recovery, the Estonian legislation, unlike the Finnish²⁴, permits to terminate an employment contract also according to the applicable procedure, and the possibility has been also included in the new draft act with some reservations.

Provision of such a possibility to an employer is certainly condemnable from the social aspect; however, it is not possible either to place companies in a situation where they may never know whether an employee appears at work the next day or has taken another certificate for sick leave. This situation may be particularly complicated for the many small companies that are in Estonia.

An employee's offences may cause extraordinary termination of an employment contract also in cases where continuing cooperation cannot be presumed. The draft act sets out the following offences by an employee: intentional endangering of the employer's property, causing of substantial damage due to negligence, the theft of property of the employer or a colleague, deceiving the employer, repeated presence at work when intoxicated by alcohol, narcotics or toxic substances, rude handling of the employer or a representative of the employer, unauthorised absence from work for more than three working days and placing himself or herself or his or her colleagues into actual danger by violation of occupational safety or health regulations.

Compared to the applicable procedure, upon the adoption of the ECA, the most significant changes will occur with regard to termination of an employment contract due to an offence by an employee. According to the Employees Disciplinary Punishments Act²⁵ (hereinafter also: EDPA), termination of an employment contract due to violation of the duties of employment, loss of trust or indecent act shall be a disciplinary punishment determined according to the rigid rules prescribed by law. According to § 11 of the EDPA, a disciplinary punishment shall be formalised in at least two written copies, one of which shall be retained by an employer and the other shall be given to the employee by the employer. This document shall contain the name of the employee to be punished, the time of commission of the offence, a description of the offence and other circumstances taken into account upon punishment, the imposed punishment, the date that the

²⁴ A. J. Suviranta, p. 107.

²⁵ Töötajate distsiplinaarvastutuse seadus (The Employees Disciplinary Punishments Act) – Riigi Teataja (the State Gazette) I 1993, 26, 441; 1998, 64/65, 1009.

document is prepared, and the name and signature of the person imposing the punishment. The terms provided for imposing a punishment are relatively short. A punishment shall be imposed within six months after the date that an offence is committed, but not later than one month after the date that any person to whom the offender reports to becomes aware of the offence. Termination of an employment contract as a disciplinary punishment shall not be in apparent conflict with the gravity of the offence. A significant violation of the rules of procedure for imposing a disciplinary punishment may entail declaration of the termination of an employment contract illegal.^{*26} This has also been accepted by the Supreme Court. An analysis of court practice testifies that in many cases, the cause for declaring termination of an employment contract illegal, has been the inability to formalise termination of an employment contract, not the fact that the employer has arbitrarily terminated an employment contract.^{*27} The draft act under inspection will simplify the rules of procedure for terminating employment contracts. Upon the adoption of the draft act, the EDPA shall become invalid with regard to employees. However, § 103 of the applicable ECA permits an employer to terminate an employment contract for the first severe breach of duties by an employee, whereas the employer is not obliged to notify the employee thereof. According to the developed practice, unauthorised absence from work while present at work is a severe breach of duties and termination of the employment contract therefor does not presume repeated breach. On the basis of the draft act, an employment contract may be extraordinarily terminated only when an employee has been absent from work for over three working days or has been repeatedly present at work when intoxicated by alcohol, narcotics or toxic substances. The adoption of the draft act will entail particular changes in all cases of terminating an employment contract.

3. Restrictions on Termination of Employment Contracts

The draft act provides for special guarantees for imposing restrictions on the termination of employment contracts with pregnant women and women raising infants. An employer may terminate an employment contract with a pregnant woman or a woman raising a child below three years of age only upon a prior written consent of a labour inspector. If there is no such consent, termination of an employment contract shall be invalid, except for cases when an employee does not notify the employer of any of the above-mentioned circumstances. According to the applicable procedure, it is impossible to make pregnant women and women raising a child below three years of age redundant, neither can the employment contract of such employees be terminated due to the unsuitability of the employee, restrictions have been imposed thereon also in case of long-term incapacity for work. The draft act does not provide for a universal prohibition and relates termination to the consent of a labour inspector. Consequently, in this respect, the redundancy of pregnant women and mothers of infants will be simplified, and proceeding from the principle of equal treatment, the same guarantees will be applied to men.

Termination of an employment contract with a representative of employees due to the legal activities of the representative upon representing the employees' interests shall be prohibited. According to the draft act, a representative of employees, a member of the board of the trade union, a working environment representative, and members of the working environment council shall be subject to special protection. An employment contract may not be terminated with them without the consent of a labour inspector either. The need for the special protection of representatives of employees is caused by the fact that according to court practice, employers attempt to rid themselves of particularly active representatives of employees.

On the basis of the draft act, termination of an employment contract shall be prohibited during an annual holiday, as well as during pregnancy and maternity leave of an employee. The same prohibition also applies during service in the armed forces. In other periods of terminating an employment contract, notification of termination of an employment contract may be given but the employment contract may not terminate at that time. Thus, when an employee is, for example, ill on the day provided for the termination of the employee's employment contract, the contract shall terminate upon the recovery of the employee.

²⁶ Individuaalse töövaidluse lahendamise seadus (Individual Labour Dispute Resolution Act, hereinafter: ILDRA) § 28 – Riigi Teataja (the State Gazette) I 1996, 3, 57. See also I.-M. Orgo, H. Siigur, G. Tavits. Töölepingu seadus. Kommenteeritud väljaanne (kolmas parandatud ja täiendatud trükk) (Employment Contracts Act. Commented Edition, third revised version). Juura, Õigusteabe AS, 1997, p. 121.

²⁷ I.-M. Orgo. Töövaidluste lahendamine (Settlement of Labour Disputes) (Note 16), pp. 47–49.

Upon the transfer of a company, a part thereof or other structural unit, employment contracts shall transfer to the employer continuing the same or similar activities and termination of employment contracts due to the exchange of employers shall be prohibited.

4. Consequences of Illegal Termination of Employment Contract

Section 117 of the ECA determines the liability of an employer upon illegal termination of an employment contract. Upon illegal termination of an employment contract, the employee shall have the right to demand reinstatement in the employee's position and payment of the employee's average wages for the time of compelled absence from work. If an employee waives reinstatement in the employee's position, the employee may demand that the statement of the basis for the termination of the employment contract is amended and payment of compensation in the amount of the employee's six months' average wages to be ordered. If the labour dispute committee or court identifies that the employment contract had been terminated upon lack of circumstances that serve as the basis for terminating an employment contract according to law, or the basis for terminating an employment contract prescribed by law had been adjusted by substantial violation of rules of procedure established therefor, the labour dispute committee or court shall declare the termination of an employment contract illegal and the employee shall have the right to demand reinstatement in the former job or position. In that case, the labour dispute committee or court shall adopt a decision on reinstatement of the employee in their former job or position. The applicable law does not grant to the labour dispute committee or court the right to decide on the practicability of reinstatement in position, *i.e.* the application of the employee shall be satisfied in each case when an illegal termination of an employment contract has been identified. Such a rigid regulation of § 117 of the ECA and § 29 (1) of the ILDRA has led to a situation where the labour dispute committees and courts reinstate employees even when the position has been liquidated or there are no preconditions for normal continuation of cooperation between the parties. In case of any dispute, it is always beneficial for an employee to demand reinstatement. In such cases, the payment of average wages for the whole time of compelled absence from work until the making of the decision is ordered, is considerably larger than the compensation that the employee would receive without demanding reinstatement. The analysis of court practice demonstrates that employees frequently have themselves reinstated in their positions and ordered payment of average wages, but thereafter waiver the reinstatement. The rigid regulation of an employer's liability for illegal termination of an employment contract is unjustified and does not enable the labour dispute committee and court to take into account a particular situation when making a decision. This deficiency has been eliminated from the draft act. If the employer terminated the employment contract with an employee illegally, the employee shall have the right to demand reinstatement in the employee's position; however, the labour dispute committee or court shall satisfy the employee's claim for reinstatement in the employee's position only when it is possible for the employer to employ the employee and it may be presumed that the cooperation between the parties may continue. If it is impossible to reinstate an employee in the employee's position, or it is impracticable, the labour dispute committee or court shall order the payment of compensation in the amount of the average wages for three to twelve months to the employee, depending on the circumstances of the termination of the employment contract and the employee's length of employment with that employer.

An employer need not contest the termination of an employment contract starting from the receipt of the notice of the termination, but starting from the expiry of the term for termination, thus from the moment when the employment contract was actually terminated. As an employment contract is concluded in written form, both the applicable law as well as the draft act provide for the entry of the basis for terminating an employment contract into the employment contract together with a reference to the particular provision of law.

In conclusion, one may say that the procedure for termination of an employment contract is currently rather detailed in the ECA and, as well, precise regulation is included in the draft act. The rules related to the termination of an employment contract are included and will hopefully continue to be included primarily in a single act. These rules have been aimed at ensuring the consistency of an employment relationship but take into account the interests of both parties to the relationship. Proceeding from law, unjustified

termination of an employment contract by the employer is precluded; however, the justified economic interests of an employer have been taken into account when preparing the draft act. Not too many obligations have been imposed on an employer upon setting out the terms for giving notification of termination of employment contracts, amounts of compensation and the procedure for termination, neither have attempts been made to solve the social problems in community on account of an employer.

Trends in Regulating Working and Rest Time in Estonia.

Proceeding from the European Union Law

The Europe Agreement^{*1} obliges us to approximate and harmonise Estonian legislation with the EU law, particularly in the fields of trade, economy and related spheres, *i.e.* in issues concerning protection of employees (articles 68 and 69). Thus, the labour laws applicable in Estonia have to be in accordance with the EU legislative or regulatory provisions, which also serves as a prerequisite for the accession to the EU. Although the Estonian legislation on labour law is basically compatible with the EU provisions, it needs to be substantially supplemented on the basis of the EU law.^{*2} This paper will analyse the conformity of the Estonian legal regulation of working and rest time with the EU requirements and some proposals will be made for amendment of labour laws.

Taking into account the various working forms adopted over the last decades (out-working, distance work, etc.), in many cases it is impossible to precisely regulate working and rest time. According to the latest trends prevalent in the EU member states, the working time of an employee shortens and the working time of an enterprise lengthens. This allows for flexible organisation of work, increase in the complete implementation level of all resources, gradual adjustment to new circumstances, increase in productivity and competitiveness. Flexible organisation of working time also allows for a better linkup of employees' employment and family duties and enables the states to integrate more people into the labour market.

However, the working and rest time of employees has to be regulated as unrestricted working time fosters over-fatigue, occurrence of accidents at work and distress – a working week exceeding 50 hours is hazardous to an employee's health.^{*3} Regulation of working and rest time is also necessary for ensuring a higher level of protection to particular groups of workers (children, women, people engaged in work that poses a health hazard, etc.).

The EU began to regulate working and rest time in the 1990s. To date, three directives on working and rest time have been adopted in the EU – Council Directive 93/104/EEC concerning certain aspects of the organisation of working time, Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC and Council Directive 97/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC.

¹ Euroopa ühenduste ja nende liikmesriikide ning Eesti Vabariigi vaheline assotseerumisleping (Euroopa leping) (Association Agreement between the European Communities and their Member States and the Republic of Estonia (Europe Agreement)) – Riigi Teataja (the State Gazette) II 1995, 22–27, 120.

² See M. Muda. Eesti tööseaduste täiustamisest integreerumisel Euroopasse. Magistritöö (About Improvement of Estonian Labour Laws upon Integration into Europe. Master's thesis). Tartu, 1996.

³ R. Blanpain. European Labour Law. 6th and revised edition. The Hague: Kluwer Law International, 1999, p. 299.

The working and rest time of minors and women are also regulated by the 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) and Council Directive 94/33/EC on the protection of young people at work.

On 31 May 2000, the *Riigikogu* (parliament) of the Republic of Estonia ratified the revised version of the Council of Europe (CE) Social Charter^{*7}, including several provisions concerning working and rest time.^{*8} Adherence to the provisions established in the Social Charter is also important with regard to the accession to the EU, as according to article 136 of the Treaty establishing the European Community, the European Community shall proceed, *inter alia*, from the fundamental social rights set out in the CE Social Charter when designing its social policy.^{*9}

In Estonia, the principal acts governing working and rest time are the Working and Rest Time Act^{*10} (hereinafter: WRTA) and the Republic of Estonia Holidays Act^{*11} (hereinafter: HA). By the time the paper is written, a new draft Working and Rest Time Act has been prepared.

General Standards of Working and Rest Time

The EU member states aim at shortening the working time. Such a principle has also been set out in article 2 of the CE Social Charter, which lays down: with a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit (paragraph 1). With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake to provide that the working hours of persons less than 18 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training (article 7, paragraph 4).^{*12}

According to the Council Directive 93/104/EEC concerning certain aspects of the organization of working time^{*13}, the average working time for each seven-day period, including overtime, does not exceed 48 hours (article 6, paragraph 2). The general established national standard of working time in the EU member states is mostly 40 hours per week and 8 hours per day. The same standard is also set out in § 9 of the Estonian Working and Rest Time Act – the general national standard of working time of employees shall not exceed 8 hours per day and 40 hours per week. Whereas in the EU member states national standards of working time are frequently reduced by means of collective agreements, no such agreements have been concluded in Estonia. On the one hand, the lack of such agreements has been caused by the minor importance of collective agreements in regulating labour relations^{*14}, on the other hand, economic indicators do not allow for reduction of working time, and shortening of working time with collective agreements can obviously not be foreseen in the nearest future.

Subsection 10 (1) of the Estonian WRTA sets out a reduced working time for minors:

- 1) 20 hours per week for employees who are 13–14 years of age;
- 2) 25 hours per week for employees who are 15–16 years of age;
- 3) 30 hours per week for employees who are 17 years of age.

For a five-day working week, the national standard of working time is 8 hours per day for a 40-hour working week, 7 hours per day for a 35-hour working week, 6 hours per day for a 30-hour working week, 5 hours

⁷ Parandatud ja täiendatud Euroopa Nõukogu sotsiaalharta ratifitseerimise seadus (Ratification of Revised Council of Europe Social Charter Act) – Riigi Teataja (the State Gazette) II 2000, 15, 93.

⁸ Article 2, paragraphs 1, 3 and 5; article 7, paragraphs 4, 7 and 8; article 8.

⁹ Amsterdami leping. Konsolideeritud lepingud (Treaty of Amsterdam. Consolidated Treaties). Tallinn: Eesti Õigustõlke Keskus, 1998, p. 214.

¹⁰ Töö- ja puhkeaja seadus (Working and Rest Time Act) – Riigi Teataja (the State Gazette) I 1994, 7, 70; 1995, 12, 120.

¹¹ Puhkuseseadus (Holidays Act) – Riigi Teataja (the State Gazette) 1992, 37, 481; I 1999, 82, 749.

¹² Valimik Euroopa Nõukogu lepinguid (Selected Agreements of the Council of Europe). Tallinn: Õigusteabe AS Juura, 1999, pp. 109 and 112.

¹³ OJ L 307, 13.12.1993, p. 18.

¹⁴ In Estonia, approximately 10% of the employees are covered by collective agreements. See K. Pärmits. On Questions Surrounding Collective Agreements in Estonia. – *Juridica International. Law Review. University of Tartu*, III, 1998, p. 124.

per day for a 25-hour working week and 4 hours per day for a 20-hour working week (§ 12 (1)). According to § 12 (3), upon the recording of total working time^{*15}, the duration of working time of employees who are 13–14 years of age shall not exceed 5 hours per day, the duration of working time of employees who are 15–16 years of age shall not exceed 6 hours per day and the duration working time of employees who are 17 years of age shall not exceed 7 hours per day.

In the Council Directive 94/33/EC on the protection of young people at work^{*16}, the standards of working time have been determined considerably more precisely. The directive distinguishes between children^{*17} and adolescents^{*18}, regulating their working and rest time in a different manner. If the working time of adolescents may be up to 40 hours per week and 8 hours per day according to the directive, the duration of working time of children has been regulated in a more detailed manner – the working time of children has been bound to the obligation of children to attend school. Thus, for example, the working time of children shall be restricted to two hours on a school day and 12 hours a week for work performed in term-time outside the hours; in no circumstances may the daily working time exceed 7 hours; this limit may be raised to 8 hours in the case of children who have reached the age of 15 (article 8, paragraph 1).

Estonian legislation does not provide for so precise rules, although a more detailed regulation would be certainly necessary with regard to the protection of minors. The draft WRTA does not foresee fundamental changes in this respect because minors who have reached the age of 13–14 may work only during holidays according to the new Employment Contracts Act to be soon adopted. According to the draft act, minors starting from 15 years of age may work throughout a year since basic education has been acquired by that age.

However, some alterations have been made in the draft WRTA concerning the standard of working time. Reduced working time has been, *inter alia*, provided for:

- 1) employees who are 13–14 years of age – 4 hours per day and 20 hours per week;
- 2) employees 15 years of age – 6 hours per day and 30 hours per week;
- 3) employees 16–17 years of age – 7 hours per day and 35 hours per week.

According to § 15 of the draft act, a shift may last up to 12 hours as a rule (§ 15 (1)); upon recording total working time, the daily working time of minors shall be:

- 1) for employees 13–14 years of age – up to 5 hours;
- 2) for employees 15 years of age – up to 7 hours;
- 3) for employees 16–17 years of age – up to 8 hours.

Thus, the standard of working time for minors 13–14 years of age has remained the same, whereas alterations have been made in the standard of working time for employees 15–17 years of age. The regulation of the draft WRTA fully conforms to the requirements of the directive.

For Estonia, also the principle established in article 6 of the Council Directive 93/104/EEC, according to which the average working time for each seven-day period, including overtime, does not exceed 48 hours proves problematic. Subsection 15 (2) of the WRTA allows employees to work overtime for 4 hours per day and establishes 12 hours as the maximum duration of a shift. Consequently, it is possible that the maximum working time per week may exceed well over 48 hours (5 x 12 = 60 hours per week). According to § 14 of the Wages Act^{*19} (hereinafter: WA), additional remuneration for overtime may be compensated by provision of time off or money, whereas the additional remuneration per hour of overtime paid to an employee shall not be less than 50 per cent of the hourly wage rate of the employee. Although from the viewpoint of protection of employees, it would be more reasonable to compensate for overtime with provision of time off, this option is hardly ever employed in practice as it would render the calculation of employees' working time too complicated. Thus, as a rule, the working time of an employee usually increases in the case of overtime. Also, proceeding from the nature of work, in case of many professions (*e.g.* executive workers, journalists, lecturers, etc.) precise calculation of working time is impossible and frequently considerably more work is done there than prescribed by national standards of working time. In

¹⁵ *I.e.* a longer period than 24 hours serves as a period for calculating working time.

¹⁶ OJ L 216, 20.08.1994, p. 12.

¹⁷ According to subparagraph 3 (b) of the directive, "child" shall mean any young person of less than 15 years of age or who is still subject to compulsory full-time schooling under national law.

¹⁸ According to subparagraph 3 (c) of the directive, "adolescent" shall mean any young person of at least 15 years of age but less than 18 years of age who is no longer subject to compulsory full-time schooling under national law.

¹⁹ Palgaseadus (Wages Act) – Riigi Teataja (the State Gazette) I 1994, 11, 154; 2000, 40, 248.

such a case, overtime is not taken into account and a longer working time should be compensated for with higher salaries.

In addition to the above-mentioned options, according to § 37 of the Employment Contracts Act^{*20} (hereinafter: ECA), a person may have a second job.^{*21} According to § 17 of the WRTA, the working time of a person with a second job shall not exceed 20 hours per week at the second job; if a person with a second job works part-time at his or her principal job, the total working time in the principal job and the second job together shall not exceed 60 hours per week. Conflict with the directive here is obvious, working for more than 48 hours per week is absolutely legal.

As a person holds a second job usually with the same employer, where the employee has his or her principal job, one of the aims of establishing this regulation was the precise calculation and limiting of the working time of an employee. Working in a second job has also been caused by a practical necessity. The living standard in Estonia is not comparable with that of the other European states, where the income received for reduced working time enables employees to afford normal living. According to a variety of international instruments (the Universal Declaration of Human Rights, European Social Charter, etc.), remuneration shall ensure satisfaction of the needs of an employee's and his or her family on a human level. As the wages paid in Estonia in many cases fail to conform to this requirement^{*22}, an opportunity has been provided to employees to increase their income by overtime and working in a second job. There is no doubt that such regulation is not justified with regard to the safety of employees and protection of their health. In addition to that, limited working time would contribute to the reduction of unemployment. Due to that, the new draft ECA and WRTA provide for a different regulation of these matters. According to the draft ECA, working in a second job will no longer be possible. If an employee works on the basis of several employment contracts, all the rights arising from an employment relationship shall apply to him or her in the case of each and every contract. The draft WRTA sets out that if an employee works under several employment contracts, the total of his or her working time with various employers shall not exceed the national standard of working time (§ 4 (3)).

In addition to that, the draft WRTA imposes restrictions on overtime: an employer is not allowed to use an employee for overtime for more than 4 hours per day. The duration of a shift together with overtime shall not exceed 12 hours. The working time and overtime per week shall not exceed 48 hours per week (§§ 9 (2) and (3)). As the actual need to work more in order to increase income does not cease when restrictions are imposed on the working time of an employee, the maximum rate of overtime has been increased from the previous 200 hours per year to 240 hours per year in the draft act.

In the WRTA, the regulation of breaks during a working day needs to be supplemented, particularly with regard to occupational health and safety of minors. According to article 12 of directive 94/33/EC, where daily working time is more than four and a half hours, young people are entitled to a break of at least 30 minutes, which shall be consecutive if possible. According to § 24 (2) of the WRTA, a break for rest and meals shall be provided not later than after 5 hours of work. Subsection 24 (1) of the WRTA sets out two hours as the maximum duration of the breaks, the minimum duration of the breaks should also be laid down. According to § 16 of the draft WRTA, an employer shall be obliged to provide to an employee a break for rest and meals not later than after 4 hours of work. A break for rest and meals shall last from 30 minutes to 1 hour (§§ 16 (1) and (2)).

According to § 27 of the WRTA, the duration of rest time between shifts shall be at least 11 hours (§ 27 (1)). This provision has been specified in the draft WRTA in order that it be expressly in compliance with the principle provided in directive 93/104/EEC, according to which every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period (article 3), and the requirements of directive 94/33/EC, according to which for each 24-hour period, children are entitled to a minimum rest period of 14 consecutive hours and adolescents are entitled to a minimum rest period of 12 consecutive hours (subparagraphs (a) and (b) of paragraph 10 (1)).

²⁰ Töölepingu seadus (Employment Contracts Act) – Riigi Teataja (the State Gazette) 1992, 15/16, 241; I 2000, 25, 144.

²¹ Working on the basis of another employment contract outside the working time spent in a principal job with the same or another employer shall be considered as working in a second job. People working in a second job do not have several guarantees (people holding a second job are laid off in the first order, they lack guarantees upon termination of the employment contract, etc.), which have been ensured to people working in principal jobs.

²² The minimum monthly wage in Estonia at the moment is 1,400 kroons or approximately 86 USD and the average monthly wage is 4,500 kroons or approximately 276 USD.

According to § 20 (1) of the draft WRTA, a minimum of 11 consecutive hours of daily rest shall be provided to an employee. The duration of daily rest shall be:

- 1) for employees 13–14 years of age – a minimum of 18 consecutive hours;
- 2) for employees 15 years of age – a minimum of 16 consecutive hours;
- 3) for employees 16–17 years of age – a minimum of 15 consecutive hours (§ 20 (2)).

According to directive 93/104/EEC, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest. If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied (article 5). According to directive 94/33/EC, for each week, young people are entitled to a minimum rest period of no less than 36 hours (article 10, paragraph 2).

Section 28 of the WRTA establishes as a minimum duration of weekly rest time 36 hours (§ 28 (3)). Exceptions from this standard may be made (with regard to adult employees) with the consent of a labour inspector (§ 28 (4)). Proceeding from directive 93/104/EEC, the regulation of weekly rest period has been specified in the draft WRTA. Namely, when making exceptions to the minimum weekly rest period standard of 36 hours, one has to take into account that the duration of the rest period shall under no circumstances be less than 24 hours (§ 21 (4)).

There are no problems involved upon applying international standards laying down annual paid leaves. Both the CE Social Charter (article 2, paragraph 3; article 7, paragraph 7) and directive 93/104/EEC (article 7) set out the duration of a paid annual leave as at least 4 weeks. The Estonian HA provides for 28 days for annual holiday and lays down an extended base holiday^{*23} (from 35 up to 56 days) and additional holiday^{*24} possibilities.^{*25} Directive 94/33/EC establishes a following principle with regard to the annual rest of children: a period free of any work is included, as far as possible, in the school holidays of children subject to compulsory full-time schooling under national law (article 11). The Estonian HA does not set out such requirement and there will be no need for such regulation upon the entry into force of the new ECA, according to which minors under 15 years of age may work only during school holidays.

Part-time Working Time

In addition to the overall reduction in working time, part-time working is widespread in the EU member states. In the EU, part-time working time has been regulated by Council Directive 97/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC.^{*26} According to clause 3.1 of the agreement, a part-time worker is an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker, whereas a comparable full-time worker is a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work or occupation (clause 3.2). According to § 18 of the Estonian WRTA, part-time working time is working time which is shorter than the established standard of working time at the place of employment and which is applied by agreement of an employee and employer (§ 18 (1)).

The most important principle of directive 97/81/EC has been set out in clause 4: in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds (clause 4.1). As there is no special regulation in Estonia concerning the employment relationships of part-time workers, full-time workers and part-time workers shall generally have equal rights and obligations – no restrictions have been set out with regard to part-time workers proceeding from their standard of shorter working time. Neither have restrictions been established concerning the calculation of remuneration or implementation of a social care system; equal conditions have been ensured to part-time employees

²³ An extended base holiday is granted to minors, disabled persons, state officials and local government officials, heads, researchers, academic staff, teachers, educators and other pedagogical specialists of universities, institutions of applied higher education, research institutions, schools and other child care institutions and pedagogical specialists of medical institutions, children's sanatoriums and adult welfare institutions (§ 9 (2) of the HA).

²⁴ Additional holiday is granted in case of underground work, persons engaged in work which poses a health hazard or work of a special nature (§ 10 (1) of the HA).

²⁵ Sections 9–11.

²⁶ OJ L 14, 20.01.1998, p. 9.

concerning the protection of motherhood, termination of employment relationships, annual paid leaves, public holidays, sick leaves and other guarantees.

According to the WRTA, people holding a second job also work part-time. According to § 95 of the ECA, the guarantees prescribed in §§ 87–94 do not apply upon termination of an employment contract with a person in a second job. Consequently, the employer may terminate the employment contract of a person in a second job as an employee working part-time for any reason without prior notification, payment of compensation and disregarding other guarantees (prohibition to terminate an employment contract at the time of disability to work, leave and parental leave, etc.). Upon terminating an employment contract with a person in a second job, pregnancy of the employee or a fact that he or she raises a child under 3 years of age are of no importance. Serving as a representative of employees does not grant provision of guarantees.^{*27} Thus, no benefits or compensation are ensured to an employee in a second job as a part-time employee upon termination of his or her employment contract. As working in a second job precludes the existence of a principal job, the implementation of the above-mentioned guarantees to such employees should be ensured via their principal job. However, one cannot rule out a situation where the employment contract with a person working in a second job has been terminated in his or her principal job and the employee works only in his or her second job. Cessation of a labour law relationship in one's principal job does not transform work performed in a second job into the principal job. Work performed in a second job transforms into the principal job only through the making of amendments to the employment contract upon agreement between the parties.^{*28} In order to provide equal protection to all employees irrespective of the duration of their working time, a possibility to work in a second job has not been provided for in the new ECA and upon the entry into force of the act, equal treatment of full-time employees and employees in a second job should be ensured.

According to § 18 of the WRTA, part-time working time has been provided for pregnant women and persons raising a child – at the request of the pregnant woman and 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 (§ 18 (3)). In practice, this provision is applied extremely rarely, as the employer is in most cases unable to employ the woman for a part-time job. Employees themselves are frequently not interested in part-time working either, as this automatically entails reduction in remuneration. Therefore the above-mentioned provision has been left out from the draft WRTA.

Although according to directive 97/81/EC, as a rule, equal treatment of part-time and full-time employees shall be ensured, provision of all guarantees arising from an employment relationship to extremely short-time employees is not always justified. According to the directive, where justified by objective reasons, member states and/or parties to the employment relationship, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification (clause 4.4). The labour laws applicable in Estonia do not prescribe such restrictions. According to § 6 (2) of the draft WRTA, guarantees granted to an employee may be restricted by law, if his or her standard of working time remains below 12 hours per week. The draft WRTA does not specify what guarantees may be restricted in case of employees whose standard working week is below 12 hours because this does not fall within the area of application of this act and these fields will be regulated by special acts. As working time limit has not been established with regard to the guarantees granted to part-time employees earlier, no relevant restrictions are prescribed by applicable acts; however, making of exceptions with regard to annual leave, termination of an employment contract, and other guarantees may be justified in future.

According to directive 97/81/EC, the member states and parties shall identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them (clause 5.1). As restrictions on working time and implementation of part-time working time significantly contribute to the reduction of the expanding unemployment, the EU precepts concerning the encouragement of part-time working time are reasonable. Estonian labour laws make no exceptions as to implementation of part-time working time – part-time working time is implemented upon agreement between an employee and employer, whereas similar guarantees as to a full-time employee have been provided for a part-time employee. Unlike in the EU member states, part-time work is not widespread in Estonia. Neither employees nor employers are interested in implementing part-time working time. For an employee, part-time working would entail reduction of his or her income, which would considerably

²⁷ Töölepingu seadus. Kommenteeritud väljaanne (Employment Contracts Act. Commented Edition). Commentary by I.-M. Orgo, H. Siigur, G. Tavits. Tallinn: Õigusteabe AS Juura, 1997, p. 106.

²⁸ *Ibid.*, p. 46.

deteriorate his or her economic situation. For the sake of practicability, employers also prefer to employ one full-time employee instead of several part-time ones. As the opportunity to work part-time is seldom used in Estonia, there are no grounds to fear that part-time employees will be discriminated against. The regulation set out in the EU will probably become relevant to Estonia only after several years when the economy and labour market have reached a particular level of stability and people aim at ensuring an increasingly better quality of life.

Night Work

According to the generally accepted rules of international labour law, people working at night need particular protection, as night work demands greater effort from an employee than working in daytime. According to article 2 paragraph 7 of the CE Social Charter, the parties undertake to ensure that workers performing night work benefit from measures which take account of the special nature of the work. The EU has regulated working at night with several directives, setting out the general rules of working at night and establishing detailed standards of the night work performed by minors and women.

According to directive 93/104/EEC, nighttime shall mean any period of not less than 7 hours which must include in any case the period between midnight and 5 a. m. (article 2). The Estonian WRTA distinguishes between the evening and nighttime. According to § 19 of the WRTA, evening time is the time between 18:00 and 22:00, and night time is the time from 22:00 until 6:00 (§ 19 (1)). According to § 17 of the WA, additional remuneration of at least 10% of the hourly wage rate of the employee shall be paid to an employee, additional remuneration for each working hour at night shall not be less than 20 per cent of the hourly wage rate; also, several restrictions have been imposed on working at night.

Subsection 19 (2) of the WRTA prohibits the use at night work of pregnant women, minors, and employees who are not allowed to work during nighttime by the decision of a doctor. Work performed by minors at night has been prohibited with the CE Social Charter (article 7, paragraph 8) and directive 94/33/EEC, according to article 9 of which children shall not work between 8 p.m. and 6 a.m. and adolescents either between 10 p.m. and 6 a.m. or between 11 p.m. and 7 a.m. (subparagraphs 1 (a) and (b)). On the basis of the directive, exceptions may be made with regard to the prohibition of adolescents from work at night: in such a case, work shall continue to be prohibited between midnight and 4 a.m. (paragraph 2). As minors of 13–14 years of age may not work starting from 8 p.m., a provision has been included in the draft WRTA, according to which performance of work by an employee 13–14 years of age is prohibited during evening time (*i.e.* from 6 p.m. to 10 p.m.) (§ 11 (2)).

Another group which has had night working restrictions imposed on it with international instruments is pregnant women, women who have recently given birth and women nursing their infants. According to the CE Social Charter, the parties shall be obliged to establish rules concerning the night work of these employees (article 8, paragraph 4). Prohibition of women to work at night has been set out in 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 breastfeeding²⁹, according to article 7 of which the member states shall 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 (paragraph 1). The measures referred to in paragraph 1 must entail the possibility, in accordance with national legislation and/or national practice, of transfer to daytime work or leave from work or extension of maternity leave (paragraph 2).

As mentioned above, the Estonian WRTA does not allow the working at night of a pregnant woman or an employee who has been prohibited from working by a decision of a doctor. Section 63 of the ECA sets out that pregnant women have the right to request temporary easement of working conditions or temporary transfer to another position based on a certificate for sick leave prepared by a doctor. If the employer is unable to ease the working conditions of the pregnant woman or transfer her to an easier job, she shall be released from work for the period prescribed in the certificate for sick leave and paid a compulsory medical insurance benefit (§§ 63 (1) and (2)). As a result of the amendments made to the ECA on 9 December

²⁹ OJ L 348, 19.10.1992, p. 11.

1998^{*30}, the above-mentioned amendment is not provided for with regard to a woman who has recently given birth to a child or a breastfeeding employee. The existence of such a guarantee would undoubtedly be necessary and it should be restored in its previous form^{*31} in the act. The fact that an employer may not require a woman breastfeeding her child to work during pregnancy and maternity leave (which lasts up to 8 or 10 weeks after the childbirth) does not provide sufficient guarantee to her because the breastfeeding period may last considerably longer.

According to article 8 of directive 93/104/EEC, normal hours of work for night workers do not exceed an average of 8 hours in any 24-hour period; night workers whose work involves special hazards or heavy physical or mental strain do not work more than 8 hours in any period of 24 hours during which they perform night work. The Estonian WRTA establishes a more favourable condition to employees in this respect – according to § 20 (1) of the act, upon the application of general working time, the duration of a shift shall be reduced by one hour during night time. This means that if the duration of a shift is normally 8 hours at daytime, the night shift shall last 7 hours. The duration of a shift during nighttime is treated as equal to that during the day if this is unavoidable due to production conditions (§ 20 (2)). In relation to the application of these rules, a question whether an employee's standard of working time will also be reduced upon reduction in night shift, or the employee must, on account of the reduction in the night shift, work respectively more in a day or evening shift needs to be answered. No single answer can be obtained from the act, but it is logical that reduction in night shifts is a compensation for unfavourable working time regime and the standard of working time has to be reduced accordingly. In opposite cases, reduction in night shift would not have been reasonable. In order to avoid disputes, it would be practicable to remove this questionable provision from the act in future and set out expressly that upon reduction of night shifts, the standard of working time of an employee shall be reduced.^{*32} According to § 11 (5) of the draft WRTA, upon the reduction of the duration of shift at nighttime, the standard of working time shall decrease accordingly.

In the EU directives, several supplementary guarantees have been provided for persons working at nighttime. Both according to article 9 of directive 93/104/EEC and article 9 paragraph 3 of directive 94/33/EC, night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals. Directive 93/104/EEC sets out that night workers suffering from health problems recognized as being connected with the fact that they perform night work are transferred whenever possible to day work to which they are suited (article 9). In Estonia, a person working at night time can demand that he or she be transferred to daytime work on the basis of § 61 of the ECA, which sets out that if, by decision of a doctor, continuation in former position by an employee is not advisable for reasons of health and the employer has other work which the health of the employee allows him or her to perform, the employee has the right to claim transfer to such position (§ 61 (1)). If it is not possible for an employer to transfer an employee to a position which is suitable to his or her state of health, the employment contract is terminated due to unsuitability of the employee to his or her position (§ 61 (3)). In order to ensure the full conformity of Estonian legislation with the requirements of the EU directives, working at night should also be added to the list of jobs where prior and regular assessment of health approved by the Government of the Republic regulation^{*33} is provided.

Rest Time with regard to Pregnancy and Raising of Children

Additional rest is provided to employees in relation with pregnancy and raising of children according to international instruments. Benefits are provided for, above all, pregnant women and breastfeeding employees as well as persons raising babies.

³⁰ Riigi Teataja (the State Gazette) I 1998, 111, 1829.

³¹ Before the amendments were made to § 63 of the ECA, a woman raising a child under 3 years of age had the right to demand to be transferred to another job on the basis of a decision of a doctor until the child attains 3 years of age.

³² I.-M. Orgo. *Vaieldavused töö- ja puhkeaja seaduse kohaldamisel* (Disputabilities upon Application of the Working and Rest Time Act). – *Juridica*, 1994, No. 6, p. 145.

³³ Vabariigi Valitsuse määrus 22. juunist 1992 "Eesti Vabariigi töölepingu seaduse rakendamise otsuse täitmise kohta" (Government of the Republic regulation on the performance of a resolution concerning implementation of the Republic of Estonia Employment Contracts Act of 22 June 1992) – *Riigi Teataja* (the State Gazette) 1992, 34, 454.

According to article 9 of the EU directive 92/85/EEC, pregnant workers are entitled to time off, without loss of pay, in order to attend antenatal examinations, if such examinations have to take place during working hours. In Estonia, the right of pregnant women to time off from work for antenatal examinations without loss of pay has not been established and this issue is usually regulated by agreement between an employee and employer. In order to ensure the conformity of Estonian legislation with the requirements of directive 92/85/EEC, the new WRTA sets out a principle, according to which an employer is obliged to provide to a pregnant woman time off for antenatal examinations at the time indicated in the decision of a doctor, which is calculated as working time (§ 18).

As one of the most important guarantees to pregnant employees and women who have recently given birth to a child, international instruments provide for paid pregnancy and maternity leave. Article 8 paragraph 1 of the CE Social Charter sets out the duration of pregnancy and maternity leave as being 14 weeks. According to article 8 of directive 92/85/EEC, employees are entitled to a maternity leave of a least 14 consecutive weeks allocated before and/or after confinement in accordance with national legislation and/or practice (paragraph 1). The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice (paragraph 2). The Estonian HA establishes for workers provisions which are considerably more favourable than the above-mentioned ones. According to § 28 of the HA, based on a certificate for maternity leave, a woman is 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. Thus, as a rule, a woman has a right to have a pregnancy leave of 18 weeks and in case of multiple birth or delivery with complications 20 weeks. The HA does not establish the duration of mandatory pregnancy and maternity leave, but according to the Republic of Estonia Health Insurance Act^{*34} (hereinafter: HIA), in case of pregnancy and maternity leave a certificate of incapacity for work (certificate for maternity leave) shall be formalised for 126 calendar days (in case of multiple birth or delivery with complications for 140 calendar days) (§§ 7 (2), 8 (2), 9 (3)). According to § 10¹ of the HIA, an employer is prohibited from permitting an employee to work during the time off from work indicated on the certificate of incapacity for work. For the sake of being clear, pregnancy and maternity leave should be set out as mandatory also in the HA.

The most important benefit of people raising children is an opportunity to use parental leave. In the EU, matters related to parental leave are regulated by directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.^{*35} The agreement grants men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years (clause 2.1). To promote equal opportunities and equal treatment between men and women, the parties to this agreement consider that the right to parental leave provided for under clause 2.1 should, in principle, be granted on a nontransferable basis (clause 2.2). According to § 30 (1) of the Estonian HA, 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 parental leave, the leave may be granted to the actual caregiver of the child who lawfully resides in the Republic of Estonia (§ 30 (2)). Parental leave is not granted if the child is wholly or partly maintained by the state (§ 30 (4)). Parental leave may be obtained also upon the adoption of a child less under 3 years of age because according to § 86 (1) of the Family Law Act^{*36}, an adopted child and his or her descendants shall be deemed to be equal with respect to his or her adoptive parents and their relatives, and the adoptive parents and their relatives shall be deemed to be equal with respect to the adopted child and his or her descendants with regard to personal and proprietary rights and obligations.

According to the HA, parental leave can be used by one of the parents by agreement of the parties. Generally, the mother of the child takes parental leave; fathers do not use that opportunity as a rule. Thus, parental leave can be transferred – if the father of a child does not take leave, its mother shall have a right thereto. One possibility to change such a situation would be to set out an equal duration of parental leave for both parents, for example, the mother of a child could use parental leave after pregnancy and maternal leave until the child attains 1.5 years of age; thereafter the father of the child could take a leave and if the latter does not use the leave, the mother shall have no right to extend the duration of the leave. Such an approach would ensure the equal treatment of employees, but would probably entail a reduction in the time of using

³⁴ Ravikindlustusseadus (Health Insurance Act) – Riigi Teataja (the State Gazette) 1991, 23, 272; I 1999, 29, 397.

³⁵ OJ L 145, 19.06.1996, p. 4.

³⁶ Perekonnaseadus (Family Law Act) – Riigi Teataja (the State Gazette) I 1994, 75, 1326; 1997, 3 5, 53.

parental leave until a child attains 1.5 years of age because as a rule, a man's salary ensures a larger income to the family and the taking of paternal leave by the man would substantially deteriorate the economic situation of the family. Thus, equalisation of male and female workers with regard to the use of parental leave in the nearest future is not obviously likely.

According to clause 2.3 of directive 96/34/EC, the conditions of access to parental leave shall be defined by law and/or collective agreement in the member states, whereas entitlement to parental leave may be made subject to a period of work qualification and/or a length of service qualification which shall not exceed one year; also, establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the circumstances in which an employer is allowed to postpone the granting of parental leave. The Estonian HA does not set out any restrictions with regard to access to parental leave. One has the right to take parental leave irrespective of the fact whether the person works full or part time. A mandatory period of working has not been established for access to parental leave – an employee shall have the right to access to the leave irrespective of length of employment. If access to parental leave is bound to the length of service (according to the directive, the mandatory length of service must be at least one year), many Estonian employees may lose the opportunity to use parental leave, because people frequently change jobs due to unstable economic conditions. According to § 30 (3) of the HA, parental leave may be used at once or in parts at any time until the child attains three years of age. It is not possible to obtain parental leave in advance. Also, law does not provide for a requirement for prior notice concerning the parental leave. As the leave may last until a child attains 3 years of age, and it can be used in parts, it is hard for a person using the leave to foresee when, for example, the economic situation of a family demands that the person on leave start immediately working.

As one advantage to pregnant women, women who have recently given birth to a child and employees raising babies, prohibition to dismiss such employees has been provided as one benefit. According to article 8 paragraph 2 of the CE Social Charter, termination of an employment contract on the employer's initiative during the pregnancy and maternity leave shall be prohibited. Clause 2.4 of directive 96/34/EC sets out: in order to ensure that workers can exercise their right to parental leave, member states and/or parties shall take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship (2.5). According to § 91 (1) 2) of the ECA, termination of an employment contract is prohibited on the initiative of an employer, while the employee is on a holiday (including parental leave and holidays without pay). This principle is not applied upon termination of employment contracts due to the liquidation of a legal person or the declaration of bankruptcy of the employer (§ 91 (2)). The above-mentioned prohibition against dismissal should ensure to an employee the right to return to the same work after parental leave. In practice, problems occur in cases where an employee has been on parental leave until the child attained 3 years of age, meanwhile the work has been reorganised, the employee's position has been laid off and the employer has no other jobs to offer. Thus, return to work may end with a prompt dismissal of an employee, which forces the employee taking parental leave to seek a new job for himself or herself.

An additional restriction has been imposed upon termination of an employment contract also on a pregnant woman and female employee raising a child under 3 years of age. According to § 92 (1) of the ECA, 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 (1) and (2), (5)–(8) and (11).³⁷ Termination of employment contracts with employees on the bases prescribed in § 86 (1)–(2) and (5)–(8) (liquidation of a legal person, declaration of bankruptcy of the employer, due to unsatisfactory results of a probationary period, breach of duties an employee, loss of trust in an employee, indecent act by an employee) is only permitted with the consent of the labour inspector of the seat (residence) of the employer (§ 92 (2)).

According to § 11 (1) of the ECA, the benefits prescribed in § 92 for women raising disabled children or children under 3 years of age also extend to persons raising motherless children who are disabled or under

³⁷ Section 86 of the ECA sets out 12 bases (liquidation of the enterprise, agency or other organisation, declaration of bankruptcy of the employer, lay-off of employees, unsuitability of an employee for his or her position or the work to be performed due to professional skills or for reasons of health, unsatisfactory results of a probationary period, breach of duties of an employee, loss of trust in an employee, an indecent act by an employee, long-term incapacity for work of an employee, age of an employee, hiring an employee for whom the position is a principal job, act of corruption of an employee), when dismissal of an employee by an employer is permitted. An employer may not terminate an employment contract with an employee for any other reason.

3 years of age. Consequently, mostly female employees are protected upon termination of their employment contracts, because the benefit applies to the father of the child only when the latter raises a child under 3 years of age without the mother of the child. Such regulation has been caused by the fact that mostly women use parental leave in practice. However, this is not in accordance with the EU directive 96/34/EC, the main purpose of which is to ensure equal treatment to male and female workers with regard to the use of parental leave. Provision of equal protection to employees raising children under 3 years of age upon termination of an employment contract is possible only if the regulation for the use of parental leave is amended.

Conclusions

The working and rest time regulation applicable in Estonia generally conforms to the requirements established in the EU and harmonisation of Estonian legislation with the EU law will not entail alterations of principles in this field. When comparing Estonian labour laws with the EU directives, one may conclude that in many matters, the EU acts prescribe a considerably more detailed regulation than Estonian legislation. This concerns, above all, regulation of the working and rest time of women and minors.

The EU directive 94/33/EC divides minor employees (young people) into two groups – employees up to 15 years of age (children) and employees older than 15 years of age (adolescents) and proceeding from that, establishes for minors different standards of working and rest time. Estonian labour laws do not distinguish between children and adolescents, but depending on the age of adolescents, their employment relationships have been regulated in a different manner – more strict rules have been established with regard to employees 13–14 years of age, restrictions are milder with regard to minors 15–17 years of age. According to the new draft ECA to be soon adopted, employees 13–14 years of age may work only during school holidays, and upon entry into force of the act, no problems should arise from the implementation of directive 94/33/EC. According to the new draft WRTA, in addition to the prohibition against night work, restrictions have been imposed also on the working of minors 13–14 years of age during evening time – from 6 p.m. to 10 p.m. they are prohibited from working.

Regulation of the working time of pregnant women, breastfeeding women and employees who have recently given birth to a child also requires some specifications. According to the new WRTA, a pregnant woman shall have the right to obtain time off for antenatal examination, which shall be calculated as a part of working time. In order to ensure the conformity of Estonian legislation with the EU requirements, a principle according to which a breastfeeding employee may claim transfer to another (daytime) job, unless working at night is not advisable to her should be restored.

In most cases, the weaknesses found in Estonian legislation can be omitted through specifications in a relatively simple manner. In relation with the adjustment of the EU directive 93/104/EEC, more significant problems may be entailed by the reduction of weekly maximum working time from 60 hours to 48 hours per week. According to the applicable WRTA, the working time of an employee may be 60 hours per week in two cases. If an employee works overtime, his or her shift may last up to 12 hours, which enables to work 60 hours per week in case of a five-day working week. The duration of a working week may also be 60 hours when working in a second job – according to the WRTA, the working time of an employee in the principal job and the second job together shall not exceed 60 hours per week. Legalisation of a 60-hour working week has been caused by practical needs, as working overtime and working in a second job are extremely widespread in order to increase one's income. From the standpoint of an employee's health, such regulation cannot be deemed appropriate and at least on the national level, regulation should aim at reduction in weekly working time. This principle has been taken as the basis when preparing the new WRTA. According to the draft, working time together with overtime shall not exceed 48 hours per week. According to the draft ECA, the possibility to work in a second job will no longer exist in future, and when an employee works under several employment contracts, all rights arising from the employment relationships shall be granted to him or her. Abolishment of working in a second job is also necessary in order to protect part-time workers, as according to the ECA, several guarantees ensured for employees in principal job have not been provided for employees in a second job as part-time employees. At the same time, provision of particular guarantees to persons working part-time is not justified, as their standard of working time is extremely limited. According to the new draft WRTA, guarantees of a part-time employee may be restricted in cases prescribed by law, if his or her standard of working time is below 12 hours per week.

A significant change is introduced by application of the principle established in the EU directive 96/34/EC, according to which parental leave cannot be transferred. According to the Estonian HA, the mother or father of a child may use parental leave; thus, transfer of the leave is possible according to the applicable regulation and in most cases parental leave is used by the mother of a child. Proceeding from the principle of equal

treatment of male and female employees, this should be rendered mandatory both to the mother and father of a child upon the use of the right to access to leave.

Consequently, the Estonian regulation of working and rest time needs to be amended and supplemented with regard to several matters on the basis of the EU law.

Private Law of the Baltic Provinces as a Patriotic Act

1. The Baltic Private Law Code – a Unique Legislative Step in the Legal History of the Baltic Provinces

The Russian autocrat Alexander II granted an imperial confirmation to the Private Law Codification of the Baltic provinces^{*1} which entered into force on 1 January 1865.^{*2} This was an extraordinary event, compared to the history of the private law of the German population of *Estland*, *Livland* and *Curland*.^{*3} For the first time, the private law regulations of all the three provinces had been assembled in one code.

During the former period, their private law had remained dispersed in various sources which dated also from various periods of political subjugation. In the 13th–16th century, the territories of the German state were a part of the Holy Roman Empire; the dioceses were directly accountable to Vatican. In the middle of the 16th century, *Livland* and *Curland* as relatively independent units were annexed by Poland, whilst *Estland* or present-day northern Estonia became Swedish. During the first half of the 17th century, Sweden also conquered the territory of *Livland*. *Curland* managed to maintain its status of an independent duchy as a Polish province. In the course of the Great Northern War, Russia conquered *Estland* and *Livland* in 1710 and attached them as autonomous provinces to the Russian Empire. At the end of the 18th century, *Curland* became a part of Russia as well.^{*4}

Each time, the transfer of the ownership had been confirmed with particular surrender treaties, or acts of surrender. From the perspective of legal development it is of major importance that these acts always

¹ The original version of the code was prepared in German: *Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht: Liv-, Est- und Curlaendisches Privatrecht. Zusammenestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg, 1864.* Soon, a Russian translation was prepared and published as well: *Svod mestnykh uzakonenij gubernii ostzeyskikh. Tshast' tretya. Zakony grazhdanskije. St. Petersburg, 1864.*

² For the sake of being concise, I use here a name which is utilised to denote this legal act primarily in Estonian publications: the Baltic Private Law Code, BPLC.

³ Namely, the code did not cover the law of Estonians and Latvians as peasant people. Their law, including private law, was regulated by an agrarian legislation in the 19th century. The BPLC was applied to the entire population in Estonia and Latvia which had regained their independence only after the First World War. In Estonia, the BPLC remained valid until the Soviet occupation in 1940, because the draft Civil Code, completed in 1936, had not entered into force yet. For details: B. Dälemeyer. *Das Privatrecht Liv-, Est- und Kurlands von 1864.* In: H. Coing (Hrsg.). *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte.* Bd. 3. Teilbd. 2., München 1982, pp. 2076–2098.

⁴ An overview of the history of the Baltic provinces until the First World War: R. Wittram. *Baltische Geschichte: Die Ostseelände Livland, Estland, Kurland 1180–1918.* München, 1954. The most representative one of the recent collections is G. Pistohlkors (Hrsg.). *Deutsche Geschichte im Osten Europas: Baltische Länder.* Berlin, 1994.

confirmed the continuing validity of the legislation already in force. Thus, even in the middle of the 19th century, medieval law books, privileges, records of chivalric law, etc. had to be treated as sources of applicable private law on these territories. However, various rulers had still attempted to interfere with the moulding of provincial law in a legislative manner. The result was a conglomerate of legal sources of various origin and nature and the provisions contained therein. In 1822, C. C. Dabelow, the then Professor of the Faculty of Law of the University of Tartu described the local provincial law as a stockpot in which everyone could find something suitable as they saw fit.^{*7} Decades later, no significant changes had occurred. In 1841, Professor C. O. von Madai opined that there could hardly be a country where various types of legal sources combined such a plexus as in the Baltic Provinces.^{*8}

Nobody had ever taken time to scientifically study this topsy-turvy system before the 19th century. During the Swedish era, in 1632, a university was opened in Tartu including a Faculty of Law.^{*9} Only Roman law and, to a lesser degree, Swedish law and natural law were taught there. The actual local law was left intact by the contemporary professors. During the Great Northern War, in 1710, the Swedish university was discontinued. Attempts to reopen the university in the 18th century remained fruitless.^{*10} The university of Tartu (Dorpat) was only reopened in 1802. With regard to administrative control and financing, it was an imperial university.^{*11} With regard to the language of study, as well as the internal structure of the university, it was, however, a German *Landesuniversität* for the Baltic provinces.^{*12} At the beginning, as many as three chairs of local law were established in the Faculty of Law – one for the law of each province.^{*13} However, with the Statutes of the University dating from 1820, they were united into an integrated chair of “theoretical and practical provincial law of *Curland, Livland* and *Estland*”.

The first professor was elected to the faculty of integrated provincial law as late as in 1831.^{*14} That was Friedrich Georg von Bunge (1802–1897), who later compiled the BPLC.^{*15} In his programmatic article on the scientific approach to the local provincial jurisprudence, published in 1822, C. C. Dabelow predicted eternal fame to the pathfinder of this field both at home and abroad.^{*16} His student Bunge is regarded as the founder of the local provincial jurisprudence. This work was crowned by the codification of local private law. As Bunge proceeded from the same principles in his activities both as a scholar and a codifier, his scientific programme and the problems related to its application need to be examined in greater detail.

⁷ C. C. Dabelow. Ueber die wissenschaftliche Behandlung des besonderen Rechts der Russischen Ostsee-Provinzen. In: E. G. Bröcker (Hrsg.). Jahrbuch für Rechtsgelehrte in Russland. Bd. 1., Riga, 1822, p. 190. About Dabelow’s role as a reformer of the Faculty of Law of the University of Tartu and his views on the research of local rights: M. Luts. Integration as Reception: University of Tartu Faculty of Law Case in 19th Century. – *Juridica International. Law Review. University of Tartu*, III, 1998, pp. 134–139.

⁸ C. O. Madai (Rezension): F. G. Bunge. Das Liv- und Esthländisches Privatrecht. – *Kritische Jahrbücher für deutsche Rechtswissenschaft*. A. L. Richter, R. Schneider (Hrsg.), Jg. 5, Leipzig, 1841, pp. 830–831.

⁹ The last collection of the history of the University of Tartu dates back to the 350th anniversary of the university: K. Siilivask (Ed.). History of Tartu University 1632–1982. Tallinn, 1985. An overview of the history of the Faculty of Law is presented only in Estonian and in the parallel publication also in Russian: P. Järvelaid. 360 aastat Tartu ülikooli õigusteaduskonda (Three Hundred and Sixty Years of the Faculty of Law of the University of Tartu). – *Eesti Jurist*, 1992, No. 1–6, pp. 43–48, 154–158, 241–250, 346–349 and 419–428.

¹⁰ Details: H. Neuschäffer. Die baltischen Provinzen ohne Universität von 1721 bis 1802. In: G. Pistohlkors u.a. (Hrsg.). Die Universitäten Dorpat/Tartu, Riga und Wilna/Vilnius 1579–1979. Köln, Wien, 1987, pp. 20–32.

¹¹ See V. Tamul. Die Dörptsche Universität – Landes- oder Reichsuniversität? Zum Verhältnis von Deutschbalten, Stadt und Universität im 19. Jahrhundert. In: H. Piirimäe, C. Sommerhage (Hrsg.). Zur Geschichte der Deutschen in Dorpat. Tartu, 1998, pp. 85–110.

¹² Details: M. Luts. Keiserlik *Landesuniversität* Läänemereprovintsidele. Tartu ülikooli õigusteaduskonna struktuur 19. sajandi alguses (Imperial *Landesuniversität* for the Baltic Provinces. Structure of the Faculty of Law of the University of Tartu at the Beginning of the 19th Century). – *Ajalooline Ajakiri*, Tartu, 1998, No. 3 (102), pp. 43–53; Summary p. 124.

¹³ About the original scientific orientation of the university and the Faculty of Law: M. Luts (Note 5), pp. 130–133.

¹⁴ From 1825 to 1831, the extraordinary Professor of provincial law was G. E. Bröcker, who was elected as a professor of constitutional and international law in 1831.

¹⁵ Bunge had begun to teach provincial law as a private associate professor already in 1825. Until 1842, Bunge remained a professor of provincial law in the University of Tartu. Then he had to leave the position and continued as a member of the town council of Tallinn. Bunge spent the years 1856–1864 in the II department of the Emperor’s Privy Council where he had to prepare the draft BPLC. His biography W. Greiffenhagen (Hrsg.). Dr. jur. Friedrich Georg v. Bunge. Reval, 1891 gives an overview of his life. Proceeding from that, but with corrections and supplements: H. Diederichs. Friedrich Georg von Bunge. – *Baltische Monatschrift*. Jg. 39, Reval, 1897, pp. 357–386. Even the latest Estonian overview of Bunge’s life and works has taken Bunge’s autobiography as the basis, supplementing it with important references to sources and other relevant literature: P. Järvelaid. Bunge sajand ja sajand Bungeta (Bunge’s Century and Century Without Bunge). I and II. – *Kleio. Ajaloo Ajakiri*, No. 4 (22), Tartu, 1997, pp. 49–51 and *Ajalooline Ajakiri*, No. 3 (102), Tartu, 1998, pp. 17–30.

¹⁶ C. C. Dabelow (Note 5), p. 213.

2. F. G. von Bunge's Point of Departure upon Scientific and Legal Treatment of Local Private Law

Before proceeding with a more detailed analysis of Bunge's provincial law concept, I have to point out one generally acknowledged opinion in research to date. This is manifested in the belief that Bunge developed his approach to provincial law according to the historical school of F. C. von Savigny and K. F. Eichhorn. E. Landsberg, who compiled the most comprehensive review of German jurisprudence in the 18th–19th century, called Bunge the man who transferred the methods of the historical school to the far edge of German culture. At the same time, Bunge could discuss the law of the Baltic provinces in vivid relation with German law and its historical development.^{*17} Landsberg also called the Baltic Private Law Code, compiled by Bunge, “the most glorious victory of historical-germanic German jurisprudence”. Landsberg compared this to the achievements of J. C. Bluntschli in compiling the civil code of Zurich on the basis of the methods of the historical school.^{*18} Estonian legal historians have also assumed up to this point that when now analysing the rights of local provinces, Bunge proceeded from the methods of the historical school.^{*19} Thus, Bunge has been proven to be famous both locally and internationally for his use of the methods of the historical school in his scientific treatment of the local private law regulations in the Baltic provinces of *Estland*, *Livland* and *Curland*. As he was also the founder of this branch of research, it must signify that the Baltic-German jurisprudence established by Bunge was in the wake of the most modern contemporary legal school from the very beginning.

Such treatment was facilitated, if not established, primarily by Bunge himself. In an autobiography published in 1891, he claimed that he had got hold of Savigny's *About the Call of our Era to Legislation and Jurisprudence* in about 1830–1831.^{*20} The reading of this work had reportedly evoked in him an awareness and a scientific transformation “into an eager disciple of the historical school”.^{*21} Prior to that, he had been excessively influenced by the practical and strictly deductive-logical approach of his teacher Dabelow to law and jurisprudence. However, Bunge was not too accurate when he extended Dabelow's generally practical and formal logical approach to his attitude to the scientific treatment of the law of the local provinces. Dabelow splendidly recognised the special historical condition of the Baltic provinces and demanded that the local jurisprudence observe the methods of Savigny's historical school.^{*22}

However, this situation was already pre-determined in 1710 when the former Swedish overseas provinces *Estland* and *Livland* were attached to the Russian Empire during the Great Northern War. As mentioned above, the merger was formalised with surrender treaties or acts of surrender. The merger of *Curland* with the Russian Empire in 1795 was also completed through the conclusion of an act of surrender. All the acts of surrender confirmed the continuing validity of the local legal order, privileges, judicature and, among other things, also the “historically developed law”.^{*23} In this context, it seems only natural that when a foundation had to be established to the scientific treatment of the local law in the 19th century, historical research into its sources proved unavoidable. At the same time, the historical school led by F. C. von Savigny was highly valued on the theoretical law market. Moreover, Savigny himself demonstrated how to build of centuries-old legal material, relying on one's own theoretical principles, a modern private law system that

¹⁷ E. Landsberg. *Geschichte der deutschen Rechtswissenschaft*. III Abth., 2. Hbd, Text., München und Berlin, 1910, p. 559.

¹⁸ E. Landsberg (Note 15), p. 561. H. Schlosser uses the same comparison with Savigny's student Bluntschli's activities in Zurich in his overview of the more recent history of private law. H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte*. 6. Aufl., Heidelberg, 1988, p. 139. Also, in the most authoritative reference book on the history of German jurisprudence, *Handbook of History of German Jurisprudence (Handwörterbuch zur deutschen Rechtsgeschichte, HRG)* H. Blaese claims that Bunge laid a foundation to the scientific treatment of the Baltic law, using the method of the historical school: H. Blaese. *Bunge, Friedrich Georg von.* – HRG, Bd. 1., Berlin, 1971, p. 540.

¹⁹ P. Järvelaid (Note 13), II, p. 19; also, M. Luts. *Die Modernisierung der Rechtswissenschaft und Juristenausbildung in den Ostseeprovinzen im 19. Jahrhundert im Rahmen der alteuropäischen Ständeverfassung.* – *Acta Baltica*, XXXV, Königstein, 1997, pp. 248–252.

²⁰ F. C. Savigny. *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*. Heidelberg, 1814. Bunge probably came across the second edition, published in Heidelberg in 1828, because he refers to that in his work. F. G. Bunge. *Wie kann der Rechtszustand Liv-, Esth- und Curlands am zweckmässigsten gestaltet werden?* Riga und Dorpat, 1833, Fn. 26, p. 44.

²¹ W. Greiffenhagen (Hrsg.) (Note 13), pp. 13–14.

²² C. C. Dabelow (Note 5), pp. 207–218. See also M. Luts (Note 5), pp. 137–138.

²³ The law confirmed with the acts of surrender acquired such a general name, above all, in the 19th century literature. See C. C. Dabelow (Note 5), p. 207. The acts of surrender laid down that courts administer justice “according to Livonian privileges, old generally-accepted customs and the old well-known Livonian Chivalric law” (clause 10 of the acts of surrender of the Livonian Knighthood) or the persistence of “income, benefits, privileges, court procedures, customs, freedoms and other similar matters” would be confirmed (clause 2 of the acts of surrender of the city of Riga).

conforms to the needs of the industrialising society. It was a thoroughly considered act that Savigny entitled his dogmatic fundamental work as *Contemporary (sic!) Roman Law System*^{*24}, not Roman Law System.

As expected, it seems that the professor of the provincial law of the University of Tartu and the later codifier of the local provincial law F. G. Bunge adopted Savignian demands to jurisprudence and legislation in his scientific and legislative activities. In what other reasonable manner would he have been able to shape the law originating from medieval sources into a convenient form for the modernising 19th century? Moreover, Bunge himself claimed that he became an eager disciple of Savigny and the historical school around 1830, which gave rise to the inconsistencies in the views presented in his earlier and later works.

In 1833, Bunge published his jurispudent programme *How to Shape Legal Condition* in Livland, Estland and Curland in *Most Efficient Manner*.^{*25} Following a historical overview of the development of provincial rights by that time, Bunge formulated his views concerning their scientific and subsequent legislative treatment. Doing so, he also had to find a solution to at least two complicated problems arising from the peculiarities of the historical development of local rights. The first may be regarded as an issue of territorial and estate particularism; the second as an issue of the crucial role of practice.

2.1. Solution to the Issue of Particularism

Bunge began his historical overview from the Middle Ages. During the Old Livonian period, the area was occupied by several state-like units. However, their private law did not differ according to states but rather according to estates. For example, the principles of inheritance law of the nobility in the countryside could radically differ from the inheritance law norms valid in towns, not to mention the clergy and the private law applicable within that estate. In the 19th century, the estates-based legal order had survived in the Baltic provinces, but its structure had undergone transformation. Catholic clergy as an estate had largely disappeared and the evangelical church did not constitute a comparable estate. In addition to that, as a result of the agrarian reform laws dating from the beginning of the 19th century, a new free estate of peasants had developed. Consequently, Bunge had to distinguish between four contemporary estates, to each of which particular private law principles applied: the nobility, townspeople, peasantry and Protestant clergy as well as other persons who did not belong to any of the three above-mentioned estates.^{*26}

With regard to the latter, Bunge acknowledged the existence of a general provincial law in his programme dating from 1833, which should have been distinguished as such from the private law of the principal estates. According to Bunge, the general private law was to be applied in cases where none of the particular rights of the estates were applicable. Still, in 1833 Bunge did not mention anything about the origins or material contents of the general private law. However, three years earlier he had asserted that its norms relied primarily on Swedish, general German (together with Roman and canon law) and Russian law.^{*27}

Thus, according to the differentiation by estate, Bunge obtained four types of private law proceeding from various principles. When during the Old Livonian period, or, according to Bunge, “during independence”, the differences arising from private law were nearly entirely related to estates, then later history and different political jurisdiction of individual territories had also given rise to territorial differences. So, due to a colourful historical background, the private law regulations applying to each province had acquired its own peculiarities by the beginning of the 19th century. Their validity had also been confirmed in the acts of surrender concluded with the Russian rulers. Thus, Bunge had to admit that there were $3 \times 4 = 12$ different types of private law valid in the Baltic provinces.^{*28}

In order to avoid confusion and unnecessary transfers, Bunge considered it necessary that all these private law regulations be treated separately. So it would be easier to notice inherent overlaps and differences. The separated treatment should also allow for obtaining a better overview of the whole system in Bunge’s opinion. However, the unification of private law regulations to an integrated system would give rise to

²⁴ F. C. Savigny. *System des heutigen Römischen Rechts*. Bd. 1–8, Berlin, 1840–1848.

²⁵ F. G. Bunge (Note 18).

²⁶ *Ibid.*, pp. 1–21.

²⁷ F. G. Bunge, Recension: R. J. L. Samson v. Himmelstiern. *Das livländische Erbschafts- und Nöherrecht*, Riga 1828. – R. J. L. Samson v. Himmelstiern. Ueber die Recension, welche der Dr. (jetzige Professor) Bunge in der *Allgemeinen Litteratur-Zeitung*, May 1830, Nr. 84 und 85 hat abdrucken lassen. St. Petersburg, 1834, pp. 97–98. Himmelstiern’s fierce criticism of Bunge’s thesis of the existing “general provincial law” above all, was obviously the reason why Bunge abandoned this view in his later works.

²⁸ F. G. Bunge (Note 18), p. 21.

inevitable errors and mistakes. It would create a danger that the crucial deviations of various institutes in different particular laws would remain unnoticed or seem illusory. According to Bunge, this was also a reason behind the temptation to remove crucial differences by force.^{*29}

For Bunge an integrated private law system, of which an overview should be gained by means of separated treatment, was a private law of a particular individual estate of one province. Naturally, similarities and overlaps could be detected concerning the institutes or principles, but the researcher should not have been troubled thereby. The main objective was to avoid unreasonable generalisations. Another grave danger concerning integrated treatment of private laws arose from the fact that they seemed to complement one another. This would lead the person applying the law to an idea that, for example, the provisions of the chivalric law of *Estland* could be subsidiarily applied to the private law of *Curland*. However, only the validity of Roman law and general German law had been imperially approved as subsidiary law in all these provinces. And the extent to which they were applied varied again in individual provinces and their estates. Thus, according to Bunge, the uniform applicability of the subsidiary rights in the Baltic provinces was merely abstract. But specifically, it differed according to the developed yardstick of local practice in each province and also according to the estates. And this difference had to be taken into account in the provincial law.^{*30}

In this context it is natural to wonder why Bunge dedicated so much attention to issues that seem to relate to the form rather than the content at a first glance. The programme dating from 1833 does not answer the question. Namely, Bunge does not point out any particular authors, with whom he should discuss the issue. This is clarified when we take into account the legal and political background of Bunge's tract. The tract had to be a counter-programme to the codification plans of Reinhold Johann Ludwig Samson von Himmelstiern.^{*31} Thus, Bunge had to provide a detailed account of shortcomings from which his opponent's approach to the provincial law suffered in his opinion. Already at the end of his life, Bunge criticised the unified and thus confusing treatment of the differing private law regulations of the Baltic provinces in Himmelstiern's projects.^{*32}

The practical consequence of the differentiation was that a dozen men were needed for the (scientific) treatment and scientifically reasoned codification of the private law regulations in force in the Baltic provinces. Bunge agreed that they should be educated in legal matters but the knowledge of the theory and practice of the local law (their estate^{*33}) would be even more important.^{*34} A condition added by Bunge that these men should not be trammelled by prejudices arising from general law and an excessive love of the Roman law was aimed at Himmelstiern as criticism. Also, Bunge considered it essential that they work locally (not in St. Peterburg). This was necessitated, above all, by the location of the sources. In addition to that, it was in the interests of exploring the bulk of the material that these men be free from all other obligations for that time.^{*35}

So Bunge demanded, in the general scientific treatment and codification of the provincial law, the active participation of local practitioners. In addition to them, his plan involved one more man. He had to undertake the task of exercising supervision over all works done. He had to take care of the harmonisation of the form of all private law regulations and final revision. In order to accomplish this, he had to be familiar with more or less all private law regulations in force in the Baltic provinces.^{*36} It is hardly necessary to add who the man was in the then Baltic provinces who had to know already, due to his profession, the private law regulation of all three provinces to some extent. Naturally, this could only be the Professor of the provincial law of the University of Tartu, Friedrich Georg Bunge.

²⁹ *Ibid.*, p. 22.

³⁰ F. G. Bunge (Note 18), pp. 22–23.

³¹ R. J. L. Samson von Himmelstiern (1778–1858) was the president of the provincial codification committee from 1824 and from 1829–1840 a member of the codification committee of the imperial Privy Council with the task of compiling codes of the laws of the Baltic provinces. Himmelstiern himself about his concept of the codification of the local laws: R. J. L. Samson von Himmelstiern. *Codex der Livländischen Rechte nach der Römischen Pandektenordnung*. In: E. G. Bröcker (Hrsg.). *Jahrbuch für Rechtsgelehrte in Russland*. Bd. 2, Riga, 1824, pp. 196–222. It is already evident from the title of this programme that Himmelstiern aimed at taking the legal order of Roman law as the basis.

³² W. Greiffenhagen (Hrsg.) (Note 13), p. 13.

³³ In case of peasantry, it is clear that it was hardly possible to find any one within the estate in the first half of the 19th century who would have been educated in law. Obviously, Bunge did not regard that as a problem – legislation concerning the peasantry was prepared by the representatives of the knighthood. So they had to know better on what principles the respective private law was based.

³⁴ F. G. Bunge (Note 18), p. 25.

³⁵ *Ibid.*, pp. 39–40.

³⁶ *Ibid.*, p. 25.

In 1838, Bunge published his first major work on the private law of the Baltic provinces: *Private Law of Livland and Estland, A Scientific Approach*.^{*37} The title of Bunge's work manifests an important deviation from his original strict programmatic demand that the law of each province be handled and treated as a separate integral unit. In fact, it could be deduced from his earlier writings that he considered a unified treatment of at least these two provinces feasible. Namely, already in 1832 in the plan to publish legal sources Bunge provided for an integrated collection of the legal sources of *Livland* and *Estland* and a separate collection of the legal sources of *Curland*. At the time, his reasoning behind the feasibility and necessity of an integrated collection of legal sources of the two northern provinces was that these sources were either closely related or even common and thus frequently also complementary.^{*38} In addition to that, in 1838, Bunge found that the unified treatment of the private law of both provinces was not only feasible, but even reasonable due to reciprocal influences and complements.^{*39} Nevertheless, he emphasised that he considered it justified only with regard to scientific treatment. After all, his book was to be used as a textbook. The treatment meant for practitioners was another matter altogether. In that, Bunge was determined to remain faithful to the separation thesis expressed in his programme of 1833.^{*40}

What else was meant for a more practical use than the Baltic Private Law Code compiled by Bunge himself? In the case of the BPLC, Bunge has still adopted an integrated treatment and thus abandoned his original requirement of strict separation. This solution was probably caused by an entirely practical attempt to avoid otherwise inevitable repetitions.^{*41} The fact that Bunge himself was able to observe the practical consequences thereof presumably also forced him to abandon the separation thesis. The imperial codification committee had already earlier drawn up a draft on the private law of the Baltic provinces, in the preparation of which both the nobility and the delegations of the towns had participated. Bunge notes that one of the major shortcomings of this draft was the endless repetitions.^{*42} He was determined to avoid them in his code and opted for the integrated treatment of the private law of all three provinces.

The ardent supporter of science as handled by Savigny and Eichhorn should find these common and "inevitable" principles on what the definitions of the law sources of various provinces relied. In other words: to identify the principle concealed behind the legal provisions, which would connect the seemingly conflicting provisions. Naturally, the "uniqueness" of each and every private law would have been lost in such a procedure, which, for Bunge, was worthy of preserving and storing them all as autonomous values.

In BPLC, Bunge has adopted a method that reminds of the legal method (*usus modernus*) used in the 18th century. Firstly, he has provided a list of provisions common in all three provinces. Then, the characteristics of regulations applicable in one or another province and their deviations from the previously determined common share have been presented as separate subsections. In the same way, he used to treat Estonian and Livonian rights in his earlier scientific works. Apart from that, deviations applicable in one or another city or rural region have been presented as notes accompanying respective paragraphs.

Thus, as a result of conscientious and detailed work, Bunge managed to register almost the entire territorial and estate particularism, which characterised the condition of the Baltic provinces before that time. In fact, the notes describing regional variations served as independent provisions. If they had been set out as separate paragraphs in BPLC, their already large number (4,600) would have increased further. This number of paragraphs implicates a working standard used by Bunge. Consequently, the work did not contain general principles, but rather, was as casuistic and detailed collection of applicable law as possible.

³⁷ F. G. Bunge. Das liv- und estländische Privatrecht, wissenschaftlich dargestellt. Dorpat, 1838. In this, Bunge already abandoned the analysis of the general provincial private law. He emphasised, however, that theoretically its existence and applicability should be acknowledged (p. 4). Thus, Bunge did not want to disregard the (theoretical) idea that such general private law existed in each province. He surrendered to the sharp criticism of practitioners and excluded its analysis from his work. The fact that theory had to give way to practice in the Baltic provinces arose from the crucial role assigned to practice by Bunge. Besides that, the arithmetic operation familiar to us already could be rewritten as follows: $3 \times 3 = 9$ different types of private law in total in all the Baltic provinces. As Bunge failed to summon a dozen local jurists under his auspices, this restriction enabled his work to be better covered and accomplished.

³⁸ F. G. Bunge. Plan zu einer Handausgabe der liv-, esth-, und curländischen Rechtsquellen. In: *Ibid.*, Beiträge zur Kunde der liv-, esth-, und curländischen Rechtsquellen. Riga und Dorpat, 1832, pp. 146–147.

³⁹ F. G. Bunge (Note 35), p. 2.

⁴⁰ *Ibid.*, p. 3, Anm. a.

⁴¹ No other reason can be detected at least in Bunge's own handwritten explanation on the history of BPLC. Cf. F. G. Bunge. Geschichte der Entstehung des Privatrechts. The Estonian History Museum (Tallinn), fond 53, liat 1, item 49, p. 3p: "... die verbundene Darstellung der neun verschiedenen Privatrechte mußte in der Art geschehen, daß jedes derselben in seiner Eigenthümlichkeit erkenntlich blieb und doch dabei Wiederholungen vermieden wurden."

⁴² *Ibid.*, p. 3–3p.

In addition to that, every local jurist could enjoy the fact that all peculiarities applicable in their territory until that time were entered into the new code. In this respect, we have no reason to join E. Landsberg in congratulating German diaspora provinces where legal unity had reportedly been achieved already when the motherland could only dream about it.^{*43} Rather, one has to admit that Bunge managed to provide the entire legal particularism, having its origin in the Middle Ages, with modern legal force. Problems arising thereafter in Estonian jurisdiction indicated that such solution was confusing and unexpected for the modern society.^{*44} As already mentioned, Bunge's contemporary practitioners could meet the familiar, particularly local law in the code compiled by him.

2.2. Acknowledgement of the Crucial Role of Practice

Another important peculiarity of the private law applicable in the Baltic provinces, apart from their estate and territorial diversity, was the fact that they had developed and transformed not as a result of persistent legislative activities but rather as common law and court practice. First of all, it applied to the original law or the law applicable before 1561. It was primarily feudal law that determined the nature of private law at that time. Notwithstanding the persistence of estates in the Baltic provinces, the underlying feudal order lost its validity over the course of time. However, several sources of that time were still applicable in practice. At the same time, the courts had frequently extended provisions concerning only nobility also to other estates. Moreover, no legislator has ever *expressis verbis* repealed the older legal sources. On the contrary, each new conqueror had confirmed the continuing validity of the existing law. Thus, it had been for the practitioners to decide which old laws and to what extent they acknowledged them as valid law.

As the major role in deciding on the applicability of earlier laws was played by the practitioners, so it was also in the case of foreign laws. These were imposed either by former rulers or received on the initiative of practitioners. The first category embraced Polish, Swedish and Russian laws. Canon law, Roman and general German law, above all, constituted the other category. In Bunge's opinion, the section of Swedish law applied by Livonian and Estonian courts only after these territories had been annexed to Russia was also to be included here.^{*45} Despite the fact that the acts of surrender never mentioned a more extensive use of Swedish law, the local courts were, in fact, rather eager to do this in the 18th–19th centuries.

The local practice had exclusively decided and still did in 1833 about the mutual relationships of all these various bodies of law and what was to be done if various provisions collided. In defining practice, Bunge proceeded from the opinions and definition published by Dabelow in 1824.^{*46} Guided by Dabelow, Bunge regarded as binding practice the common and persistent decision-making practice of mid to upper-level courts.^{*47} When Dabelow spoke about the crucial role of practice in shaping and transforming law in the Baltic provinces^{*48}, it was but a confirmation of the condition prevalent in the Baltic provinces till that day. In moulding private law, the future provincial jurisprudence had to take over, if not the leading role, then at least position itself as an equal creative factor beside the local practice according to his programme. At the same time, an understanding of the guiding principles reflected in historical sources of provincial law had to be gained through legal and historical study, on which the system of applicable law, or rather, a system of law that was to be applicable, would be erected.^{*49} It is clear that this task was to be assumed by

⁴³ E. Landsberg (Note 15), p. 561.

⁴⁴ Upon the application of BPLC to the whole population of Estonia after the First World War the differences concerning estate contained in them were cancelled, but the territorial ones remained in force. Taking all of them into account proved, periodically, to be even beyond the powers of judges and the higher instance had to draw their attention thereto. See the decisions of the Civil Department of the Supreme Court of 18 May 1922 and 3 November 1933: T. Anepaio (ed.). Riiigikohus. Otsuste valikkogumik 1920–1940 (The Supreme Court. Selected Decisions 1920–1940). Tartu, 1999, pp. 107–108 and 124–127. After Estonia regained its independence (1991) the principle of restitution, return of property to their former owners or their successors were taken as the basis in ownership reform. In determining succession, the present Estonian officials and judges have to proceed from the provisions of BPLC once again. The practice testifies that there is a tendency in such cases to forget the territorial particularism included in BPLC, and it is implemented as a modern code with common principles. For more details: T. Anepaio. Hobusemüügist omandireformini (From Horse Selling to Ownership Reform). – Juridica, 1997, No. 6, p. 291.

⁴⁵ F. G. Bunge (Note 18), pp. 27–31.

⁴⁶ One of Dabelow's programmatic works dating from 1820s was dedicated to the problem of legitimacy of court practice: C. C. Dabelow. Die Praxis sowohl überhaupt, als in den Russischen Ostsee-Provinzen besonders, kritisch beleuchtet. In: G. E. Bröcker (Hrsg.). Jahrbuch für Rechtsgelehrte in Russland. Bd. 2, Riga, 1824, pp. 223–248.

⁴⁷ F. G. Bunge (Note 18), pp. 31–32.

⁴⁸ C. C. Dabelow (Note 5), p. 201. See also M. Luts (Note 5), p. 137.

⁴⁹ C. C. Dabelow (Note 5), pp. 213–215.

jurisprudence. In this sense, Dabelow demanded, in fact, fully Savignian and metaphysically based (provincial) jurisprudence also for the Baltic provinces.^{*50}

Bunge has abandoned the very same metaphysical element and pursuit of general principles in his programme. According to his scientific treatment of provincial law it was unnecessary to investigate the origin of each legal institution “down to the roots”^{*51}, neither was it necessary to strive for the perception of principles through a thorough study of law provided by history. In Bunge’s opinion, the scientific treatment of local law was to proceed from nothing but the currently existing practice and common law.^{*52}

If jurisprudence has to proceed from practice and common law, its methodological impact will be different from the one produced by the study of historical legal sources. The source criticism will nearly be minimised in this case. The only concern will be the text from which practice proceeds. The question whether the text corresponds to the original and what version of the text should be regarded as valid no longer exists. The demand of the scientific treatment of local law established by Bunge necessitated a study of other sources. Court records were to lie in the centre of provincial jurisprudential research. As Bunge’s understanding of practice (as a more limited concept) involved the common judgement practice of mid to upper-level courts, a scientific research could remain restricted to the above-mentioned judgements of local and mid to upper-level courts of the central government. Such a proposition also clarifies why the persons preparing summaries of local laws had to work on the spot and not, for example, in the Department of Codification of the Imperial Chancellery in St. Petersburg. Making copies of older laws could also have been a feasible option. Delivery of all archives of upper-level courts to the imperial chancellery or making copies thereof would, however, have been unthinkable.

Bunge also demanded that the research of court practice extend as far back in history as possible.^{*53} It is clear what gave rise to such demand. Bunge recognised a continuing common judgement of courts as the legitimisation criterion of practice (following Dabelow’s example). It was for the sake of identifying continuity and uniformity that a study of as long a period of practice as possible was required.

Thus, according to Bunge’s concept, research of judicial practice was to be launched in order to reveal what was valid as justified practice and consequently as provincial law in force or current provincial law. In case of judgements based on clear written sources, the matter was simple – the solution derived from law. In the case of other judgements the first step was to identify whether these were common and continuous judgements. The last step was to be the adjustment of already studied judgement practice and its use in (scientific and legislative) treatment of provincial private law regulations.

Having reached such a methodologically and jurisprudentially suspicious opinion that the existing practice had to be rendered compulsory, Bunge had to make certain reservations. Above all, he admitted that practice was not always consistent. If the actual practice was not consistent, it could not be regarded as valid practice according to the Dabelow-Bunge definition and here jurisprudential adjustments were probably expected. Bunge considered inadequate knowledge of law, first and foremost, insufficient knowledge of local law, as another reason for mistakes and confusion in local law. On the one hand, it was caused by the existing court system where legal training of judges was, in fact, not required.^{*54} Insufficient knowledge of local law among judges and other legal professions originated from training in foreign universities as well as the former weakness of the University of Tartu in teaching provincial law. If lawyers had been educated in some German university, they also tended to implement the knowledge acquired there in subsequent practice. Roman law studied as general law and the theories derived therefrom could frequently not be combined with the principles valid in the local law of the Baltic provinces according to Bunge. Unnecessary dependency on Roman law principles was the third mistake expostulated by Bunge with local practice. However, he had to admit that Roman law was undoubtedly better researched and juridically better founded. In his eyes, this was no reason to justify the abandonment of implementation of the existing legal source of local origin.

⁵⁰ Here I proceed from J. Rückert’s thesis that Savigny’s teaching of law is metaphysical by nature. Above all: J. Rückert. *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny*. Ebelsbach, 1984, particularly pp. 232–415, in summary also J. Rückert. *Savignys Konzeption von Jurisprudenz und Recht*. – *Tijdschrift voor rechtsgeschiedenis*, D. LXI, 1993, pp. 84–95. I am not, however, willing to agree to Rückert’s concept that Savigny’s teaching of law involves “objective” idealism. It should be rather called “individual”, “concrete” or even “positive” idealism.

⁵¹ F. C. Savigny (Note 18), pp. 117–118.

⁵² F. G. Bunge (Note 18), pp. 30–31.

⁵³ *Ibid.*, p. 32.

⁵⁴ For more details: M. Luts. *Freedom via Acquired Profession? On the Possibility of Being a Jurist in an Estate Society*. – *Juridica International. Law Review*. University of Tartu, IV, 1999, pp. 201–203.

However, in his reluctance to appreciate the impact of Roman law, Bunge actually contradicted his own programmatic demand for the crucial role of practice. According to the presented concept of practice he should have acknowledged that at least such practice of judgement based on Roman law, which was consistent and recurrent as to its contents should have been regarded as valid provincial law. This should have been the case even if it was in conflict with the written laws or other legal sources of the Baltic provinces themselves. The failure to correct this contradiction in Bunge's writing once again demonstrates that his point of departure had been Dabelow's article on practice. The article immediately provides an answer to the question why the continuity and uniformity in the practice of judgement of the courts suddenly proved insufficient. The practice, preferring Roman law to local laws, was absolutely unjustified according to Dabelow, as it had unlawfully assumed the functions of legislative power.⁵⁵

Now it was the provincial jurisprudence that had to interfere with these deficiencies from which the local practice suffered in Bunge's opinion. On the one hand, the study had to provide a solution to conflicts found in practice. On the other hand, the part of practice which, according to Bunge, unjustly tended to ignore provincial law sources and prefer Roman law solutions had to be redirected. All this had to be done by approximately a dozen men whom Bunge intended to trust with the preparation of the summaries of local private rights.

According to Bunge, the common and recurrent practice of the mid to upper-level courts was to be, above all, declared as valid private law in the Baltic provinces, to provide a foundation for jurisprudence and receive legislative approval. If court practice was inconsistent in case of some institutions, jurisprudence had to identify the local written source concerned and find a legitimate solution from its provisions. Particular attention was to be focussed on these cases where the court practice proceeded from Roman law. In such instances it was necessary to check if there were any written local laws available for the case concerned. If the result proved positive, the provisions of the local law had to be regarded as legitimate. This was obviously also the case when a provision based on Roman law had been consistently applied in court practice.

It is noteworthy that Bunge's plan lacks, for example, individual jurisprudential-dogmatic treatments for systemising the future practice and guiding it to the right path according to his understanding. However, a place has been provided for academic training in law. Namely, Bunge was of the opinion that one of the most important preconditions of the future "provincialisation" of court practice had to be the knowledge of local law acquired in the university. In addition to that, persons who had not passed a thorough examination in local law were not to be admitted to the positions of the judge or registrar.⁵⁶

Bunge recognised the major importance of the actual common law, beside court practice, in local private rights and the function of this role as a (trans)forming factor. Nevertheless, apart from the "practice in a more limited connotation", it was another crucial foundation, on which provincial jurisprudence and provincial law were to be based according to Bunge. Bunge aimed at solving the problem of completeness of the (private) law system by means of researching common law. It was from customs and common law that solution should be sought in case of a gap, when appropriate provisions existed in written legal sources of neither local nor subsidiary law, and a solution could not be found from court practice, either.

With regard to the customs of people, the researcher could no longer rely on written sources. In this case, Bunge had to include one more body in his plan, or in other words: the next dozen persons competent in law. They had to be knowledgeable about law for the purposes of medieval court procedure (Ger. *Schöffen*). When Bunge regarded education in law still necessary for compilers of the summary of private law of each individual estate, it was not as essential for persons competent in common law. Nevertheless, they had to know well the local circumstances and customs. In addition to that, it was important that they were trusted by their estate. Bunge provisionally called this body of persons competent in law "a practical committee".

Using the modern diction, Bunge's plan included also a group of experts in common law. Bunge was ready to assign an even more significant role to this group than dissemination of information concerning the local customs. In fact, they and thus the common law were to have the final word in the question of what had to be valid in the Baltic provinces as private law. Namely, in Bunge's opinion, the body of persons competent in common law were to finally check the summaries of applicable private law as prepared by jurists. They

⁵⁵ C. C. Dabelow (Note 44), p. 241. Such an etatist viewpoint refers to the inconsistency of Dabelow himself. On the one hand, he demanded that the method of the historical school be applied to the research of local provincial law. On the other hand, with regard to his own particular scientific viewpoints he proceeded from the concept of law and method prevailing before Savigny.

⁵⁶ F. G. Bunge (Note 18), p. 33.

had to decide whether these provisions were set out precisely as “the local private law had developed them in real life under centuries”.⁵⁷

At this point, the question how Bunge intended to find people who actually knew centuries-old customs and could confirm that one or another custom had been in use already for centuries may be left aside. Instead, it is important that by assigning such a role of final decision to experts in common law, Bunge further emasculated the power of decision to shape local law and adjust practice resting with jurisprudence. If sometimes the expression *ancilla legis* is used in jurisprudence, then in Bunge’s concept the study was to have a role that could be called *ancilla usus*. However, one has to admit that Bunge had not yet become an eager disciple of Savigny’s historical school at least by 1833, as he himself asserted in his biography. Still, by that time, he had actually read Savigny’s *Call*. Bunge even referred to it when he had to justify his opposition (*sic!*) to the treatment of provincial law modelled according to Roman law. Bunge also used the Savignian term “unavoidable” and perhaps this is truly caused by reading Savigny’s *Call*. This is indicated by the use of the expression “internal life of people” (*innerstes Volksleben*). Namely, Bunge claimed that the treatment of provincial law developed according to his draft plan would ensure such legal condition in the Baltic provinces, which is inherent to them as their ancestors’ legacy and as such, has become unavoidable.⁵⁸ Even if this claim by Bunge was meant as a reference to Savigny’s teaching of law and “inherent forces” operating in each nation, Bunge has turned Savigny’s teaching upside down. Bunge called unavoidable the very matters that for Savigny served as an incidental part of law, its external embodiment in a random historical situation.

Bunge’s later works are characterised both by consistency with his programme dating from 1833 as well as deviations therefrom. It has to be mentioned of the latter, first and foremost, that he failed to involve a couple of dozen practitioners who would have participated in his effort. Also, Bunge soon abandoned the idea of the primacy of the actual common law.⁵⁹ Thus, there was no longer any need for a practical committee consisting of common law experts. However, emphasis on the crucial role of common law and practice did not disappear from Bunge’s works. If possible, and knowledge permitting, he always attempted to take that into account. Once again, Bunge tried to “scientifically present”⁶⁰ “nothing more than the current, practical law”.⁶¹ Bunge aimed at offering as local provincial jurisprudence as detailed an overview and summary of the actual functioning of court practice as possible. Its traces can be found in his codification activities. BPLC is, in a large part, a rather casuistic summary of the practice of judgement exercised in local courts in the first half of the 19th century. E. Landsberg has also had to admit that Bunge had remained faithful to his principle “to rely on the prevalent practice with maximally pious conservatism”.⁶² E. Landsberg did not thematise how to relate such empiricist orientation to contemporary practice to the methodological principles of the historical school.

3. BPLC as Bunge’s Patriotic Gift to the Politics of the Home Provinces

The title of this article makes one wonder how Bunge’s empiricist and casuistic codification was to serve the patriotic interests of the Baltic provinces. Had the Baltic provinces of the 19th century deserved the harmonisation of law accompanying modernisation, a principle-sensitive and flexible provincial jurisprudence, a scientific approach to court practice, etc.? Instead, Bunge offered to them estate and territorial particularism, similar to the medieval legal practice. The codification, having casuistic and detailed regulation, did not facilitate free development of jurisprudence as demanded, for example, by Savigny. Bunge did not take the contemporary practice before the court of science and demand that it follow the scientifically based work method. Instead, he simply put a part of the contemporary practice down as law.

⁵⁷ F. G. Bunge (Note 18), pp. 34–35.

⁵⁸ *Ibid.*, p. 39.

⁵⁹ F. G. Bunge (Note 35), pp. 22–24.

⁶⁰ “Scientifically presented” (*wissenschaftlich dargestellt*) is namely an addition that Bunge included in the titles of his textbooks on private law.

⁶¹ F. G. Bunge. *Das curländische Privatrecht, wissenschaftlich dargestellt*. Dorpat, 1851, p. X.

⁶² E. Landsberg (Note 15), p. 561.

Nevertheless, we have to regard Bunge as the founder of the local provincial jurisprudence. Moreover, he may be considered to be its discoverer. This was also pointed out by Bunge's peer from the faculty, colleague and friend C. O. von Madai. In his review of Bunge's textbook on Livonian and Estonian private law, published in 1838–1839, Madai noted that it was probably through this book that lawyers and jurists could first discover the existence of a particular provincial law. Until that time, there had also been sceptics among the local jurists, to whom the particular law of the Baltic provinces appeared as a couple of insignificant modifications of general German or Roman law. Thus, Madai had a good reason to claim that Bunge's book was an important patriotic gift and deserved the utmost approval.^{*63} However, it is an entirely different question as to for what purpose the fatherland needed such a conservative gift in the 19th century.

An answer to the question is inherent to the relationship between the Baltic provinces and the central government of Russia. On the one hand, Russia had included many frontier territories in the empire with the clause of recognising their (judicial) autonomy. On the other hand, the Russian central imperial government was unwilling to accept such a situation. For example, already at the end of the 18th century, the general Russian administrative reform was extended to the Baltic provinces. After the death of Catherine II, the previous condition was restored in the Baltic provinces. However, the central government did not discard the idea about a harmonised constitutional, administrative and legal organisation. Although major readjustments were made only at the end of the 19th century during Russification, the attempts to harmonise the empire and abolish the differences between provinces could be felt by his contemporaries to a lesser or greater degree throughout the century. The Baltic nobility based their oppositional policy to such attempts on the idea of conservation and protection of their historically developed peculiarities.^{*64} Such policy was supported, above all, by the acts of surrender.

In addition to that, the private law developed by Bunge and BPLC may be regarded as one act in this policy of preserving what was deemed to be *local, fair and appropriate*. As a result of a year's assiduous work, Bunge collected all the particularities of the local law. Moreover, he managed to organise this mosaic of differences in a more or less satisfactory manner. By means of the table of contents and index, it was still possible to find a legal verdict from the casuistic BPLC. To the contemporary patriots of the Baltic provinces, the possibly precise outlining of local particularities should appear so as that everyone's and their home province's particular needs have been taken into account. Bunge's "conservative piety" with regard to local practice only intensified this perception. Each practising jurist could see that BPLC set out their daily operations. At the same time, it was not important whether the local jurists had adopted the same decisions in similar cases in the period preceding 1710. In the same way, it was not necessary to ask in the case of Bunge's codification whether its provisions conformed to "the internal system of law" or the insight into "organic principles" constituting the legal system obtained through historical research, if one uses Savigny's apparatus of concepts. It was important that the local jurist possessed a summary of the provisions of private law, presented in a systematic form, to a certain extent, which allowed them to feel the familiar pleasure of recognition. One could demonstrate to the Russian central government that there was our own law the continuing validity of which was confirmed already by Peter I.

⁶³ C. O. Madai (Note 6), p. 850.

⁶⁴ In fact, the nobility did not lack an innovation-oriented wing among themselves, but ultimately the conservative attitude prevailed. For details, e.g. G. Pistohlkors. *Ostseeprovinzen unter russischer Herrschaft (1710/95–1914)*. In: G. Pistohlkors (Hrsg.) (Note 4), pp. 367–382. See also M. Hatzel. *Der Abbau der deutschen ständischen Selbstverwaltung in den Ostseeprovinzen Rußlands 1855–1905*. Marburg, 1977.

Dialogue or Conflict?

The Legal Reform of 1889 and Baltic Private Law Code

The entry “border” is divided into three in the Estonian Encyclopaedia:

- administrative boundary – line dividing the state into administrative units;
- economic frontier – line on which the check points protecting the domestic market are situated;
- state border – line marking the territory of a state.

Thus, border denotes, above all, marking, separating, parting.

It is common indisputable knowledge that Estonia (the Baltic states) is (are) situated on the border; however, neither in Estonia, nor to speak of anywhere else, has it been determined in such a unified manner what a border or a path is, what the position of situating on the border is, on what border(s) Estonia is situated.

The location of Estonia on the border is a fact catching the viewer’s eye on every map of Europe – this need not be even mentioned here; however, this triviality has determined and continues to determine our development to date, including legal development. Map No. 4 in S. Huntigton’s book “The Clash of Civilizations and the Remaking of World Order”, reflecting the border between Western-Christian and Orthodox-Slavonic area, indicates that Estonia is located on the borderland of the Western cultural sphere. In other words or from the viewpoint of legal history – Estonia is located on the border of two large, Russian and German legal cultures.

According to the definition of S. Huntigton, Estonia (the Baltic states) belongs (belong) to the fracture line, region of conflict where the centres of civilisation or fundamental states fight one another. Thus this border is, above all, a site of battle, persisting opposition, a breaking point. The foreword to the Estonian version of the book by S. Huntigton, written by T. H. Ilves, the Estonian Minister of Foreign Affairs, also has a meaningful title “News from the Field of Conflict: Huntigton and Estonia.”¹ The Orthodox Cathedral of Alexander Nevsky with its onion-cupolas, standing opposite the Lutheran Dome Church and citadel of the age of the Teutonic Order, is an expressive embodiment of the historical persistence of such conflict.

Some dominant phrases in the accounts of the history of Estonia in the 19th century, including legal history, and not only in the case of researches proceeding from the Estonian national viewpoints, are “fight, critical years, decade, etc.”² On the one hand it is justified if we think, from the viewpoint of legal development, about the fight for the abolishment of personal dependency of peasants and against this, for the rebirth of the University of Tartu (Dorpat) (*i.e.* the Faculty of Law), for the maintenance of Baltic autonomous provincial regime (*status provincialis, der baltische Landesstaat, ostzeiskii osobyi poryadok*) and codification of the Baltic-German law. Paradoxically, such a “fight-centred” method of treatment was equally suitable for both the Baltic-German and national historical accounts of the Republic of Estonia

¹ S. P. Huntigton. *Tsivilisatsioonide kokkupõrge ja maailma ümberkujunemine (The Clash of Civilizations and the Remaking of World Order)*. Tartu, 1999, p. 16.

² P. Pirsko. *Talud päriks. Protsessi algus müüjate ja ostjate pilgu läbi (Purchase of Farmhouses. Beginning of the Procedure through the Eyes of Sellers and Purchasers)*. – *Seltsid ja ühiskonna muutumine. Talupojaühiskonnast rahvusriigini. Artiklite kogumik (Associations and Changes in Society. From Peasant Community to Nation State. Collection of Articles)*. Ed. E. Jansen, J. Arukaevu. Tartu–Tallinn, 1995, p. 98.

(1920–1940), as well as for the Soviet Marxist-Leninist historical writing. This approach unavoidably entails categorical generalisations, as the fight presumes that someone prevails and someone surrenders^{*7}, be they “revolutionarily-minded workers and peasants” or “Estonian people, cultivating their land and developing their culture on the shores of the Baltic Sea” for more than five thousand years.

I claim that such treatment already by its nature inevitably restricts the issue under examination.

The position of Estonia on the borderline or frontier between two major legal systems implies that both German and Russian researchers, who focus on a large system, frequently treat one or another event or process in Estonia (in the Baltic states) (*i.e.* on the border) only as a peripheral, insignificant fragment and do not take time or can not penetrate into the process on the border or the actual nature and significance of an event. On the other hand, J. Lotman claims that in the centre, ideas are often rendered static, stagnate, but in the periphery of a cultural oecumene they are renewed, enriched, *i.e.* semiotic processes proceed frequently more actively in the periphery of a cultural oecumene than in the centre.^{*8} The problem is further complicated, when one or even several (*i.e.* Estonian, Latvian, Baltic German) integral cultural systems (*pro*: legal cultures), striving to define themselves, are situated on the border.

In my opinion, these issues emerge distinctly for example in the studies of the Russian judicial reform^{*9} of 1864. The analysis by B. Vilenski, still serving as the principal work on the judicial reform as a whole in the Russian study of legal history, the Baltic states are examined only on 2.5 pages of 400.^{*10} B. Vilenski mainly emphasises the opposition of the Baltic-German nobility against the judicial reform and points out that the Justices of the Peace were appointed by the government, whereas juries were not established in the Baltic states.

J. Baberowski, author of the newest German study on the Russian judicial reform of 1864 dedicates to the Baltic states 11 pages out of 800.^{*11} He states accurately that the knowledge concerning the functions of the judicial institutions in the border areas of the empire are extremely scarce.^{*12} However, this does not prevent him from claiming confidently that there was little difference between the legal organisation of the Russian and Baltic provinces prior to the reform. According to him, only a sufficient supply of jurists accompanied by an opportunity to have recourse to codified law distinguished the justice of these provinces from that of the Russian provinces.^{*13}

In his work, Baberowski self-evidently analyses, above all, the issues concerning the Baltic-German upper class, *i.e.* the nobility; only a couple of passages have been dedicated to the country people, *i.e.* Estonian and Latvian peasants.^{*14} It is yet stranger compared to the fact that in his monograph, J. Baberowski focuses his attention on Russian peasants and emphasises their avoidance with regard to modern law. J. Baberowski demonstrates that Russian people will not accomplish the transfer to the modern law. He accentuates that the gap, or in other words, the border will widen between the peasantry living in the pre-modern world of thinking and educated and Europeanised estates. The relationship between the literate Estonian peasants and modern law is left out from J. Baberowski's analysis.

I dare say that although J. Baberowski himself does not clearly word the problem of the border in his work, he actually deals with this, *i.e.* the cultural frontier and the problem of surmounting it in his work.

When treating the border as having the connotation of a fighting, breaking and dividing line, we inadmissibly restrict the meaning of the border. In mathematics, boundary or frontier is a set of points belonging simultaneously to interior and exterior. (Frontier – a set of frontier points. Frontier point of a set – a point in space surrounded by points belonging to the particular set as well as points outside it.^{*15}) In

⁷ For example, according to the assessment of P. Järvelaid, the outcome of the legal reform of 1889 was an unjustified demolition of the integral legal and legal educational system. P. Järvelaid. 360 aastat Tartu Ülikooli õigusteaduskonda (Three Hundred and Sixty Years of the Faculty of Law of the University of Tartu) (III). (1865–1888 and 1889–1917). – Eesti Jurist, 1992, No. 3–4, p. 246.

⁸ J. Lotman. Semiosfäär (About Semiosphere). Tallinn, 1999, pp. 16–17.

⁹ The Russian media of the 19th century and due to that the Russian legal historical sources have employed the term “court reform” (*Gerichtsreform*). The term *Justizreform*, used also in German writing would be more precise, as the reform also concerned other legal institutions apart from courts. This is evident in S. Kazantsev's study “Istoriya tsarskoi prokuratury”. Sankt-Peterburg, 1993, pp. 125–145.

¹⁰ B. Vilenski. Sudebnaya reforma i kontreforma v Rossii. Saratov, 1969, pp. 214–216.

¹¹ J. Baberowski. Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914. Ius Commune. Sonderheft. Studien zur Europäischen Rechtsgeschichte. 78. Frankfurt am Main, 1996, pp. 374–385.

¹² *Ibid.*, p. 8.

¹³ *Ibid.*, p. 375.

¹⁴ *Ibid.*, p. 377.

¹⁵ Ü. Kaasik. Matemaatikaleksikon (Lexicon of Mathematics). Tallinn, 1982, pp. 55 and 147.

semiotics, the border is viewed as the total of bilingual “translation filters”, the passing through of which translates the text into another language (other languages). Thus, the points of the semiotic border may be compared to receptors that translate external stimuli into the language of our nervous system^{*16}, to adapters.

With regard to this meaning, the border denotes a territory that allows for mutual understanding, positive dialogue – consequently, it is first and foremost a uniting, not a separating line. Conflict can naturally be viewed as a form of dialogue but in that case we could probably speak of a negative dialogue. However, we are now interested in a positive dialogue.

I attempt to analyse the legal reform performed in 1889 in the three Baltic provinces (*Estland, Livland and Curland*) or the implementation of the Russian court laws of 1864 in these three provinces as a dialogue between two different legal cultures, not as a battle between the advancing Russian legal culture and Baltic-German legal culture engaged in desperate defence. Although each and every dialogue, and in particular a dialogue proceeding as a reform, can be viewed as a process in time. At the moment, I choose to focus on two texts – the text of the third volume of the Baltic Provincial Code or the Baltic Private Law Code as of 1890 and “The Law Applying to the Reorganisation of Court Institutions in the Baltic Provinces” (“*Polozheniye o preobrazovanii sudebnoi tshasti v Pribaltiiskikh guberniyakh*”) enforced by a registered ukase on 9 July 1889.^{*17} The reasons for this approach are twofold. Firstly, the current stage of research and secondly, the limited size of this article that will not enable me to analyse the process the duration of which was at least 25–30 years.^{*18}

To date, the legal and historical analysis of the legal reform in the Baltic provinces in 1889 has mainly paid attention to its “external aspects”, focussing primarily on the structure of the judicial institutions (*Gerichtsverfassung*) and the general description of codes of proceeding, where some minor deviations with regard to the Russian inland provinces have been noted. However, the legal historians have not actually analysed the changes taking place in procedural law, whereas the draft Code of Civil Procedure, submitted by F. G. Bunge but never implemented, has been entirely left out.^{*19} As it is known, the collection of laws issued by Alexander III on 9 July 1889 consists of the following acts^{*20}:

- registered ukase concerning the implementation of the court laws of 20 November 1864 in the provinces of *Livland, Estland and Curland* and reorganisation of local peasant agencies (*Imenoi vysotshais-hii ukaz o primenenii k guberniyam Lifyandskoi, Estlyandskoi i Kurlyjandskoi sudebnykh ustavov 20 noyabrya 1864 goda i o preobrazovanii mestnykh krestyanskikh prisutstvennykh mest*);
- the opinion of the State Council on the reorganisation of judicial institutions and peasant agencies in the Baltic provinces (*Mneniye Gosudarstvennogo Soveta o preobrazovaniyakh sudebnoi tshasti v Pribaltiiskikh guberniyakh i krestyanskikh prisutstvennykh mest sikh gubernii*);
- law on the reorganisation of judicial institutions in the Baltic provinces (*Polozheniye o preobrazovanii sudebnoi tshasti v Pribaltiiskikh guberniyakh*);
- law on the reorganisation of peasant agencies in the Baltic provinces (*Polozheniye o preobrazovanii krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh*);
- opinion of the State Council on the implementation rules of the reorganisation of judicial institutions and peasant agencies in the Baltic provinces (*Mneniye Gosudarstvennogo Soveta po proyektu pravila o privedenii v deistviye zakonopolozhenii o preobrazovanii sudebnoi tshasti i krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh*);
- implementation rules of the law on the reorganisation of judicial institutions and peasant agencies in the Baltic provinces (*Pravila o privedenii v deistviye zakonopolozhenii o preobrazovanii sudebnoi tshasti i krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh*).

The following discussion covers primarily only one part of the law on the reorganisation of the court institutions in the Baltic provinces, namely, Part A “About the Implementation of the Court Laws of the Emperor Alexander II” (“*O primenenii sudebnykh ustavov Imperatora Alexandra II*”).

¹⁶ J. Lotman, p. 13.

¹⁷ Polnoye Sobraniye Zakonov Rossiiskoi Imperii. III T. 9. No. 6188. 1889 g. iyulya 9.

¹⁸ The Russian Emperor Alexander II signed the Baltic Private Law Code on 12 November 1864 and the Russian Court Laws on 20 November 1864.

¹⁹ F. G. Bunge. Entwurf einer Ordnung des gerichtlichen Verfahrens in Civilsachen für Liv-, Est- und Curland. Reval, 1864.

²⁰ Sobraniye uzakonenii i rasporyazhenii Pravitelstva. Izdavayemoye pri Pravitelstvuyjuschem Senate. 1889, No. 78.

The opinion that no significant changes took place in material law, particularly in civil law, prevails to date.^{*21} One may get the impression as if the court system and procedural law operated in some other isolated space, without a dialogue with the former law.

In the field of criminal law, it is evident that the Code of Laws on Punishments to be Inflicted by Justices of the Peace (*Ustav o nakazaniyakh, nalagayemykh mirovymi sudyami*) could not be implemented in the Baltic provinces before 1889, as there were no appropriate court institutions available. In the Code of Laws on Punishments to be Inflicted by Justices of the Peace, punishments have been determined through the institution imposing them – magistrates' court. It is a code that is aimed at a particular court institution.^{*22}

At a first glance, the private law supports the above-mentioned standpoint. Section 63 in Part I of the law concerning the reorganisation of judicial institutions in the Baltic provinces sets out that upon hearing civil cases, the courts shall proceed from the provisions of Volume III of the Baltic Provincial Code (*i.e.* the Baltic Private Law Code) and the local agrarian laws. However, attention has not been paid to the second half of the very same section 63, which adds:

“...mit Ausnahme derjenigen Theile der erwähnten Gesetze, welche durch das Erlassen dieser Verordnung aufgehoben oder abgeändert werden.”^{*23}

By the way, the history of this provision vividly illustrates the temporal dimension of the dialogue (reform) – this principle has been laid down already in the law on the introduction of Justices of Peace in the Baltic provinces issued on 28 May 1880.^{*24}

The former Professor of the University of Tartu, one of the best experts in the Baltic private law, C. Erdmann affirms the existence of rather significant changes in the particular field of material law, saying:

“Allein gerade in einem sachenrechtlichen Gebiete, dem des Pfandrechts, haben sie [d.h. Justizgesetze] recht wesentliche Veränderungen vorgenommen.”^{*25}

When speaking of the changes in law, we have to take into account the fact that the following restrictions were imposed on the territorial applicability of several laws in the tsarist Russia: “... in those parts of the Russian State, where the court laws of 20 November 1864 have been implemented in full.” Thus, these laws extended without a special act also to the Baltic provinces in 1889. In this case, the law concerning the international private law of 5 April 1869 may be pointed out.^{*26}

The avoiding nature of the dialogue was in accordance with another view, pervading tacitly but without a fixed ground, that the Baltic Private Law Code as it was enacted in 1864 was preserved without significant changes until 1940. Thus, “*Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*” issued by F. Schlegelberger in 1929 claims that the main source of private law for the inhabitants of Estonian rural regions are estate-based agrarian laws.^{*27} Here the authors have taken into account neither the Constitution of the Republic of Estonia of 1920, nor the law on the abolishment of estates adopted on 9 June 1920^{*28}, nor the practice of the Supreme Court.^{*29} Such an erroneous claim is not accidental because the same assertion is offered about Latvia.^{*30}

²¹ B. Vilenski. Sudebnaya reforma i kontreforma v Rossii. Saratov, 1969, pp. 214–216; E. C. Thaden. Russia's Western Borderlands, 1710–1870. Princeton, 1984, p. 196; V. Kalninsk. Otscherki istorii gosudarstva i prava Latvii v XI–XIX vekakh. Riga, 1980, p. 165–169; Y. Meguro. Istoriya gosudarstva i prava Estonskoj SSR: Dooktyabrskii period (XIII v. – okt. 1917). Tallinn, 1981, pp. 125–130.

²² Sudebnaya reforma. Otv. red. B. Vilenski. Rossiiskoye zakonodatelstvo X–XX vekov. V 9-ti tomakh. T. 8. Moskva, 1991, p. 420.

²³ Die Verordnung über die Reorganisation des Gerichtswesens in den baltischen Gouvernements § 63. In: Die Verordnungen über die Reorganisation des Gerichtswesens und der Bauerbehörden in den baltischen Gouvernements und die Regeln betreffend die Ausführung der erwähnten Verordnungen mit Darlegung der Motive, auf die sie gegründet sind. Zusammengest. von A. Gasman, A. Nolcken. Ausgabe des Justizministeriums. Band. I, p. 40.

²⁴ Pravila o primenenii utsherezhdeniya mirovykh sudebnykh ustanovlenii v Pribaltiiskikh guberniyakh. § 19. Sudebnye Ustavy, 1883; Ustav Grazhdanskogo Sudoproizvodstva, 1883, § 1880.

²⁵ C. Erdmann. System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. Zweiter Band. Sachenrecht. Riga. 1891. Vorrede zum zweiten Bande.

²⁶ Polnoye Sobraniye Zakonov Rossiiskoi Imperii. II T. 44. Nr. 46935. 1869 g. aprelya 5.

²⁷ H. von Nottbeck, V. Johanson. Estland. – Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes. Erster Band. Länderberichte. Herausgeb von F. Schlegelberger. Berlin, 1929, p. 53.

²⁸ Riigi Teataja (the State Gazette) 1920, 129/130, 254.

²⁹ Judgement of the Supreme Court en banc No. 6 of 9 May 1927.

³⁰ A. Lawrentjev. Lettland. – Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes. Erster Band. Länderberichte. Herausgeb von F. Schlegelberger. Berlin, 1929, p. 112.

This view is also amplified to a particular extent by the fact that the last comprehensive text of the Baltic Private Law Code was published in Russian in 1915^{*31}, remaining, as a rule, outside the field of vision of scholars. The last official comprehensive issue was published in 1893.^{*32} The last amendments to the text of the Baltic Private Law Code were made as late as in 1938.^{*33}

These two above-mentioned views have amplified each other.

C. Erdmann proposed law of pledge as the field where the most significant changes took place. The right of security found in the Baltic Private Law Code was largely based on Roman and Old Germanic law. Section 1336 of the BPLC (1864):

“Erhält der Gläubiger zugleich den Besitz des verpfändeten Gegenstandes, so ist ein Pfandrecht im engern Sinne – bei beweglichen Sachen Faustpfand oder Kastenpfand genannt – vorhanden. Wird dagegen das Pfandrecht ohne Besitzübertragung bestellt, so heisst es Hypothek.”

Section 1357:

“Gegenstand des Pfandrechts können alle und jede Sachen sein, deren Veräusserung nicht ausdrücklich. Verboten ist (a), und zwar nicht nur gegenwärtige, sondern auch zukünftige (b), sowohl körperliche, -bewegliche, wie unbewegliche, – als auch unkörperliche Sachen, namentlich Sculdforderungen (c).”

Consequently, both immovable and movable property could serve as the object of mortgage, whereas this included single movables as well as sets of movables or the entire property both in the present and in the future. According to section 1387 of the BPLC (1864) this could involve general or universal mortgage:

“Das Pfandrecht an einem gesammten Vermögen wird ohne Besitzübertragung bestellt und General- oder Universalhypothek genannt.”

These old provisions regulating right of security conformed to the contemporary needs neither in the Baltic states nor elsewhere in Europe^{*34}, expanding the notion of mortgage too much. The main principles characterising the modern mortgage system related to property – the principle of publicity and speciality of mortgages – were extremely inconsistent in the former provisions of the BPLC. In addition to that, the previous provisions failed to ensure the protection of the creditors' claims even in *Livland*^{*35} and *Curland*, where the BPLC demanded that the mortgages be entered in public records (engrossed). A. Gasman and A. Nolcken considered, with regard to the principles of publicity and speciality of mortgages, as the major shortcoming of the former provisions of the BPLC the possibility that mortgages under law of property might be created also without entry into the public records.^{*36} The BPLC provided for the total of 12 tacit mortgages related to various types of immovables, having privileged status when compared to the mortgages entered in the public records.^{*37}

Consequently, the opportunity held by the local great landowners to obtain actual credit from the capital markets to be formed was limited. This was not felt solely by the Russian central government but also by the local great landowners. Thus, the Council of the Diet magistrates – the directing body of the Livonian corporation of the nobility – submitted by the demand of Diet (*Landtag*) to the Russian Ministry of Internal Affairs their proposals concerning the prompt improvement of the current system of mortgages as early as in 1882.

The central government did not regard the making of a limited number of amendments reasonable and decided to reorganise the system of mortgages in the framework of the general legal reform, which also included the reorganisation and harmonisation of the registry system and bankruptcy proceedings within the entire territory where the BPLC applied.

³¹ A. Nolken. Svod Grazhdanskikh Uzakonenii Gubernii Pribaltiiskikh (tsh. III Svoda mestnykh uzakonenii gubernii Ostzeiskikh) so vklutsheniemy izmenenii i dopolnenii po prodolzheniyam i pozdneishim uzakonieniyam i s razyasneniyami Pravitelstvuyushchago Senata. Izdaniye nieofitsialnoye. Izd. 2-oe. Ispravl., peresmotr. Sost. A. Nolken. Petrograd, 1915.

³² Svod grazhdanskikh uzakonenii gubernii pribaltiiskikh. Izdaniye 1864 so vklutsheniemy statei po prodolzheniyu 1890. St.-Peterburg. 1893. 16' Izdaniye Kodifikatsionnogo Otdeleniya pri Gossudarstvennom Sovete.

³³ Riigi Teataja (the State Gazette) 1938, 60, 588.

³⁴ H. Coing. Europäisches Privatrecht. Band II. 19. Jahrhundert. Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern. München, 1989, pp. 207–220.

³⁵ Except for the city of Riga.

³⁶ Gasman, Nolcken, p. 392.

³⁷ *Ibid.*, p. 393; BPLC (1864) sections 1394, 1395, 1397–1402, 1406–1409.

The law on the reorganisation of judicial institution in the Baltic provinces of 9 July 1889 was followed by actual rearrangements. The law consisted of several parts:

- implementation of the court laws of Emperor Alexander II (*Primeneniye sudebnykh ustavov Imperatora Alexandra II*);
- some amendments to the laws concerning mortgages (*O nekotorykh izmeneniyakh v zakonopolozheniyakh ob ipotekakh*);
- about the establishment of guardianship and welfare institutions (*Ob utshrezhdenii opekunskikh ustanovlenii*).

The Part B of the law on the reorganisation of the court institutions in the Baltic provinces involves significant changes with regard to mortgages. According to section 1 of Part B, a mortgage shall be established only in immovable property and the mortgage shall assign a real right to a creditor in the pledged immovables only upon entry into the land register. The general mortgages in movables as well as (so-called legal or tacit) mortgages established on the law itself³⁸ were generally abolished; only special tacit rights of security remained valid.³⁹ In the text of the BPLC, these changes were repeatedly reflected as follows:

Section 1336 of the BPLC (1890):

“Erhält der Gläubiger zugleich den Besitz des verpfändeten Gegenstandes, so ist ein Pfandrecht im engern Sinne – bei beweglichen Sachen Faustpfand oder Kastenpfand genannt – vorhanden. Wird dagegen das Pfandrecht an einem Immobil (T. A. [author’s emphasis]) ohne Besitzübertragung bestellt, so heisst es Hypothek.”

Section 1357 of BPLC (1890) Anmerkung:

“Gegenstand der Hypothek kann nur ein Immobil sein.”

Section 4 set out that mortgages were entered into the land register only within the limits of a particular amount and in relation to a pre-determined immovable property, the pledgor of which had been entered in the land register as its owner or user.

Section 1580 of the BPLC (1890):

“Hypotheken dürfen nur in dem Betrage einer bestimmten Summe Geldes und auf ein bestimmtes Immobil, als dessen Eigenthümer oder Nutzungseigenthümer der Verpfänder in den öffentlichen (Krepost-) Büchern verzeichnet steht, in diese Bücher eingetragen werden.”

The sequence of satisfying the claims entered in the land register was inseparably connected to the principles of publicity and speciality. Critical changes were also introduced here.

As determined by the BPLC (1864), various privileged claims of pledge were preferred before 1889, the claims registered (engrossed) in the public records were only satisfied in the second order. The latter had, in their turn, advantage over the claims that had not been engrossed.

Section 5 of Part B also established the procedure for determining the priority of mortgages – the time of entry of one or another mortgage in the land register proved decisive. Simultaneously registered claims had to be met proportionally. Secondary claims related to the basic claim were to be satisfied in the same order; however, interest was to be paid only for the three previous years in this stage. The interest for the remaining years were to be paid equally with all other personal claims.

Section 1351 of the BPLC:

“Das Pfandrecht dient zur Sicherheit nicht bloss der Hauptforderung, sondern auch der mit ihr zusammenhängenden Nebenforderungen an Zinsen, Schäden und Kosten, Conventionalstrafe u. dgl. m, wenn nicht das Gegentheil ausdrücklich verabredet worden (a). Die Priorität der Hypotheken richtet sich nach dem Zeitpunkt ihrer Eintragung in die öffentlichen (Krepost-) Bücher. Nach derselben Priorität gelangen auch die mit der Hauptforderung zusammenhängenden Nebenforderungen zur Befriedigung, doch werden die Zinsen nur für die drei der öffentlichen Versteigerung des Immobils vorhergehenden Jahre bezahlt. Zinsforderungen für frühere Jahre werden im demselben Maasse wie Schulforderungen persönlicher Gläubiger befriedigt (b).”

Another purpose in addition to the updating of law of pledge was the harmonisation of the existing law. It is perhaps self-evident that the provisions observed above extended to all the regions of the territory where the BPLC was valid (*Rechtsgebiet*). Apart from the establishment of new provisions, the reform of 1889

³⁸ BPLC (1864), sections 1394–1402.

³⁹ BPLC (1890), sections 1403–1405.

expanded the territorial applicability of several provisions already existing in the BPLC, which had previously applied only in one or two of the legal regions, to the entire sphere of influence of the BPLC. According to section 7 of Part B of the law on the reorganisation of court institutions in the Baltic provinces, sections 1572, 1574, 1595 and 1606 extended to all legal regions. For example, section 1595, which had been valid only in *Livland* and *Curland* until that time, extended now to *Estland* in both the fields of city and rural law. It set out that the transfer of property to third persons would not alter the creditors' claims related to mortgages.

Having a dialogue, particularly a positive dialogue, presumes the principle of reciprocity and this is also evident in the case of the ukase issued on 9 July 1889. Section 9 of Part B of the law on the reorganisation of judicial institutions in the Baltic provinces provided for the retention of all rights and privileges prescribed by law, valid at the time of their establishment, by all mortgages in movables and general mortgages insofar as concerning movables until their termination according to the procedure provided for by the BPLC (sections 1414–1436).

Section 10 set out that all mortgages irrespective of the manner of creation^{*40}, established in immovables until 1889 but not entered in the land register and all general mortgages insofar as concerning immovables, even if engrossed, were to be reregistered during the coming two years in an appropriate land registry institution in order to preserve their nature under law of property.^{*41} Section 11 demanded that the principle of speciality be observed upon the (re)registration of general mortgages.

Before 1889, common law played a rather significant role besides the BPLC. For example, the BPLC lacked concrete provisions laying down the procedure for deletion of mortgages registered in the public records. The court practice in the Baltic provinces prior to the reform proved determinant here, and later served as the basis for the procedure set out in section 344 of Part A of the law on the reorganisation of court institutions in the Baltic provinces.

The changes introduced on 9 July 1889 did not naturally concern the issues related to the updating and harmonisation of law of pledge, neither were the amendments to the BPLC restricted to the repeal or amendment or supplementation of the wording of one or another section of the BPLC. The ambient legal environment might occasionally cause the alterations in the meaning and validity of a provision even if the wording remained intact.

From the perspective of the future development of the BPLC, it was important that due to the legal reform of 1889, the BPLC came to be in the sphere of activity of the reorganised cassation department of civil cases of the Russian Senate. Both the BPLC (1864) and section XXVI of the Introduction (1890) set out that court judgements made in particular individual cases, even the judgement made by the medium to higher level courts, do not have the legal force of law and thus are not mandatory upon the adjudication of other analogous cases. At the same time, the law did not prohibit a plaintiff or defendant from referring to earlier judgements already in force upon reasoning their rights.

Section XXVI of the BPLC (1864) and (1890):

“Die in einzelnen Fällen ergangenen Urtheile selbst der höchsten Justizbehörden haben nicht die Kraft eines Gesetzes und können daher für andere Fälle nicht maassgebend sein. Insofern jedoch die Richter verpflichtet sind, in ihren Urtheilen, unter ganz übereinstimmenden Verhältnissen, folgerecht zu bleiben, ist es den rechtsuchenden Parteien nicht verwhrt, zur Begründung ihrer Ansprüche, sich auf früher ergangene, rechtskräftig gewordene, übereinstimmende Erkenntnisse des Gerichts zu beziehen.”

At the same time, section 815 of the Russian Code of Civil Procedure set out that, “all judgements and rulings of the cassation departments of the Senate, clarifying the precise meaning of law, shall be published for general knowledge and as instruction for the uniform interpretation and use of laws.”^{*42} This provision applied also in the Baltic provinces.^{*43} The cassation department of the civil cases of the Senate commented

⁴⁰ The BPLC recognised three manners: legislative, judicial and voluntary.

⁴¹ Note 2 in section 1389 of the BPLC (1890).

⁴² Ustav Grazhdanskogo Sudoproizvodstva (Izd. 1883), section 815.

⁴³ Svod deistvuyuschikh v Pribaltiiskikh guberniyakh zakonopolozhenii po grazhdanskomu protsessu, o notarialnoi tshasti i o poryadke proizvodstva del o nesostoyatelnosti. Section 815. Polozheniya o preobrazovanii sudebnoi tshasti i krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh. i pravila o privedenii oznatshonnykh polozhenii v deistviye. S izlosheniyem soobrashenii, na koikh oni osnovany. 2-oe peresmotrennoye i dopolnennoye izdaniye Ministerstva Yustitsii. Osoboeye prilozheniye. Sost. A. Gasman, A. Nolcken. St. Peterburg, 1890, section 815.

on and explained the BPLC for the first time in its judgement No. 66^{*44} of 16 October 1891 and it concerned the registration of “tacit” (*bezmolvnyaya*) mortgage. According to the assessment of some authors, the contents of the judgement of the Senate exceeded its restricted (court judgement) limits, acquiring nearly the meaning of a law.^{*45} As such example, V. Tsheshikhin points out judgement No. 78 of the cassation department of civil cases of the Senate dating from 1892, which concerned section 3621 of the BPLC and handled the limitation periods in *Curland*. The explanation provided came to serve as the basis of the State Council resolution approved by the Emperor.^{*46}

The first collection of the resolutions and explanations of the Senate concerning the BPLC was the very same collection compiled by V. Tsheshikhin, supplementary Justice of Peace of the province of *Livland*, which was published in Riga already in 1900 and contained the resolutions of the Senate concerning the BPLC until 1898. The issue of the BPLC published by V. Bukovski, member of the tsarist circuit court and subsequent Professor of the University of Latvia and member of the Supreme Court of the Republic of Latvia, which was provided with comprehensive comments also demonstrates the importance ascribed to resolutions of the Senate and explanations contained therein. These relied to a high degree on the resolutions of the Senate.^{*47}

The last collection of the resolutions of the Russian Senate concerning the BPLC, compiled by I. Kantor, was published as late as in 1932.^{*48}

The Supreme Court of the former Republic of Estonia paid also considerable attention to the practice of the Senate.

When analysing the reforms carried out in the Baltic states during the second half of the 19th century, particularly the legal reform of 1889, one may conclude that since the 1870s, the European modern law entered Estonia on the level of legislation and implementation of legal practice increasingly from Russia. However, on the level of jurisprudence and judicial conceptions, such shift took place only after the reform of 1889, when the German-speaking University of Dorpat became a Russian University of Yurev.

The statements above do not imply autochthonous Russian law. On the contrary, I dare say that it was western (western European) law which was received in Russia according to the Russian cultural needs. It has been claimed that it was the last attempt of the Russian historical élite to import in the optimum manner the most modern fruit of the western school, particularly jurisprudence and statehood.^{*49} On the one hand, it means that the western law arrived in the Baltic provinces with Russian influences, adjustments and simplifications, whereas the abundant resources of legal writing, court practice and legal traditions of western Europe (German and French, above all) were not adopted.

On the other hand, the mechanism described above meant that the western law received in Russia arrived in the Baltic states as the laws of the Russian Empire, the political goal of which was to integrate the region increasingly with the rest of the Russian state.

Therefore, the conflict between different legal systems has been highlighted in the previous study of reforms. It is my opinion that future research would be more fruitful, if we viewed the legal reform as a dialogue between two different legal systems.

⁴⁴ Postateyniy ukazatel k polnomu svodu reshenii Grazhdanskogo Kassatsionnogo departamenta Pravitelstvuyushchago Senata. Za 1866–1910 g.g. Izdaniye 2-e neoffitsialnoye. Yekaterinoslav. 1912, pp. 334–335; Polnyi svod reshenii. Grazhdanskogo Kassatsionnogo departamenta Pravitelstvuyushchago Senata (natshinaya s 1866 goda) s podrobnym predmetnym alfavitnym i postateynym ukazatelyami. Za 1891 g. Izdaniye 2-e neoffitsialnoye. Sost. L. Rotenborg. Yekaterinoslav, 1911, No. 66, pp. 162–165.

⁴⁵ Svod grazhdanskikh zakononii gubernii Pribaltiiskikh v razyasneniyakh Pravitelstvuyushchago Senata. Izdaniye nieoffitsialnoye. Sost. V. Tsheshikhin. Riga, 1900, p. 3.

⁴⁶ Sobraniye zakononii i rasporyazhenii Pravitelstva. 1892, No. 20.

⁴⁷ Svod grazhdanskikh zakononii gubernii Pribaltiiskikh s prodolzheniyem 1912–1914 i s razyasneniyami v 2 tomakh. Izdaniye nieoffitsialnoye. Sost. V. Bukovski. Riga, 1914.

⁴⁸ Sbornik reshenii Grazhdanskogo Kassatsionnogo i Obschego Sobraniya 1-go i Kassatsionnykh Departamentov byvshego Pravitelstvuyushchago Senata razyasnyayushchikh zakonopolozheniya deistvuyuschiya v zapadnoi Latvii i Estonii. Sost. L. Kantorom. Riga. 1932.

⁴⁹ J. Baberowski. Europa in Rußland: Justizreformen im ausgehenden Zarenreich am Beispiel der Geschworenengerichte 1864–1914. – Reformen im Rußland des 19. und 20. Jahrhunderts. Hrsg. D. Beyrau, I. Èiëurov, M. Stolleis. Ius Commune. Sonderheft. Studien zur Europäischen Rechtsgeschichte. 86. Frankfurt am Main, 1996, p. 151.