

Dear Reader,

The main topic of this year's *Juridica International* is the Estonian Civil Code in a European Private Law Context, as an international conference on this subject will take place in Tartu on 27–28 September. The conference is organised by the University of Tartu in conjunction with the Ministry of Justice and the Supreme Court. More than 600 people will participate in the conference, including acclaimed jurists from Belgium, Germany, Switzerland, the USA, France, Russia, Netherlands, Denmark, Poland, Sweden, Finland, Norway, Latvia, Lithuania, Belarus and the Ukraine. The conference is dedicated to the completion of the new Estonian Civil Code, the objective is to discuss the main problems of civil law, to compare Estonia with other countries and to address the development trends of private law in Europe.

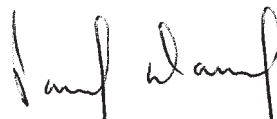
Preparation of the new Estonian Civil Code began in 1992. The goal was to create a civil code suitable for a democratic, market economy-orientated state, as the old civil code no longer corresponded to the new conditions after Estonia regained its independence in August 1991. The Civil Code consists of five parts, adopted as separate Acts — the General Part of the Civil Code Act and the Family Law Act in 1994, the Law of Property Act in 1993 and the Law of Succession Act in 1996; the preparation of the draft Law of Obligations Act, as the lengthiest part, has also taken the longest time, but is now ready and will be adopted in the near future. The part laws have been prepared with a view to the fact that they are organically linked parts that collectively form the Civil Code.

So, by 2001, ten years after regaining independence Estonia has a new and modern Civil Code. Of course, work continues to elaborate the parts of the Code. Together with the Law of Obligations Act, an amended General Principles of the Civil Code Act is planned to be adopted, whereas the provisions of international private law are separated from the General Principles and an international private law act will be adopted in spring 2002 as a separate law. (The sources used in preparation of the Civil Code and the new developments arising from the Civil Code are described in greater detail in: P. Varul. *Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia*. – *Juridica International*. Law Review. University of Tartu, V, 2000, pp. 104–118).

In preparation of the Civil Code, the goal was not to create an innovative civil code for Estonia — in the present era of intensive harmonisation and unification of law, it would not have been expedient or even feasible. It was important to establish tried and tested rules that would function well within the state and enable participation in international co-operation. The source materials included not only the laws of other countries, special literature and court practice, but also internationally harmonised legislation such as the Vienna Convention on Contracts for the International Sale of Goods, Principles of European Contract Law and Principles of International Commercial Contracts.

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 fully into account in the preparation of legislation. In the area of private law, this mainly concerns corporate law, consumer protection and contract law, competition law 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.

Paul Varul



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The Structure and the Salient Features of the Principles of European Contract Law

This is the first time I address an audience in a Baltic country on the Principles of European Contract Law. I am very pleased and very honoured.

I shall first tell you why the Principles were made and who made them. Then I shall address what they contain, their scope style and technique, and finally some of their salient features.

1. Why they were made and who made them

The European Union of today is an economic community. Its purpose is the free flow of goods, persons, services and capital. The Union is based on these four flows. They go by way of contracts. To make the flows go easily it should be made simpler to conclude contracts and to calculate contract risks.

The contract laws of the Union countries differ considerably. Anyone doing business in Europe knows that a foreign law will come to govern some of his contracts with foreign partners. The unknown law of the foreign countries is therefore one of his risks. They are often difficult for him and his local lawyer to understand. They make him feel insecure, and may keep him away from foreign markets in Europe. Thus, the existing variety of contract laws in Europe is a non-tariff barrier to trade.

It is the aim of the Union to do away with restrictions of trade within the Communities, and therefore the differences of law, which restrict this trade, should be abolished.

In the last decades there have been important developments of what may be called the EU contract law. Most significant is the unification of the law of consumer contracts by way of directives. In this way the Union has provided some harmonisation. However, it is only fragmentary. It tends to vary in its level of detail and is often unpredictable in terms of its contents. In addition it is not well co-ordinated, and since the national laws of contract are very different, it causes problems when it is to be adjusted to the various national laws. There is no European law of contract to support these specific measures.

The Principles are intended to become part of a future European Civil Code. They may also serve other purposes. They will apply when the parties have agreed that their contract is to be governed by them. They may be applied when the parties have agreed that their contract is to be governed by the “general principles of law”, the *lex mercatoria* or the like, or when the parties have not chosen any

system or rules of law to govern the contract, see article 1:101 (2). Parties to an international commercial contract often agree that disputes which may arise between them shall be submitted to arbitration. When doing so they also often agree that the contract is to be governed by the *lex mercatoria* i.e. the international customs and usages of international trade, the rules which have been established for this purpose, such as the PECL or the UNIDROIT Principles, and the rules of law which are common to most of the States engaged in international trade or to the States connected with the dispute.

Finally the PECL may help national legislatures that wish to reform their contract law. It is our hope that the Principles may be a source, which the legislators of the Baltic Countries may use.

Since 1982 the Commission on European Contract Law (CECL) has been working to prepare the Principles of European Contract Law (PECL). The CECL has not been appointed by any government or international authority. It has appointed itself. The present 23 Members of the CECL come from all the states of the EU. They have been selected for their independence and have not promoted any governmental or commercial interests. A large majority of the Members have been academics but many of the academics have also been practising lawyers.

2. What they contain, their scope, style and technique

The Principles were published in 1999.^{*1} The first chapter contains general rules on the scope and application of the Principles. The next chapters deal with the formation of the contract, that is the agreement between the parties, the authority of an agent to bind his principal, the validity of the contract, which is mostly about defects in the consent such as mistake, fraud, and duress, the interpretation, the contents and the performance of a contract. The final chapters treat breach of contract, which we call non-performance, and the remedies for non-performance such as damages and termination.

The articles drafted are supplied with comments that explain the operation of the articles. In these comments there are illustrations, ultra-short stories which show how the rules will operate in practice. Furthermore, there are notes, which tell of the sources of the rules and state the laws of the Member States.

In 1997 the CECL began to draft additional rules, many of which are common to contracts, torts and unjust enrichment, such as plurality of creditors and debtors, assignment of debts and claims, set-off, and prescription and some other outstanding issues. We finished this part in February this year, and it will be published when edited, probably in 2003.

The Study Group of a European Civil Code, which is established under the leadership of Professor Christian von Bar, is a continuation of this work. The general principles of the law of contracts provided in the PECL will be integrated in what will eventually become a European Civil Code. The Code will deal with obligations, that is contracts, torts, unjust enrichment and *negotiorum gestio*, and with the law of movable property, which includes transfer of title and secured transactions, such as retention of title and mortgages. It will not be a Code in the traditional continental sense. Family law and the law of succession will not be included.

The rules of the Civil Code will not only apply to international trade transactions within Europe; they are to be applied equally to purely domestic transactions.

The PECL, which deal with the general law of obligations, do not make special provision for consumer contracts. On the other hand, the PECL are not confined to commercial relationships but are intended to apply to contracts generally, including contracts between merchants and consumers.

An attempt has been made to draft **short** rules, which are easily understood by the prospective users of the Principles, the practising lawyers and business people. As the authors of CISG we tried to avoid legal concepts and used a factual language, which is easier to translate.

The rules drafted are **broad principles**, not rules that go into details. Broad principles claim a broad interpretation. Like the rules of CISG those of the PECL give room for development and flexibility. Article 1:106 provides that “these Principles should be interpreted **and developed** in accordance with

¹ O. Lando, H. Beale (eds.). Principles of European Contract Law. Parts I and II. The Hague, 1999, p. xlviii, p. 561.

their purposes”, and that “issues within the scope of the Principles but not expressly settled by them are as far as possible to be settled in accordance with the ideas underlying the Principles.” This is the approach generally adopted by the Continental courts. Flexibility will ensure the continuity and stability of a European civil code.

3. The salient features

3.1. You shall keep your bargain

This is a basic principle in the laws of all countries. The legislators and courts stick to it with vigour. A contracting party must be able to rely on the contract and exercise the freedom and rights granted to it under the contract. The CECL considered it to be so obvious that it was not stated in a special rule in the PECL. It is, however, implied in several articles, including article 1:102 on freedom of contract and article 6:111 (1) on change of circumstances which provides that a party is bound to fulfil its obligations even if performance becomes more onerous.

3.2. You shall render the performance you promised

Most contracts provide that one party shall pay a sum of money for the goods or services it has purchased and the other party shall deliver the goods or perform the services. If one party fails to perform, can the other request performance?

3.2.1. Monetary obligations

A creditor may require performance of a **contractual obligation to pay money**. He can tender his performance to the other party and then claim the price. The rule generally applies even if the buyer later discovers that he does not want performance. Most continental systems have no restrictions on claims for payment of the price. However, experience gained seems to indicate that there should be exceptions to the rule. If the supplier has not yet performed and the buyer repudiates the contract and he can show that the supplier has no legitimate interest in performing, the supplier's action should be confined to one for damages.^{*2} The underlying consideration is that a debtor should not have to pay for an undesired performance in cases where the creditor can easily make a cover transaction and in other cases where it would be unreasonable to oblige the debtor to pay the price. The latter occurs in construction contracts in which the contract or part of it has not yet been performed, and the owner makes it clear that he does not desire performance and is able to show that the other party has no legitimate interest in performing.^{*3}

Article 9:101 (2) of the PECL provides that, in cases where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless:

- (a) it could have made a reasonable substitute transaction without significant effort or expense;
or
- (b) performance would be unreasonable in the circumstances.

The exceptions under (a) and (b) may be regarded as applications of the principle of proportionality, see section III, 6 below.

3.2.2. Non-monetary obligations

With respect to **non-monetary obligations** the civil law countries generally recognise the aggrieved party's right to specific performance. Under German law it is axiomatic that the aggrieved party has

² See the English case *Attica Sea Carriers Corp. v. Ferrostaal Poseidon Bulk Carrier Reederei GmbH* [1976] 1 Lloyd's Rep 250 (C.A.).

³ See Belgian Court of Cassation, 16 Jan. 1986, Arr. Cass No. 317, RW 1987–1988.

the right to claim performance of the contract and to obtain a judgement ordering the obligor to fulfil it. The right to performance is also provided in French law, for instance in article 1184 (2) of the Civil Code.

In contrast the Common Law of the British Isles makes specific performance a discretionary remedy^{*4} based on equity. Generally such remedy is only granted if compensation for damages would be inadequate. For this reason it is administered most frequently in contracts for the sale of land.

The position of the civil law countries is based on dogmatic rather than practical reasons. An aggrieved party will pursue an action for specific performance only if it has a particular interest in performance that cannot be adequately satisfied by compensation.^{*5} Furthermore, on the Continent as well as in the common law, specific performance is not always available. There are, as we shall see, many exceptions from the continental rule.^{*6} In practice the results will often be the same.

Despite the similar results in practice, the civil and common lawyers could not reach agreement on common rules when the Vienna Convention on Contracts for the International Sale of Goods (CISG) was drafted in 1980. Though article 46 of CISG gives the buyer the right to require performance, article 28 provides that, if in accordance with the provisions of the Convention one party is entitled to require the performance of any obligation by the other party, the court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention. Thus article 28 preserves the discretion for the common law courts.

This partition was unnecessary. The civil law countries could have agreed to restrict the right to require specific performance to situations in which such remedy is needed in practice. For their part, the common law countries could have conceded to grant the aggrieved party the unconditional right to request specific performance in such situations.^{*7}

The CECL could agree. Under article 9:102 (1) of the PECL, the aggrieved party is entitled to request the specific performance of a non-monetary obligation, including the remedying of a defective performance. Paragraph 2 provides that specific performance cannot be obtained where

- (a) performance would be unlawful or impossible; or
- (b) performance would cause the obligor unreasonable effort or expense; or
- (c) performance consists in the performance of services or work of a personal character or depends on a personal relationship; or
- (d) the aggrieved party may reasonably obtain performance from another source.

Most of these exceptions to the right of specific performance we also find in the civil law countries.

In regard to the exception under (c), it is explained in the Comments that a judgement ordering the performance of personal services or work would be considered a severe interference with the party's personal freedom. Furthermore, performing such services or work under coercion would often be unsatisfactory for the creditor, and finally it would be difficult for the court to control the enforcement of such an order.

The exception under (d) is the same as the one provided in paragraph (2) (a) of article 9:101 and is explained by the same reasons.

The procedural rules on the ways and means of enforcing a judgement for performance are left to the national legal system. These rules, however, are different in civil law and common law countries, thus casting doubt on the wisdom of using the common law term **specific performance** in article 9:102. The term was used in the absence of a better one that would be generally understood.

3.3. You must act in accordance with good faith and fair dealing

A moral principle accepted by every honourable man and woman is that you shall act in accordance with good faith and fair dealing. It is related to Kant's categorical imperative: "Your behaviour shall be governed by such principles as if you were a legislator in a society of reasonable beings obeying

⁴ See G. Treitel. *The Law of Contract*. 9th ed. 1995, p. 918 *ff.*

⁵ K. Zweigert, H. Kötz. *An Introduction to Comparative Law*. 3rd ed. Oxford, 1998, pp. 470, 479.

⁶ See O. Lando, H. Beale (Note 1), p. 399 *ff.*

⁷ See O. Lando. *Commentary on the International Sales Law*. Milan: M. Bianca & M. J. Bonell, 1987, p. 237.

common laws.” It is, however, a question whether this moral commandment should be elevated to a legal principle.

In Europe the views vary. This is most graphically illustrated if one compares German law with the English and Irish common law. The differences, however, concern the principle more so than the results in practice.

Section 242 of the German Civil Code provides that the debtor must perform his duty in accordance with good faith and fair dealing, having due regard for commercial practices. Known as the “king” of the Civil Code, this provision has been used to “moralise” the entire German law. In the law of contract, it is applied to the formation and interpretation of contracts and to the granting of relief to a party in cases of changed circumstances. It operates as a “super provision” used to modify other statutory provisions. As such, it has been used to change the rigorous individualism of the original contract law of the Civil Code and also as a device to adapt the law to the changed social and moral attitudes of society.*⁸

Authors maintain that section 242 should not allow the courts to disregard provisions of the contract or rules of law whenever they believe that equity or fairness so demands. However, in view of the many instances in which the courts have applied section 242, one gets the impression that it has produced some decisions that are “undirected, exuberant and variable”.*⁹

Dutch law*¹⁰ comes close to German law and provisions providing for the application of the principle of good faith in contractual relationships are also found in other continental countries. In France where it previously played a modest role, it is now considered a principle in expansion.*¹¹ It is recognised by the courts of the Nordic countries, although it has not been expressed in general terms in the statutes.

In contrast the English common law does not recognise any general obligation to act in accordance with good faith and fair dealing. In 1997 the Privy Council refused to order specific performance of a contract for the sale of land to a purchaser who had paid the price ten minutes too late, time having been made expressly of the essence for the performance of the contract. The court refused to apply equity to this situation, and one of the justices, Lord Hoffmann, expressly rejected the civil law approach to good faith.*¹² In the view of the court the predictability of the legal outcome of a case was more important than absolute justice.

However, the English courts often reach the same results as the continental courts by using other rules. For example, a strict moral code has been imposed in fiduciary relationships, such as contracts between solicitor and client and doctor and patient. The duty of good faith is also required when the court is asked to grant equitable remedies. There are a growing number of cases where the courts have interpreted the terms of a contract in such a way as to prevent a party from using a clause in circumstances in which it was not intended to be used. New examples of cases where good faith has been invoked are constantly being added to English case law.*¹³

In the study on Good Faith in European Contract Law edited by Reinhard Zimmermann and Simon Whittaker some 20 reporters of different nationality have assessed the outcome of 30 cases which the editors have chosen. The English reports*¹⁴ on these cases are in line with those of the majority of the continental countries. Many of the results achieved in the continental systems by requiring good faith have been reached in English law by more specific rules.

Article 1:201 of the PECL adopts the continental approach. It provides: “Each party must act in accordance with good faith and fair dealing.” This provision covers not only performance, but also the formation, validity and interpretation of contracts. Practical applications of this rule appear in several specific provisions of the PECL. The concept, however, is broader than any of these specific applications. Its purpose is to enforce community standards of decency, fairness and reasonableness in commercial transactions. It supplements the provisions of the Principles and it may take precedence

⁸ See K. Zweigert, H. Kötz (Note 5), p. 150.

⁹ *Ibid.*

¹⁰ See the Netherlands Civil Code. Book 6. The Law of Obligations. Draft Text and Commentary. Ed. by the Netherlands Ministry of Justice, 1977, p. 73 *ff.*

¹¹ See Ph. Malaurie, L. Aynes. Droit civil. Les obligations. No. 622. 7th ed. Paris, 1997. Heading: Bonne foi, un principe en expansion. See also F. Tere, Ph. Simler, Y. Lequette. Droit civil. Les Obligations. 6th ed. Paris, 1996, No. 414 *ff.*

¹² *Union Eagle Ltd v. Golden Achievement Ltd.* [1997] 2. All. E.R 215 at 218, see also *Arcos Ltd. v. E. A. Ronassen & Son* [1933] AC 270.

¹³ See G. Treitel (Note 4), p. 202 *ff.* and Chitty on Contracts, 27th ed. (1994), with Second Cumulative Supplement, 1997, § 1011.

¹⁴ Good Faith in European Contract Law. Ed. by R. Zimmermann, S. Whittaker. Cambridge Studies in International and Comparative Law. The Common Core of European Private Law. Cambridge, 2000, p. 653.

over other Principles when strict adherence to them would lead to a manifestly unjust result. It may be used to explain some of the rules governed by the principle of proportionality. The principle is open-ended and may impose new obligations.

Good faith means honesty and fairness of mind. It is contrary to good faith to exercise a remedy if doing so is of no benefit to the aggrieved party and it is only done to harm the other party. **Fair dealing** means observance of fairness in fact. It covers, for instance, the duty to show due regard for the interests of the other party.

Good faith is presumed. The party alleging that the other party has failed to observe good faith and fair dealing must convince the court.

Article 1:201 will sometimes lead to a conflict between law and justice. It happens when a rule of law or a contract term that is otherwise valid leads to injustice. As mentioned above, such conflicts may result in an undirected case law. However, it is not possible to give general guidelines specifying when the court should let the law prevail. That will depend, *inter alia*, on the extent to which certainty and predictability in contractual relationships would suffer by letting justice get the upper hand. Thus, strict compliance with the terms of a contract may be of essence when the debtor knows that those responsible for controlling his performance are able to determine whether there is strict compliance, but unable to judge the gravity of a non-compliance.

Article 1:201 (2) provides that the rule in paragraph 1 is mandatory. The parties may not exclude or limit their duty to act in accordance with good faith and fair dealing. However, some of the other articles where the principle of good faith and fair dealing is applied may allow the parties to agree on the terms of their contract. Thus, when making the contract, the parties may agree who shall bear the risk of certain contingencies, and in such cases they will not be covered by the hardship rule in article 6:111, see section III, 7 below. Such an agreement, however, is subject to the rules on validity in article 4:109 in situations when a party takes excessive or grossly unfair advantage of the other party's weak position.

3.4. Unfair contract terms

The modern mass production of standardised goods and services has brought about standard contracts. Standardised contract terms make individual negotiation unnecessary and reduce transaction costs. They are often more detailed and more suitable for the contract than the implied terms provided by the law. But standard terms tend to be one-sided; one party (hereinafter: the stipulator) who is often the selling enterprise, imposes its terms on the other party (the adhering party), thereby letting the adhering party carry as many of the risks as possible in the transaction.

For instance, the terms may permit the stipulator to raise the price of his performance after conclusion of the contract. Exemption clauses may exclude the stipulator's liability in cases of his non-performance or exclude or limit the adhering party's right to terminate the contract. Some clauses impose severe penalties on the adhering party in case of his non-performance. A clause in the contract may provide that the stipulator is not bound by promises and statements made by him or his agents during the negotiations, unless they have been put down in writing and signed by the stipulator.

The clauses are not always written in simple language, and an adhering party, especially a consumer, is often unable to understand the standard terms. For this reason or due to carelessness, he does not even read them, and if he does, he does not care. He believes that the stipulator will stand by his promise and make a good and conforming tender on time. And even if the consumer might wish to have the terms changed in his favour, he cannot avail against the stipulator. If he would go to another supplier, the terms would be similar. For this reason, many laws now provide special protection to consumers in their capacity of an adhering party to a standard form contract.

3.4.1. EC Directive on unfair terms in consumer contracts

This Directive¹⁵ has now been implemented in all the Member States. Article 2 (b) defines the consumer as "any natural person who in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession". The consumer buys goods and services for his or her own needs and those of his or her household. Article 3 provides that a contractual term that has not been individually negotiated shall be regarded as unfair — and therefore not binding on the

¹⁵ 93/13/ of 5 April 1993, OJ, L 95/29.

consumer — if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. In an annex the Directive supplies an indicative and non-exclusive list of 17 terms that may be regarded as unfair (see art. 3 (3)). Article 4 (1) provides that the unfairness of a contract term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

Under article 4 (2), assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other hand, in so far as these terms are in plain and intelligible language.

Contracts between private persons and between business enterprises and charities and other non-business organisations fall outside of the scope of the Directive. Nor are contracts between big and powerful enterprises and small and medium-sized traders, artisans, farmers and fishermen covered by the Directive, although their position *vis-à-vis* the enterprise is basically the same as that of the consumer. It has been left to national laws to protect these parties against unfair terms. However, the existing European laws vary considerably in this respect.*¹⁶

The Directive is a so-called “minimum-directive”, which means that a Member State is permitted to provide better protection for the consumer than that given by the Directive.

3.4.2. PECL

In the chapter on the validity of contracts and contract clauses PECL article 4:110 provides rules on unfair contract terms that in several respects follow those of the Directive. Paragraph 1 of article 4:110 provides that a party may avoid a term that has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded. The Comments on article 4:110 refer to and bring the list contained in the Annex of the Directive. As in article 4 (2) of the Directive, the court cannot assess whether the main subject matter of the contract or the price is unfair.*¹⁷ However, the rules in Chapter 4 of the PECL on “procedural unfairness” may come to the help of a disadvantaged party, notably the rules on mistake, misrepresentation, fraud and on taking excessive or grossly unfair advantage of a party's weakness. As the case law of several countries shows, the courts tend to find “procedural unfairness” in cases of unequal bargaining power and those where there is a gross disparity between value and price.

Article 4:110 is not limited to contracts between enterprises and consumers. It covers any terms that have not been individually negotiated. Hence, terms in contracts concluded between private persons, one of which has used a standard term, and in contracts between big enterprises and small businessmen, such as farmers, fishermen, artists, *etc.* may also be set aside. Even the big and powerful enterprise is protected. Experience shows that such a party may also inadvertently subject itself to unfair terms. Similarly, an individually negotiated contract or a contract term that proves to be unfair is not covered by article 4:110, but by the rules on “procedural” unfairness mentioned above. If these rules cannot help the disadvantaged party and there is a case of gross unfairness, the general clause on good faith and fair dealing in article 1:201 can be invoked to set aside the unfair contract or term.

Article 4:110 is mandatory. A party cannot waive its application when the contract is being made. However, it is up to the disadvantaged party to take the initiative to have the clause set aside or modified.

¹⁶ See H. Kötz, A. Flessner. European Contract Law. Vol. 1. H. Kötz. Oxford, 1997, p. 124 *ff.*

¹⁷ However, a term allowing a party to raise the price later is covered by article 4:110 (1).

3.5. Non-performance and remedies; an attempt to establish a universal terminology

In the EU the rules on breach or non-performance of contract and on remedies for non-performance, and the concepts used vary considerably. We will begin by describing the situations which arise.

Most contracts fix a time for their performance. If this has not been done in the contract, the law will do it. Furthermore, the quality and quantity of the performance is either explicitly provided or implied. If the person obliged to perform — the debtor — has to deliver goods, these must be free from any rights and claims of a third party. The contract may contain other obligations such as the duty not to disclose information received from the other party, or not to engage in certain competitive activities.

If the contract is not performed in accordance with these express or implied terms, the failure to perform may be due to the debtor's fault; or it may be due to other causes where he is not at fault, but for which he nevertheless must bear the risk. The failure to effect due performance may also have been caused by the person receiving performance — the creditor — either by his fault or by other causes for which he bears the risk.

If a party fails to perform duly and is at fault or carries the risk, the aggrieved party may be entitled to certain rights *vis-à-vis* the defaulting party. The aggrieved party may claim damages for its loss suffered as a result of the other party's failure to effect due performance or it may reduce its own performance or withhold it until due performance is effected by the other party. Under certain conditions it may terminate the contract, *i.e.* choose not to perform its obligations and not to claim performance by the other party. Finally, the aggrieved party may have the right to claim specific performance.

It is the "breach of contract" for which the CECL has set up a structure and terms for a future European Code. The system adopted in the Principles of European Contract Law is almost the same as that of CISG.^{*18} Breach is called **non-performance**, and occurs whenever a party fails to perform any of its obligations under the contract.^{*19} Non-performance may consist of a defective performance, failure to provide goods which are free from any rights and claims of a third party, failure to effect a performance in time, which may be a performance that occurs too early, too late or never. It also includes the violation of other duties, such as the duty not to disclose the other party's trade secrets. Where a party is obliged to receive or accept the other party's performance, failure to do so also constitutes non-performance.

The **remedies** available for non-performance depend on whether the non-performance is excused or not, see article 8:101 of PECL. In cases where the non-performance is not excused, the aggrieved party is entitled to claim specific performance, to claim damages, to withhold its own performance, to reduce it or to terminate the contract. If the non-performance is excused, the aggrieved party does not have the right to claim damages and to require specific performance. However, the other remedies mentioned above may be available. Non-performance is excused if the defaulting party proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take such impediment into account at the time of the conclusion of the contract to have avoided or overcome the impediment or its consequences (see art. 8:108 (1) of the PECL).

If the non-performance is caused by an act or omission on the part of the creditor he may not resort to any of the remedies. There is no remedy if the creditor is unable to receive performance, even when this is due to an impediment beyond his control.

3.6. The principle of proportionality

This principle, which is found in many areas of law, is a manifestation of the principle of good faith in that it requires a reasonable relationship between an offence and its consequences. For example, if the result of non-performance by a party is not serious, the aggrieved party should not be permitted to enforce a drastic remedy.

¹⁸ See P. Schlechtriem. Commentary on the UN Convention on the international sale of goods. Oxford, 1998, article 45, notes 12–17 (U. Huber).

¹⁹ See on non-performance and remedies, O. Lando, H. Beale (Note 1), p. 359 *ff.*

3.6.1. Termination for fundamental non-performance

Where a party terminates the contract due to the other party's non-performance, termination releases the aggrieved party from its contractual obligations. If the contract is terminated before the parties have performed, they will not be required to perform. Termination has, as a rule, only prospective effect, see PECL article 9:305. In contracts for services, leases and other contracts of duration, termination will generally release the parties from future performance, whereas performances already rendered will not be affected. However, if one party has delivered property that can be returned and the other has not, the property will have to be returned and the other will be released from its duty to perform. If both parties have received property, they will have to restore it. Accordingly, the buyer must return the goods and the seller the purchase money, see articles 9:306–9:308.

Termination is a remedy with serious consequences for the parties. A party that has incurred costs by tendering or preparing performance will often lose its investment in whole or in part. A party that has relied on goods and services for its enterprise may suffer serious losses if it cannot obtain the property or services, or if it is required to return the property. For these reasons, many legal systems permit termination only in cases of a fundamental breach by the defaulting party. In international trade where performance is often rendered over great distances, termination will often hit even harder than in the internal trade.

As specified in article 8:103 of the PECL, a non-performance of an obligation is fundamental if:

- (a) strict compliance with the obligation is of essence to the contract;
- (b) the non-performance substantially deprives the aggrieved party of what it is entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen the result; or
- (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

Article 9:301 (1) provides that a party can terminate the contract if the other party's non-performance is fundamental.

The condition laid down in article 8:103 (a) gives effect to an agreement between the parties that strict adherence to the terms of the contract is essential, and that any deviation from the obligation goes to the root of the contract so as to entitle the other party to be discharged from its obligations under the contract. Thus, if a commercial leasing agreement provides that the object leased **has to** be delivered on a certain date, then delivery on that day is of essence to the contract, and any delay will constitute a fundamental non-performance. However, in such cases the principle of good faith in article 1:201 may come into play. If a defect in delivered goods or another non-performance is so trifling that it would be unreasonable for the aggrieved party to terminate the contract, it shall generally not be entitled to do so.

The condition set forth in article 8:103 (b) emphasises the gravity of the consequences of non-performance for the aggrieved party. It is modelled on article 25 of the CISG that contains the definition of fundamental breach. The case law relating to article 25^{*20} will be relevant for the interpretation of article 8:103 (b).

A fundamental non-performance by one of the parties is not the only ground for termination. It is often difficult to determine when a delay in performance has lasted long enough to be deemed a fundamental non-performance. In order to alleviate this uncertainty article 8:106 provides that in case of non-performance by the other party the aggrieved party may send the defaulting party a notice specifying an additional period of time deemed reasonable for performance. If at the end of that period the defaulting party has not performed its obligations, the aggrieved party may terminate, see article 9:301 (2). In its notice the aggrieved party can specify that if the other party does not perform within the designated period, the contract shall terminate automatically.^{*21} If a dispute arises it is for the court to determine which period of time is reasonable. The rule has its origin in German law.^{*22} The other legal systems do not provide any procedure of this kind. However, they will often accept that the aggrieved party, once the date of performance has passed, can “make time of the essence”

²⁰ See also the case law relating to CISG's predecessor, the Uniform Law of International Sale of Goods (1964), article 10 has a similar text.

²¹ This *Nachfrist* procedure is also found in articles 47, 49 (1) (b), 63 and 64 (1) (b) of the CISG.

²² See G. Treitel. Remedies for Breach of Contract. Oxford, 1988, § 245 ff.

by serving a notice on the defaulting party to perform within a reasonable time. If at the end of this period, the defaulting party has not performed, the aggrieved party may then terminate the contract.*²³

3.6.2. Other applications of the principle of proportionality

The principle of proportionality has been applied in cases relating to the specific performance of monetary and non-monetary obligations, see on articles 9:101 and 9:102 above. Under article 4:103 a mistake may lead to avoidance of the contract only if the mistake is fundamental. Article 9:201 (1) provides that a party who is to perform simultaneously with or after the other party may withhold its performance until the other part has tendered his performance or has performed. The party may withhold the whole of his performance or a part of it as may be reasonable. Furthermore, an agreed penalty for non-performance may be reduced to a reasonable amount if it is grossly excessive in relation to the loss resulting from the non-performance in the given circumstances, see article 9:509.

3.7. Changed circumstances

Changed circumstances will sometimes modify the *pacta sunt servanda* principle. They will give a total or partial relief to a party. In the PECL they are found in two rules, one on excuse due to an impediment (*vis major*) and the other on hardship.

In French civil law and a number of other legal systems a party can be relieved of his obligations only in situations where performance must be regarded to have become impossible in law or in fact (*vis major*).

However, in many business circles this strict rule is considered too severe. In contracts of duration, such as co-operation agreements, lasting construction contracts, continuous supply of goods or services, unforeseen contingencies can make performance very onerous for one party, especially in times of depression or unrest. For such contracts, a hardship rule more lenient than the *vis major* rule is needed. Hardship clauses are inserted in many contract documents. However, the parties often forget to insert them or consider them unnecessary. It has been argued that the party who is then a victim of changed circumstances must bear the consequences of his inadvertence. However, the hardship suffered by a party is often out of proportion compared to its forgetfulness or optimism.

In addition to rules on *vis major* covering impossibility, some legal systems relieve the obligor when performance, though not impossible, has become excessively onerous (Italy: *essesaiva onerosità*)*²⁴ or so different that the economic basis on which the contract was concluded has disappeared (Germany: *Wegfall der Geschäftsgrundlage*).*²⁵ A similar rule is found in Dutch law*²⁶ and in French administrative law.*²⁷

The Vienna Sales Convention (CISG) has no separate provision on hardship. However, it has been argued that article 79 dealing with exemption in case of impediments stands somewhere between the very tough French rule on *force majeure* governing civil contracts and the more lenient German rule on *Wegfall der Geschäftsgrundlage*.*²⁸ It provides that a party's non-performance is excused if the party proves that the impediment is due to an impediment beyond its control and that it could not reasonably have been expected to take such impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

Article 8:108 of the PECL provides a rule on impediments similar to article 79 of the CISG. In addition, article 6:111 contains a provision on hardship.

Paragraph 1 of article 6:111 provides that a party is bound to fulfil its obligations even if performance has become more onerous due to an increase in the cost of performance or a reduction in the value of the performance received. This is a warning to those who believe they can get out of a contract merely because it has turned out to be unprofitable.

²³ See, for England, *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904 and *Bunge Corp. v. Tradax* [1981] 1 W.L.R. 77.

²⁴ Italian civil code, article 1467.

²⁵ See K. Zweigert, H. Kötz (Note 5), pp. 516, 518.

²⁶ Civil Code of 1992 (NBW) article 6:258.

²⁷ See B. Nicolas. *The French Law of Contract*. 2nd ed. Oxford, 1992, p. 208.

²⁸ See J. Honnold. *Uniform Law of International Sales*. 2nd ed. Deventer, 1991, p. 542 with reference to authors.

However, if performance of the contract has become excessively onerous because of changed circumstances, paragraph 2 of article 6:111 requires the parties to enter into negotiations with a view to modifying the contract or terminating it, provided that:

- (a) the change of circumstances occurred after the time of conclusion of the contract,
- (b) the change of circumstances was not one which could reasonably have been taken into account at the time of the conclusion of the contract,
- (c) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time the contract was concluded, and
- (d) the risk of the change of circumstances is not one which the party affected should be required to bear.

The hardship rule differs from *vis major* in the following respects:

- (a) Performance need “only” be excessively onerous, not impossible. Thus, hardship occurred when an English water company which in the 1920s had undertaken to deliver water at a fixed price to a hospital for “times ever after”, suffered heavy losses in the eighties when the agreed price had become derisory due to inflation.^{*29} Hardship also occurred when a French gas company which in 1908 had undertaken to deliver gas to the citizens of Bordeaux for a period of 30 years at a fixed tariff, had to continue to deliver gas in World War I when a severe shortage of coal caused the price of coal used to produce gas to increase four times.^{*30}
- (b) The contract is not automatically ended, but may be modified. Being the best judges of their situation, the parties must renegotiate the contract in good faith. They may adapt the contract to the new situation, and, if such adaptation is pointless, end the contract.
- (c) Where the parties do not reach agreement within a reasonable time the court or the arbitrator may either terminate the contract at a time and on terms determined by the court, or adapt the contract so as to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages to a party for its loss suffered as a result of the other party’s refusal to negotiate or for having broken off negotiations in bad faith, see article 6:111 (3).

Like the *vis major* rule in article 8:108, article 6:111 is not mandatory. When making their contract, the parties may agree on how the risks are to be distributed.

3.8. Some general policies

Finally I shall mention some policies which the CECL have pursued.

The general principles of contract law do not raise many issues of a **constitutional** character, and these issues were not much discussed. However, the PECL upholds the freedom of contract as a fundamental principle, see article 1:102. On the other hand, article 6:109 lays down that even a contract which purports to be everlasting can be ended. No party is bound to the other for an indefinite period of time. The rules on *vices de consentement* (fraud, threat, undue influence, *etc.*) in Chapter 4 on validity show respect for the person’s honour and dignity and so does the prominent role of the good faith principle.

As mentioned under section I the parties may choose the PECL to govern their contract either directly or by implication through agreeing that the contract be governed by the *lex mercatoria*. This means that the **mandatory rules** of the PECL will apply, see article 1:102. If the law otherwise so allows, the choice of the PECL will have the effect that the national mandatory national rules do not apply. However, effect should nevertheless be given to those mandatory rules of national, supranational and international law which according to the rules of private international law are applicable irrespective of the law governing the contract, see PECL article 1:103. A court or an arbitrator will have to give effect to the so-called directly applicable rules of a country having a close connection to the contract. The consumer-protective rules of the EC Directives belong in this category.

²⁹ See *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* [1978] 1 W.L.R. 1387 where inflation had made a price for supply of water agreed in 1929 “for times ever after” derisory, and where the Court of Appeal through an “interpretation” of these words, which according to Lord Denning could not mean what the parties had said, decided to raise the price.

³⁰ See on the *Gaz de Bordeaux* decision of the French *Conseil d’État* of 30 March 1916 (Sirey 1916, 3.17) B. Nicolas (Note 27), pp. 208, 209.

The PECL leave much in the **hands of the individual party**. A party can unilaterally fix the status and the terms of the contract without waiting for a court to decide the matter. A party may, for instance, unilaterally fix the price and other conditions.^{*31} In case of a *vice de consentement*^{*32} he can declare a contract avoided. If a party commits a fundamental breach of contract the other party can terminate it.^{*33} The party who acts does it subject to the standard of reasonableness and under the subsequent control of the court.

Like most of the legal systems in Europe the CECL agreed that **formalities** are required neither for the formation of a contract nor for the acts by which the parties later modify it or end it, see articles 1:303, 2:101 (1) and 9:303. However, in a clause in a written contract the parties may agree that the writing embodies all the terms of the contract, and that any modification or ending by agreement must be in writing. Such clauses, however, only have a limited effect, see articles 2:105 and 2:106.

The Principles **give the judge powers**, which some European courts have not (yet) got. The court may act as a draftsman, which frames a contract that the parties were unable to make on efficient or reasonable or complete terms. It may set the terms of the contract in case of an unreasonable determination by one party or by a third party, see article 6:105 and 6:106. When a third person who was appointed to fix the price or another term refuses to do so or disappears the court may appoint a third person instead, see article 6:106 (1). When a party can invoke change of circumstances (hardship) as a ground for voiding or modifying the contract and the efforts of the parties to renegotiate the terms of the contract have failed, the court may adapt the contract in order to distribute between the parties in a just manner the losses and gains resulting from the changed circumstance.^{*34}

³¹ Article 6:105.

³² Article 4:112.

³³ Articles 9:301 and 9:303 (1).

³⁴ See article 6:111 (3).

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The New Law of Obligations in Estonia and the Developments Towards Unification and Harmonisation of Law in Europe

Introduction

The creation of a new Civil Code as undertaken in Estonia, and the reform of parts of an old Civil Code as under way in the Federal Republic of Germany need acceptance not only by the legislative bodies and organs competent to enact new laws but also by the wider community of those who have to apply and interpret the law in general and in the particular areas to be reformed: lawyers, practitioners and scholars, therefore, have to participate in the discussion preceding the enactment of the new law, and their concerns and criticism have to be taken seriously by the drafters. Both in Germany and in Estonia one line of critical arguments was based on the claim that the respective reform projects did not sufficiently take into account the new developments towards unification or harmonisation of the law in Europe and on the international level, in particular of the law of obligations which is of overriding importance for commerce.*¹ If the claims of these critics were well-founded, the new reform projects would indeed be faulty and outdated, for the time of insular developments of codes and legal systems has passed with the fall of hurdles and barriers for commerce in regions of Europe and beyond. The emerging body of key concepts and basic structures common to the law of obligations of market-oriented economies of the European states in general and the

¹ As to critical voices in Germany, see M. Lutter. – *Frankfurter Allgemeine Zeitung*, 9 December 2000; Huber. *Das geplante Recht der Leistungsstörungen*. – Ernst/Zimmermann. *Zivilrechtswissenschaft und Schuldrechtsreform*. Tübingen: Mohr Siebeck, 2001, p. 31 *et passim*.

member states of the European Union in particular mandate that every new codification, every project of reform or amendment of a legal system has to be tested whether it is in tune with these developments or falling behind. But are these critics right, and are their arguments well-founded? To answer that question, this paper will compare basic features of the new Estonian law of obligations and the reform project for the German law of obligations with the basic structures and key concepts of the various developments towards unification and harmonisation of this area of the law in Europe and on the international level.

1. Institutions and projects

If developments towards common principles and structures for the law of obligations in Europe are used as a yardstick for measuring the reform projects in Estonia and Germany, it has to be considered first, how and where, *i.e.* driven and undertaken by which institutions these developments take place, and how far they have come already.

First of all, legal acts of the European Community are a source of unification and harmonisation. While in the field of private law, *regulations* which are directly binding for all citizens of member states of the EC, are still extremely rare — an example being the regulation on overbooking by airlines —, **directives** are more and more reaching and harmonising central parts of private law; sales law and the EC directive on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC) of 25 May 1999 and, furthermore, the directive on delayed payments, are just two, albeit the most important, examples.

Another road to unification or harmonisation is attempted by model codes (in the widest sense). The main objective of some of these model projects is the hope for a European code of obligations (or the like). But short of that, they offer very useful tools for educating European lawyers, *i.e.* those jurists who will have and must have a command of the common legal language to be developed in order to facilitate cross-border communication.

Last but not least, one of the model projects, the UNIDROIT Principles of International Commercial Contracts, which are not confined to Europe, have mainly gained recognition and importance in arbitration proceedings, when the parties in the arbitration clause had not determined the applicable domestic law, but had rather loosely referred to the *lex mercatoria* the general principles of law, *etc.* But they are also a source of inspiration for domestic reformers and legislators.

1.1. Drafting and drafters

Model codes and similar projects are rarely drafted by single persons. Usually they are elaborated by groups of experts from many countries, the number of countries represented and the selection of experts being mainly a matter of the respective framework — and not least the financial basis — for the project and a more or less informal co-option of the group members. Let me name just some of these drafting groups.

The prestigious project of the Commission on European Contract Law, which had published the Principles of European Contract Law in two parts in 1995 and 2000, edited by the Danish scholar Professor Ole Lando together with Professor Hugh Beale of Warwick, England, is nominally a private initiative instigated by the editors and some others and was funded by private and public institutions, but it has the moral and to some extent the financial backing of the EC Commission and the European Parliament, which on several occasions has emphasised the need for a European Civil Code. The group, often named after its *spiritus rector* the “Lando Commission”, co-opts its members and tries to have a fair representation of, if not all legal systems of Europe, at least the main European law “families”.

UNIDROIT, the Institute for the Unification of Private Law, is a creation of the League of Nations in 1926, and now an international juridical entity, financed by member states; it has promoted a number of important uniform law conventions and has — in 1994 — published the first part of the Principles of International Commercial Contracts. The working group elaborating the mentioned Principles consists of representatives of countries of all five continents, some of the European members being members of the Lando Commission, too.

The most ambitious project to date is the so-called Study Group for a European Civil Code. It consists of a number of working teams in several European countries and is financed by research foundations in the Netherlands, Germany, Sweden and other sources. The general idea is to build on the Principles of European Contract Law as a kind of general part of the law of obligations and supplement them

by more specific topics such as sales and services, insurance contracts, secured transactions, transfer of property, torts, *negotiorum gestio*, restitution and unjust enrichment. The working teams draft proposals with the help of expert advisers — again striving for a representation of all major European legal systems —, and twice a year the so-called co-ordinating group convenes in a kind of plenary meeting, discusses and refines the draft proposals and aims at formulating black letter rules, which were later to be backed up by comments to be prepared by the working teams.

What also deserves mentioning is the Academy of European Private Law Scholars founded and guided by Professor Gandolfi of Pavia, who presented a draft for a European Contract Code in competition to the European Principles only last year.

As to directives of the EC, their drafting and drafters are somewhat shrouded in the fog of the bureaucratic institutions of the EC and the complicated procedure of co-decision of the Commission and the Council of the EC on the one side and the European Parliament on the other side. Simplified, the creation of a directive usually begins with an initiative from the European Parliament or the Commission to take legal action in order to address a certain problem, *e.g.* an impediment to the free flow of commerce within the EC. This often leads to the commissioning of outside experts, who prepare papers on what could and should be done, which in turn might become the basis for a Green Book of the commission or its respective department outlining legal proposals and stating the law in the member states more or less complete. While the further procedure is guided partly by the rules under the EC treaty for the co-decision of the organs of the EC, partly by considerations of political and economic opportunity, advanced by national governments in the Council or lobbyists in private lunch meetings with members of the Commission's administration, in the end it is very often a rather small and informal group of administrators and members of the European Parliament that hammers out black letter rules and the necessary compromises, and sometimes one can detect traces of their background in their respective domestic legal systems in the end product, *i.e.* their proposals and the directive based on them.

1.2. The influence of the UN Convention on the International Sale of Goods (CISG)

Even the most creative experts in these groups and commissions do not start from scratch, but need inspiration. Since most of them know their own law best, it is understandable and legitimate that their domestic legal system is their first source of inspiration. The representation of experts from different legal systems should ensure that the drafts elaborated are the result of a careful weighing and evaluating of competing solutions, of selecting the most fitting ones or merging them into new rules.

In the field of contract law, such an amalgamated result has been achieved already more than 20 years ago by the United Nations Convention on the International Sale of Goods, now in force in almost 60 countries and in all major trading nations except the UK and Japan. This Uniform Sales law was based on an unprecedented effort of comparing and analysing the sales laws of the world, of predecessors (ULIS and ULFIS) and their "test run" in several countries, and of the guiding convictions of its drafters that the best solutions had to be selected for the various issues, and that one had to find concepts and structures encoding these solutions acceptable and understandable to lawyers all over the world. The stunning success of this Convention is evidence that this was achieved, the success being shown not only by the ever-increasing number of contracting states and the hundreds of court decisions applying the convention, but also by the influence of the CISG on the development of the Law of Obligations in Europe, on directives such as the Consumer Sales Directive as well as on projects like the Principles mentioned above, the first draft proposals of the Study Group's team on Sales and Services, and the German reform draft. This will be explored further in the next part (II).

2. CISG and European sales law

2.1. General remarks

Three developments of sales law in Europe are markedly influenced by the UN Sales Convention.

Firstly, the Consumer Sales Directive^{*2} is probably the most important example; it expressly pays tribute to the influence of the CISG in its recitals.

Secondly, the Dutch working team of the Study Group for a European Civil Code in charge of Sales decided at the very beginning that they should stick to the CISG as closely as possible, deviating only from such rules which in the CISG were clearly tailored to the needs of international sales only, which were already outdated or — as an exception — questionable.

Thirdly, for more than 20 years the German Ministry of Justice has worked on a proposal to reform parts of the German Civil Code in the area of breach of obligations, the provisions on sales and service contracts and limitation periods, topics on which the existing code provisions are regarded as inadequate and partly misbegotten. Since the Consumer Sales Directive which has to be implemented by the end of this year, requires an amendment of the existing sales law anyway, it was decided to use the implementation of the directive as a kind of tug boat to pull the super-cargo ship of a reform of the law of obligations through the treacherous waters of public debate and the legislative process: the Ministry of Justice, therefore, presented a new reform proposal last autumn which right now is heatedly discussed in circles of academic scholars and practitioners.^{*3} What interests here is, that again, the provisions for a new sales law in particular as well as those on remedies for breach of contract in general are partially influenced by the CISG, so that one could state already at this point that the reform of the German law of obligations will bring these parts of the German private law into line with European and international developments.

2.2. Sales law and beyond

The influence of sales law is not restricted to sales, but serves as a model for the rules on other topics such as formation of contracts and — in particular — general rules on contract, breach of contract and remedies in case of breach. While some Civil Codes such as the German BGB have laid down these rules in general parts, other legal systems such as those of the Scandinavian countries derive their general rules on breach of contract from the explicit provisions of sales law. Therefore, the Convention on the International Sale of Goods has not only bearing on the development of modern and harmonised sales laws in Europe but also on the so-called general part of the law of obligations. Reading through the UNIDROIT Principles of International Commercial Contracts or through the main parts of the Principles of European Contract Law, the influence of the model “CISG” is visible throughout. Despite divergences in details, the basic structures and key concepts are quite similar in CISG and these Principles, so that it is no exaggeration to point out a common core of concepts and solutions in these attempts at unification of the law of obligations. One of the reasons for this is that some scholars and specialists have been involved in the preparation of all three of these projects — and sometimes in the amendment and reform of their domestic laws as well —, so that they were “spreading the word”, *i.e.* the key concepts of CISG to the Principles. But they would not have succeeded if the key concepts and solutions would not have spoken for themselves, in other words, would not have been as convincing to encode solutions of common problems as, in fact, they are. And it is this — in German — “*Sachgerechtigkeit*”, *i.e.* the obvious reasonableness and fairness of solutions to common issues that make the respective provisions persuasive and appealing to drafters of other reform projects such as the commissions which prepared the first reform draft for the German law of obligations in the eighties and lately guided and counselled the German Ministry of Justice in its recent efforts to bring about a reform of the law of obligations in Germany.

I dare say, therefore, that any new codification of the law of obligations has to be measured against the unification projects mentioned before: their key concepts and basic structures — and the basic solutions encoded in them — represent a kind of yardstick for reformers and drafters. They have to explain, if not to justify, if and where they deviate from this body of common convictions and their materialisation in black letter rules. I think the new Estonian law of obligations will pass this test convincingly.

² *Ibid.*

³ In the meantime, the Ministry with the assistance of a commission of experts has presented a revised draft (*Konsolidierte Fassung des Diskussionsentwurfs eines Schuldrechtsmodernisierungsgesetzes* = KF), and as of now – April 2001 – it seems to be certain that the reform will be accomplished by the end of the year.

3. The Estonian law of obligations: details and key solutions

Though I cannot give an exhaustive report and analysis of the Estonian law of obligations, a concentration of the central points of the new act may suffice to prove my point. Since the CISG and the Principles only deal with contracts and obligations created by contracts, I shall first concentrate on the comparable provisions of the new Estonian law.

The backbone of any law of obligations are the remedies of the obligee in case of a breach of a contractual obligation by the obligor, which is generally called “non-performance” in the UNIDROIT and European Principles, while the CISG — although not generally — uses “breach of obligation” as the respective key concept.^{*4}

In the continental legal systems as well as in the uniform law projects, the first and main remedy of the obligee is always his or her or its right to claim specific performance. Although in practice, other remedies, such as a claim for damages may be used more frequently, the right to claim performance is the dogmatic centrepiece of the system of remedies, often described as the primary remedy in comparison to secondary remedies such as a claim for damages. But the claim for specific performances must have its limitations, the most common one being impossibility of performance: a legal theory granting a claim for performance in case of impossibility might be appealing for a dogmatist but violates common sense. Therefore, the rule in article 79 V CISG, a misbegotten provision, is heavily — and rightly so — criticised, and both the UNIDROIT Principles (in articles 7.2.1 and 7.2.2) and the European Principles of Contract Law (in articles 9:101 and 9:102) calibrate the right to performance: while monetary obligations are generally unlimited, specific performance of an obligation other than one to pay money cannot be obtained, where performance would be unlawful or impossible, or would require unreasonable effort or expenses of the obligor, or where services or a work of a personal character are owed or where the obligee may reasonably have obtained performance from another source. These restrictions apply also to a claim for performance to cure a defective performance. Estonian law is fully in conformity with these rules: section 99 of the (draft) Law of Obligations Act provides an unlimited claim for performance, if the obligor is obliged to pay money, but limits the claim for performance in other cases, *i.e.* where performance would be unlawful or impossible, or would impose an unreasonable burden on the obligor or where the obligee could fairly obtain performance from other sources, or where the obligation is of a highly personal character. As in the Principles, this applies to the right to cure as well, subsection 99 (4).

Breach of a contractual obligation jeopardises the existence of the contract. Legal systems, therefore, have to find an answer, how and under what circumstances the contract could be terminated. The uniform law projects follow a common model: the contract can be terminated (avoided) by the obligee, hurt by the breach of the obligor, either if the breach is “fundamental”, or if the obligee has set an additional period of time, which has lapsed without the obligor having performed. Thus, even if there are doubts whether the breach of the obligor amounts to a fundamental breach, the obligee principally can get out of the contract by setting an additional period of time, the lapse of which is regarded as making a breach a fundamental one. This interplay between gravity of breach and the instrument of an additional period of time cannot only be found in the CISG (article 49 (1) a) in regard to the seller’s breach, article 64 (1) a) in regard to the buyer’s breach), but also in the European Principles (articles 9:301, 8:106 (3)) and the UNIDROIT Principles (articles 7.3.1 (1) and (3)), both projects specifying what constitutes a fundamental breach.

The Estonian Law of Obligations Act is based on the same model: termination is allowed, if the breach is fundamental, subsection 107 (1), and what constitutes a fundamental breach is concretised in similar terms as in the uniform law projects. In addition, the lapse of an additional period of time, granted by the obligee under section 105, is regarded as a fundamental breach, subsection 107 (1) 5); the Estonian Act thereby uses the dogmatically most consistent solution to rationalise the consequence of termination in case of a futile additional period of time.

In the central provision for the remedy of a damage claim — section 106 —, the Estonian Act is based on the notion of “breach of obligation” as a general concept, and on the basic policy that damages could be claimed only if the obligor is responsible for the breach of his or her or its obligation. “Responsibility” is a requirement for liability in damages defined in section 94. In addition, subsection 106 (2) provides for an additional period of time to be set by the obligee, if he or she or it asks for damages “instead of performance”, *i.e.* the so-called “performance interest”. The

⁴ So does the German Reform Draft, see section 280 KF: Pflichtverletzung.

setting of an additional period of time is not required if it would be obviously futile or unnecessary as a requirement for termination of the contract. These — basic — structures of the claim for damages are fully in line with modern developments in Europe: although the European Principles as well as the UNIDROIT Principles use as a key concept “non-performance” instead of “breach of obligation” — which, however, is the key concept in the new German draft for the reform of the German law of obligations —, the essential features of the new Estonian Law of Obligations Act are the same as in the projects for Uniform Principles projects: the obligor is liable only, if he or she or it is responsible for the breach, and he or she or it can excuse himself or herself or itself (only), if the impediment to performance is beyond the obligor’s control and could not reasonably have been expected to be taken into account at the time of the conclusion of the contract or creation of the obligation, and could not have been avoided or overcome later. The basic elements of responsibility in section 94 are the same as in article 79 I CISG, article 8:108 (1) European Principles or article 7.1.7 (1) UNIDROIT Principles. The special norm for damages instead of performance — subsection 106 (2) —, however, seems to be based on the German reform draft and a general distinction between performance interest and reliance interest.

Price reduction: the remedy of price reduction is — unlike in German or other domestic laws, but in conformity with the European Principles — a general one and not restricted to sales, construction contracts and leases as, *e.g.* in Germany. Section 102 of the Estonian draft, allowing price reduction in all cases of non-conforming performance — as article 9:401 European Principles — reflects the policy that in case of non-conforming performance the contract has to be adjusted, *i.e.* the price has to be adjusted to the value of the non-conforming counter-performance. This is common stock in Europe in regard to sales contracts and is in so far based on the old Roman *actio quanti minoris*, but it is an impressive improvement to have a general norm for price reduction, which also applies to contracts for services, *etc.*

Although the limits of time and space preclude me from a more detailed comparison, I feel confident and justified to summarise that the system of remedies for breach of an obligation in general and breach of contract in particular are not only compatible with the modern solutions to be found in the European Principles, in the UNIDROIT Principles and in the Convention on the International Sale of Goods, but also with modern reform projects such as the draft for a new law of obligations in Germany.

4. Unjust enrichment

While in the law of contracts there are the European Principles, the UNIDROIT Principles and the Sales Convention as models and yardsticks for any reform, matters are quite different in the law of unjust enrichment. The territory of “Restitution and Unjust Enrichment”, in other words, is far less explored and mapped out in comparison to contracts and torts. If one attempts to harmonise the law of unjust enrichment (in Europe) or to codify this area of the law on the domestic level, some basic issues have to be decided at the outset: the first question, which arises when one analyses the law of Restitution and unjust enrichment comparatively is whether unjust enrichment as a category of its own is really needed. Since, however, there is at least a strong continental tradition to codify remedies for unjust enrichment, the drafters of the Estonian Law of Obligations Act did not really have a choice to deviate from this common heritage of European legal systems. The next question, however, is a more tricky one: should the law of unjust enrichment be codified by distinguishing several types of unjust enrichment or would it be sufficient to have a general principle along the line of the famous Pomponius dictum that nobody should enrich himself or herself to the detriment and injury of another? The Estonian drafters have based their proposals on a compromise, which could be found in other European jurisdictions as well: they start with a general clause in section 1131, but then go on to distinguish between enrichment by conscious transfer of assets without legal cause, *i.e.* the old *condictio indebiti*, and regulate content and extent of the restitutionary action and the defences of the enriched who has changed his or her or its position. Special regard is paid in this context to exchange contracts, section 1139. The difficult balance between protection of commerce on the one side and protection of the disenriched plaintiff on the other side is struck — in conformity with other legal systems — by distinguishing good faith acquisition for good value on the one hand and acquisition by a third party free of charge: only in the latter case is the third party bound to surrender the enrichment to the disenriched person. In contrast to the enrichment by conscious transfer, sections 1142 *et passim* deal with enrichment by infringement of the plaintiff’s right — sections 1142–1145 — and enrichment by improvements of another one’s goods, sections 1146 and 1147. Although I cannot report and analyse details here, it must suffice to state that the structure of this concept of remedies of unjust enrichment is not only in line with the basic structures of the European law of

unjust enrichment as revealed by comparative law research, but also very progressive and drafted with intimate knowledge of issues and policies.

5. Torts

To codify the law of torts poses a similar basic question at the outset as a codification of the law of unjust enrichment: should the law of torts be based on a general clause or on several provisions distinguishing special torts? Europe is divided on this question: while *e.g.* the French Civil Code is based on a general clause, the German Civil Code codifies a number of special torts. Of particular interest is the Swiss solution, for the Code itself is based on a general clause, while the courts and scholars have followed the German model and have interpreted the general clause as if it contained several types of delicts. The new Estonian Act, again, tries to strike a compromise by starting out with a general clause, whereby any wrongful causation of damages triggers a respective tort remedy, but goes on by qualifying the wrongfulness in form of several types such as causing death, injury to person or property, *etc.*, sections 1149 and 1150. Although seemingly thereby following the German model, the drafters have included several types of wrongfulness which the German Code does not know, but which were developed by courts and scholarly contributions, *e.g.* the interruption of another one's business activities by strike, *etc.* The most modern part of the new Estonian law of torts, however, is the introduction of a general clause of strict liability for typical risks of a dangerous thing or doing, section 1160. This general clause is then exemplified by special provisions on certain dangerous things and activities, and the position of the plaintiff is strengthened by a right to information from the owner or possessor of the dangerous thing. Although these very artfully drafted provisions should have been sufficient, the authors of the draft have added special provisions on product liability, doubtlessly anticipating the implementation of the respective EC directive.

While it is still too early to compare this draft with the first attempts to codify a uniform tort law on the European level, I dare say that the concept and structure of the new Estonian law of torts is very modern, well-drafted and adjusted to the European solutions to be expected in the near future. It must be hoped, therefore, that the members of the study group for a European Civil Code take account of this progressive piece of legislation in Estonia.

Conclusions

If I may take up my preliminary remarks about the necessity that a new law must be acceptable to the wider community of those who have to apply and interpret it, I feel entitled to summarise that the parts and provisions of the new Law of Obligations Act which I have compared and analysed here with the developments on the European level, deserve respect and admiration and should without doubt be acceptable to those who have to apply and follow them in the coming years. And if the noble project of a European Civil Code should be successful, Estonian jurists who had to study the new Estonian Law of Obligations Act should have no problems in understanding the coming European law, for their domestic law is fully in conformity with the tendencies and basic structures of the European law to come or having arrived already in the form of Directives of the EC. One has to congratulate all those jurists who took part in the drafting of the Estonian Law of Obligations Act, and it is to be hoped that it will find the recognition it deserves not only in Estonia but throughout Europe.

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Towards a (Post)modern European Contract Law

Estonian and European contract law

A discussion of the development of a European private law and a European contract law is very appropriate here on Estonian soil. After regaining its independence, Estonia, together with the other newly independent states, has had the unique opportunity to completely recreate its private law system. Estonia has been forced to look at private law experiences in various parts of Europe and the world when making decisions concerning its own future. By necessity, Estonia as well as the other countries in the same position, have become showcases of the ongoing processes of the Europeanisation of private law.

Estonia has, for various reasons, including its pre-Soviet historical background, in principle decided to base the development of its private law on the German model.^{*1} From the point of view of Europeanisation, this seems, at the outset, like a step backwards — why look (back) toward the law of a certain country, when legal ideas are moving across borders in Europe at an ever-increasing rate. However, Estonia did not choose German law in order to find a model to copy as such, but rather to find a suitable and needed point to anchor its legal culture.^{*2} When making concrete substantive decisions, a comparative method and a plethora of sources from various places have been used.^{*3}

The Europeanisation of contract law is taking place today on many levels. The rapid rate at which the EC is issuing directives in areas like consumer law is well known.^{*4} However, the creation of a general structure and general rules for a possible European contract law has so far been a task which has been mainly performed by the European academic community. Collections of rules have been created, or are in the process of being created, by various more or less privately organised groups of comparative contract lawyers. For Europe^{*5}, the most important result so far is the collection of the Principles of European Contract Law (PECL), elaborated by the Commission of European Contract

¹ See P. Varul. Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia. – *Juridica International. Law Review*. University of Tartu, V, 2000, p. 107 ff.

² As a Nordic citizen I am, of course, a little disappointed that we could not welcome Estonia into the Nordic legal family.

³ P. Varul (Note 1), p. 107.

⁴ See e.g. G. Howells, T. Wilhelmsson. *EC Consumer Law*. Aldershot. Ashgate, 1997.

⁵ A similar collection on international level is the very well known UNIDROIT Principles of International Commercial Contracts. Rome. UNIDROIT, 1994.

Law, sometimes also called the Lando Commission after its convener Ole Lando.^{*6} These principles have gained much attention and will certainly influence the legal development of Europe.^{*7}

The PECL have already been used as source material by various countries outside the EU in the development of their own contract legislation.^{*8} Their influence is visible in the drafting of the Estonian Law of Obligations Act as well.^{*9} If the PECL become an important guideline in the Europeanisation of contract law, Estonian law has been placed in the vanguard of such a possible development.

Today I would like to make some general comments on the possible role of the PECL in the Europeanisation of law. As the future is notoriously difficult to predict, I will not try to make any prognosis concerning the role of the PECL in this inevitable process. Instead, my discussion is normative in character. First, I will make some comments on the quality of the PECL, comments that are relevant when discussing a modern law of contract from the perspective of commercial contracts. I will claim that in this perspective, the PECL are fairly modern and useful.^{*10}

However, this does not imply any enthusiasm concerning the idea of the European Civil Code, based on the PECL — which is the vision of at least some of its creators.^{*11} I will, at the end of my paper, argue for a more “postmodern” vision of European contract law and private law that respects the pluralism of Europe while it also promotes the free movement of legal ideas across the European borders.

PECL as modern principles for commercial contracts

The drafters of the PECL have seen as one of the main aims of the Principles to provide a useful set of rules to be chosen by parties from different countries as the “law” governing the contract. According to the express provision in the PECL article 1:101, the Principles will apply both when the parties have expressly agreed to incorporate them into their contract and when they have agreed that the contract is to be governed by “general principles of law” or a *lex mercatoria*. They may even be applied by arbitrators when no explicit choice of law has been made, again as a kind of an elaborated *lex mercatoria*.

Although not all national legal systems would approve of a clause of this kind^{*12}, one may expect that in practice the PECL can become relevant in this way. As a comparison, one should note that the UNIDROIT Principles already have been applied in some arbitral awards as generally accepted principles, even if the parties have not expressly referred to them^{*13}, and that such an award has been upheld by an American court.^{*14} Through such practices, the PECL may also exert influence on the gradual development of national commercial law. And I think this is entirely appropriate. To my mind, the PECL do represent a modern European view on commercial contracting in many respects, and are therefore worthy of being influential in this area.

A good set of European contract rules cannot be created by searching for the “average” European contract law. The strength of the PECL lies in the fact that the Lando Commission did not strive to make only such a compilation, but to design a modern set of principles that responds to the needs of business today — of course with due regard to national traditions. In a very interesting way, this can be seen, *e.g.* in the fact that the Commission members belonging to the common law tradition did not insist on doctrines like the doctrine of consideration, which is both rather strange for a Continental lawyer and impractical from the business point of view. Others, of course, made similar concessions. And what is perhaps most interesting: there are also principles in the PECL that do not reflect any

⁶ O. Lando, H. Beale (eds.). Principles of European Contract Law. Parts I and II. The Hague: Kluwer, 2000.

⁷ The most important ongoing activity, “The Study Group on a European Civil Code”, will follow the results of the Lando Commission. The leader of the Study Group, Christian von Bar, is a member of the Lando Commission.

⁸ Even the newly adopted Contract Law of the People’s Republic of China, of 15 March 1999, has been influenced by the PECL.

⁹ P. Varul (Note 1), p. 114; 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, p. 147 ff.

¹⁰ As I have been a member of the Commission since 1995 — when Finland joined the EU — my objectivity may of course be questioned. Most of the provisions I will mention were, however, already in place at that time.

¹¹ O. Lando, H. Beale (Note 6), p. xxiii.

¹² See, *e.g.* R. Goode. A New International *Lex Mercatoria*? – Juridisk Tidskrift, 1999–2000, pp. 266–267.

¹³ *Ibid.*, p. 266.

¹⁴ M. J. Bonell. UNIDROIT Principles: A Significant Recognition by a U.S. District Court. – Uniform Law Review, 1999, p. 653 ff.

present law, but are taken instead from modern commercial practice. The rules on change of circumstances, which I will return to below, are good examples of this.

As to their substantive starting point, the PECL are certainly very traditional. The main substantive principle is freedom of contract, which is expressly spelled out in article 1:102. However, a collection of principles of this kind, developed primarily to meet the needs of international trade and meant to be used as a kind of soft law based on express or implied choices of the parties, could hardly have had any other starting point. As long as we are talking about soft law for international commercial contracting, the traditional principle of freedom of contract is a natural basic principle.

The modern features of the PECL should be sought elsewhere. First, one should note that the principle of freedom of contract and its corollary, the binding effect of the contract, are not adhered to *in absurdum*, despite the fact that the Principles are offered to the parties to be used at their discretion. The general part of the PECL already includes a provision on good faith and fair dealing (article 1:201) that is mandatory. The parties may not exclude or limit their duty to act in accordance with good faith and fair dealing.

In the Comments on the PECL, this principle is presented as a basic principle that runs through the whole PECL.¹⁵ The principle of good faith and fair dealing should be followed, both when the contract is made and when it is performed and enforced.

Of course, from the point of view of a Continental lawyer, it may seem strange that I mention this principle as an example of the “modern” character of the PECL. In fact, its model is taken from and it corresponds to the established Continental principles reflected, *e.g.* in the French concept of “*bonne foi*” and the German “*Treu und Glauben*”. In Nordic law as well, a similar concept has traditionally been used to infuse a minimum level of honesty and decency in commercial relations.¹⁶ However, from a common law point of view, this principle has introduced new patterns of thinking into contract law. It has been said that “the criterion ¼ of good faith is mysterious and exciting to an English lawyer”.¹⁷ The principle of good faith has — primarily because of the EC Directive on unfair terms in consumer contracts, but perhaps also because of the PECL — caused much discussion in the common law world.¹⁸

A good example of the practical relevance of the good faith principle can be found in the rules on liability for negotiations (article 2:301). Although the starting point is, and must be, that a party is free to negotiate and is not liable for failure to reach an agreement, the PECL also state that a party who has negotiated or broken off negotiations contrary to good faith is liable for the losses caused to the other party. Entering into or continuation of negotiations with no real intention of reaching an agreement has been expressly mentioned as an example. Rules of this sort reflect ideas of decency and loyalty that should be important in a modern set of rules on contract.

The importance of the principle of good faith and fair dealing in an European instrument is underlined by the fact that basic patterns and customs for honest dealing in the marketplace may not yet be well established in the former socialist countries. In Estonia, section 108 of the General Part of the Civil Code Act prescribes an obligation to act in good faith which thus has been in force already since 1994. Despite this, as Irene Kull states: “the traditions of negotiations and the tradition of fair business relations in a wider sense have not yet developed.”¹⁹

A part of the idea of good faith is the perception of contract not only as a ground where conflicting interests are momentarily reconciled but also as an instrument for loyal co-operation. The more the parties in the marketplace found their relationships on the basis of long-term co-operation, the more important such an approach becomes. The PECL are modern in the sense that they reflect the growing importance of loyalty and co-operation. According to article 1:202, each party owes to the other a duty to co-operate in order to give full effect to the contract. Although the examples in the Comments tend to indicate that the main purpose of the article is to regulate a fairly traditional co-operation duty of the party who receives a performance, there is at least one example which hints that more extensive information duties may be based on this provision. According to the example, a party has

¹⁵ O. Lando, H. Beale (Note 6), p. 113.

¹⁶ See, *e.g.*, T. Wilhelmsson. Good Faith and the Duty of Disclosure in Commercial Contracting — The Nordic Experience. — R. Brownsword, N. J. Hird, G. Howells (eds.). Good Faith in Contract. Concept and Context. Aldershot. Ashgate, 1999, p. 165 *ff*.

¹⁷ H. Collins. Good Faith in European Contract Law. — Oxford Journal of Legal Studies, 1994, p. 249. Collins here analyses the concept of good faith in the EC Directive on unfair terms in consumer contracts.

¹⁸ See, *e.g.*, R. Brownsword, N. J. Hird, G. Howells (Note 16).

¹⁹ I. Kull. Legal Integration and Reforms — Innovation and Traditions. — Juridica International. Law Review. University of Tartu, V, 2000, p. 122.

to inform the other party if the latter may be unaware of the fact that certain acts in performance of the contract may involve a risk of harm to persons or property.^{*20}

Leaving the general part of the PECL and turning to its more concrete provisions, the choice of examples of modern provisions by necessity becomes extremely subjective. Obviously, I cannot, in this context, go through the whole collection of principles. I will only mention some examples of what I mean when I claim that the PECL are at least relatively modern.

The provisions on formation in Chapter 2 seem, *prima facie*, very traditional and old-fashioned. The chapter on formation which rests so strongly on refined rules concerning clearly separated acts of offer and acceptance does not seem to reflect the realities of the modern marketplace. However, these provisions are in line with those of the modern international basic law of contracts, the UN Convention on Contracts on the International Sale of Goods (CISG). Looking more closely at Chapter 2 of the PECL, one also finds more modern provisions, for example on the binding effect of standard form contracts (article 2:104). In that context, it is interesting to note the procedural fairness rule, according to which a mere reference to standard form terms in a signed contract document is not sufficient; the party invoking them should have taken reasonable steps to bring the terms to the other party's attention before or when the contract was concluded.

It is also worth noticing that the PECL contain a provision on the problem of the so-called "battle of the forms" (article 2:209) that ensues when both parties have referred to their own general conditions. In this provision, the PECL do not try to fit their solution into the traditional scheme of offer and acceptance — which would result in on/off rules preferring either the "first shot" or the "last shot" solution^{*21} — but have chosen a more flexible compromise that reflects recommendations in modern doctrine.^{*22} According to this provision, both sets of general conditions form a part of the contract to the extent that they are common in substance.

The modern principle of loyalty is also reflected in the provision on change of circumstances in article 6:111. According to this provision, a party is, subject to certain conditions, bound to enter into negotiations with a view to adapt or terminate the contract if performance becomes excessively onerous because of a change of circumstances. This provision is not based on examples from national law, but on commercial practice as expressed in "hardship clauses" connected with renegotiation duties.^{*23}

Finally, turning to the chapters on remedies, I would like to mention the very central rule on the basis of liability in the PECL article 8:108. According to this provision, a party's non-performance is excused if the party proves that the failure is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences. This provision expresses the so-called control liability that is also used as the basic type of liability in the CISG (article 79). As the control liability of the CISG has found its way into many pieces of national legislation as well, it is in the process of becoming an internationally accepted basic principle of contract law. For example, the Nordic countries have adopted this principle in their new Sale of Goods Acts, at least for certain situations, and serious consideration is being given to generalising it as the basic liability principle of contract law.^{*24} It is considered to be especially suitable for judging behaviour in businesses. In a modern set of principles for commercial relationships, it is natural to base liability on the concept of control.^{*25}

PECL as model for Civil Code

On the basis of these considerations, as a collection of model rules for commercial contracts, the PECL have many merits. However, some of the drafters of the PECL have more far-reaching ambitions. The Lando Commission has expressed as one of its aims to offer a basis for the future

²⁰ O. Lando, H. Beale (Note 6), p. 120.

²¹ Such thinking is still applied in many national laws, see U. Göranson. *Kolliderande standardavtal* (Collision of Standard Form Contracts). Uppsala: Iustus förlag, 1988, p. 25 ff.

²² See for Nordic law, e.g., J. Hellner. *Standardavtal vid avtalsslutande* (Standard Form Contracts When Contracts are Made). – Tidskrift, utgiven av Juridiska Föreningen i Finland, 1979, p. 297.

²³ Hardship clauses are mentioned also in the Comment, O. Lando, H. Beale (Note 6), p. 323.

²⁴ See, e.g., L. E. Taxell. *Skadestånd vid avtalsbrott*. Åbo, Åbo Akademi University Press, 1993, p. 133 ff.

²⁵ This principle is also expressed in the new Estonian legislation, see I. Kull (Note 9), p. 150.

European Code of Contracts.^{*26} In this respect, however, I do not consider the PECL to be as useful and modern as in serving as a model for commercial contracting.

This general aim of the PECL is reflected, *inter alia*, in the fact that the PECL, unlike the UNIDROIT Principles, are not limited in their scope to cover commercial contracts only, but are at least in principle said to cover the whole area of contract law, including consumer relations.^{*27} However, the PECL contain almost no attempt to distinguish between the rules for business relationships and for consumer contracts. This is fairly strange in a set of contract rules that purport to be modern.

The answer to this criticism is given in the PECL: specific rules for consumer contracts should be provided by special legislation.^{*28} This would, however, reinforce the traditionalist idea — in some sense — of a more important general contract law and a special, inferior area of consumer law (*Sonderprivatrecht*). The general rules are considered as main rules, and the consumer rules as exceptions, with unfortunate consequences for example concerning the interpretation of the latter. The said counterargument cannot remove the impression that this is not a very modern collection of rules.

In contrast to the conservative stance of the PECL, one might mention that consumer protection rules, *e.g.* stemming from EC law, are being incorporated in the Estonian legislation for a civil code.^{*29}

As just one concrete example of the (relative) shortcomings of the PECL in this respect, I would like to mention the provision on adjustment of unfair contracts (article 4:110): a party may avoid a term of the contract if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract. This adjustment rule is basically copied from the EC Directive on unfair terms in consumer contracts, and it extends the provision of the Directive to other contracts besides consumer contracts. This extension seems to increase the role of welfarist principles in the PECL. However, the (other) important limitations of the scope of the Directive, which make it relatively traditional and very conservative, *e.g.* from a Nordic point of view, but which are only minimum requirements in the Directive, are all retained and even converted to rules in the PECL.

The strong respect for freedom of contract, as traditionally understood, is contained in the basic solution adopted in the Directive, according to which the unfairness control of contract terms is applied only to the contract terms that have not been individually negotiated. However, as a minimum directive, it does not force national legislations to delimit the power of the courts and supervisory authorities to cover only standard form terms and other non-negotiated terms. It is probably not even the purpose of the delimitation adopted in the Directive to promote such restrictions. The basis for the delimitation was mainly the difficulty in finding unanimity with respect to the need to regulate the fairness of individually negotiated contracts.^{*30} However, the PECL emphasise this very traditional contract philosophy, as they do not present it only as a part of a minimum requirement that can be improved by national law, but as a rule that will eventually become a part of a future European Code of Contracts (and thereby decreasing the protection offered today by, *e.g.* Nordic contract and consumer law).

In the PECL, the traditional, market-rational approach to the problems of contract law can also be seen in another important restriction of the scope of the adjustment provision. Terms which define the main subject matter of the contract and adequacy in value are expressly excluded from the scope of the Directive, and therefore also from the scope of the adjustment provision of the PECL. In other words, neither set of rules extends the application of the adjustment provision to the most central parts of the contract, that is, to the price/performance relationship. In this respect as well, the Directive is a minimum directive and as such does not preclude the more comprehensive view on adjustment that prevails, for example, in Nordic law in this matter. However, the PECL again make a rule of what was only a minimum requirement in the Directive. The developers of a European Code of

²⁶ O. Lando, H. Beale (Note 6), p. xxiii.

²⁷ *Ibid.*, p. xxv.

²⁸ *Ibid.*

²⁹ P. Varul (Note 1), p. 115.

³⁰ The Preamble to the Directive notes that national laws allowed only partial harmonisation and that it was therefore necessary to restrict the Directive only to contractual terms that have not been individually negotiated. In its Communication to the Parliament, the Commission openly regretted that it had to include this limitation in the Directive; see COM(92) 66 final.

Contracts again offer a traditional solution in which the fairness principle is clearly subordinated to the principle of freedom of contract.^{*31}

Toward flexible and fragmented (postmodern) Europeanisation

Not only are the PECL unsuitable to serve as a model for the common European Civil Code or Contract Code, one may even question the idea of a complete harmonisation of European private law altogether.

I have elsewhere more extensively criticised such ideas^{*32}, and I will not repeat all details of the arguments here. The general thrust of my reasoning is the following.

Firstly, a large codification is as such fairly static in nature. This feature would surely affect the European Code in an even more drastic way. The creation of the European Civil Code would mean a shift of legislative power in this area from the parliaments of the Member States to the European Union. This would reduce the power of the Member States to react to socio-economic changes^{*33} within large parts of the central areas of the legal order. Changes could be made only through the cumbersome legislative mechanisms of the Union. Not only would the harmonisation of European contract law be created on the basis of traditional values; it would in addition form an obstacle to the piecemeal experimental development of, for example, consumer protection provisions, which has been so typical of modern European contract law.

Secondly, one may claim that the strength of Europe and the core of its identity is the recognition of the plurality of its languages, social structures and cultures. A systematic harmonisation of law would, in this view, destroy rather than strengthen the identity of Europe, resulting in “abolishing the Idea of Europe”.^{*34}

Some have seen the EU as an emerging new type of “Post-modern State”^{*35}, which “is abstract, disjointed, increasingly fragmented”.^{*36} This is in line with the claim that the European “idea” as such is one of pluralism.^{*37} In this view, the idea of the unified harmonisation of the law of Europe — if one believes in these claims — may even be at odds with the basic function and idea of the EU itself. A person with a positive attitude towards the idea of the EU as such might very well, without being inconsistent, be opposed to the project of systematic harmonisation of the law within the Union.

The postmodern and pluralist alternative to systematic harmonisation is, in other words, to take fragmentation seriously. The rejection of a European codification of private law does not necessarily imply a defence of traditional national structures.^{*38} Instead, as the pluralism of Europe offers a wealth of opportunities, the pluralism of European law can be seen as creating a field of new legal possibilities. EC law as well as ideas from the other European countries can be used in a creative way to break up petrified structures of national law that are hampering the development.

³¹ The EC Council actually justified the inclusion of this limitation of the scope of the Directive by the wish to exclude from the scope of the Directive “anything resulting directly from the contractual freedom of the parties”. See the Common Position adopted by the Council on 22 September 1992 with a view to the adoption of Council directive 93/13/EEC on unfair terms in consumer contracts, the Council’s reasons, p. 5.

³² T. Wilhelmsson. *Europeiseringen av privaträtten: för ett fragmenterat utbyte av erfarenheter* (Europeanisation of Private Law: for a Fragmented Exchange of Experience). – *Tidsskrift för Rettsvetenskap*, 2001.

³³ H. Kötz. *A Common Private Law for Europe: Perspectives for the Reform of European Legal Education*. – B. De Witte, C. Forder (eds.). *The Common Law of Europe and the Future of Legal Education*. Dordrecht: Kluwer, 1992, p. 32.

³⁴ H. J. Thue. *Norwegian Private International Law at the End of the 20th Century: Progress or Regress?* – S. C. Symeonides (ed.). *Private International Law at the End of the 20th Century: Progress or Regress?* The Hague: Kluwer Law International, 1999, p. 328.

³⁵ See J. A. Caporaso. *The European Union and Forms of State: Westphalian, Regulatory or Post-modern?* – *Journal of Common Market Studies*, 1996, p. 44 ff. See also I. Ward. *A Critical Introduction to European Law*. London: Butterworths, 1996, p. 182.

³⁶ J. A. Caporaso (Note 35), p. 45.

³⁷ I. Ward (Note 35), p. 191.

³⁸ See on this strategy of Member States D. Caruso. *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*. – *European Law Journal*, 1997, pp. 3–32.

EC directives, like the Directive on unfair terms in consumer contracts, may bring in useful new ideas in the various national settings, starting processes of development in that context.^{*39} Such ideas may also flow directly over national borders without making the detour through Brussels. Contract law ideas can move, for example, in connection with international trade and transnational standard form contracts. This movement of ideas presupposes openness in relation to impulses from other places, which is not possible within the framework of a strict system. A comprehensive European Civil Code would easily destroy — or at least weaken — the potentially experimental nature of European law.

The development of European consumer law — although from a Nordic perspective, it seems a little too modest in some, but not all respects — is a good example of how experiences from various European countries can be used in order to create European solutions: German and Nordic experiences of unfair contract terms regulation, the English experience of consumer credit regulation, *etc.* A continuous experimental development and improvement of the kind to be seen in this area — where new ideas not only flow via EC legislation, but also directly between the Member States — would naturally be much more difficult if the field was controlled by the general European Civil Code.

The idea of an experimental and learning law that makes use of experience from other countries presupposes a minimum basis of understanding between legal players from different national environments, a common “legal language”.^{*40} A project like the Lando Commission can, despite its commercial biases, be useful in creating a conceptual basis for a common European legal discourse.^{*41} As long as this and the other projects produce “soft law” and “soft legal knowledge”, they facilitate the experimental and fragmented movement of ideas within the EU rather than hamper it, as a petrified code would do. They may also be taken into account as useful guiding materials when developing national legislation, as the Estonian example shows.

In other words, I want to underline that the idea of a continuous free movement of legal concepts and ideas does not imply any dissociation from the academic European legal harmonisation projects, like the PECL, as such. On the contrary, I find them very important, both because they help to create a necessary conceptual basis for the free movement of ideas and because the work as such is already producing new thoughts and ideas. My criticism is directed only towards the final vision of a common and static European Code.

³⁹ See the very interesting paper G. Teubner. Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences. – *Modern Law Review*, 1998, p. 11–32.

⁴⁰ M. Van Hoecke, M. Warrington. Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law. – *The International and Comparative Law Quarterly*, 1998, p. 525 ff. See the development of “some conceptual legal meta-language” as a “necessary condition for a real development of comparative law.” They consider the development of such a language to be a task for legal doctrine (p. 530).

⁴¹ K. Riedl. The Work of the Lando Commission from an Alternative Viewpoint. – *European Review of Private Law*, 2000, p. 83, also emphasises the commission’s contribution to “a fruitful discourse culture”. In his commentary to the UNIDROIT Principles of International Commercial Contracts, M. J. Bonell also seems to emphasise their role as a framework for discourse, see M. J. Bonell. An International Restatement of Contract Law. New York: Transnational Juris Publications, 1994, p. 2 ff. – M. J. Bonell. The need and possibilities of a codified European contract law. – *European Review of Private Law*, 1997, p. 505 ff. The author expressly defends the idea of non-binding instruments as opposed to a formal Code.

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Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act

1. Development of Estonian private law

The Estonian private law has always been a part of Baltic-German law. The first major written body of law, the Baltic Private Law Code (BPLC) dates back to 1863. It was an extensive and extremely voluminous private law code that regulated in great detail the civil relations of the time. Its volume and contents were very similar to the old Common Prussian Land Law. The BPLC was in force in Estonia as a result of the so-called Baltic Special Rights granted to the Baltic countries by Russia (Estonia was a part of Russia from the beginning of the 18th century), which allowed to maintain the predominant Baltic-German law that was in force here before the Russian Empire.

In 1918, Estonia became independent and the young state gradually also started to enforce its own laws. In the area of private law, the preparation of the Estonian Civil Code commenced in 1920, which was meant to replace the tsarist legal acts (including the BPLC) that had been in force until that time. The draft was prepared mainly on the basis of the BPLC and the German Civil Code, but it was also largely influenced by the Swiss Civil Code. The draft was structured as a classical code: general provisions, law of property, law of obligations, family law and law of succession. While in several areas, particularly concerning the law of property, the code was clearly orientated to the establishment of a new thorough and systematic regulation, the same could not be said about the law of obligations and, above all, the family law in which the already outdated concepts of the BPLC still prevailed. The legislative proceeding of the draft in the *Riigikogu* (Estonian parliament) continued until 1940, but it never became an act because the USSR armed forces occupied Estonia just before the draft was passed. Hence, the old BPLC in fact continued to apply to private law relations until 1940, although it was obvious that several concessions and adjustments had to be made to be able to implement the code.

Under the Soviet occupation, the Civil Code of the Russian Federation was at first enforced in Estonia to regulate private law relations. Although it was an ideological document rich in propagandist provisions, its basic regulations were similar to those of the classical European civil code, the main distinctive feature being the lack of legal transactions with land due to the non-existence of real property law. With regard to the law of obligations, the basic regulations did not differ from what had been in force in Estonia until that time. In 1964, the occupying power formally replaced the

Russian code with the Civil Code of the Estonian SSR, which applied in full until 1993. As to its contents, there were no significant differences between that Code and the earlier code, apart from the fact that it had become even more ideological and the hitherto categories used in Estonian for the law of property and law of obligations (in Estonian: *võlaõigus*) were formally replaced with the new categories “title” and “law of the obligations” (in Estonian: *kohustisõigus*). However, it did not involve any fundamental changes as to their content.

When Estonia restored its independence at the beginning of the 1990s, the young state also lacked the authority and facilities for the enforcement of a new legal act to regulate private law. Instead, it was decided to reform the private law step by step, gradually proceeding to a legal system based on the Western-European standards. In 1993, the Law of Property Act entered into force as the first new source of civil law, followed by the General Part of the Civil Code Act and the Family Law Act in 1994. The Commercial Code governing primarily company law was passed in 1995, to be followed by the Law of Succession Act in 1996. Only one part of the old Civil Code — the one concerning obligations — has survived to date, which will be replaced by the Law of Obligations Act.

2. System of applicable private law

2.1. General regulation of private law

As mentioned above, the present system of Estonian private law consists of various legal acts that date from different periods. Despite the fact that the areas of private law have not been regulated by a single legal act (code), it can be said that, with regard to the system of law, Estonia is still a European country with classical codified civil law.

Namely, applicable private law clearly divides as follows:

- (a) general principles concerning persons, objects and transactions (the General Part of the Civil Code Act);
- (b) law of property (the Law of Property Act);
- (c) family law (the Family Law Act);
- (d) law of succession (the Law of Succession Act);
- (e) law of obligations (the Civil Code of the ESSR, the Commercial Lease Act, the Employment Contracts Act, the Dwelling Act, the Consumer Protection Act, *etc.*, henceforth to be regulated by the Law of Obligations Act);
- (f) private international law (the General Part of the Civil Code Act, henceforth to be regulated by a separate act);
- (g) company law (the Commercial Code);
- (h) intellectual property law (the Copyright Act, the Patents Act, the Utility Models Act, the Trade Marks Act, *etc.*);
- (i) contracts related to shipping (the Merchant Shipping Code).

2.2. Main regulation of law of obligations

As said above, the law of obligations is the only area of private law where a new system of provisions conforming to modern requirements has not yet been established and the Civil Code of the Estonian SSR¹ continues to remain in force. A question may arise of how it is possible to still live with the deeply Soviet rules dating from 1964 when almost ten years have passed since the restoration of independence and the revolutionary transformation of economic relations. Nevertheless, a large part of the disputes arising from contractual and extra-contractual obligations are solved on the basis of the Civil Code even nowadays. Presumably, it has been possible for the following reasons:

- (a) as to their underlying structure, the provisions of the Civil Code regulating the law of obligations conform to the classical idea of contracts and extra-contractual obligations;

¹ Eesti NSV Tsiviilkoodeks (Civil Code of the Estonian SSR), adopted on 12.06.1964; entered into force 1.01.1965 (abbreviated to the Civil Code) (in Estonian).

- (b) the main regulations of the Civil Code are sufficiently general to avoid major problems in different social formations when the regulations are applied;
- (c) several special areas have already been regulated by other legal acts;
- (e) after the entry into force of the Constitution, courts no longer apply ideological provisions or provisions restraining the disposal of ownership and providing for the inequality of persons.

What was said above does not naturally mean that the regulation of the Civil Code is sufficient for the present situation. Since the preparation of the new act has been delayed for a number of reasons, the legal system has simply tried to adapt itself to the changed circumstances.

To date, approximately 250 sections of the Civil Code are officially in force, of which about 200 actually function and can be applied. Compared to the Western-European principles, an important difference in the understanding of the provisions of law of obligations is the imperative interpretation of law, *i.e.* the established provisions serve as imperative unless otherwise provided by the provision itself. This relatively unreasonable regulation is mitigated by the fact that in the unregulated part (which is the major one) the parties may adjust their relationships as they need.

The main functioning part comprises the **general provisions of the Civil Code** that govern obligations including, *inter alia*, rules concerning the entry into contracts, the performance of obligations and the liability arising from the violation of obligations. The provisions regulating solidary liabilities, penalties, surety, guarantee, cession of claims and transfer of debts as well as the provisions concerning the termination of obligations are also important. As for the factual principles, the provisions in force have no peculiarities. The common and general feature is superficiality and non-regulation of many important issues, which has, in its own way, probably been the factor allowing the application of the Code in contemporary society. In the light of European codes, the provisions concerning the entry into contracts and other general provisions of contracts are commonplace and do not contain any significant distinctive features. The performance of obligations has also been regulated without any major peculiarities; the Code regulates, *inter alia*, performance for the benefit of a third person, creditor default and interest in the case of delay in the performance of a financial obligation (although only 3% per year). As a special feature, the so-called favourable term of seven days could be mentioned, which is allowed for the performance of obligations and is calculated starting from the submission of claim unless the due date of performance has been pre-determined. On the whole, no formalities have been established concerning the debtor's delay. The regulation of penalties is also rather common apart from the fact that the law expressly allows the use of sanctioned penalties (independent of damage). The reduction of penalties by court is also allowed. The rather modern regulation of surety is favourable to creditors and, unlike the law of many other countries, it is based mainly on the solidary (not additional) liability of the surety. At the same time, the termination of surety with a specified term has been very problematic and confusing. The regulation of payment guarantees is also problematic, having in practice caused heated disputes over the validity of bank guarantees since the Civil Code does not recognise abstract payment obligations but considers the liability arising from a guarantee to be strictly accessory and connected with the principal debt. The cession of claims and transfer of debts are similar to the German Civil Code or *BGB* (*Bürgerliches Gesetzbuch*). Liability for the violation of obligations is one of the weakest points of the law of obligations in force as the general variety of sanctions applicable upon the violation of obligations does not meet the practical needs. The Code provides an absolute basis for the claim to perform the obligation in kind, in addition to which damages can be claimed. In the event of violation of an obligation, culpability serves as the basis for liability. However, it is true that in the Estonian practice the requirement of actual performance of an obligation (despite the strict wording of the law), similar to the principle of culpability as a basis for liability, has a rather limited area of application since the parties usually agree upon stricter liability, from which exemption can be achieved only under the *force majeure* circumstances. The inexpediency and deficiency of the legal system of sanctions presents a serious problem in practice, which forces the parties to contracts find their own thorough ways to regulate liability. The regulation of the termination of obligations is very general, containing, *inter alia*, the termination of obligations due to the impossibility of performance and due to the liquidation of a debtor who is a legal person, both of which have caused many disputes in practice. At the same time, the option to terminate a contract unilaterally if the contract is violated has not been regulated at all, which can be considered the greatest flaw of the system of sanctions.

The regulation of **transfer contracts** and mainly the contract of sale is obviously insufficient considering the importance of these relations, while it is also unclear and has given rise to many disputes. The Civil Code systematically draws a distinction between the ordinary contract of sale

and the procurement contract under which goods not yet produced are purchased. In practice, this kind of distinction is no longer made. The sale of real estate is largely conducted under the Law of Property Act and the Law of Property Act Implementation Act²; the respective contracts are attested by a notary. Sales to consumers are generally regulated by the Consumer Protection Act and acts of the Government of the Republic. The transfer of state assets is regulated by the State Assets Act. The sale of goods between undertakings, where the provisions of the Civil Code are the most insufficient remain an actual area of application. Concerning the defects of the object of sale, purchasers have been provided with more sanctions as compared to the general part, those including the requirement to reduce the purchase price, to replace goods, to eliminate defects and to terminate the contract; however, the procedure for exercising these rights remains unclear (whether they are judicial requirements or unilateral rights of parties). The law refers to the complaint (submission of a prior warning) as a precondition for the submission of claims, starting from which the expiry of claims is calculated — without submitting a complaint, claims will expire within a year. Barter contracts and gratuitous contracts are regulated very briefly. In the case of a gratuitous contract, the law proceeds from the concept of real contract; in addition thereto, practically all gratuitous contracts have to be notarised, which is usually ignored in practice. The modern transfer contracts such as factoring, contracts of sale with an option, sale with the right of pre-emption, sale by auction, *etc.*, have virtually not been regulated with regard to civil law. In these contracts, agreements between parties have given rise to major disputes and misunderstandings as the bases for the evaluation of such agreements are very questionable.

The Civil Code does not practically govern **contracts for the use of assets**. The general lease of property is regulated by the liberal and sufficiently abstract Commercial Lease Act³, which has given grounds for disputes concerning the procedure for the termination of contracts. Residential lease contracts are governed mainly by the Dwelling Act which, contrary to the regulation of commercial lease relationships, goes beyond the limit of reasonable detail — the act prescribes even the lessor's obligation to submit an invoice to the lessee and the information to be contained therein, it has imposed absurd restrictions on the amount of rental payment that in most cases are not followed in practice, and it makes it extremely difficult to terminate a contract even with a lessee who has seriously violated his or her obligations. In social efforts the legislator has probably gone beyond reason, for the rules have mainly been established in view of the co-called sitting tenants who have stayed as lessees in houses returned to the former owners. The use of state assets is regulated by the State Assets Act. The regulation of loan contracts is also based on the concept of real contract, *i.e.* the contract does not enter into force before the transfer of money, and pursuant to the law virtually all contracts have to be executed in writing (not followed in practice again). Rules related to consumer credit and consumer protection are not yet widely known in Estonia. Types of contracts that are very important in practice such as leasing and licence are either not regulated at all (leasing) or are regulated eclectically and superficially (licence). Yet the existence of minimum legal regulation is indispensable for a uniform understanding of the nature of these contracts.

The regulation of **contracts for the provision of services** is also incomplete. The regulation of the contract for services as a result-orientated contract is more or less traditional although there are problems related to the termination of contract and application of other sanctions. In the most important areas — in building and planning — the basic rules are in most cases established in the general conditions of the transaction and not in the Civil Code. The mandate has been established as a contract meant strictly for conducting legal acts, *i.e.* it is meant to be the basis for authorisation under the law of obligations. Its regulation is relatively acceptable and applicable, permitting mandates that are clearly subject to a fee. Employment contracts are governed by the Employment Contracts Act.⁴ The regulation itself is rather retrograde and does not meet the modern needs. Under the tag of employee protection, labour law has been detached from the general provisions of the law of obligations as well as from the General Part of the Civil Code Act in practice. In the currently advocated theory, labour law is seen as a separated set of provisions to which any other legal system is not liable to be applied. Such approach is the main problem in the interpretation and implementation of labour law as a whole. The Civil Code also regulates commission contracts and deposit contracts

² Asjaõigusseadus (Law of Property Act), adopted on 9.06.1993; entered into force 1.12.1993 – Riigi Teataja (The State Gazette) I 1993, 39, 590 (in Estonian).

³ Eesti Vabariigi rendiseadus (The Republic of Estonia Commercial Lease Act), adopted on 26.09.1990; entered into force 1.10.1990 – Riigi Teataja (The State Gazette) 1990, 12, 126 (in Estonian).

⁴ Eesti Vabariigi töölepinguseadus (The Republic of Estonia Employment Contracts Act), adopted on 15.04.1992; entered into force 1.07.1992 – Riigi Teataja (The State Gazette) 1992, 15/16, 241 (in Estonian).

in an acceptable manner. The Merchant Shipping Code⁵ governs special contracts related to shipping, but does it on the basis of rather outdated ideas and is in great conflict with other laws in force. At the same time, there is no contract in Estonian laws clearly and generally aimed at the performance of work and not at the achievement of a result (as the contract for services is), the object of which is not the performance of legal acts (mandate) and which is not based on the traditional dependent relationship between the employer and the employee, which serves as the main criterion for defining an employment contract. Hence, no legal regulation exists for such important contracts as contracts for the provision of medical services, agency contracts and contracts with executives of companies. This can be considered the major flaw of the existing system. Practically non-existent in the Civil Code is the regulation of contracts of carriage, while the existing regulation is not applied in practice either. In addition, there are no generally accepted standard conditions and the majority of carriers directly rely on the rules of the CMR Convention⁶ in their mutual relationships. Credit transfer relationships (including the matters related to credit cards) are based on the acts of the Bank of Estonia the legal force of which is arguable. In this area, ongoing heated disputes are frequent in practice, which is indicative of the lack of legislation. Insurance contracts as a very important type of contracts have not been governed by law at all to date. For the client, the only protection is the concordance of the insurers' standard conditions with the insurance supervisory body. The situation is intolerable. The contracts of civil law partnerships have not been regulated in the usual manner despite the relatively significant position that the contracts occupy in practice. However, the Civil Code contains some general provisions concerning the contract of joint activity, which also characterise the essence of civil law partnerships. Unfortunately, the provisions are not regulative and have caused problems rather than helped to solve them.

Of **extra-contractual obligations**, the Civil Code regulates tort, unjust acquisition and retention and competition.

Similarly to the French *Code Civile*, the regulation of tort as an extra-contractual obligation is based on the general clause of compensation for damage, supplemented with provisions concerning specific liability. A general clause also regulates the liability of possessors of a major source of danger (risk liability). The employer's liability for his or her employees does not allow exculpation as in the German *BGB*. When determining the compensation for damage, both the conduct of the injured party and the financial situation of the tortfeasor are taken into account. As a negative aspect, the restrictions on the injured parties' claims for damage to health, which are based on the daily rates of minimum salary and do not take sufficient account of the individual damage caused to the injured party could be mentioned. There are no unambiguous grounds for claiming compensation for non-proprietary damage in cases other than the violation of personal rights; payment of smart money for bodily injuries is virtually unknown. The general liability of the state for performing the functions in public law has not been regulated by law, also giving rise to major disputes.

The obligations concerning unjust acquisition and retention of assets should replace unjust enrichment. The category of the unjust acquisition of assets does replace it, allowing to reclaim unjust acquisitions; yet it provides no option to submit an objection if the circumstances of enrichment have ceased to exist. In fact, however, only the *condictio indebiti* is covered. The institution of unjust retention is meant to partly cover the area which in the German *BGB* is regulated by the institution of conducting business without mandate (*Geschäftsführung ohne Auftrag*). At the same time, the regulation is very abstract and provides little support to the submission of a specific claim.

The rules of competition establish the general obligation to pay a fee for the performance of the best-promised work according to the conditions of the competition. Nevertheless, there is no general obligation concerning the obligation to actually pay the fee that was promised in public, which has also caused problems in practice.

3. Reform of law of obligations

As mentioned above, the Civil Code still applies largely in the area of the law of obligations. Despite the adjustment of the provisions to the requirements of the new social order it is inconceivable to continue to regulate relationships under the law of obligations pursuant to the law of the occupying state, particularly as it was meant to regulate completely different relationships. To date, the majority

⁵ Kaubandusliku meresõidu koodeks (Merchant Shipping Code), adopted on 09.12.1991; entered into force 1.03.1992 – Riigi Teataja (The State Gazette) 1991, 46/48, 577 (in Estonian).

⁶ Convention on the Contract for the International Carriage of Goods by Road, 19.05.1956, Geneva.

of other states that used to be in the shadow of the former Eastern bloc have abandoned the old regulation, even Russia has adopted a new Civil Code. Unfortunately, the progress of the reforms in Estonia has been slow. The Ministry of Justice initiated the preparation of a new private law already in 1993. The new acts were to be based on the draft Civil Code of 1940. Yet it appeared in the course of preparation that the draft had become outdated in many respects and was unsuited to the changed social situation. Above all, it concerned family law and the law of obligations. It took about two years to come to this realisation, after which it was decided to develop the whole Law of Obligations Act on the conceptual basis of modern civil law.

Intensive work on the draft began in 1995. The working group mainly consisted of persons connected with the Ministry of Justice, also including scholars and practitioners of the University of Tartu. In a short time, a relatively small number of people went through numerous laws of other states, as well as their legal theories and practice. In the course of work, new areas of regulation have been added to the draft and the existing regulations have been constantly improved. The work has lasted till the present time. An expert assessment of the draft was conducted by several European leading specialists of private law. The contribution of Professor Dr. Peter Schlechtriem (Freiburg University, presently working in Oxford) to the preparation of the entire draft deserves special emphasis.

The Law of Obligations Act aims at creating as homogeneous regulations as possible in the whole area of the law of obligations, including, *inter alia*, provisions of residential lease contracts and insurance contracts. It is the only way to avoid potential conflicts between regulations and the abundance of provisions between, for instance, commercial law and general civil law.

A definite criterion for the selection of sources was to proceed from the law of obligations of such countries that have served as models for the preparation of other legal acts in private law. Steady development of a systematic and complete legal system can be ensured only through homogenous sources, thus achieving the main aim of positive law — its applicability being accepted by the society. Another criterion for preparing the draft was its orientation to the future. Efforts have been made to take into account recent developments in Europe in the draft and the development of the draft has been based thereon.

The specific part of the Law of Obligations Act provides the regulation of different types of contracts. However, the specific part of the Law of Obligations Act does not give a comprehensive list of the types of contracts. Most types of modern and distinguishable contracts have been regulated — these were the criteria for the separate regulation of a particular type of contract. At the same time, proceeding from the principle of the freedom of contract and on the condition that the contract is not in contradiction with the contents and meaning of the law, the parties may enter into a contract the content of which can not be categorised under any type of contract. The preparation of the specific part of the Law of Obligations Act was aimed at incorporating all contracts regulated in Estonia in the Law of Obligations Act. Any type of contract is in itself an object of regulation in the law of obligations, which means that incorporating the regulation of all contracts in one legal act is in accordance with the codification principle recognised in Estonia. In principle, it does not preclude the regulation of a particular type of contract in a separate legal act, but it would not be in accordance with the civil law codification principle and there would be no practical necessity, since all important types of contracts have been included in the draft.

The draft is one of the most voluminous drafts in the history of Estonian legislation, containing approximately 1,300 sections. The draft is presently being processed in the Estonian parliament (*Riigikogu*) where, regrettably, some delays have occurred. Hopefully, the Act will enter into force without major changes in 2002 at the latest.

4. Bases for Law of Obligations Act

4.1. European Union law

Estonia, as a country striving for accession to the European Union (EU), cannot but meet all requirements of the European Union for legislation, including those in the area of the law of obligations (mainly focused on consumer protection). At present Estonia probably fails to meet the provisions established for the law of obligations in the EU in most respects and our consumers are in a relatively defenceless position. Therefore, meeting the requirements of the EU has been one of the priorities during the preparation of the draft. From the very beginning, the drafters of the Law of Obligations Act attempted not to copy the rules of the EU literally, but to incorporate them into the rest of the system and harmonise the directives creatively in order to avoid possible later conflicts

upon the application of national law. Unfortunately, contradictions and problems surfaced with regard to the directives themselves, which further complicated their incorporation.

The draft contains, *inter alia*, the requirements of EU directives concerning liability for defective products^{*1}, contracts negotiated away from business premises^{*2}, consumer credit^{*3}, package travel contracts^{*4}, unfair terms of contracts^{*5}, timesharing^{*6}, distance contracts with consumers^{*7}, sale of consumer goods^{*8} and cross-border credit transfers.^{*9} In addition to this, the draft takes into consideration EU directives concerning insurance contracts and employment contracts. EU requirements for the *Handelsvertreter*^{*10} have also been incorporated. Electronic payment instruments have been regulated in compliance with the EU recommendation.^{*11}

4.2. Laws of other countries and international law

The preparation of the draft was based on three civil codes — the German *BGB* (taking into consideration the reform proposals made by the Commission for the Revision of the Law of Obligations, *BGB-KE*^{*12}), the Swiss *OR*^{*13} and the Dutch *Burgelijk Wetboek*. Thus, the bases were the legal systems that have also served as the foundation for the reform of other legal acts in private law and that are probably the closest to our legal system and its traditions. Besides this, an important role was played by the German *HGB* and Insurance Contract Act as well as other German laws regulating the law of obligations issues. Furthermore, the Italian *Codice Civile*, the new Russian Civil Code^{*14}, legal acts of the State of Louisiana, USA, the province of Quebec in Canada and the Scandinavian countries (Sweden, Finland and Denmark) concerning contracts for the sale of goods and compensation for damage as well as the Czech Commercial Code, the Japanese Civil Code and the legal acts of many other countries were examined in the course of drafting.

Besides national laws, a number of international conventions were taken account of during the preparation of the draft. The most important among them is undoubtedly the United Nations Convention on Contracts for the International Sale of Goods (CISG). An important role was also played by the Convention on the Contract for the International Carriage of Goods by Road (CMR) and conventions concerning the circulation of bills of exchange and cheques.^{*15} The bases for leasing and factoring contracts were the respective UNIDROIT Conventions concerning the international circulation of the above-mentioned institutions.^{*16} The provision of healthcare services was regulated on the basis of the Council of Europe Convention on Human Rights and Biomedicine.

¹ 85/374/EEC: Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products.

² 85/577/EEC: Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

³ 87/102/EEC: Council Directive of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit; 90/88/EEC: Council Directive of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit.

⁴ 90/314/EEC: Council Directive of 13 June 1990 on package travel, package holidays and package tours.

⁵ 93/13/EEC: Council Directive of 5 April 1993 on unfair terms in consumer contracts.

⁶ 94/47/EEC: Directive of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

⁷ 97/7/EC: Directive of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

⁸ 1999/44/EC: Directive of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

⁹ 97/5/EC: Directive of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers.

¹⁰ 86/653/EEC: Council Directive of 18 December 1986 on the co-ordination of the laws of the member states relating to self-employed commercial agents.

¹¹ 97/489/EC: Commission Recommendation of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder.

¹² Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts, 1992.

¹³ Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht).

¹⁴ Graždanskii kodeks Rossiiskoi Federatzii, 1995.

¹⁵ Genfer Abkommen vom 7. Juni 1930 über das Einheitlichen Wechselgesetz und von 19. März 1931 über das Einheitlichen Scheckgesetz.

¹⁶ UNIDROIT Conventions on International Financial Leasing, 20 May 1988, Ottawa; on International Factoring, 28 May 1988, Ottawa.

Due attention was paid to the conventions and recommendations of the UNCITRAL and the International Chamber of Commerce regarding payment guarantees^{*17}, documentary credits and collection.^{*18}

4.3. Model laws and drafts

A variety of model laws and projects of different national legal order reforms were of great importance for the preparation of the draft. The Principles of European Contract Law and UNIDROIT Principles of International Commercial Contracts had a major impact on the draft. One of the most important examples was the *BGB-KE* as well as the preceding and following *BGB* reform projects. An important source for the regulation of compensation for damage was the corresponding Swiss draft.^{*19} An inspiring example for the regulation of the cession of claims was the UNCITRAL project pertaining to the cession of international financial claims. In the course of drafting, the working group also examined the legislative reform plans of many other countries and the drafts of possible future EU regulations.

4.4. Law applicable in Estonia

Naturally, the draft was also based on the currently applicable Civil Code and on the pre-war draft Civil Code. Since the main concepts of both of these legal acts are similar to the civil codes in force elsewhere in Europe, but at the same time the whole law of obligations has undergone rapid development, the role of these legal acts in the preparation of specific provisions remained rather marginal.

¹⁷ United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 11.12.1995, New York.

¹⁸ Uniform Customs and Practice for Documentary Credits (UCP 500).

¹⁹ Schweizerische Entwurf für die Gesamtrevision des Haftpflichtrechts, 1991.

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Latvian Contract Law and the EU

Contract law has for centuries promoted international trade and complied with the necessities of international economic relations. As a result of tight integration of EU countries, breaking of obstacles for free movement of capital, goods, services and labour, new trends are appearing in contract law. Latvia, in accordance with the decision made by EU Council in Helsinki, in December 1999, has already commenced discussion on entry into the EU. Significant work has already been accomplished for the harmonisation of the law of Latvia with the law of the EU. However, the EU does not require complete unification of the law. The law of each country has differences and such differences shall remain. Law is a rather conservative social category and therefore when talking about common law, the peculiarity should be taken into consideration. Even one legal regulation, for example, on the moment of concluding a contract or on a right to terminate a contract can cause disputes and conflicts during the execution of the contract.

Generally Latvian private law belongs to the community of law of continental Europe, however we all know that even the law of Germany and France may not be acknowledged as identical. The European Union includes both countries with continental European law and common law systems. In practice that still does not trouble economic relationships too much. Endeavours to bring closer the aforementioned systems should be appreciated. Principles of International Commercial Contracts drafted by UNIDROIT and Principles of European Contract Law recently finalised by the Lando Commission show that at least theoretical progress may be reached in this area. Meanwhile, it can be predicted that implementation of theoretic conclusions in specific legal acts shall require a long time period. However, in some cases an elaboration of such principles can turn the interpretation of already existing legal regulations in another direction. It appears more often in Common Law countries, but can also happen in the countries of continental Europe.

1. Variety of contract types

Matters of concluding and execution of contracts, as well as general principles of liability are subject to the Civil Law of the year 1937 reintroduced in parts in 1992 and 1993 respectively.^{*1} Since the reintroduction, the 4th part of the CLA has neither been amended nor perfected. However, many other laws have been adopted, which detail and develop specific types of contracts within the limits and basis of general principles of CLA. Several laws and regulations of the Cabinet of Ministers can be

¹ Civil Law [The Civil Code]. Ed. by the Latvian Law Institute. - Latvian Law Library: Vol. 1. Stanford, Connecticut USA: Government Law Systems, 1998. Further in the text also — CLA (Civil Law Act).

mentioned, which, beside other transport related issues covered by them, regulate carriage as well. They are: Latvian maritime rules (Maritime Code) and Aviation Act, both adopted in 1994, Cargo Act, adopted in 1995, Road Traffic Act, adopted in 1997 and Railway Shipping Act, adopted in 2001. During preparation of the said laws, provisions on transport were harmonised with the Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956, and the Convention on the Contract for the International Carriage of Passengers and Luggage (CVR) of 1 March 1973. Latvia joined the aforementioned conventions by adopting the laws in December 1993.² Unlike carriage, the Vienna Convention on Contracts for the International Sale of Goods, which Latvia joined by adopting a law on 19 June 1997³, is not incorporated in the national law of Latvia. Similarly, UNIDROIT conventions on international financial leasing and international factoring⁴ are not incorporated in the national law. By adopting the Consumer Protection Act (18 March 1999)⁵ complying with the standards of Europe, four specific consumer contracts came into legal force, regulation of which is detailed in the Regulations of the Cabinet of Ministers. They are distance contracts, doorstep sales, time-sharing and consumer credit contracts. Separate laws detail provisions on rent of residential dwelling, land lease, labour contract, contracts in respect of intellectual property and other. The Insurance Contract Act (10 June 1998)⁶ is significant for the issues covered therein. It is important that elaboration of laws in recent years has been performed in due compliance of respective EU directives and international conventions. Experts from the EU frequently participate in the preparation of legal acts. Now and then unusual legal constructions can be faced. For example, in accordance with the tradition of Latvian legislation, obligations and liability usually are included in the same law. In 1996, the *Saeima* (Latvian parliament) approved the Safety of Goods and Services and Liability of Manufacturers and Service Providers Act⁷ with EU regulations included of course. However, several experts questioned whether such “Latvian” treatment observes and includes completely entire terms of respective EU directives. As a result on 20 June 2000, the *Saeima* adopted two new laws: the Safety of Goods and Services Act and the Liability For Deficiencies of Goods and Services Act. Thus, in this sphere Latvia has harmonised with the EU not only by content but also by the number and form of laws. However, Latvia has introduced a surprise-worthy novelty by including in the Consumer Protection Act a provision acknowledging not only an individual as a consumer, but a legal entity as well, if the legal entity has acquired goods or services for no direct entrepreneurial purposes (section 1 of the Act). The existence of such a “national feature” may not be anticipated, but execution of the said provision will cause problems.

Legislators are working on the adoption of the Commercial Act in accordance with the approved concept providing also for a section on Commercial Transactions. The *Saeima* adopted the first three sections of the Commercial Act on 13 April 2000.⁸ Those regulate: (1) general rules of commercial activities, (2) types of entrepreneurs (individual entrepreneur, personal companies, capitalised companies), (3) reorganisation of commercial companies. The said Act, as well as the Implementation Act of the Commercial Act aroused extensive discussions, during which it was often emphasised that implementation of the law would cause significant expenses, also several novelties bringing Latvia together with the EU were questioned. However, the work accomplished must be valued positively, although it can be acknowledged that it should have been done earlier as it was done in Estonia. A concession contract is one of the recent types of agreements introduced by Latvian law. Such a contract is provided by the Concessions Act⁹ adopted on 20 January 2000. It is still questionable whether the aforementioned Act fits into the existing system of contracts but it can be useful in the case of uncovering overland oil deposits of commercial use. Certainly, conclusion and execution of contracts is affected by the Competition Act (18 June 1997), the State and Municipality Order Act (24 October 1996) and others as well. In practical business in Latvia not only contracts formalised by CLA, but also so-called “modern” contracts are used. No law mentions contracts like franchise or monitoring, however they are used in practice. That is promoted by legal provisions of the Introductory Part of Civil Law allowing parties to choose the most appropriate solutions with one restriction — they may not contradict with imperative and prohibitive provisions of Latvian law. On 19 June 1997, the *Saeima* adopted laws on joining UNIDROIT conventions of 1988 on international

² Latvijas Vēstnesis (hereinafter: LV), 12.01.1994, 15.01.1994.

³ Zinotājs, 1997., nr. 15

⁴ Zinotājs, 1997., nr. 16

⁵ Zinotājs, 1999., nr. 9

⁶ Zinotājs, 1998., nr. 15

⁷ Zinotājs, 1996., nr. 21

⁸ LV, 04.05.2000.

⁹ LV, 02.02.2000.

financial leasing and international factoring. That favours implementation of the said types of contracts according to those known world-wide. However, it must be noted that there are a number of other contracts called “leasing” several of them corresponding more with purchase on an instalment plan or long-term lease with buy-out. By adopting the new Civil Code on 18 July 2000, Lithuania decided to include several so-called modern contracts (financial leasing, factoring, distribution) in the law and on at least minimal regulation of them. This experiment deserves detailed analysis of the practice of implementation of the law in the future since, as we know, many Western countries have not come to an understanding on the point of the matter and variations of such contracts. Few sources indicate, for example, 28 subspecies of leasing and apart from financial leasing, an operative lease is acknowledged as well. Therefore a situation may arise when definitions introduced by the law limits the initiative of parties regarding their use of legal constructions. However, disclosure of modern contracts in the code gives positive effect as well.

By summarising this survey, it can be concluded that the eighteen types of contracts mentioned in the Civil Law do not reflect the variety of contract practice. Therefore, it is now more important to perfect the general provisions on contracts of the Civil Law rather than detailed regulation of each contract type known.

2. The reform of the court system and improvement of the court practice

As of the year 1992, a judicial reform for ensuring the execution of laws and the improvement of dispute litigation has been implemented in Latvia. Appeal and cassation proceedings have been introduced.^{*10} The new Civil Procedure Act, adopted on 14 October 1998 and effective as of 1 March 1999, replaced the Civil Procedure Code^{*11} initially adopted in 1963 during the Soviet regime and amended frequently afterwards. Laws on judicial reform and civil proceedings have not ensured everything that is necessary for courts: premises, computers and a sufficient number of judges. Therefore, courts are often reprimanded regarding slow work, as well as about quality of verdicts. The annual publications, which commenced in 1997, of the Supreme Court’s verdicts and decisions promote the transparency of court performance. The first collection reflecting work of the District Courts in 1999–2000 has been published also. Gradually standing courts of arbitration established in Latvia — and there are 12 at the moment — are becoming more and more popular. Also a choice of courts of arbitration located in other countries for dispute settlement has become common.

When analysing the court practice in respect to fulfilment of contracts and liability it must at first be noted that Latvia, similar to other post-communist countries, experienced a so-called period of accumulation of initial capital. After independence was regained, an atmosphere of exaggerated permissiveness dominated in business when each and every individual, state enterprise and even municipality was allowed to earn money by using all possible means. As it was discovered later, during that time many loan agreements were concluded without sufficient collateral and even with fictitious companies. Guarantees were issued (also for remuneration) and property, including property of state and municipality, was pledged with generosity. When the first restrictions on accepting deposits from individuals were imposed, trust investment and capital management companies boomed. A typical feature of the first decade of independence was abnormally high interest rates, often accompanied with very severe contractual fines. Some disputes related with the aforementioned transactions are still in court hearings even in the year 2001. However, if evaluating CLA and searching for difference in comparison with law of other countries, the following few material features are worth mentioning.

In the event of overdue repayment of debt, Latvian CLA provides for a possibility to require interest, as well as a contractual fine and recovery of damages (CLA section 1722). The rate of legal interest is 6% *p.a.*, but parties may agree on a higher interest rate in an agreement. The extent of contractual fine is not limited either. Unlike German *BGB* (section 343)^{*12} or UNIDROIT Principles of International Contracts^{*13}, Latvian courts are not entitled to reduce the contractual fine payable if and on a basis of being too excessive. There have been rather many disputes caused by uncertain formulations

¹⁰ Law On Justice (15.12.1992.) - Zinotājs, 1993., nr. 1/2

¹¹ Zinotājs, 1998., nr. 23

¹² Bürgerliches Gesetzbuch. 38. Aufl. Beck — Texte im dtv.

¹³ Principles of International Commercial Contracts. Rome: International Institute for the Unification of Private Law (UNIDROIT), 1994.

used in agreements; for example, in the event of delay the respective party pays a late charge (or penalty) of 0.5% per day. In the event of default, one party usually asserts that a contractual fine was contemplated while the opposite party understands it as interest for use of foreign capital. The difference is essential: if the provided payment is an interest, accumulation of such ceases when 100% of the capital is reached. If the provided payment is a contractual fine, then the accumulation of sum does not stop at 100% margin, moreover, the creditor is entitled to request for the legal interest — 6% *p.a.* as well. On 22 December 1997, the General Meeting of the Supreme Court adopted a decision on application of law when deciding on disputes on fulfilment of obligations, interpreting that in the event the will of parties may not be certainly determined, section 1509 of CLA must be followed providing, that in the event of doubt, a transaction should be interpreted to the detriment of the party being a creditor and therefore should have expressed itself more precisely. Disputes on guarantees and powers of representatives, as well as on rights to unilateral termination of agreement occupy a significant part of court practice. Among the disputes heard by the court, disputes on repayment of credits, payment of purchase price and similar should be singled out. In those cases defendants often challenge the validity of the agreements, arguing that its representative was not authorised to enter into such agreements on behalf of the defendant. For example, it is indicated that a vice-president was not entitled to sign an agreement without obtaining prior authorisation or that the agreements above the sum stipulated by the charter could have been concluded on a basis of the board's decision only, or that in accordance with the charter, agreements had to be signed by two representatives acting together. In some cases such arguments allowed escape from a contractual fine and the court was of the opinion that only repayment of the received money or restitution should be ensured. The amount of disputes on the aforementioned basis will decrease since the Commercial Act provides for more detailed regulation of the representation authority of the board of joint stock companies and limited liability companies.

Sections 223 and 303 of the Commercial Act provide as follows: a company is represented by all board members together unless a charter of the respective company provides for individual or joint representation of several members of the board. Individual or joint representation of several members of the board of a company creates binding contracts only if such representation is explicitly included in the charter of the company and registered in the commercial register.

By adopting the Commercial Act, a procuracy — a new type of authorisation (proxy) has been introduced into the legal practice of Latvia. A procuracy is a commercial authorisation which grants to a procurator the right to conclude transactions and to perform other legal activities connected with any commercial activity in the name of the entrepreneur, including all procedural activities during the course of legal proceedings (motions, settlements, appeals of court judgements, *etc.*). A procurator may alienate, pledge or encumber real estate only if he or she has been especially granted those rights (section 34 of the Commercial Act). Limitations of the extent of procuracy are invalid relative to third parties (section 36 of the Commercial Act). This will reduce the amount of disputes conferred on the extent of authority. In other cases, when an attorney-in-law questions the rights to submit appeals of court judgement or participate in a court hearing, objections may not arise if the attorney-in-law is claiming for due compliance of the law.

3. Specific features of Latvian contract law

Research into the differences of Latvian contract law in comparison to the law of other countries, revealed a few noteworthy matters. First, foreign investors should pay attention to the fact, that in Latvia an agreement between absent partners is concluded upon the moment when a party which has received an offer dispatches an acceptance even though the opposite party has not received it. On the contrary in Germany and several other countries the so-called “P.O. box principle” has been accepted — agreement is concluded as of the moment acceptance is received by the addressee (in its post office box). With the development of e-trade this difference becomes less important or even disappears. Besides large transactions are not usually concluded by an exchange of letters. However, in some cases a lack of knowledge of law may cause negative legal consequences.

Second, foreign lawyers consider section 1587 of CLA, corresponding to the maxim of Roman law *pacta sunt servanda*, as an excessive manifestation of formalism. Foreign lawyers could be right unless the said principle had not been repeatedly mitigated in other section of CLA. In court disputes section 1587 is quoted frequently: “A lawfully made contract commits the contracting party to carry out a promise and neither the burden of the transaction nor difficulties of execution occurring later shall entitle one party to back out of the contract even if compensating for loss and damages.” However, when becoming acquainted with the entire text of CLA, several exceptions can be mentioned certifying that similar to other countries a flexible approach is possible in Latvia as well. Certainly, *force majeure* and accident excuses non-fulfilment of a contract. A contract may remain

unfulfilled due to the nature of the contract requiring certain activities from the opposite party (for example, if a land plot for construction purposes is not allocated, a letter of credit is not issued) or when it is especially provided for by the law (CLA section 1589). If due to the fault of the debtor, the creditor is not interested any more in the fulfilment of the agreement, the latter may claim for cancellation of the agreement (CLA section 1663). Chapters on specific types of contracts provide for various exceptions. For example, purchase and lease contracts may be claimed to be cancelled due to excessive damages caused (CLA sections 2042, 2170). Further grounds for cancelling lease and rental agreements are listed in sections 2171 and 2172 of CLA.

Third, the doctrine of Latvian law does not permit non-fulfilment of a contract if such non-fulfilment complies with the public policy. However, even in the USA and England in such case the debtor is under an obligation to recover damages caused. The difference is that the USA considers such non-fulfilment of contract to be legal, while Latvia — immoral, but the financial consequences for the persons involved are similar. There has been no attempt in Latvian courts to argue on the grounds of frustration of the purpose of the contract and there is no reference in the law on that. Supposedly, a new provision should be included in the Civil Law, similar to the one of section 248, Book 6 of the Civil Code of the Netherlands. Under the said section when discussing consequences of the contract, considerations on reasonability and fairness must be taken into account. It might not be done in a hurry since the opinions of Latvian judges on reasonability and fairness may be essentially different.

Fourth, the Civil Law does not provide for any pretext on limitations for recovery of damages, which could be predicted as on the date of concluding the agreement (UNIDROIT Principles art. 7.4.4). This legal provision is effective in cases where the dispute is subject to CISG regulation. In the draft of the Commercial Act's Transaction Section the said principle is included as a general legal provision.

Fifth, in Latvian legal theory and practice the category "remedies" is used very seldom. In the Civil Law the word "remedies" is used only once (in the heading before section 1619) when consequences of selling non-qualitative good are discussed. But most frequently — Latvian lawyers speak about liability in default; which, of course, is not the only issue. Other consequences of default may not be forgotten. Section 1620 of CLA mentions remedies as reduction of price and repeal of contract. Consumer Protection Act provides for remedies as exchange of non-qualitative goods for qualitative or equivalent ones and elimination of deficiencies free of charge (section 28). Application of the Vienna Convention of 1980 (CISG) will promote Latvian lawyers to turn more to the matters of liability as well as to protection of rights in general.

In the sixth place, Latvian law does not contain legal provision on "cover" in cases of late delivery of goods. However, the Civil Law allows to act similarly complying with the set sequence. In the event of delay, the purchaser must notify the contracting party that the purchaser has lost its interest in the receipt of goods since the goods were necessary immediately. After the said notification and on the grounds of the contracting party's breach, goods may be purchased from another seller and the price difference may be recovered from the defaulting party. Theoretically, a dispute on whether the purchaser has lost its interest may be raised. Therefore, section 1663 of the Civil Law should be amended to cover the aforementioned situation as well.

Study of foreign law and court practice confirms more and more clearly that the same principle may be expressed in different formulations and placed in different places of the legal system. The Latvian Civil Law is constructed by following the chronology of forming and development of legal relationship: conclusion of agreement, conditions for legal validity of agreement, execution, amendments to or termination of the agreement, liability and other consequences of non-fulfilment. In the said aspect the category "remedies" includes liability as well as amendments to and termination of agreement, which are not always connected exclusively with breach. In Latvia the prevailing opinion is that liability as a consequence of illegal performance must be separated from the issues related to amendments to or termination of contract. However, one cannot deny that amendments to or termination of contract could be a result of illegal performance. Therefore there could be no grounds for dispute of which is a more correct approach; both have good arguments.

The aforementioned confirms that there are no huge differences among laws of different countries, especially between the systems of countries of continental Europe and common law. Such opinion is exaggerated. Development of international business contacts certifies that not only lawyers can understand each other but businesspersons without specific education in law as well. However, it does not mean that differences have no meaning and that they may be ignored.

Work on improving Latvian law continues and the list of laws to be adopted by the *Saeima* is still impressively long. Such laws of national importance as Labour Act, Criminal Procedure Act, Purchase for State and Municipal Needs Act have been anticipated for a long time. Amendments to the *Satversme* (Constitution), which will be necessary for the incorporation of Latvia into the EU are also under elaboration. It seems that against such a background there is no time for the modernisation

of Civil Law and some time will pass. However, no serious politician or reasonable lawyer shall deny the necessity to think on a new reading of the Civil Law if Latvia intends to remain a country of codified law. There are rather many questions of civil law, which already appear in court practice and legal literature waiting for new and improved solutions. It will not be reasonable to try “to patch up” once so modern, but in present-day already comparatively archaistic CLA. Similar to Lithuania and Estonia a new contract law section should be elaborated. At this time the comparative research of rules and directives of the EU and other countries dominates in a process of drafting laws in order to adopt solutions corresponding and fitting in the legal system of the state. When all the Baltic States struggled for the regaining of independence, an idea was advanced on the forming of a joined economic region and harmonisation of laws. Due to different circumstances the aforementioned idea was not implemented. Probably a new chance to harmonise or even to unify the contract law of the Baltic States has appeared on a basis of contract law of Lithuania and Estonia elaborated with the assistance of foreign experts.

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About Grounds for Exemption from Performance under the Draft Estonian Law of Obligations Act (*Pacta Sunt Servanda versus Clausula Rebus sic Stantibus*)

The sacred principle of the classical law of obligations was the idea of *pacta sunt servanda* (sanctity of contracts), which means that contracts are binding on any conditions. According to the classical theory of contracts, each reasonable person has the freedom to enter into a contract upon terms determined by that person and to be certain that a contract concluded voluntarily will be subject to judicial enforcement and binding on the parties. It is primarily in the public interest to hold contractual agreements binding under any circumstances. Everyone's freedom to decide whether to conclude a contract (*Abschlussfreiheit*) and to decide about the content of the contract (*Inhaltsfreiheit*), in addition to honesty in the process of entering into a contract, were to preclude unfairness in contractual relationships. Disputing of contracts was allowable if the contract had been concluded by fraud, mistake or duress. In the absence of those circumstances, the parties were bound to their contract. Unilateral denunciation of a contract was, therefore, in general, excluded.*¹

The very same principles, characteristic of the classical contract law, also served as a basis for drafting the Estonian Civil Code (ECC)*², applicable from 1 January 1965. Hence, in accordance with ECC section 174, unilateral refusal to perform an obligation or unilateral modification of contractual terms are not permitted, except in the cases prescribed by law.

The *Riigikogu* (Estonian parliament) is presently reading the draft Law of Obligations Act (LOA)*³, which will replace the obligations part of the 1965 Civil Code. The applicable Estonian civil law contains no provisions to regulate the general grounds and procedure for unilateral withdrawal from a contract or for claiming specific performance from a party in breach or for exemption from

¹ R. Zimmermann. The Law of Obligations. Roman Foundations of the Civilian Tradition. Deventer, Boston: Kluwer Law and Taxation Publishers, 1992, pp. 576–577.

² Eesti NSV Tsiviilkoodeks. III osa. Kohustusõigus (The Civil Code of the Estonian SSR. Part III. Law of Obligations), adopted on 12.06.1964; entered into force 1 January 1965 (in Estonian)

³ Võlaõiguseaduse eelnõu (The draft Law of Obligations Act) (116 SE II-2 of 10 January 2001). Available at: <http://www.riigikogu.ee/ems/index.html>, 20.06.2001 (in Estonian).

performance. Changes to accompany the adoption of the Law of Obligations Act in contract law are, therefore, of fundamental importance, as principles substantially different from those of the applicable law will be provided in respect of the consequences of breach of the duty to perform and with regard to the permissibility of claiming specific performance. While the applicable law, as well as judicial practice, observes, quite strictly, the principles of *pacta sunt servanda*, the draft Law of Obligations Act contains provisions, which are rather based on the principle of *clausula rebus sic stantibus*. It is yet difficult to predict the consequences of this new and considerably more flexible regulation for Estonian legal practice and economy. However, it can be stated with certainty that the new regulation will require a different approach to the binding nature of contracts both from judges as well as advocates, who will be protecting the interests of their clients on the basis of the new Act.

Principle of *pacta sunt servanda* in modern contract law

The principle of *pacta sunt servanda* has always had its limits. Even in Roman law, no contract was absolutely binding or binding under all circumstances. Unilateral dissolution of the contract was permissible if a party failed to perform its contractual obligations (e.g. in the case of leases, mandates or contracts of sale). Another known basis for dissolution of contracts was *laesio enormis*, i.e. the right to dissolve a contract of sale if a plot of land had been sold at a price below its actual value. Pandectists allowed dissolution only in the event of breach of contract. That rule was established by canon law, adopted by followers of natural law and, eventually, it found its way to *BGB* (*Bürgerliches Gesetzbuch* — the German Civil Code). Nowadays, statutory rights of withdrawal from a contract have been granted in the interest of consumer protection.^{*4}

Historically, the principle of *pacta sunt servanda* has been prejudiced by the principle known as the doctrine of *clausula rebus sic stantibus*. According to that doctrine, a contract is binding only in so far as the circumstances remain the same as at the time of the conclusion of the contract. That principle can be used to erode the binding nature of contractual promises, and thereby it substantially prejudices the *pacta sunt servanda* principle. The *clausula* doctrine fell into oblivion at the end of the 18th century and the beginning of the 19th century, when classical contract law, liberal economy and legal certainty were declared to be of superior value. Moralists philosophers were the first to draw attention to changes in the circumstances, thus laying a foundation to the recognition of the *clausula* principle.^{*5}

In the modern theory of contracts, two types of fundamental views can be found. Some authors maintain that modern contract law cannot be based on the positions of classical contract law any more, since those positions have inevitably become inappropriate in the light of the economic and philosophical developments. Others are trying to demonstrate that contract law has become increasingly relational in modern days. Contract law is studied from the aspects of several fields, and analysts are now interested not only in the legal but also the social, economic and philosophical aspects of contracts. Contract law has developed beyond the legal and economic spheres of interest, now also encompassing the social aspects. The efficiency of legal regulation and the development of legal policy are evaluated from the aspects of several disciplines and on the basis of the comprehensiveness of regulation. Hence the economic and social consequences and fundamental problems, rather than the legal aspects of legal regulation, seem to be the main focus in modern-day contract law.^{*6}

One such fundamental problem, which has become topical every so often throughout history, is the question of those circumstances whereunder contractual agreements should be binding on the parties and of when parties to a contract may be discharged from performance.

It was already stated by St. Thomas Aquinas that failure to keep promises was not a sin in the event of a change in circumstances, and Bartolus of Saxoferrato introduced the idea of implied condition — *rebus sic se habentibus* — for all kinds of possible transactions.^{*7} The 17th century was a favourable period for the *clausula* doctrine, which was accordant with the predominant political situation of that time. The principle of *clausula rebus sic stantibus* first became a respectable doctrine in international

⁴ R. Zimmermann (Note 1), pp. 578–579.

⁵ *Ibid.*, p. 579.

⁶ P. Vincent-Jones. Contractual Governance: Institutional and Organizational Analysis. – Oxford Journal of Legal Studies, 2000, Vol. 20, No. 3, p. 318.

⁷ R. Zimmermann (Note 1), p. 580.

law while in private law, its position was not the strongest. The 19th century, in contrast, was not most favourable for the recognition of the *clausula* principle. The theory of intention, whereunder a person's intention concerns only certain circumstances and develops on the basis of knowledge and consideration of those circumstances, permitted breach of promises if those circumstances proved to be wrong. On the other hand, it was realised that the society's interest in ensuring legal certainty, guaranteed by ensuring a balance of interests between the contracting parties, was also worth protection. In particular, Windscheid's doctrine of tacit presupposition (*Voraussetzungslehre*)*⁸ was one of the attempts to ensure balance in contractual relationships, especially as that theory was based on the presumption that contracting parties plan the realisation of legal consequences under certain specific circumstances. Usually, the presumption that certain circumstances will remain unchanged is not a direct condition of a contract. If the presumption of unchanged circumstances, as considered at the time of concluding the contract, proves to be wrong, requirement of performance may be unfair and unreasonable, taking, however, into account that the promisee must have understood that the other party had been influenced by certain circumstances. In such event, the promisor should have the right to demand termination of the contract. For that reason, Windscheid's theory has been regarded to be close to the theory of conditional contracts, which is based on the condition that the circumstances remain unchanged during the entire life of the contract.*⁹

Windscheid's theory could not be made acceptable to the drafters of the German Civil Code (*BGB*), and therefore, *BGB* does not contain a general rule about changes in the circumstances. However, modern versions of the *clausula* principle have been developed *extra legem* by courts and jurists.*¹⁰ An example of this is the frustration theory, the formulation of which became necessary in connection with the economic and political problems caused by the First World War, and, in particular, with regard to performance of long-term contracts influenced by those problems. By now, the *clausula* principle has become a part and parcel of modern German contract law.*¹¹

In common-law countries, the *clausula* doctrine has not exerted any substantial influence on the development of contract law. It was already stated in the case of *Paradine v. Jane* (1647)*¹² that contractual obligations were absolute and no dissolution thereof was permitted. That principle prevailed in English law until the 19th century, when the case of *Taylor v. Caldwell* (1863)*¹³ laid a foundation for the modern *clausula* doctrine.*¹⁴ Under the traditional common-law rules, parties to a contract were not excused from performance even by such circumstances, following the conclusion of the contract, that made performance impossible, and it was found that the effect of such circumstances on contractual obligations must be foreseen by the parties. That position is also in accordance with the principle of strict liability, which is recognised in common law in respect of contractual relationships.*¹⁵

Grounds for exemption from contractual duties

Regardless of different approaches to the binding nature of contracts, the study of legal grounds for exemption from contractual duties has become very important in modern times. This sphere of problems has become topical because of the increasing number of long-term contracts, which are extremely sensitive to changes and unforeseen circumstances. Moreover, despite the many theories and analyses that have been published in literature, this sphere is still unclear and undefined. What

⁸ Windscheid's main work was the monography "Die Lehre des römischen Rechts von der Voraussetzung" (1850). The name of this theory can be translated into English as "the doctrine of contractual assumption", which has been used in T. Weir's translation of the book: *An Introduction to Comparative Law* (2nd ed., 1992, p. 557) by K. Zweigert and H. Kötz.

⁹ W. Lorenz. *Contract Modification as a Result of Change of Circumstances. Good Faith and Fault in Contract Law*. Ed. by J. Beatson, D. Friedman. Oxford: Clarendon Press, 1997, p. 361.

¹⁰ R. Zimmermann (Note 1), p. 581.

¹¹ *Ibid.*, p. 582.

¹² *Paradine v. Jane* (1647) Aleyn 26; 82 ER 579, 897.

¹³ *Taylor v. Caldwell* (1863) 3 B&S 826, 835; 122 ER 309, 313, per Blackburn J.

¹⁴ However, the case of *Taylor v. Caldwell* was of decisive importance with regard to reducing differences between civil law and common law. An equitable result was achieved by supplementing the contract with the tacit presupposition that the circumstances would remain the same. The decision adopted in that case was of historical import, paving the way for the later famous cases of coronation festivities.

¹⁵ U. Draetta, R. B. Lake, V. P. Nanda. *Breach and Adaption of International Contracts. An Introduction to Lex Mercatoria*. New Hampshire: Butterworth Legal Publishers, 1992, p. 87.

are, then, those unforeseen circumstances whereupon a party may be discharged from its duties or render a performance which is substantially different from the initial agreement?*

In modern legal systems, the theory of frustration (*Wegfall der Geschäftsgrundlage*) is recognised as a basis for exemption from contractual duties. Frustration may arise upon delay in performance or extinguishment of the *causa* of the contract (death of a person, destruction of a thing, etc.), or if performance becomes illegal, or upon a material change in the circumstances, whereby the initial contract transforms into another contract, *i.e.* it becomes substantially different from what was agreed initially, or upon a bilateral mistake or for the reason of economic unreasonableness.*¹⁷ Regardless of the dissimilarities in the classification of circumstances, all of those circumstances have the common consequence of duties becoming excessively onerous. Excessive onerosity itself may be constituted by an increase in the cost of performance or decrease in the value of what is receivable under the contract. Impossibility of performance, dispute against the transaction or recourse to its voidness, impermissibility of claims for performance or excusability of breach may also serve as grounds for exemption, besides substantial difficulties in performance. Hence a distinction must be made between situations in which a party is discharged from performance without the maintenance of any other duties of conduct and situations in which a party's obligation to perform is extinguished but another duty, *e.g.* a duty to pay penalties, is maintained or the initially agreed obligation is reduced or modified.*¹⁸

In addition to the above-mentioned cases, each legal system usually provides legal measures for discharge of contracts by unilateral termination. Performance of a contract may become impossible in connection with a change in factual circumstances, establishment of statutory prohibitions or for the reason of economic unreasonableness.*¹⁹

According to Windscheid's theory of tacit presupposition, a contract is regarded to be concluded on the inchoate condition that the assumed state of affairs remains unaltered for the period of the contract. This implies a danger that one party may avail itself of the chance to transfer contractual risks to the other party, which would considerably reduce legal certainty and the reliability of economic transactions.*²⁰ If Windscheid's theory is applied side by side with Oertmann's theory, whereunder a contract is based on the presumption of the existence or realisation of certain substantial circumstances that have been notified to, or been acquiesced in by, the other party at the time of concluding the contract, it will be possible to move from the hopes of the parties to the obvious effects which the changed circumstances have had on the transaction.*²¹ However, in respect of determining the parties' positions and the permissibility of claims, importance is borne by the changes, arising out of the changed circumstances, in the balance between the duties and rights.

Regardless of the dissimilarity of theoretical conceptions and arguments regarding exemption from contractual duties in different legal systems, possible solutions to the problems are nonetheless related particularly to the question of a reasonable division of risks between the parties.*²²

Impossibility

Impossibility of performance is the most typical case of breach of contract. In old European civil codes, the consequences of impossibility of performance depend on whether or not the party in breach was at fault with regard to the breach. The Continental and Anglo-American legal systems are, however, remarkably different in their positions towards the question of the fault of the party in breach in respect of allowing recourse to remedies. While in Continental civil codes, liability is based

¹⁶ D. Tallon. *Hardship*. – A. Hartkamp, M. Hesselink, E. Hondius, C. Jouston, E. du Perron (Ed.). *Towards European Civil Code*. Nijmegen: Ars Aequi Libri, 1998, p. 327.

¹⁷ W. F. Ebke, B. M. Steinhauer. *The Doctrine of Good Faith in German Contract Law*. *Good Faith and Fault in Contract Law*. Ed. by J. Beatson, D. Friedman. Oxford: Clarendon Press, 1997, p. 180.

¹⁸ B. Markesinis. *The German Law of Obligations*. Vol. I. *The Law of Contracts and Restitution: A Comparative Introduction*. Oxford: Clarendon Press, 1997, p. 519.

¹⁹ G. H. Jones, P. Schlechtriem. *Breach of Contract*. *International Encyclopedia of Comparative Law*. Vol. VII. *Contracts in General*. Chief ed. A. von Mehren. Tübingen: Mohr Siebeck, 1999, pp. 99–100.

²⁰ B. Markesinis (Note 18), p. 518.

²¹ *Ibid.*, pp. 518–519.

²² G. H. Treitel. *Law of Contract*. 9th ed. London: Sweet & Maxwell, 1995, p. 781.

on fault, the so-called strict liability is applied in Anglo-American systems.^{*23} Nor is the conception of impossibility of performance used as a basis for exemption from contractual obligations in the UN Vienna Convention on Contracts for the International Sale of Goods of 1980 (CISG). Cases in which a party cannot perform an obligation due to impossibility of performance are, nevertheless, regarded as breach of contract. The aggrieved party may still claim damages and, if the breach can be regarded as substantial (CISG art. 25), even termination of the contract. Upon breach of contract, the aggrieved or if requirement of performance is permitted (CISG art. 28).^{*24}

The Principles of European Contract Law (PECL) and the Principles of International Commercial Contracts (PICC)^{*25} provide for liability regardless of the fault of the party in breach and regulate the cases in which specific performance cannot be obtained. Thus, according to PICC article 7.2.2 (a) and PECL article 9:102 (2) (a), specific performance cannot be obtained if performance is unlawful or impossible. If the impossibility of performance was not excusable, the aggrieved party is also entitled to damages (PECL art. 9:501 (1); art. 8:108; PICC art. 7.1.7).

The applicable Estonian law is based on the principle that duties are automatically extinguished in the event of impossibility of due performance thereof. In accordance with section 240 of the Estonian Civil Code (ECC), an obligation is extinguished if the impossibility of its performance has been elicited by circumstances beyond the debtor's responsibility. However, if the debtor is responsible for the impossibility of performance, the obligation does not terminate but, instead, only its content changes. If a duty cannot be performed any more, the party in breach must compensate for the damage caused by non-performance. Thus, impossibility of performance through the debtor's fault entitles the creditor to claim recovery of the damage thereby caused. In accordance with ECC section 227, a party in breach of an obligation is liable only upon the existence of culpability (intent or negligence), unless otherwise provided for by the law or stipulated in the contract. The absence of culpability must be proved by the person in breach. Hence, in the applicable law, an obligation is automatically extinguished in the event of impossibility of its performance, and recourse to any remedies is excluded. Claims arising out of the liquidation of an obligation must be filed on the basis of the provisions concerning unjust enrichment, which are, however, patently imperfect under the ECC for the achievement of the desired objective.

The Estonian Law of Obligations Act was drafted on the basis of the general principle that contracts are binding. Thus, in accordance with LOA subsection 8 (2), the performance of a contract is mandatory and, in accordance with subsection 11 (1), the applicability of a contract is not influenced by the fact that performance of the contract was impossible or that the thing or right serving as the object of the contract was not at a party's disposal at the time of concluding the contract.

However, in the draft Estonian Law of Obligations Act, the permissibility of applicable remedies depends on whether the non-performance is excusable or not. Still, recourse to remedies is not absolutely precluded, but only limited by the criterion of excusability.

In accordance with LOA subsection 96 (1), breach of obligation is excusable if the debtor is in breach due to an impediment beyond its control (*force majeure* circumstances). *Force majeure* is constituted by an impediment beyond the control of the debtor, who could not be reasonably expected to consider or prevent such impediment, or overcome the consequence thereof, at the time of concluding the contract or upon the inception of the obligation from tort.^{*26} If the effect of *force majeure* is temporary, the breach is excusable only during the period when performance is impeded by *force majeure* circumstances. In accordance with LOA section 98, the creditor may, regardless of the debtor's liability, withhold the performance of its own duties, unilaterally dissolve or terminate the contract as well as reduce the price. If both parties are engaged in economic or professional activities, the creditor may claim interest, regardless of the debtor's liability for the breach.^{*27} Despite the fact that impossibility of performance is not excusable, the creditor may not require specific performance if performance of the obligation is impossible (LOA subsection 101 (2) 1)). Differently from PECL article 9:102, unlawfulness, unlike impossibility, is not provided as a basis for not permitting claims for specific performance in the draft Estonian Law of Obligations Act. Thus, according to the circumstances, even those cases in which specific performance is prevented by statutory prohibitions have to be qualified as impossibility.

²³ D. Tallon. Breach of Contract and Reparation of Damage. – A. Hartkamp, M. Hesselink, E. Hondius, C. Joutstra, E. du Perron (Ed.). Towards European Civil Code. Nijmegen: Ars Aequi Libri, 1994, pp. 223–224.

²⁴ G. H. Jones, P. Schlechtriem (Note 19), p. 98.

²⁵ UNIDROIT Principles of International Commercial Contracts (1994). The Principles of European Contract Law (1998).

²⁶ The conception of excusability is analysed on the basis of CISG article 79.

²⁷ The draft Law of Obligations Act (Note 3).

In accordance with LOA subsection 101 (1), claims for specific performance with regard to monetary obligations are always permitted. Nevertheless, introduction of a general regulation similar to PECL article 9:101 (“Monetary Obligations”) should be considered with a view to those cases in which there is a need to justify the impermissibility of claims for specific performance of monetary obligations and to protect the other party against forced performance.

Frustration

Frustration is regarded to include situations in which performance is possible but the creditor has lost its interest therein. Such loss of interest may arise from different circumstances. For example, performance may become excessively onerous or the value of what is receivable under the contract may become insignificant. Frustration is not deemed to mean a failure to receive the expected benefits from a transaction, since that risk is presumed to be borne by the parties themselves.^{*28}

It has been demonstrated by German judicial practice that even nowadays, intervention in contracts is considered possible by courts, who are ready to make contracts equitable. German practice has also shown that in the case of intervention in contracts, courts prefer frustration to the institutions of impossibility or mistake, as this leaves more room for manoeuvring and finding correct solutions. Whether courts should do this or not is yet another question. Arguments justifying intervention in contractual relationships have emphasised the need to ensure an equitable division of risks between the parties (except in the event of simply a bad transaction) or for the reason that the aggrieved party cannot bear the unfavourable consequence because of its economic situation.^{*29}

In economic activities, the parties themselves must be able to evaluate the circumstances, take account thereof and foresee measures to liquidate or prevent unpleasant consequences. In any event, one should agree with the view that economically unfavourable situations should not be too easily ascertainable and not every economic change should bring about an option to dissolve the binding nature of the contract.^{*30}

One of the most frequent types of frustration involves export restrictions and quotas or the requirement to obtain a licence necessary for the activities. Such contracts often give rise to the question whether the parties have, at the time of concluding the contract, already taken account of the risk that a licence would not be obtained or that the quota would be too small or that export or import prohibitions would be established. In the event of contracts between professional traders, consideration of such circumstances at the time of entering into the contract should be regarded as an inchoate contractual condition and part of the due care.

The applicable Estonian law contains no general provisions to regulate frustration as a legal basis for exemption from contractual obligations or for demanding modification thereof. In accordance with ECC subsection 230 (2), the creditor may refuse to accept performance if it has lost its interest in performance because of a delay. Thus, the debtor may be discharged from its duty to perform if it delays the performance of its absolute obligations. However, the Civil Code contains no provisions that would permit an obligee to refuse to perform its duties if, after the conclusion of the contract, it becomes evident that the other party's economic situation has deteriorated in comparison with that of the time of concluding the contract and this would jeopardise the reception of counter-performance. Nevertheless, subsection 85 (1) 3) of the General Part of the Civil Code Act^{*31} entitles the creditor to demand security from the debtor if there is reason to believe that the debtor is not capable of performing the obligation arising from the transaction. In addition, ECC sections 248 and 249 entitle the seller and the buyer, respectively, to unilaterally refuse to perform the contract if the counter-party fails to perform its contractual obligations, which serves as a basis for frustration. A lawful right to demand review or modification of contractual terms also arises out of subsection 6 (2) of the Commercial Lease Act, whereunder the lessor may demand review of the rent in the event of change

²⁸ W. F. Ebke, B. M. Steinhauer (Note 17), p. 184.

²⁹ B. Markesinis (Note 18), p. 538.

³⁰ Usually, in this connection, reference is made to the so-called Suez Canal cases, in which frustration arose out of the closing of the Suez Canal on 2 November 1956 in connection with military activities between Israel and Egypt. The courts found that as the canal had been closed, the suppliers must find a reasonable and equivalent way to transport the goods. That was the seaway around the Cape of Good Hope. In the case of the war between Iraq and Iran, the courts also assumed the position that frustration was not evoked by an outbreak of a war as such but could, rather, result from the effect of the war on the performance of the contract.

³¹ Applicable from 1 September 1994.

in such prices, depreciation rates, tariffs or payments that are determined on the national level. As yet, no claims filed on that basis have been satisfied in Estonian judicial practice.

Frustration is, first of all, a question of whether exemption from an obligation should be based on the frustration of a subjective or objective basis. The subjective basis of a transaction includes the circumstances that have been referred to by the parties during the negotiations and that have influenced the parties to enter into the contract. The objective basis means those circumstances that should logically exist in order that the objective of the contract be achieved. In modern times, distinction between the objective and subjective bases is no longer made, and exemption from the duty to perform is possible in either event.^{*32}

In accordance with LOA subsection 101 (2) 2), specific performance may not be claimed if the performance would be excessively onerous or costly for the debtor. If the excessive onerosity results from objective circumstances (non-performance by the debtor would be excusable), such situation may be qualified as an excusable breach of the duty to perform and the creditor may have recourse to remedies provided for excusable breaches on the part of the debtor. Even in such event, claims for specific performance are excluded. Hence LOA subsection 101 (2) 2) is applicable only if performance is yet possible but claims for such performance have become unreasonable due to certain subjective circumstances.

The special part of LOA provides, like section 610 of the German *BGB*, that a person who has promised to give a loan, may withdraw that promise if the economic situation of the borrower has deteriorated to such extent as to cast doubt on the borrower's ability to repay the loan. In Estonian courts, classical examples from German judicial practice can be used to illustrate provisions of law^{*33}, but in respect of specific decisions, consideration of Estonian economic and social climate and consequences will, however, be of conclusive importance.

Frustration may also be constituted by the so-called economic frustration. Thus, for example, hyperinflation substantially influenced German judicial practice in deciding whether or not the parties were bound to their contractual duties. It was found by German courts that in the event of sale contracts, the risk of price changes must be borne by both of the parties. Nevertheless, if this led to economic ruination, contracts should not be binding. In a normal economic situation, however, inflation should naturally not be a sufficient argument for exemption from contractual duties.^{*34} Until now, in Estonian courts, no claims for reduction of or increase in agreed payments on the basis of inflation have been found to be justified.

The German theory of frustration is not so similar to the English-law theory of frustration as, rather, to the doctrine of equitableness recognised in English law, which allows adjustment of contracts in the case of a mistake that has occurred upon the conclusion of the contract. In the event of frustration, the contract terminates automatically and the court has no right to adjust the contract to the changed situation or to make the parties' duties more equitable, except in certain situations of restitution.^{*35}

Delay

A delay may result in a change in the balance between the parties' duties, in consequence of which the duties become substantially more onerous for one party or the value of what is receivable under the contract diminishes substantially. In the applicable law, ECC subsection 230 (2) provides that if the creditor has lost its interest in performance due to a delay, it may waive performance and claim damages. In accordance with LOA subsection 106 (1), a party may unilaterally dissolve the contract if the other party is in fundamental breach of a contractual duty. Fundamental breach means, *inter alia*, a breach of such duty, strict compliance with which is of the essence of the contract. Fundamental breach with regard to a part of the performance may entitle the party to unilaterally terminate the entire contract if the breach with regard to the part in question was fundamental in respect of the entire contract or if the creditor is uninterested in partial performance. Thus, a delay elicits the right to either refuse to accept performance or to unilaterally dissolve the contract and, hence, to discharge the debtor from the duty to perform.

³² W. F. Ebke, M. Steinhauer (Note 17), p. 183.

³³ RGZ 57, 116; B. Markesinis (Note 18), p. 521.

³⁴ B. Markesinis (Note 18), p. 523.

³⁵ *Ibid.*, pp. 529, 530.

Adjustment of contractual terms

Modern contract law needs, first of all, answers to questions relating to the proportional preservation of duties and the legal consequences of changes in duties. Since contracts are concluded in order to achieve a certain objective, the parties are usually interested in preserving and adjusting rather than getting rid of the contract even if obligations become disproportionate. Motivation of rights in the event of a change in the balance between the duties is based on the idea that the nature of a synallagmatic contract lies in a balance between the duties and counter-duties.^{*36} For the sake of that balance, even contractual terms may be modified to ensure the initial proportions.

In German practice, the courts have emphasised the absence of a universal rule for all cases and pointed out that, rather, each case must involve an analysis of how the balance between the parties' duties is influenced by the decrease in the value of money and what the consequences thereof are with regard to the principle of good faith. It has also been found that adjustment of the contract, rather than the right to dissolve the contract, is a reasonable consequence. That position has been motivated on the basis of reference to the general principle that contracts must be performed and the performance is mandatory for the parties and that adjustment of a contract by a court is not an intervention in the freedom of contract but, instead, an act of ensuring a natural consequence to the contract (discharge by performance).^{*37}

In the draft Estonian Law of Obligations Act, the requirement to adjust the contract is also treated as a primary requirement. In accordance with LOA subsection 90 (1), a change in the balance between the contractual duties following the conclusion of the contract is constituted by such change in the circumstances, underlying the conclusion of the contract, that results in a material alteration of the balance between the parties' duties, whereby one party's expenses related to the performance of its duties grow substantially or the value of what is contractually receivable from the other party diminishes substantially. In such event, the aggrieved party may demand, from the other party, adaptation of the contract so as to restore the initial balance between the parties' duties. Thus the Estonian LOA, like PECL article 6:111, is based on the idea that the parties are first bound to enter into negotiations with a view to adapting the contractual terms or terminating the contract. In PECL article 6:111, greater emphasis is laid on the parties' duty to reach agreement by negotiation. The Estonian LOA entitles the aggrieved party to demand, from the other party, adaptation of the contractual terms so as to restore the initial balance between the parties' duties. That statutory right to demand is also realised through the courts' right of gap-filling, because the above-referred provision does not furnish a party with a right to modify the contractual terms. In the event of dispute, the court will decide on such modification of the contractual terms that will best ensure the restoration of the initial balance between the parties' duties and, thus, an equitable division of losses and gains between the parties. If the law contained an obligation to enter into negotiations, as provided in PECL article 6:111, it would also be possible to claim damages from the other party on the basis of violation of the statutory requirement to negotiate. However, the text of the Estonian draft provides for a right to claim instead of obliging the parties to negotiate. Apparently, some consideration should be given to whether the requirement to enter into negotiations would be necessary and whether this would provide parties with better protection if the circumstances relating to the conclusion of the contract have changed and thus, there is a situation in which a claim for performance to the initial extent would be inequitable.

Under the applicable law, a court has no right to modify the terms of a contract if the initial balance has been lost due to a change in the circumstances.

A minimal justification for intervention in the content of a contract is provided by section 64 of the General Part of the Civil Code Act, which lays down the rules for interpretation of transactions. In accordance with subsection 64 (1) of the General Part of the Civil Code Act, the interpretation of a transaction is based on the actual intention of the parties to the transaction unless otherwise provided by the content of the transaction. Hence, the court interpreting a contract may disregard the alleged actual intention of the parties if a different intention is expressed by the objective content of the contract. The accordance of interpretation of contractual terms with the principle of good faith can also be controlled on the basis of subsection 108 (1) of the General Part of the Civil Code Act, which obliges the contracting parties to act in good faith in the exercise of their civil rights and performance of their civil obligations.

³⁶ *Ibid.*, p. 523.

³⁷ *Ibid.*, p. 532.

In German law, the requirement that transactions must be interpreted on the basis of good faith, taking into consideration the general practice, is also contained in *BGB* section 157, which regulates interpretation. In addition, *BGB* section 242 provides for the debtor's obligation to perform its duties in accordance with the principle of good faith, taking into consideration the general practice. Thus, similar results can be achieved in German judicial practice on the basis of either section 157 or section 242. Nevertheless, *BGB* section 242 provides grounds for interpretation with a greater potential for law-creation.^{*38}

Pursuant to LOA subsection 90 (2), modification of contractual terms may be demanded if the aggrieved party did not have reasonable grounds to believe, at the time of concluding the contract, that the circumstances could change and the change in the circumstances was beyond the control of the aggrieved party, and provided that on the basis of law or the contract, the aggrieved party does not bear the risk of a change in the circumstances, and if the aggrieved party had been aware of the change in the circumstances, it would not have concluded the contract or would have concluded the contract on substantially different conditions. Modification of the contract may also be claimed in the event that the circumstances underlying the contract had changed before the conclusion of the contract but the aggrieved party became aware of such change only after entering into the contract. The aggrieved party may also demand modification of the contract with retroactive effect, but not to an earlier date than that of the change in the balance between the duties. In addition to the option of claiming modification of contractual terms, the aggrieved party may also fix an additional period for performance (LOA section 106), withhold performance (LOA sections 102 and 103) or claim damages (LOA section 107). The choice of claims must be based on the fact that courts cannot rewrite contracts. They can only modify the terms insofar as this does not result in an entirely new contract.

If modification of contractual terms is impossible or unreasonable in respect of the other party, the party aggrieved by the change in the circumstances may unilaterally terminate the long-term contract in accordance with the special procedure laid down in section 185. Thus the aggrieved party is provided with an option to unilaterally terminate the contract even without fixing an additional period for performance if the change in the balance between the contractual duties can be demonstrated to serve as grounds for dissolving the contract in accordance with the provisions of law.

Hence the new draft Law of Obligations Act provides several options for withholding performance, either absolutely or for a certain period. How those provisions will be used by persons participating in Estonian economic activities and by judges, *i.e.* the appliers of law, will be seen after the implementation of the Act. The new Act will certainly provide parties in breach with more options to avoid performance of their duties and to postpone the moment of beginning to do what was promised at the time of concluding the contract. Yet there is a danger that courts will come to underestimate the economic practice, the transaction itself and the parties' relations in the transaction. In the case of contracts concluded within the areas of economic and professional activities, there will certainly also be a need to evaluate how the parties have secured themselves against the risks in the contract and which division of risks would be equitable. In any event, the provision of courts with such rights will require the development of certain new techniques in order to reach satisfactory solutions.^{*39}

³⁸ G. Chievely. The Future of Common Law. The Wilberforce Lecture, 1997. – The International and Comparative Law Quarterly, 1997, No. 46, p. 752.

³⁹ L. E. Trakman. Frustrated Contracts and Legal Fictions. – The Modern Law Review, 1983, No. 46, pp. 39–54.

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Problems of Consumer Protection in Russia

1. Consumer protection before the passing of the Russian Consumer Protection Act

The legal regulation of contractual and other obligations between enterprises, organisations and citizens in the former Soviet Union and pre-reform Russia was fulfilled by the norms of the main civil codified laws (the foundations of civil legislation of the USSR and republics of 1961 and later of 1991 and Civil Code of RSFSR of 1964).

Civil legislation of that period did not contain special rules connected exclusively with the questions of consumer protection. That is why a special system of rules connected with consumer protection in these laws traditionally defaulted.

From the beginning of the 1990s the necessity of special regulation in the field of consumer protection was conditioned by the transition of Russia, as with other countries of Eastern Europe, to a market economy. But the transition to a market economy was not the only reason for special regulation in this area. Indeed, there was also the illegal practice of the Supreme Soviet (former Soviet and Russian parliament) and Government to make over their rights on regulation of consumer protection to ministries. Then the situation in the field of service — particularly in tourist, sport, and cultural service — was very bad, because there was no regulation in codified civil acts in this sphere.

Finally, the legislation existing before the passing of the Russian Consumer Protection Act did not conform to international levels of consumer protection. For example, law did not protect all consumer rights. It touched on such thorny subjects as information and product liability.

There was no regulation of the questions connected with the rights of consumer organisations. As for the special state borders on consumer protection, they did not exist.

2. Adoption of the Russian Consumer Protection Act

It is necessary to say that during the final days of existence of the USSR, the Soviet Consumer Protection Act of 1991 was adopted. But it did not enter into force and was not applicable in Russia because of the disintegration of the Soviet Union. In these conditions now the legal base of consumer protection is either special laws on consumer protection of independent republics (like Belarus,

Kazakhstan, the Kyrgyz Republic, Russia, the Ukraine^{*40}), or civil codes and other legislation of other republics — members of the Commonwealth of Independent States.

Within the framework of the CIS, steps are now being taken to prepare a model draft consumer protection act.

The Consumer Protection Act consists of four chapters. Chapter 1 regulates the general provisions in the field of consumer protection. It includes norms about consumer legislation, consumer education, the quality of consumer goods and services, the security of consumer goods and services for the health of people, terms which merchants can or sometimes must establish on their consumer goods and services, information, including the liability for non-performance of the obligation to provide information, the main rules of civil liability of merchants for non-performance of their contractual obligations and for the damage including the compensation of moral damage, the rules of judicial protection of consumers and, finally, about the invalidity of terms and conditions of contracts which limit the rights of consumers.

Chapter 2 regulates consumer rights in sales contracts. It includes norms about the rights of the buyer in the case of sale of goods of inadequate quality to them, terms during which the buyer can realise their rights in the event of sale of goods of inadequate quality, liability of vendor and producer of goods of inadequate quality for the delay in fulfilment of consumers' claims, compensation of price difference in case of sale of goods of inadequate quality and exchange of goods.

Chapter 3 regulates consumer rights in the contracts on performance of works, or rendering of services. It also includes the norms about rights of client in case of performance of works, or rendering of services of inadequate quality, terms during which client can realise their rights in event of performance of works, or rendering of services of inadequate quality, liability of producer of works or services of inadequate quality for the delay of fulfilment of consumers claims, compensation of price difference in case of inadequate quality of works or services.

Finally, chapter 4 regulates the rights of federal executive bodies, local bodies and consumer associations in consumer protection. It includes the norms about competence of federal executive bodies and local bodies in this sphere, penalties levied on merchants who violate the legislation on consumer protection, the rights of consumer associations and the rules and class actions.

Now to point out the most important theoretical and practical positions which have taken place in the Consumer Protection Act. First of all it is the tendency to a strengthening of legislative regulation of consumer protection. As it has been assigned in section 1 of this Act the legislation on consumer protection in the first instance include the rules of the Civil Code of Russia, the rules of the Consumer Protection Act and other laws. These other laws cannot limit rights and interests of consumers as compared with the rules of the Civil Code and the Consumer Protection Act. The decrees of the President and resolutions of Government can be implemented only if they are directly indicated in the Civil Code, the Consumer Protection Act and other laws. By the way, in the Consumer Protection Act there are some sections which empower the Government to adopt the rules about, for example, some different kinds of consumer sale contracts or about the sale of different kinds of consumer goods (section 26). The Government has already adopted more than 20 such special acts. As for the acts of ministries and other federal executive boards the Consumer Protection Act contains direct prohibition of regulating any question in the field of consumer protection.

Then the Consumer Protection Act has laid special stress on paying losses as a universal measure of civil liability. The losses are defined in accordance with section 15 of the new Civil Code of Russia as expenses that a person whose right has been violated has incurred or must incur in order to restore the violated right, the loss or impairment of their property (it names actual damages or losses), and income that this person could have received under ordinary circumstances of civil intercourse if their right would not have been violated (it names lost profits).

Equally with the measures of contractual liability the Consumer Protection Act also contains rules about tort liability. According to section 14 the damage caused to the health or property of a consumer by goods, works or services, in which construction or production defects were disclosed must be paid. Moreover every victim can claim for compensation, not only the consumer himself or herself. It means, that it does not matter whether the victim had contractual relations with the producer, vendor, provider of services or not.

⁴⁰ The Ukrainian SSR Consumer Protection Act, adopted on 12 May 1991; the Kazakhstan SSR Consumer Protection Act, adopted on 5 June 1991; the RF Consumer Protection Act, adopted on 7 February 1992; the Republic of Kyrgyzstan Consumer Protection Act, adopted on 28 February 1992; the Republic of Belarus Consumer Protection Act, adopted on 19 November 1993.

The victim can in this case claim for payment of damages, which were disclosed at the terms of work (for example for a car or television set) or at the terms of fitness (for example for food, pharmaceuticals and so on). And in this event there exist three different situations:

- (a) if the producer, vendor, provider of services can set such terms and has set them, the victim has the right to claim for payment of damages within the limits of these terms;
- (b) if the producer, vendor, provider of services can set such terms, but has not done so, the victim has the right to claim for payment of damages within 10 years from the date of assignation of goods or the results of work or service;
- (c) if the producer, vendor, provider of services must set such terms (because goods or the results of work or services may be dangerous to the health of people and they were included in the special enumeration, adopted by Government), but has not done so, the victim has the right to claim for payment of damages at any time without limitation.

The consumer can claim for damages either from the seller, or from the producer within the limits of the guarantee term of exploitation of the consumer goods. It means that the Consumer Protection Act allows the competition of contractual and tort liability (or the competition of contractual and tort action).

The liability of merchants in the field of consumer protection in general outline has one more specific characteristic. The producer, vendor or provider of services, who has failed to perform or has improperly performed an obligation (it does not matter whether this obligation arises from contract or from tort), bears liability unless they prove that proper performance is impossible as a result of insurmountable force, that is, extraordinary and under the particular conditions unavoidable circumstances. By the way, according to section 401 of the Civil Code of Russia in particular, a breach of duties on the part of contractual parties of the debtor, the absence of goods in the market necessary for performance, and the lack of necessary financial resources on the part of the debtor do not constitute such circumstances.

The Consumer Protection Act sets up a possibility to pay a penalty (so-called legal penalty). This is an amount of money specified by law which the producer, vendor or provider of services is required to pay to a consumer in the event of a delay in performance of their obligations. For example, they must pay a penalty in the amount of 1% of the price per day for the delay of fulfilment of consumer claims in case of inadequate quality of consumer goods. And the Consumer Protection Act contains the rule that damages may be recovered in full in excess of a penalty.

At last, the Consumer Protection Act gives the consumer a possibility to claim compensation for moral damages. In accordance with sections 151 and 1099 of the Civil Code of Russia moral damages are determined as physical or moral suffering which have been inflicted upon a citizen by acts violating their personal non-property rights or infringing upon other non-material values belonging to a citizen, as well as in other cases provided for by a law. A court may impose the duty of monetary compensation of said harm upon the offender.

The moral harm that has been inflicted upon a citizen by acts violating their property rights may be imposed by a court only in cases provided for by law. Compensation of moral harm according to section 15 of the Consumer Protection Act is the only case of such liability for violations of property rights in Russian civil law.

Where the amount of compensation of moral harm is determined, a court takes into account the degree of guilt of the offender and other circumstances meriting attention. A court must also take into account the degree of the physical and moral suffering connected with the individual specific circumstances of the person upon whom the harm was inflicted.

It is important to know that moral damages must be compensated to the consumer only in case of the producer's, vendor's, or providers of services' fault (intent or negligence). And according to section 400 of Civil Code of Russia a person is not deemed to be at fault if they have taken all measures for the proper performance of an obligation with that degree of care and prudence that is required from them according to the nature of the obligation and commercial conditions.

The Consumer Protection Act guarantees not only protection of an individual consumer, but also the protection of common consumer rights and interests. Special federal executive boards such as the RF Ministry of Antimonopoly Policy and Support of Enterprise, the RF State Committee of Standardisation and Metrology, the RF Ministry of Public Health and others have a right to enforce producers, vendors and providers of services to perform their obligations. They can issue orders to producers, vendors and providers of services who violate consumer legislation. If producers, vendors and providers of services have failed to perform or have improperly performed such order, they bear liability in the form of a penalty. Producers, vendors and providers of services have a right to appeal the order to a state arbitration court if it is unlawful.

Finally, the federal executive organs, local organs and consumer associations also have a right to bring suits against producers, vendors and providers of services who violate consumer legislation. The most interesting question here is for the first time in Russia provided for by law, the possibility to bring a suit, named “the suit for protection of an uncertain circle of consumers”. This kind of action must not get entangled with so called “class actions”. The suit for protection of an uncertain circle of consumers is a kind of action, which has a purpose to plead the acts of producers, vendors and providers of services unlawful with respect to an uncertain circle of consumers and to stop these acts. That is why the claims cannot have the character of a property claim.

Nine years have passed since the adoption of the Consumer Protection Act of Russia. The application of this law, from one side has considerably improved the situation in the field of consumer protection. Now we have rich judicial practice. The result of generalisation of judicial practice here has become the adoption by the Supreme Court of Russia special resolution on 29 September 1994.^{*1} On 17 January 1997 and on 21 November 2000 this resolution was amended because of the necessity to allow for new rules of the Civil Code.^{*2} Some questions of application of the Russian Consumer Protection Act were considered also in official interpretations of the RF Ministry of Antimonopoly Policy and Support of Enterprise, which received the right to prepare and adopt official interpretations of the Consumer Protection Act according to section 40 of this law.^{*3}

From the other side, the Russian Consumer Protection Act has exerted influence upon civil and other legislation. The new Civil Code of Russia has perceived practically all juridical constructions of this law.

3. New Civil Code of Russia and the Consumer Protection Act. The problems of correlation and application

From the new rules of the Civil Code of Russia arise the problems of correlation and application of its norms and the norms of the Consumer Protection Act. There are many important steps which were made in the Civil Code for the strengthening of consumer protection.

First of all, now in section III “General part of the law of obligations” of the Civil Code there exists a special regulation of public contracts and contract of adhesion (sections 426, 428), as well as a very important main rule of section 400, which sets up: an agreement to limit the amount of liability of a debtor under a contract of adhesion or other contract in which a citizen acting as a consumer is the creditor, is void if the amount of liability for the particular type of obligation or for the particular breach has been determined by a law and if the agreement was concluded prior to the occurrence of the circumstances that result in liability for the failure to perform or for the improper performance of the obligation.

Then in the second part of the Civil Code there are numerous sections and chapters, which are, dedicated to the specifics of contractual relations between merchants and consumers (section 2 chapter 30; section 2 chapter 37, chapters 39, 44, section 3 chapter 59 and others), or single sections like section 783, 786, 799, 800, 835, 838, *etc.*

The Civil Code also establishes new kinds of contracts including contracts between merchants and consumers. The appearance of chapter 39 named “Compensated Providing of Services” gives the possibility to regulate numerous contractual relations between merchants and consumers in the field of culture, sports, tourism and other kinds of services.

The correlation between the rules of the Civil Code and the Consumer Protection Act may now be characterised in accordance with section 9 of the Entry into Force of the Second Part of the Civil Code of the Russian Federation Act adopted on 26 January 1996. It says: in the case of one party in an obligation being a consumer, he or she has the rights in this obligation both according to the Civil

¹ The Supreme Court of Russia 29 September 1994 Resolution about the practice of considerations consumer protection cases by courts. – Russian newspaper, 26 November 1994.

² Bulletin of the Supreme Court of Russia, 1997, No. 3; 2001, No. 2.

³ The interpretations of the RF Ministry of Antimonopoly Policy and Support of Enterprise “About some questions connected to the application of the Consumer Protection Act”, adopted on 20 May 1998 (amended on 11 March 1999). – Bulletin of normative acts of the RF federal state executive boards, 1999, No. 2, pp. 18–19.

Code and the rights according to the Consumer Protection Act and other acts of consumer legislation. It is the main principle, but we cannot say that it is the decision of a question of correlation between the rules of the Civil Code and the Consumer Protection Act in general.

The Civil Code contains other sections in which this question is decided. First of all the Civil Code includes the types of consumer contracts in which different rules were established. These are Retail Purchase and Sale (section 2 chapter 30), Consumer Service Contract (section 2 chapter 37) and compensated providing of services (chapter 39). According to sections 492 and 730 of the Civil Code laws on protection of consumer rights and other legal acts adopted pursuant thereto shall apply to relations under a retail contract involving a buyer-citizen insofar as these are not regulated by the Code.

It means that if any question must be regulated by the rules of section 2 chapter 30, section 2 chapter 37 and chapter 39, the norms of the Consumer Protection Act may be applicable only where they are not contradictory or insofar as these are not regulated by the Code. In case of contradiction the rules of the Code must be applicable. It seems to me that an analogous situation exists in other contracts such as hire or custody, *etc.*

But not all rules of the Consumer Protection Act apply only in such a manner as it was said earlier. Some special rules of this law have a priority. For example, it takes place in cases, when Civil Code admits to the other rules by law. According to section 477 of the Civil Code unless otherwise provided for by a law or sale contract, the buyer shall have the right to present demands concerning defects in the goods provided that they have been revealed within the time limits established by this article. It means, that in a consumer contract of sale goods will be applicable to section 19 of the Consumer Protection Act about special terms to present demands concerning defects in the goods. The same situation exists in the case of application of section 724 of the Civil Code and section 29 of the Consumer Protection Act.

In all cases the sections of chapters 1 and 4 of the Consumer Protection Act are applicable to every consumer contract.

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

Comprehension of law and aspects thereof

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

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

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

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

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

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

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

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

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

Text of law as object of interpretation

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

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

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

⁴ *Ibid.*

⁵ T. A. O. Endicott. Linguistic Indeterminacy. — Oxford Journal of Legal Studies, Spring, 1999, Vol. 19, No. 1, p. 690.

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

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

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

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

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

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

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

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

⁹ *Ibid.*

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

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

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

¹³ P. Varul. Eesti õigussüsteemi taastamine (Restoration of Estonian Legal System). – *Juridica*, 1999, nr. 1, lk. 3 (in Estonian).

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

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

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

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

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

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

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

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

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

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

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

¹⁷ Perekonaseadus (Family Law Act) – Riigi Teataja (The State Gazette) I 1994, 75, 1326 (in Estonian).

¹⁸ Pärimisseadus (Law of Succession Act) – Riigi Teataja (The State Gazette) I 1996, 38, 752 (in Estonian).

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

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

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

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

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

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

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

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

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

Nonetheless, the situation becomes particularly interesting upon a comparison of possible developments in GPCCA section 2 “Interpretation of Acts”. Specifically, a new draft General Part of the Civil Code Act²⁶ has been prepared with substantial changes in the regulation dedicated to interpretation of law. In the draft, the interpretation provisions are contained in section 3. The only provision left of the presently applicable text is that part of section 2 which, after the amendment of GPCCA section 2, found its way to the first paragraph, namely: “A provision of an Act shall be interpreted together with the other provisions of the Act on the basis of the meaning and purpose of the Act.” This may now provide some clarity with regard to the question whether the will of the legislator has been directed towards a substantial revaluation of linguistic interpretation in comparison with the generally applicable principles, or towards a specification of its ranking in comparison with other methods of interpretation, or this has been just a formulation adjustment in the text of the Act.

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

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

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

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

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

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

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

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

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

²⁸ *Ibid.*, p. 215.

²⁹ P. Varul (Note 23), p. 182.

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

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

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

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

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

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

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

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

³³ R. Narits (Note 10), p. 229.

³⁴ A. Aarnio. On Legal Reasoning. Turku, 1977, p. 19.

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

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

³⁵ I. Kull (Note 14), p. 182.

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

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

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Regulation of Limitation Periods in Estonian Private Law: Historical Overview and Prospects

The rules concerning limitation periods is an area of private law that can be easily overlooked. Jurists consider the law on limitation periods boring, even a technical topic the theoretical potential of which is restricted to the discussion about how justified one or another limitation period is. The issues related to limitation have largely been disregarded also in the reform discussion opened in Estonian private law after the restoration of independence. The debate has been limited to a relatively small circle of people who participate in the working groups preparing the drafts. In a situation where the processing of the draft Law of Obligations Act and the new draft of the General Part of the Civil Code Act in the *Riigikogu* (Estonian parliament) is about to come to an end as the last stage of the Estonian private law reform, it is the right time to change such practice, taking into account, above all, the topicality of the issue all over Europe in the light of the German law of obligations reform and the anticipated completion of the parts of the Lando Commission's Principles of European Contract Law and the UNIDROIT Principles of European Commercial Contracts focusing on the law on limitation periods. The author has derived additional inspiration from the article by Prof. Dr. Reinhard Zimmermann on the main features of the contemporary law on limitation periods published recently in *Juristenzeitung*.^{*1}

The more specific purpose of the article is to examine the development of the regulation of limitation in Estonian private law and provide a more detailed overview of the discussion and debates that the working groups have held when preparing the provisions of the General Part of the Civil Code Act, particularly with a view of the latest developments in European private law.

1. Historical overview

When speaking about the history of Estonian private law, we have to distinguish between the period preceding the Second World War (1918–1940) and the years following the restoration of independence (1992). The actual impact of the historical argument on the development of Estonian contemporary private law is disputable. In principle, the Estonian legislator has continually stressed

¹ R. Zimmermann. "... ut sit finis litium" Grundlinien eines modernen Verjährungsrechts auf rechtsvergleichender Grundlage. – *Juristenzeitung*, 2000, S. 859 ff.

the importance of the doctrine of legal continuity after the restoration of independence.^{*2} The relevant guidelines of the *Riigikogu* were included in the decision on the legal continuity of the Republic of Estonia^{*3}, which determined unambiguously the effect of the historical argument on legislation, obliging the government to maintain legal continuity in that field. In the field of private law, such assignment did not mean an automatic re-establishment of the Acts applicable until 1940, but has a dramatic effect on the ideological foundation of the civil law reform. The main effect entailed by such approach was the justified ties with the German legal family facilitated by the historical argument of the post-reindependence legislator; the trend can be clearly identified in Estonian legislation of the 1990s.

1.1. Years 1918–1940

Estonian legislation of that period never came to the codification of its own private law — when the main part of the draft Civil Code was completed in 1940, the tide of history had already turned. The main source of private law during the whole period of independence had been the Baltic Private Law Code^{*4}, representing the country and town law of *Estland*, *Livland* and *Kurland* as codified in 1864. It was essentially a collection of Roman law, heavily influenced by German traditions.^{*5} The draft Civil Code of 1940 served is an updated and simplified version of the Baltic Private Law Code^{*6}, nevertheless containing some significant implications derived from the more important civil law codes of the beginning of the 20th century (German *BGB*, Swiss *ZGB* and *OR*).

The Baltic Private Law Code (BPLC) contained general rules concerning limitation in sections 3618–3640. The legal nature of limitation, however, cannot be clearly identified on the basis of the provisions, the Act governs both the limitation of a claim^{*7} and the right of action.^{*8} According to section 3639, the effect of limitation is “not only the termination of the right of action but also the extinguishment of the right of claim itself”.

The regulation of limitation found in the BPLC stood out by its relatively short limitation periods. The general limitation period set out in section 3620 of the BPLC was ten years, in *Kurland* even five years. The limitation period commenced with collectibility of the claim (section 3623), while the unawareness of the person entitled to claim of the existence of the claim did not hinder limitation (section 3626). The limitation periods provided for several contractual claims were even shorter. Above all, the following should be mentioned: the one-year limitation period established with regard to the claim to reduce prices^{*9} due to the defects of the object of sale in the case of a contract of sale (section 3271) and the six-month limitation period established with regard to the claim to terminate a contract^{*10} (section 3272), which commenced as from the delivery of the object of sale or from the conclusion of the contract (sections 3271 and 3272 respectively).^{*11}

The same principles were in fact taken as a basis when preparing the draft Civil Code in which the general regulation of limitation established in the BPLC was retained as well as the system of remedies with specific periods of limitation for transfer deeds represented by *actio quanti minoris* and *actio rehibitoria*.

² It has been expressed in its utmost form in the preamble of the applicable Constitution.

³ The *Riigikogu* resolution on the legal continuity of the Republic of Estonia of 1.12.1992.

⁴ I.e. private law of *Livland*, *Estland* and *Kurland* contained in Part III of the provincial law of the Baltic provinces (Provinzialrecht der Ostsee-Gouvernements. Theil III. Privatrecht Liv-, Est- und Curlands).

⁵ The provinces of *Estland*, *Livland* and *Kurland* maintained their legal autonomy also as parts of the Russian Empire, particularly in the field of private law.

⁶ The crucial role of the BPLC in the Civil Code is also emphasised in the explanatory memorandum of the draft: “Estonia is a country with a rich civil law past while its historical development has been excessively unique, consisting of elements that originate from ancient to the modern era. This legacy had to be updated and supplemented /.../ the draft attempts to retain the currently applicable rules, and also supplement and renew it with rules that have been tried out, more or less, in Estonia or elsewhere and inevitably due to the reasons provided below.” Seletuskiri Tsiviilseadustiku 1936. aasta eelnõu juurde (Explanatory memorandum to the draft Civil Code of 1936). Prof. J. Uluots. Available in the Ministry of Justice library (in Estonian).

⁷ E.g. sections 3618 and 3620 of the BPLC.

⁸ E.g. section 3621: “/.../ erloschen alle Civilklagen /.../ durch Nichtanstellung”; section 3637.

⁹ It was essentially *actio quanti minoris* as known from Roman law, or *Minderungsklage* in German.

¹⁰ *Actio rehibitoria*; *Wandelungsklage* in German.

¹¹ The regulation concerning the defective object of sale in the case of a contract of sale originated directly from Roman law, particularly with regard to faultless liability, freedom of choice with regard to the applicability of remedies and, above all, in relation with the short-term extinguishment of these claims.

The draft Civil Code (hereinafter: the dCC¹²) regulated the limitation issues in its general part or in Part 5 of Book 1 of the draft (Exercise and Protection of Rights). The regulation was contained in Chapter 2 (sections 223–248) of the part mentioned. Unlike the regulation of the BPLC, limitation was laid down purely as procedural objection. The notion of limitation was contained in subsection 223 (1) of the draft, the legal effect of limitation was the extinguishment of the right to demand protection of the right before court. According to section 246, limitation was also of great import in substantive law. Namely, the expiry of the limitation period meant, besides the extinguishment of “right of action”, the extinguishment of the claim proper, which is, in principle, a controversial effect, taking into account that according to subsection 223 (2) limitation retained its objectional nature that the court could not take into account due to its official duties (a solution identical to that of the BPLC). Section 247, however, excluded *condictio indebiti* in the case of performance after the expiry of the limitation period.

As to the limitation periods, the dCC retained the general limitation period of ten years as known from the BPLC (section 230), from which a number of important exceptions were made, particularly the three-year limitation period of several contractual claims as set out in section 231 (rentals (clause 1)), claims arising from the contract for service of craftsmen and the claims of persons engaged in free trades, claims arising from contracts of sale on condition that the objects are “small-scale goods” (clause 3)). In the case of defects detected in a transferred thing, the regulation involving remedies and limitation periods derived from the BPLC and was based on Roman law applied (see above and section 1502¹³). The regulation concerning the accrual of the limitation period was largely derived from the BPLC. According to the general rule contained in section 232 of the draft, the limitation period accrued on the “date when the right to protection by court emerged”. As for claims under the law of obligations, subsection 233 (1) (more precisely, section 3623 of the BPLC) provided for the accrual of the limitation period as from the collectibility¹⁴, in the case of transfer deeds, the claims to reduce prices and terminate a contract extinguished as from the delivery of the thing. The question about the commencement of the extinguishment of the claims arising from the violation of a(n) (debt) obligation or delicts. There is no special regulation to govern these matters. In the case of delictual claims, the “eternal” question was whether damage as such served as an element of the claim for damages or only an important component for determining the consequences of breach of an obligation under the law of obligations or delictually protected legal benefit.

In any case, “the unawareness of a person entitled to claim of his or her right” did not preclude limitation (section 225), while this also applied in the case of delictual claims.

The regulations concerning suspension (sections 235–240) and interruption (sections 241–247) of the limitation period set out rather traditional compositions (limitation in the case of claims between spouses, parents and children, absence of a guardian and *force majeure*; interruption when an action is filed and in the case of acts equivalent thereto).

1.2. Reforms after restoration of independence

The situation in Estonian private law after the restoration of independence has been complicated. As it was impossible to re-enact the Baltic Private Law Code valid during the first era of independence (the act was in German), the ESSR Civil Code dating from 1964 remained in force at first. A new Estonian civil law was approached step by step, gradually replacing the respective parts of the civil code by adopting new specific acts. For limitation, the primary significance rests with the general part of the civil code, replaced by the General Part of the Civil Code Act in 1994. It largely has the status of a transitional regulation: in connection with the last stage of the civil law reform — the adoption of the Law of Obligations Act — the applicable General Part of the Civil Code Act will be thoroughly revised.

The provisions concerning limitation contained in Chapter 6 of the general part of the ESSR Civil Code (sections 81–94) generally represented a relatively compact, balanced and reasonable regulation of limitation periods

¹² The draft has been republished in *Tsiviilseadustik* (Civil Code). Tartu: Tartu Ülikool, 1992 (in Estonian).

¹³ “The right to file an action for cancellation of a contract lapses in six months, the right to file an action for reduction of prices in one year of the transfer date or the date when the defects of a thing had been denied later or the qualities thereof had been stated” (section 1502 of the CC).

¹⁴ “/.../ the limitation period commences on the date when the claim is in such a condition as an action may immediately commence against the debtor failing to fulfil his or her obligation /.../”.

According to the Civil Code, limitation was, above all, a procedural category. As a special feature of Soviet civil law, limitation did not serve as an objection — the court was obliged to inspect limitation at its own initiative (section 85). The consequences of limitation were also procedural — expiry of a term acted as a basis for dismissal of the action (subsection 90 (1)). As limitation represented a procedural term, it was also possible to restore it “with good reason” (subsection 90 (2)).

In respect of the length of limitation periods, the Civil Code was very user-friendly — section 81 of the Civil Code provided for three years as a general limitation period.^{*15} In relation with the effective length of the limitation period, we still have to consider also the regulations concerning the accrual and length of the limitation period. As a rule, the length of the limitation period accrued from “the day when the right of action was created” (section 86), which actually meant a moment when the person entitled to claim became aware or ought to have become aware “of the violation of his or her right”.

For several important contractual claims, above all, for sale and employment, the Civil Code provided for shortened limitation periods, modifying also the starting moment of the period. Hence, the claims arising from the defect of a sold thing expired, according to sections 254 and 252, during the maximum of one year of the delivery of the object of sale. In the case of employment contracts, subsection 367 (1) of the Civil Code provided for a limitation period of six months after the acceptance of the work. In the case of hidden deficiencies or deficiencies that could not be identified by exercising ordinary care upon acceptance of the work, the limitation period extended to one year (the last part of subsection 367 (1)), in the case of buildings even up to three years (subsection 367 (2)).

The General Part of the Civil Code Act that entered into force in 1994 replaced the ESSR Civil Code part containing general provisions. With regard to limitation as an integrated institution this entailed certain confusion as the specific provisions of limitation contained in the only part of the Civil Code that is still applicable — in the part concerning the law of obligations^{*16} — continue to be valid in their previous form (this concerns, above all, limitation of claims arising from contracts of sale and employment contracts).

Nevertheless, we must be careful when assessing the provisions of the General Part of the Civil Code Act governing limitation (sections 113–123). We must keep in mind that the General Part of the Civil Code Act was one of the first acts adopted in the course of the civil law reform in Estonia. The draft was prepared under considerable time pressure and the essential value of the solutions opted for therein is questionable in several instances (*e.g.* in the part where the general limitation period of ten years, originating from the BPLC, was established for contractual relationships, among other relationships). Yet we cannot disregard the advantages of the Act and its general legal and political disposition upon the transfer from Soviet civil law to the regulation of private law relationships characteristic of a market economy.

However, a large part of the General Part of the Civil Code Act represents a mixture of the Civil Code and the principles derived from the draft Civil Code of 1940. This applies, above all, to the regulation of limitation periods.

In connection with the preparation of the draft Law of Obligations Act, the regulation of which should replace the last applicable part of the Civil Code (law of obligations), amendment of the currently valid General Part of the Civil Code Act also became topical. Occasional changes, when combined, have yielded a new draft General Part of the Civil Code Act which should, upon the entry into force of the Law of Obligations Act, fully replace the applicable regulation of the General Part of the Civil Code Act. One of the significant issues that has caused much debate during the development of the new General Part of the Civil Code has been the chapter on the law on limitation (sections 139–168); this is, on the one hand, due to the negative assessment of the regulation of limitation periods in various European legal orders and, on the other hand, the uncertainty prevailing during the preparation of the draft with regard to the specific development trends in the law on limitation in the unifying European private law.

In the following overview, an attempt is made to describe the dangers and threats during the preparation of the regulation of limitation and to assess the work done. The provisions of the draft

¹⁵ The provision was, in fact, more complicated, also providing a one-year limitation period for the claims between state organisations.

¹⁶ The ownership provisions of the Civil Code were replaced by the Law of Property Act, adopted in 1993; the family law part was replaced by the Family Law Act (1994) and the law of succession part by the Law of Succession Act (1997).

General Part of the Civil Code Act can also be assessed in the light of the recent developments in European private law.

3. Point of departure of regulation of limitation periods (functions of limitation)

The point of departure of the preparation of any regulation of limitation periods definitely relates to the functions of limitation periods as an institute of law in private law. The main functions of limitation periods in various European legal orders are, *prima facie*, very similar and can be summed up in three basic statements^{*17} that should justify imposition of time limits upon the enforcement of a claim:

- it will become increasingly difficult for a debtor to defend himself or herself from the creditors' claim as time passes;
- delay upon enforcement of claims gives rise to the debtor's justified expectation that the possible claims against him or her will not be filed;
- it is in public interest to ensure the reviewal of legal disputes as quickly as possible or guarantee restoration of legal peace in any other manner.

The results achieved by specification of such relatively general and also generally accepted principles in various legal orders still differ significantly.

In order to inquire about the possible structure of a modern regulation of limitation periods, the main components of the institution of limitation periods should be identified on the basis of the functions presented. Comparison of different systems of limitation periods and drawing of conclusions from such comparison is complicated, above all, due to the fact that the components of the regulation of limitation periods must be viewed collectively and in the context of their combined effects, taking frequently also into account their substantive law background, *i.e.* the character, prerequisites and competitive situations of expiring claims.^{*18} It is relatively pointless to compare limitation periods prescribed for a particular claim in different legal orders without saying anything about the accrual of the particular period, possible interruptions and suspensions and periods applicable to competing claims. As a rule, the following set may be examined as the main components of the regulation of limitation periods: length of the limitation period, accrual of the period, bases for the suspension and interruption of the limitation period and finally, the issue of the imperativeness of the regulation of limitation periods or, *vice versa*, of the permissibility of the agreements deviating therefrom.^{*19}

4. Structure of law of limitation, criticism of system

The traditional method of structuring the rules concerning limitation periods would be to regard the above-mentioned "main points" in the context of various classes of typical claims and attempt to find for such groups solutions that would satisfy the main functions of the law on limitation. When doing this, the legislator frequently makes use of the structure that foresees an abstract "general limitation period" for all possible claims together with the rules of the accrual, suspension and interruption of the period. The next step is usually the provision of specific rules for different classes of claims or for individual claims belonging to a particular class.

When examining the issue with a view to the law of obligations which is undoubtedly, both theoretically and practically, the most important area of interest for the law on limitation, we may, first and foremost, distinguish between contractual and non-contractual claims. Within the classes, the making of distinction may have a multilevel effect. The possible claims may be distinguished by means of the types of contract or by means of the function or content of the claim itself — enforceable claims and secondary claims aimed at compensation for damage, reduction of price, *etc.*

¹⁷ See, above all, (together with the following references) R. Zimmermann (Note 1), p. 854; specifically of German law, *e.g.* von Feldmann. — Münchener Kommentar zum Bürgerlichen Gesetzbuch. Hrsg. von K. Rebmann; F. J. Sack. 3rd ed., Vol. 3. Schuldrecht. — Besonderer Teil (sections 433–606). Rev. by H. P. Westermann. München: Beck, 1995, paragraph No. 6 for section 194.

¹⁸ Thus also Kommission zur Überarbeitung des Schuldrechts: Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts. Hrsg. vom Bundesminister der Justiz. Köln: Bundesanzeiger, 1992, p. 34.

¹⁹ R. Zimmermann (Note 1), p. 857; Note 17, p. 34.

We may continue such distinction-making endlessly and it is obviously possible, when approaching from the micrological level for example, to reason also that a claim for compensation of damage arising from the employment contract due to the deficiency of work should expire basically as a result of other criteria than a claim caused by breach of a lease contract. At a particular moment, however, it seems more reasonable to turn around and shift our attention from differences back to general regulation and search for harmonisation opportunities.

The German *BGB* provisions concerning limitation constitute a brilliant example of the problems entailed by an over-complicated system of limitation periods. The consequence of an abundance of different limitation provisions, their scatteredness and mutual distinction and the competition problems arising therefrom is the fact that a system the main purpose of which is allegedly a rapid restoration of legal peace and avoidance of debates related to complicated verification problems is, in its complexity, an important source of complicated legal debates.^{*20} Countless titles of legal literature, commentaries and court decisions have been dedicated to the issue of limitation periods. The need to alter the provisions concerning limitation periods has been regarded as the main concern also in the framework of the German law of obligations reform.^{*21} A situation in which a significant part of the court cases related to a particular type of contract is made up by debates concerning the expiry of claims is, by all means, unsatisfactory, while this is true from the perspective of all interests functionally protected by the regulation of limitation periods (interest of the public in the restoration of legal peace, a debtor's interest in clarification of the claim and the creditor's interest in the availability of effective means for the enforcement of claims). Thereby, on the micrological level, just and reasoned rules of limitation lose their efficiency with regard to the system as a whole.

We may generalise and claim that similar problems exist in all legal orders where the legislator has paid relatively little attention to the compactness of the regulation of limitation periods and harmonisation of individual limitation periods and the bases for their duration, suspension and interruption. Above all, danger arises in connection with a solution where the limitation regime applied depends on the nature of the extinguishing right of claim. Thus, the English Law Commission whose primary task is to prepare proposals concerning areas of law in need of reform describes the applicable regulation of limitation periods using expressions "incoherent, needlessly complex, outdated, uncertain, unfair and wastes costs".^{*22} The most radical reform schemes of the law of limitation in Europe originate from Germany, and above all, from the expert analysis published by Peters-Zimmermann in the framework of the *BGB* law of obligations reform^{*23}, and from England in the form of the Law Commission Consultation Paper referred to above. These proposals have also had a significant impact on the harmonisation tendencies of European private law.

5. Description of problem

The problems related to the regulation of limitation periods described above have, as a rule, two sources: the problem of restriction and competition of limitation provisions or, more generally, expiring claims. Although the problem of restriction is more of legal-technical nature and the issues of competitiveness primarily have a substantive law background, both are closely interrelated and it is difficult to separate them. These issues usually emerge when different types of claims are subject to different regulation of limitation periods.

The distinction-making problem arises from a simple and, *prima facie*, banal fact that the various criteria prescribed by law for distinguishing between expiring claims frequently remain imprecise and ambiguous. Such difficulties may have their roots in a simple question, for example, taking German law as a basis, in the question of what are "the works performed on a construction" or *Arbeiten an Bauwerken* for the purposes of the first sentence of subsection 638 (1) of *BGB*. They may end up with problems that are complicated already at first glance, such as a question of whether breach of a contract of sales was committed by "supply of a deficient thing" (*Lieferung einer*

²⁰ As vividly expressed by R. Zimmermann (Note 1), p. 858.

²¹ See, e.g. Abschlussbericht (Note 1), p. 15: "Der rechtspolitisch dringendste Handlungsbedarf wurde im Verjährungsrecht erkannt."; or a more recent one: Informationspapier zum Entwurf eines Schuldrechtsmodernisierungsgesetzes (Stand 4. August 2000). Bundesministerium der Justiz, 2000, pp. 5–6. Available at: <http://www.bmj.de/ggv/arbeitssh.pdf> (28.04.01).

²² Limitation of Actions. Law Commission Consultation Paper 151. The Law Commission of England and Wales: 1998 (hereinafter: the Law Commission), p. 241. Available at: <http://www.lawcom.gov.uk/library/lccp151/cp151ind.htm> (28.03.01).

²³ F. Peters, R. Zimmermann. "Verjährungsfristen" im Gutachten und Vorschläge zur Überarbeitung des Schuldrechts Bd. I. Hrsg. vom Bundesminister der Justiz, 1981, S. 77–373.

mangelhafter Sache^{*24}) or “violation of other obligations”. The former case would be subject to a limitation period of six months provided for in subsection 477 (1) of *BGB*, and the latter case to a general thirty-year limitation period according to section 195 of *BGB* (only on condition that the claim “was not founded on circumstances immediately and inseparably related to the deficiency of the thing” — in such a case, subsection 477 (1) of *BGB* would apply on the basis of analogy).^{*25} The purpose of this example is not to start a detailed discussion of the issues related to sections 459 and 477 of *BGB*. It should demonstrate that the distinction-making problem creates a potential danger that the actual aim of the limitation provision is lost in formal reasoning. This may easily lead to contradicting assessments. The example of the contract of sale would create a situation where the claims concerning breach of contract arising from the circumstances related more immediately to the main performance of the seller would expire faster than the claims the relation of which to the supply duty is more far-fetched and less immediate.

A similar threat to the balance of the law on limitation arises from the problems of competition related to functionally similar claims, *i.e.* a situation where the same collection of vital circumstances constitutes a basis for different types of claims while these claims aim at the satisfaction of similar interests. In a developed system of private law, competition of claims is inevitable. In this respect, problems arise, above all, in the law of obligations where competition occurs between contractual claims as well as between contractual and extracontractual claims, and first and foremost, between delictual claims. If these claims expire according to different rules, it creates several problems. Firstly, it gives easily rise to contradicting assessments that are substantially difficult to reason. Secondly, the implementer of the right is frequently tempted to artificially overlook the apparently troublesome limitation provisions of the individual case concerned, and to settle the matter by means of a competing rule of claim under the conditions of a more favourable limitation regime. However, thereby the regulation of limitation periods tends to directly affect the content and impact of substantive law, eliciting special solutions, determined by the law of limitation, and actually directing the development of substantive law itself. Thus, the special character of the regulation of limitation periods in the case of contracts of sale and employment in *BGB* has caused the barycentre between contractual and delictual liability to shift considerably towards delictual law solutions and a more favourable limitation regime for creditors (as a result of which the specific behavioural requirements generally falling under the contract law and effective only *intra partes* transfer to law of delict, affecting and altering its functions significantly).

The same circumstances have been in focus in the English Law Commission that has foregrounded incoherence as the primary problem of the applicable law of limitation.^{*26}, which arises, first and foremost, from different limitation regimes applicable to different claims. This, in turn, leads to contradicting assessments in result as the law of limitation as a whole has not been constructed on the basis of uniform principles.^{*27}

To sum it up, it thus seems that finding the best limitation regime for each potential claim cannot be the priority purpose upon the development of the foundations of the law on limitation periods. The advisable point of departure should rather be an attempt at uniform and universal principles that could offer acceptable solutions for a possibly wide range of different claims and represented conflicting interests (debtor-creditor-public).

The main question arising in this context is naturally whether such a theoretical wish can be realised in its pure form. In other words: is there a universal limitation regime offering satisfying solutions for different types of claims and what are the possible and necessary exemptions therefrom.

²⁴ Such test is simple only at first glance. In a situation where an undefined legal notion carries an extremely important practical meaning (*e.g.* to identify the area of application of different limitation periods the lengths of which differ fundamentally), legal practice, if pressed by need, may end up using extremely specific criteria when furnishing the simplest notion. An illustrative example is “deficiencies of a thing” for the purposes of section 459 of *BGB* H. Putzo. – O. Palandt. Bürgerliches Gesetzbuch. 60th edition. Beck: Munich, 2000, section 459, paragraphs No. 1 and 3.

²⁵ Continuing and prevailing court practice in the form of a quote from the judgement of *Bundesgerichtshof* of 07.03.83, published in: Entscheidungen des Bundesgerichtshofes in Zivilsachen (hereinafter: BGHZ). Vol. 87, p. 92 (with the following references): “Insbesondere findet die kurze Verjährungsfrist auch auf Schadenersatzansprüche wegen positiver Vertragsverletzung Anwendung, sofern die Schäden **aus einem Sachmangel hergeleitet werden und zu diesem in unmittelbarem, untrennbarem Zusammenhang stehen**. Dagegen ist § 477 Abs. 1 nicht auf Ansprüche aus positiver Vertragsverletzung anwendbar, die nicht aus einer Mangelhaftigkeit der Kaufsache selbst, also nicht aus einer Verletzung der Lieferungsspflicht, hergeleitet werden, sondern aus einer Verletzung von Nebenpflichten, **die mit der Mangelhaftigkeit der Kaufsache in keinem unmittelbarem Zusammenhang stehen**.”

²⁶ Law Commission (Note 22), pp. 241–242.

²⁷ *Ibid.*

6. Solution variants and topical treatments

Recognition of the above-described problems has led to a serious discussion about limitation periods in European private law during the recent years, both within national legal orders and under the framework of attempts to harmonise private law extending all over Europe. Two most conspicuous and radical reform projects — the already mentioned Peters-Zimmermann study prepared in relation with the German *BGB* law of obligations reform²⁸ and the Discussion Paper on the law on limitation periods, published by the English Law Commission in 1998²⁹ — have developed from the problems of national legal order. The obvious similarity between the typical problems of the law on limitation periods and solutions offered in two countries with such controversial legal traditions testifies that significant potential exists for harmonisation in this area. It is apparently not a coincidence that the problems related to limitation periods have become a topical issue also in the two main committees engaging in the harmonisation of European private law — UNIDROIT and the Commission on European Contract Law headed by Prof. Ole Lando. Publication of both the UNIDROIT principles and the chapters on limitation periods of the Principles of European Contract may be expected in the near future.³⁰ We may also presume that both the UNIDROIT Principles and the European Principles follow, in their proposals, the principles the content and ideology of which are similar to the proposals made by Peters-Zimmermann for reforming German and by the Law Commission for reforming English law on limitation periods.

As briefly indicated above, the proposals made by Peters-Zimmermann in the framework of German law of obligations and the solution offered by the Law Commission for English law are very similar as to their point of departure and results. Taking into account the problems related to the regulation of limitation periods described above, the purpose of both of them is to develop as uniform regulation of limitation periods as possible for all claims. In order to accomplish this, one should return to examining the functions of the law on limitation periods and the conflicting interests serving as the basis therefor.

On the one hand, the regulation of limitation periods should preclude a situation where the filing of a claim is delayed over a considerable period of time, which would be in conflict with the debtor's interests (renders it more difficult to defend oneself against the claim efficiently; is in conflict with the debtor's increasing expectation that the potential claim will not be filed) as well as public interest in speedy and efficient settlement of the legal dispute and establishment of legal peace. This argument is in favour of a short limitation period, which confirms a general legislative trend in Europe. On the other hand, the regulation of limitation periods must ensure for the creditor a reasonable opportunity to enforce his or her claim. Above all, the creditor must be provided with a sufficiently long period for identifying a potential claim, verifying the legitimacy of the claim, collection of evidence therefor and preparation of an effective enforcement in court. Both according to Peters-Zimmermann and the Law Commission, it would be unfair if, when weighting the functions of limitation periods and the parties' interests, the creditor was punished under the rules of limitation by depriving him or her of the claim, while he or she did not have an opportunity to discover the claim during the limitation period and thus also to enforce thereof.³¹ This statement concerns the accrual or suspension of the limitation period — the limitation period cannot commence or should be at least suspended until the expiring claim is not discoverable for the creditor or if the creditor is unable to enforce the claim due to any other reason. Besides the creditor's justified interest public interest also has to be taken into account. There can be no question of the establishment of legal peace and speedy and efficient settlement of disputes thereby if the creditor would be, due to the limitation regime, deprived of an opportunity to file a justified claim and the claim would expire before the enforcement thereof would become feasible.³² After all, when relating the limitation period with discoverability of a claim, it is not in conflict with the debtor's justified interests that are important with regard to the functions of limitation periods. The rules of limitation must impede the development of a situation where the debtor experiences, due to the opportunities of presenting evidence that deteriorate over time, difficulties in defending himself or herself against (potentially) unjustified claims, granting to himself or herself for that purpose a summary objection to limitation. However, it is not the purpose of

²⁸ F. Peters, R. Zimmermann (Note 23).

²⁹ Law Commission (Note 22).

³⁰ R. Zimmermann, Die "Principles of European Contract Law", Teile I und II. – Zeitschrift für Europäisches Privatrecht, S. 391–393 (392).

³¹ R. Zimmermann (Note 1), p. 7.

³² *Ibid.*

limitation periods to create a situation in which such an objection would allow to disregard also the justified claims in full.^{*33}

According to the proposal of Peters-Zimmermann, all claims would principally expire during a two-year limitation period. This limitation period would commence with collectibility of the claim and the limitation period would be suspended for the period when the creditor is unaware and needs not be aware of the existence of the claim against the debtor. The suspension possibility must still be taken into account together with the absolute limitation period. According to the proposal, the limitation period may, as a result of suspension, extend up to ten years.

There are only technical differences between the proposals of the Law Commission and those of Peters-Zimmermann: the Committee proposes three years as a general limitation period, while the limitation period would accrue from the moment when the creditor became aware or ought reasonably to have become aware of the existence of the claim. Besides the short limitation period, the so-called long stop limitation period must be also taken into account; it commences from the “act or omission” serving as the basis of the claim and as a result of which the maximum limitation period may extend up to ten years (in the case of personal damage, up to thirty years).

The definite advantage of such solution is the fact that it allows to subject the expiry of all claims to uniform principles and terms. If the limitation period accrues when the person discovers the existence of the claim or the limitation period has been suspended until that moment, there is principally no difference in whether the expiring claim arises from a contract, delict or unjust enrichment, providing the creditor with sufficient and justified opportunity to enforce his or her claim.^{*34}

Criticism of such proposals has, to date, relied on the argument that it would not be the limitation period that is important for practice with regard to such limitation structure, but rather the moment when the creditor became or should have become aware of his or her right of claim.^{*35} This creates, above all, a danger that the debtor is, as a rule, unable to identify the possible expiry of the claim by means of circumstances belonging to the sphere of his or her impact or knowledge. The expiry of a claim rather depends on circumstances related to the creditor as a person and belong to his or her sphere of knowledge.^{*36} The Law Commission points out the same potential problems, admitting that the uncertainty of the central component of the solution is the price for increased legality achieved with regard to the creditor by means of the criterion of discoverability^{*37}, particularly for contractual relationships where the parties have a justified interest in objective assessment of the moment when the limitation period expires.^{*38}

Nevertheless, the main objection to the regulation of limitation periods that are absolutely connected to the criterion of discoverability lies elsewhere. Namely, such solution is based on the idea that a limitation period may not, due to its nature, be in effect at the time when the creditor lacks an opportunity to enforce his or her claim, also in the cases when the creditor cannot discover the existence of the claim.^{*39} However, the absoluteness of this argument is questionable: it is directly dependent on the functions to be performed by the regulation of limitation periods in legal order. No problems will emerge if only the functions of limitation periods listed in Part 3 above are used. This list may not be exhaustive. Problems arise, above all, in connection with the purpose of the limitation provisions in contractual relationships.

Namely, we may claim that in contractual relationships, short limitation periods carry a considerably different function when compared to ordinary limitation provisions. The limitation periods in contract law, again on condition that they are effectively short limitation periods, perform, above all, the function of temporal apportionment of contractual risk for parties to the contract.^{*40} Upon the expiry of the limitation period, the debtor is released from contractual risks. The deficiencies that become evident after the expiry of the limitation period in the object of contract or damage incurred will be borne by the creditor. If the limitation provisions in contract law are understood, first and foremost, as rules temporally redistributing contractual risks between the parties, the possibility that the claims

³³ *Ibid.*

³⁴ See Note 17, p. 36.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Law Commission (Note 22), p. 252.

³⁸ *Ibid.*, p. 253.

³⁹ R. Zimmermann (Note 1), p. 20.

⁴⁰ Thus, for *BGB* section 477 D. Leenen. “§ 477 BGB: Verjährung oder Risikoverlagerung?” (Schriftenreihe der Juristischen Gesellschaft zu Berlin, book 148). Berlin, 1997, p. 15 ff.; Similarly, W. Flume. *Archiv für die civilistische Praxis*. 1993, Vol. 193, p. 89 ff.

arising from the contract expire before the creditor has an opportunity to discover that the nature of the claim is absolutely legitimate with regard to such purpose.

If the limitation provisions are understood as a means to apportion contractual risk, this gives inevitably rise to the accrual of the limitation period irrespective of the criterion of discoverability examined above. This means that the limitation period is inevitably related to a criterion traditionally known from contract law — expiry accruing from collectibility of a claim or, in the case of claims arising from breach of contract, expiry accruing from the occurrence of the circumstance serving as the basis for breach of contract.

When opting for apportionment of contractual risk between the parties as the main function of contractual limitation provisions, which also justifies the situation where, particularly in the case of latent damage, the limitation period may expire before the creditor has an opportunity to discover breach of the contract and his or her claim, we may definitely keep in mind the limits within which such apportionment of risk is still acceptable. Such apportionment of contractual risk is justified only if the expiring claim really serves as a risk factor for the creditor, *i.e.* as a more or less likely threat that a particular circumstance may occur. A person who is, upon the contractual performance, aware of the deficiencies of the performance or must be aware of breach of contract, is not worthy of protection by means of the limitation period. Interestingly enough, attention has not been paid to such considerations in German law where the analogous function of apportionment of risk in the case of contracts of sale is borne by *BGB* section 477. Leenen and Flume are obviously right when claiming that the debatable regulation found in *BGB* section 477 is acceptable as to its purpose^{*41}, if the provision is correctly understood (once again: the function of apportionment of contractual risk!).^{*42} Unfair and condemnable results are rendered only by an analogous application of the short limitation period of the section (six months) to claims for damages in the case of delictual liability of the seller^{*43} (the original area of application of the provision, also justifying the short limitation period and arising from Roman law was faultless liability of the seller^{*44}). Taking into account the particular features of a contract of sale, the wrongful breach of contract by the seller with regard to the defects of a thing usually includes cases where the seller does not inform the purchaser of the defect that is discoverable to him or her or that the seller should have discovered (the seller is not the manufacturer, as a rule). Thus, the conclusion is similar to the one above.^{*45}

Hence, the traditional treatment of limitation periods that relates the accrual of the contractual limitation period to the occurrence of the circumstance serving as the basis for breach of contract in the case of breach of contract needs to be corrected. It is already a question of legal technology how the classes of such cases should be described (debtor's fraudulent acts, intentional or delictual breach of contract, discoverability or expected discoverability of the deficiency of performance or breach of contract).

7. Assessment

Which of the two solutions should be preferred is obviously largely a legal and political question affected by various financial considerations. However, several facts are contrary to the absolute relation of the principle of limitation periods to the criterion of discoverability. It is clear that upon apportionment of contractual risks, the temporal criterion is at least as important for contractual relationships as other means of apportioning risk liability between the parties, particularly in a situation where the bases for the debtor's contractual liability are increasingly less related to the criterion of fault (and it will undoubtedly be the prevailing trend in future European private law).

A situation where it is virtually impossible for the debtor to temporally predict contractual liability risks is economically definitely unsatisfactory.^{*46} If a definite wish to limit contractual risks tempo-

⁴¹ *I.e.* principally acceptable, disregarding the question of the legitimacy of the six-month limitation period (the general opinion is that it is too short).

⁴² D. Leenen (Note 41); W. Flume (Note 41).

⁴³ *Ibid.*

⁴⁴ W. Flume (Note 41), p. 89 *ff.*

⁴⁵ According to W. Flume, the system of apportionment of risk related to short limitation periods differs "categorically" from the cases involving delictual liability of the seller, where the seller should have discovered the defects of the object of sale, in which case a "long" (section 195 of *BGB*) limitation period should be applied; see W. Flume (Note 41), p. 119.

⁴⁶ See, *e.g.* *BGH* judgment BGHZ 77, 215 referred to German law (Note 24), pp. 222, 223.

rally may be expected from a reasonable participant in transaction, the same principle should also be, as a rule, provided in statutes.

Proceeding from similar considerations, the German *Schuldrechtskommission* also opted, in its final report, for a less radical way of resolving the issues related to limitation periods and disregarded the bulk of the proposals by the experts Peters and Zimmermann.^{*47} At the moment, we may presume that the same principles dominate in the revived *BGB Schuldrechtsrechtsmodernisierungsgesetz*^{*48} that has, until recently, adhered to the principles reflected in the final report of *Schuldrechtskommission* with regard to limitation periods.^{*49}

However, we may argue that the choice between different solutions largely depends on the subjective assessment of the person who makes the decision. In principle, we may claim that the solutions offered by Peters-Zimmermann or the Law Commission are in need of correction as regards their claims in contract law, primarily in order to relate the commencement of the limitation period to traditional criteria (collectibility, occurrence of the circumstance serving as the basis for breach, delivery of the object of sale or acceptance of work). On the one hand, such variant should obviously take better account of the needs upon fair apportionment of contractual risks; on the other hand, it gives rise to many legal and technological problems represented by various exceptions and correctives, which were described above as typical inadequacies of the regulation of limitation periods.

8. Regulation of limitation periods in new draft General Part of Civil Code Act

The problems described above served as the topics of an important discussion also during the preparation of the new draft General Part of the Civil Code Act. In its final version, the working group still opted for a solution the main features of which largely remind us of the proposals found in the final report of the German *Schuldrechtskommission*; expert analysis of the draft also supported such choice of solution.^{*50}

Although the waiver of the criterion of discoverability may be considered a principally correct or at least theoretically acceptable solution with regard to the claims in contract law, this inevitably entails many problems that should be avoided upon the development of the regulation of limitation periods.

When the limitation periods in contract law are considered as means for the temporal apportionment of contractual risk, a situation is created where the legislator should, through the limitation period to be established, attempt to determine average and fair apportionment of risk for all types of contracts. In this case, it is difficult to achieve as logically, the claims arising from relationships that entail a greater risk potential or potentially latent and hardly identifiable damage should expire during a longer period than ordinary claims. This is clearly testified by the specific regulation concerning deficient constructions found in subsection 141 (2) of the draft General Part of the Civil Code Act.^{*51} Hence, the general three-year limitation period (subsection 141 (1) of the draft General Part of the Civil Code Act) creates tension with regard to both aspects, but should, however, provide a fair solution in the majority of cases. The provision of the law on limitation periods as optional law should also contribute to the avoidance of problems.

A problem similar thereto but arising from a different aspect can not principally be disregarded in solutions based on the criterion of discoverability: the long stop period offered frequently proves to be too long for contractual relationships (according to the solutions of Peters-Zimmermann and the Law Commission, for example, it is ten years). A significant reduction thereof (*e.g.* to three to five years that would be reasonable for contractual relationships) does not satisfy the interests in the case of extracontractual claims. However, when two limitation periods — the short limitation period accruing from the discovery and the long stop period come relatively close to each other, it is obviously more reasonable to abandon the uncertain criterion of discoverability (the same tasks are functionally performed by different obligations concerning reporting of deficiencies).

⁴⁷ See Note 21, p. 36.

⁴⁸ Entwurf eines Schuldrechtsmodernisierungsgesetzes (Diskussionsentwurf – Stand 4. August 2000). Bundesministerium der Justiz, 2000. Available at: <http://www.bmj.de/ggv/eschurmo.pdf> (28.04.01).

⁴⁹ With reservations, see Note 21, pp. 5–6.

⁵⁰ Prof. Dr. Walter Rolland, the former chair of the above-mentioned *Schuldrechtskommission*.

⁵¹ Substantially, see Note 21, *BGB-KE* subsection 195 (2).

Application of different limitation regimes to different types of claims inevitably gives rise to the dangers accompanying the problems of competition described above. As the claims in contract law expire according to the same principles, the issue of competition primarily arises in relation with non-contractual obligational relationships and, first and foremost, regulation of law of delict, to which the limitation regime related to the criterion of discoverability applies (section 145 of the draft General Part of the Civil Code Act). From the viewpoint of Estonian law, the dangers entailed thereby may be considered minimum. This is primarily due to the reason that section 1149 of the draft Law of Obligations Act precludes the competitive situation of compensation for delictual and contractual damage for the majority of cases. The exemption applies, in principle, only to personal damage⁵² and is justified, taking into account the high level of protection of such legal benefits.

In conclusion, the author considers the choices made upon the preparation of the draft General Part of the Civil Code Act as correct. However, this is not an absolute truth free of any criticism, which should also be testified by this article.

⁵² This actually applies also to damage the prevention of which was not the purpose of the contractual duty violated. In such a case, a claim for damages can be filed according to the provisions of delictual liability, but this case does not represent a competitive situation (such damage is not compensated for according to the contract).

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Statutory Marital Property Law *de lege lata* and *de lege ferenda*

1. Introduction

In the light of the turbulent changing and reorganisation of the Estonian private law during the last decade, family law has modestly remained in the background and has, apparently to the greatest extent when compared to the other branches of civil law, maintained its decades-old structures and forms.

The applicable Family Law Act^{*1} entered into force on 1 January 1995. Its regulation method and prevalent ideology largely rely on the ESSR Marriage and Family Code of 1969^{*2} — a fact not concealed by the authors of the Family Law Act of 1995.^{*3}

When comparing the applicable Family Law Act of Estonia with the corresponding laws of different West European or American countries, then the general ideology of the Family Law Act of 1995 is not actually outdated or overly ignorant of today's forms of cohabitation. Rather, several structural solutions dating back to the Soviet period have been fairly progressive in their overall regulative content. Western countries have only within the last few decades come close to recognising certain approaches that have been taken for granted in communist and post-communist society for a long time, at least on the legislative level. For example, the Russian SFSR 18 December 1917 Decree on marriage, children and establishment of vital statistics registers stressed the equality of spouses, including their equal freedom to act in obtaining an income, and the equal treatment of children born of marriage and those born outside marriage. The so-called factual marriages were recognised as equal to registered marriages. In Germany, an equality law that granted married women greater rights than before (including a statutory marital property regime based on the equality of spouses instead of the usufructuary right of the husband) was passed only in 1957; but actual equality between spouses was achieved later by the adoption of further laws — the last regulation that provided for the

¹ Perekonnaseadus (Family Law Act), adopted on 12.10.1994; entered into force 1.01.1995. – Riigi Teataja (The State Gazette) I 1994, 75, 1326; last amended: Riigi Teataja (The State Gazette) I 1997, 35, 538 (in Estonian).

² Eesti NSV abielu- ja perekonnakoodeks (Estonian SSR Marriage and Family Code), adopted on 31.07.1969; entered into force 1.01.1970. – ENSV Teataja (The ESSR Gazette) 1969, 31, lisa; last amended: Riigi Teataja (The State Gazette) 1992, 11, 168 (in Estonian).

³ See E. Salumaa *et al.* Perekonnaseadus (kommentaar) (Family Law Act (Commentary)). – Juridica, 1995, No. 1, p. 2 *ff.* (in Estonian).

advantageous position of the husband (the adoption of the husband's family name as the marital name) was repealed only in 1993.^{*4} Similarly, Dutch law waived only in 1957 its regulation concerning the status of a married wife which resembled more that of a minor or custodian than that of an equal partner.^{*5}

Although the general concept of the Family Law Act of 1995 in the broadest sense also corresponds to the modern understanding of family relations, the fact that a number of problems have arisen from the aspect of practical application cannot be ignored. The main shortcoming of the present Family Law Act is its low degree of regulation. The Act contains a large number of declarative provisions, but frequently lacks specific private law bases for claims to enable a person court protection of his or her interests and rights. Parts of the Act are more like a compilation of programme positions and leave adjudicative bodies such a scope for decision that it is almost impossible to predict the outcome of a specific case from the provisions of law. The second direct need to review the Family Law Act of 1995 arises from the general reforms of civil law (including amendments to regulation of active legal capacity in the draft General Part of the Civil Code Act). Thirdly, in co-operation with different international organisations and family law jurists of other countries, the need has been revealed to pay more attention to internationally accepted and applied family law institutions and rights of action.^{*6} The time seems ripe to go on a second round and thoroughly review the applicable family law.

Family law regulates the proprietary relations between persons mainly in two areas: the proprietary relations of spouses and the proprietary relations arising from the right of guardianship (including between parents and children). This paper focuses on the proprietary relations of spouses, and chiefly on the statutory marital property relationship. As marital relations characterise a remarkable part of subjects of private law, it can be said that marital property law affects the entire private law economic turnover to a certain extent. Also, the arrangement of proprietary relations of spouses has a most direct link to the law of obligations and the law of property, which in view of the current reforms in Estonia renders the subject of marital property law highly topical.

2. Role of marital property regimes in family law

The marital property regime or property relationship sets out the real right status of each spouse's entire property (including the matter of belonging of the items of property under the sole ownership of one spouse or in the joint ownership of spouses), the procedure for administration (use and disposal) of the property, and its possible restrictions in view of the other spouse's interests, liability to creditors who are third persons, as well as rules for division of property upon termination of the proprietary relationship.^{*7} The objective of the marital property regime is — pursuant to the accentuation selected by the legislator — to balance the various, often conflicting interests: the personal interests of spouses *versus* general interests, the interests of the husband *versus* those of the wife; the interests of spouses *versus* those of third persons (creditors, successors). The world practice

⁴ See A. Lüderitz. Familienrecht. München: C.H. Beck'sche Verlagsbuchhandlung, 1999, p. 11, paragraph No. 28.

⁵ See M. J. A. van Mourik. Huwelijksvermogensrecht (Marital Property Law). Zwolle: W. E. J. Tjeenk Willink, 1994, p. 14.

⁶ Such recommendations and principles mainly arise from international conventions (European Convention on Human Rights, other UN or European Council conventions and recommendations, agreements of the *Commission Internationale d'Etat Civil*, as well as agreements concluded in the framework of the Hague Conference on Private International Law). International co-operation in family law largely takes place today on the level of international private law harmonisation (mutual recognition of national acts, such as marriages or divorces, and court judgements concerning maintenance and curatorship of children, *etc.*). Other co-operation projects mainly concern ensuring the rights of children or other areas belonging to the field of constitutional law (equality of spouses in choosing the family name, *etc.*). In the area of the main topic of this paper — marital property law — only one known agreement has been concluded under the Hague Conference on Private International Law: Convention of 14 March 1978 on the law applicable to matrimonial property regimes, which Estonia has not joined.

⁷ Further to the provisions on marital property relationships, regulation of the obligation to maintain the family and the mutual right of representation of spouses also plays an important role in the proprietary relations of spouses. These norms are to be distinguished from the marital property regime, insofar as their content is not to define the real right status of property, but rather obligations under the law of obligations, concerning which property relations are irrelevant. These obligations are also of such importance from the viewpoint of the family as a whole that they should apply as preceptive norms to any arrangement of the proprietary relations of spouses, so that the possibility to deviate from these under a marital property contract would be quite limited.

knows a large number of marital property regimes, which can be broadly generalised into two basic models: separate property and joint property regimes. However, these do not occur in the pure form, because the interests of the society and of an individual require a combination of the elements of both models.*⁸

Within a legal order, marital property regimes divide into statutory property systems and those based on a marital property contract.*⁹

A statutory marital property relationship regulates the proprietary relations of spouses only pursuant to law, unless they have entered into a marital property contract in the required form or until the statutory marital property regime is not terminated on other grounds (*e.g.* by court judgement).

The statutory marital property relationship is the most important property regime, the role and spread of which in both Estonia and in foreign countries by far exceeds the role of all alternative marital property relationships or those created by a marital property contract.*¹⁰ Although the relevant statistics are not available in Estonia*¹¹, it can be said that the vast majority of married couples do not enter into a marital property contract, which is why the statutory marital property relationship directly applies to the proprietary relations of the greatest number of married people. This requires that the statutory property system should be particularly elaborated and balanced, because it governs the relationships of people of most different proprietary positions.

3. Mutual proprietary rights created by statutory marital property law

In the post-World War II Estonian family law regulation*¹² the system of joint property of spouses has become so commonplace that its amendment or replacement by another regime regulating the proprietary relations of spouses has not even been discussed on a larger scale. The following part of the paper focuses on the problems related to the marital property regime established by the applicable law and provides an opinion on the ability of the regime to function.

3.1. Statutory marital property relationship *de lege lata*: joint property system

3.1.1. General

Pursuant to the applicable Family Law Act, the property acquired by spouses during marriage becomes the joint property of spouses, while property owned by a spouse prior to marriage remains his or her separate property.*¹³ According to family law terminology, this is the limited community property or joint acquisition regime*¹⁴, which as characteristic to community property relationships

⁸ See C. Hegnauer, P. Breitschmid. *Grundriss des Eherechts*. Bern: Stämpfli Verlag AG, 1993, p. 209, paragraph No. 22.03 *ff.*; G. Hohloch. *Die Entwicklung des deutschen Familienrechts im europäischen und internationalen Zusammenhang. – Brennpunkte des Familienrechts*. Berlin: Rechtspraxis, 1998, pp. 108, 143 (a review of statutory marital property regimes in European countries).

⁹ See also Family Law Act subsection 8 (2).

¹⁰ For instance, in the Netherlands marital property contracts are concluded in *ca* 25–30% of marriages. This is considered to be one of the highest rates in Europe. See M. J. A. van Mourik (Note 6), p. 75.

¹¹ Information on concluded marital property contracts is available from the marital property register, but it should be kept in mind that registration of marital property contracts in the register is not mandatory with respect to validity of the contracts — the contract is entered in the register only at the request of a spouse. An entry in the marital property register is relevant for third parties (Family Law Act subsection 10 (6); Marital Property Register Act subsection 7 (2)). Summarised statistical data on the contracts entered in the marital property register are also not available, as the registrars are the land registries acting in county and city courts (Marital Property Register Act subsection 2 (1)) and there is no common database.

¹² From 1 January 1941 the Russian SFSR Code of Marriage, Family and Guardianship Laws applied in the territory of Estonia, section 10 of which provided similarly to the later ESSR Marriage and Family Code of 1 January 1970 that property acquired by spouses during marriage is regarded as their joint property, while the property owned by the spouses prior to marriage remained their separate property.

¹³ Family Law Act subsection 14 (1), subsection 15 (1).

¹⁴ Limited community property in German: *beschränkte Gütergemeinschaft*; *Errungenschaftsgemeinschaft* or *Errungenschaftsbeteiligung*; in Dutch: *beperkte gemeenschap van goederen*.

entails a fairly strong proprietary bond between the spouses. Any community property relationship remarkably limits the spouses' economic freedom to act and thus greatly interferes with the personal sphere of spouses. Therefore, the question that needs to be answered first is whether the joining of proprietary rights enables to protect the rights of all parties concerned better than other possible legal structures do, and whether it thereby justifies the limitations characteristic to this property system.

Marital property systems creating joint property rights have been regarded as characteristic of the social nature of marriage — they correspond to the understanding of marital cohabitation as a social unit, which joins together both the personal and proprietary spheres of the spouses.^{*15} The concept of community property directly relates to the notion that marriage is for life: having permanently linked their fates, spouses agree to incur each other's proprietary losses. This shows that community property as a marital property regime does not intend to create flexible and differentiated solutions for divorce or other cases of division of joint property, but is chiefly targeted at fixing the joint liability of spouses during marriage. The great divorce rate, however, forces one to consider the need to arrange the division of joint proprietary rights in an adequately efficient manner while having regard to the reasoned interests of both parties.

3.1.2. Scope and definition of the sphere of joint proprietary interests

Pursuant to the statutory marital property regime set out in the Family Law Act of 1995, almost all valuable property acquired during marriage becomes joint property.^{*16} This also includes property acquired by a spouse on account of his or her separate property. Court practice too has largely relied on the grammatical interpretation method in this respect.^{*17} According to court practice, the proceeds of an item acquired prior to marriage, which is separate property, is regarded as joint property; only when joint property is divided the court may declare a part of the joint property to be the separate property of a spouse, or to deviate from the equality of the shares of the spouses if joint property was acquired on account of the separate property of one spouse.^{*18}

Against such a definition of joint property speaks the argument that simple replacement of an item belonging with separate property (such as a car) for another item of value (a sum of money corresponding to the market value of the car) means acquisition purely within the real right meaning, not in the economic meaning, and the property does not increase due to the transaction. This is why the items of value acquired on account of the separate property of spouses cannot be formalistically included in the sphere of joint proprietary rights of the spouses, and neither does it correspond to the society's perception of law. Such a property system significantly complicates the exercise of the collector's rights, because he cannot predict which items the court would assign to which spouse when joint property is divided. Pursuant to the Family Law Act of 1995, the entire property of a spouse related to economic activities (*e.g.* as a sole proprietor) is also regarded as belonging with joint property, insofar as it has been acquired during marriage. For example, a spouse running a car dealership should acquire the written permission of the other spouse for the sale of each car^{*19}, which may become an inhibiting factor to business, although the other spouse has essentially no interest in the business activities of the first spouse. On the contrary, the inclusion of one spouse's business-related property in joint property means a significant risk for the spouse who is not involved in the business, because if the economic situation impairs and property decreases, his or her share in the joint property also decreases. The possibility to regard property related to economic activities as the separate property of the spouse who runs a business exists in the form of the marital property contract, but as mentioned above, this possibility is not widely used. The marital property contract option cannot therefore be regarded as a sufficient means of hedging economic and other risks.

¹⁵ Also see the preamble of the ESSR Marriage and Family Code (adopted on 31.07.1969): "The Soviet marriage and family legislation shall actively contribute to **the final clearance of family relations of economic considerations** /.../" (author's accentuation — K.K.).

¹⁶ Exceptions are provided in section 15 of the Family Law Act. These are property acquired during marriage as gift or by succession, as well as property acquired after the factual termination of conjugal relations, and personal effects.

¹⁷ See as a typical example the judgement of the Tartu Circuit Court of 5 May 1999 No. II-2-128/99 (a spouse exchanged the apartment owned by the spouse prior to marriage for contribution in a dwelling association — as the exchange took place after marriage, the circuit court regarded the contribution as the joint property of spouses). It is worth mentioning that the prevalent interpretation of the Marriage and Family Code applicable prior to entry into force of the Family Law Act was different despite the similar texts of section 20 of the earlier law and section 14 of the present Act. Money received from sale of separate property also remained the personal, *i.e.* separate property of one spouse. Also items acquired for money belonging as separate property to one of the spouses were regarded as the separate property of that spouse. See J. Ananjeva, E. Salumaa. Eesti NSV abielu- ja perekonnakoodeks: kommenteeritud väljaanne (Estonian SSR Marriage and Family Code: commented issue). Tallinn: Eesti Raamat, 1974, p. 39 (in Estonian).

¹⁸ Family Law Act subsection 19 (2) 3).

¹⁹ As cars are movables subject to registration — Family Law Act subsection 17 (4).

The court may, at its own discretion, deviate from the principle that property acquired prior to marriage is the separate property of spouses and property acquired during marriage is their joint property.^{*20} Therefore, the division of property rights upon division of joint property is largely unpredictable until actual division. It is apparent that the existing statutory marital property law has no common and clear methodology to predict which part of property is to be divided as the joint property of spouses and which part is assigned to the sole ownership of one spouse upon division.

3.2. Mutual proprietary rights arising from the statutory marital property regime *de lege ferenda*

3.2.1. Overview of statutory marital property relationship provided in the draft law

The proprietary relationship set out in the draft law does not provide for the community property or joint property of spouses neither with regard to property acquired prior to marriage nor with regard to that acquired during marriage. Instead, the entire property of each spouse is regarded as separate throughout marriage (and the statutory proprietary relationship, respectively), which each spouse may freely use and dispose of at his or her own discretion. This so-called acquired property offset system would enable to avoid several disadvantages of the joint property relationship, which mainly relate to the extension of joint ownership to all property acquired during marriage, the restrictions arising from this to economic activities, and the complicated issues of liability.

The effects of the described property relationship mainly arise upon its termination (and not during it), which in turn relates to termination of marriage or entry into a marital property contract, which establishes another arrangement of the proprietary relationship of spouses. Essentially, the statutory proprietary relationship of spouses as provided by the draft law yields a similar result as the community property of spouses under the present Family Law Act: each spouse will have the right to an equal part of what the spouses jointly acquired during marriage, insofar as both spouses have contributed to the acquisition and increase of property with their work or this was enabled by the division of duties within the family. Instead of joint ownership, however, each spouse will be entitled to a right of claim under the law of obligations, pursuant to which he or she is guaranteed a fair part of what was acquired during marriage. The right of claim arises as from the moment the proprietary relationship terminates. On this basis, the increase in property acquired in the meantime is divided on the basis of whether and to what extent the property of spouses increased during the statutory regime. The spouse whose property increased to a lesser extent when compared to the other spouse is entitled to claim from the spouse whose property increased to a greater extent half of the amount by which the increase in the other spouse's property exceeds his or her own (offset claim). During marriage, the provisions regulating marital cohabitation and maintenance of family ensure that both spouses, in a due and adequate manner, participate in obtaining the means necessary to cover the needs of the family and through this enjoy the property and income of the other spouse.

Although the described marital property system does not render the property of spouses joint, it does not exclude the creation of joint proprietary rights of spouses. For example, property may be acquired into the common ownership of spouses, or into their joint ownership under a joint activity agreement (association agreement). Insofar as common ownership is concerned, the legal shares of each spouse are regarded as their separate property, which shall be disposed of having regard to the interests of the other spouse as a common owner and the family.

The so-called acquisition property system was already provided in Part I of the second book of the draft Civil Code of 1940 as prepared under the guidance of J. Uluots.^{*21} The present draft also uses the terminology of the 1940 draft as a basis.

²⁰ Family Law Act subsection 14 (2), subsections 19 (2) and (3).

²¹ The statutory marital property relationship described in this paper and set out in the new draft Family Law Act is largely based on the provisions of the Civil Code of 1940. The family law legislation of a number of countries (including the Netherlands, Germany, Austria, Switzerland, Ontario and Alberta provinces of Canada, Latvia, *etc.*) have also been used as an example.

3.2.2. Accounting methods

Concerning the statutory marital property regime, the draft law follows the example of the draft Civil Code of 1940 and introduces the following concepts of property: (1) basic property, (2) acquired property, and (3) aggregate property.

The practical effects of the proprietary relationship under discussion definitely depend on which part of the property of a spouse is regarded as his or her basic property and which part is treated as acquired property. These two categories of property are in an inverse relation and form the aggregate property of a spouse. According to the legislator's choice, basic and acquired property can be defined either toward the separateness of proprietary rights (if the bulk of a spouse's property is included in his or her basic property) or as creating greater mutual rights and obligations (the larger the acquired property, the greater the offset claim of the other spouse). The main criterion in this respect should be to balance the proprietary interests of spouses: the marital property regime should enable to have as adequate as possible regard to the extent to which the spouse entitled to offset of acquisitions has contributed to the increasing of the other spouse's property, *i.e.* creation of acquired property, during marriage.

(1) Basic property means, according to the draft law, the core set of the proprietary rights of a spouse and covers the following rights:

- (i) the property belonging to the spouse at the moment of entry into force of the statutory proprietary relationship;
- (ii) property acquired by the spouse during the statutory proprietary relationship by succession, grant or other disposal free of charge;
- (iii) property acquired by the spouse on the basis of the proprietary rights belonging with his or her basic property, as well as property acquired as compensation for transfer, destruction, damaging or deprivation of an item of basic property.

The latter clause sets out the principle that the basic property of a spouse does not merely include the property existing at a particular moment of time, but also the proprietary benefits directly related to such items of property (property acquired on account of basic property). The provision particularly covers various acts that a spouse is entitled to from third parties on the basis of ownership, as well as other real right relations and also relations under the law of obligations. These include, for example, the selling price or other consideration received upon transfer of an item, property acquired for money that belongs with basic property, as a rule, the benefit resulting from items of basic property²², insurance indemnity, compensation for expropriation, compensation received due to unlawful damage if an item of the property of the spouse was damaged, *etc.* Increase in the value of basic property (*e.g.* stocks) also belongs with basic property. Thus, the basic property of a spouse forms a certain core that remains basically in the same scope throughout the proprietary relationship and enables the spouse to dispose of such property at his or her own discretion without the legal status of this category of property changing from the aspect of the proprietary relationship of spouses. However, the draft law provides for an exception to the above general rule — namely, the basic property of spouses does not include the value of expenses made by each spouse during the statutory proprietary relationship on gaining benefit from the property through work or proprietary acts. The value of such expenses must be included in the acquired property of the spouse in connection with whose property such expenses were incurred. The exception attempts to adhere to the original principle of the selected statutory proprietary regime, the goal of which is to ensure each spouse an equivalent part of that which was acquired during marriage and to have regard to the efforts made by the spouses in the interests of each other and the family.

Rules are also established on which liabilities are deducted from basic property (liabilities arising from unlawful damage caused by the spouse, and also the sum by which the spouse has deliberately reduced the value of his or her property).

(2) Aggregate property is the whole property of a spouse after termination of the statutory proprietary relationship, less the spouse's total liabilities as of that time.

(3) Acquired property is an entirely figurative amount and does not constitute actual property in the proprietary relationship of spouses. The acquisition amount is the sum received by deducting the value of the spouse's basic property from the value of his or her aggregate property. As the

²² The benefit of a thing (the fruit) is defined in section 23 of the Law of Property Act (see also section 61 of the new draft General Part of the Civil Code Act). This covers both the natural and civil fruits of a thing — fee from granting use of a thing to a third person (rent, licence fees, *etc.*), dividends, interests, late interests, *etc.* There are, however, exceptions to the inclusion of benefits in basic property (see below).

composition of the basic property of a spouse is exhaustively set out by law, acquired property can also be defined negatively — it is the property which is not the basic property of the spouse.

Besides the above basic principles, the regime to be applied to items of property and the division methods of acquired and basic property are also allowed to be defined otherwise under a marital property contract. Spouses may provide in a marital property contract that certain types of things (e.g. securities), which are acquired during the property acquisition regime, belong with the basic property of the spouses.^{*23}

It is important to say that the purpose of the above categories of property is mainly for calculations. The calculations are based on the value of property that determine the size of the potential mutual rights of claim; the question here is not in the rights of ownership to any specific items of property. As opposed to the statutory regime of the presently applicable law, the given property system allows to focus on the dynamics of proprietary relations in the economic sense, *i.e.* it takes account of the actual changes that have taken place in the proprietary status of a spouse during the marital property regime.

3.2.3. Offset claim

If the acquired property of one spouse exceeds that of the other spouse, the spouse whose acquisition is smaller is entitled to one-half of the sum by which the other spouse's acquired property exceeded his or her own. The goal of the offset claim is to create a situation in which each spouse's property will have increased during marriage (and the statutory proprietary relationship, respectively) in equal parts. The prerequisite for applying the proprietary compensation mechanism is that one spouse's property increased during the statutory proprietary relationship, while that of the other spouse did not or only increased to a small extent. If each spouse's property increased equally, the offset result is zero and neither will have the right of claim against the other.

The offset claim is a financial liability under the law of obligations, which in itself does not give the right of claim to the ownership of specific items of property. Disputes over which spouse owns a particular thing or whether a thing belongs with the joint property of spouses should therefore significantly diminish. Instead, the calculated value of increase in property will have to be proved.

An offset claim arises when the proprietary relationship ends (upon divorce, conclusion of marital property contract or upon premature offsetting) and can also be bequeathed and assigned as from that moment.

3.3. Protection of rights arising from statutory marital property relationship

3.3.1. Restrictions on disposal of property

The present Family Law Act imposes restrictions on the disposal of joint property based on a mechanical division of things into movables, registered movables and immovables; no restrictions apply to transactions with separate property.^{*24} According to the regulation of the present Family Law Act, nothing prevents a spouse from transferring or encumbering, for instance, a residential building in which the family jointly resides, if the building belonged to the spouse already prior to marriage and is thus a part of his or her separate property.

On the other hand, according to the new draft law, restrictions particularly apply to the disposal of property that belongs with the sphere of both spouses' (the family's) joint and primary interests, regardless of their belonging with one spouse's independent set of property. Specific cases are provided in which a spouse may dispose of his or her property only with the consent of the other spouse:

- (a) if the object of the disposal or the assumed obligation is the whole property of a spouse or the majority of it, and

²³ By explanation, it should be mentioned that this concerns items of property that are not acquired on account of a spouse's basic property (e.g. securities are purchased for wages).

²⁴ Family Law Act subsection 17 (3)–(5).

- (b) if the disposal or the assumed obligation concerns the dwelling in which the family jointly resides, as well as the substantial property belonging with the dwelling (ordinary furnishings).

Other disposals do not presumably concern the welfare of the other spouse (who is not the owner of the property) and the rest of the family to such an extent as to justify the imposition of restrictions on disposal in the form of the obligation to obtain the consent of the other spouse. The lack of consent is also elaborated (voidness of transaction), but a possibility is provided to replace a missing consent with a later approval. At the same time, the restrictions on disposal of the entire property of a spouse or the bulk of it, as well as restrictions on the disposal of the object used as a dwelling, are planned to be absolute: acquisition in good faith by third parties is excluded in such transactions.

3.3.2. Joint ownership versus offset claim

The question may be raised whether the right of claim arising upon termination of the above-described marital property regime protects the spouse who is at a weaker position equally with the joint ownership provided in the present Family Law Act, which is created as of the moment of acquisition of property and can be henceforth protected under the relevant rights of claim. The question lies in the efficiency and potential effects of the measures established in the interests of the protected party. In case of joint property of spouses, with which one of the spouses concluded transactions adverse to the other party, the damaged party can apply for the protection of his or her interests only in court.^{*25} Acquisition of items of joint property in good faith by a third person as a result of disposal performed by one spouse is also not excluded. Moreover, the present Family Law Act does not enable a spouse to demand termination of the community property relationship similarly to termination of a marital property contract under subsection 11 (2) of the Family Law Act, if the other spouse is bankrupt or handles the joint property in a dissipatory or damaging manner.^{*26}

Thus, the compensation claim system under the law of obligations as offered in the new draft law enables to protect the interests of the economically less well-off spouse at least to the same extent as the joint property relationship under the Family Law Act of 1995. The draft law also provides for the right of claim for premature offset of acquired property if one of the spouses violates the proprietary (economic) obligations arising from the conjugal relationship, concludes transactions for which the consent of the other spouse is required without such consent, or otherwise intentionally damages the potential future offset claim of the other spouse. As a result, adverse effects on the spouse entitled to an offset claim can also be avoided if the marriage is not divorced. When acquired property is offset prematurely, then a separate proprietary relationship will take effect, thus preventing further damage to each other's potential proprietary rights and also creating a clearer situation for third parties.

3.4. Transactions between spouses

3.4.1. Applicable Family Law Act

Pursuant to section 16 of the Family Law Act, spouses may enter into transactions with each other concerning separate property, whereas no specific form is provided for such transactions. The joint effect of section 16 and section 14 raises questions due to their general formalistic approach that only takes account of the law of property meaning of acquisition: if one of the spouses desires to transfer to the other an item of separate property, the item becomes a part of the joint property of spouses under subsection 14 (1) of the Act. It is difficult to find a derogation to section 14 from section 16, which would enable to deviate, in relations between spouses, from the general rule, according to which everything acquired during marriage become the joint property of spouses. Therefore, the

²⁵ Family Law Act subsection 17 (2), Law of Property Act subsection 70 (6), section 71 *ff.*

²⁶ In case of a statutory joint property relationship, a spouse can, in such case, only apply for division of joint property in a court under subsection 18 (5), but this does not constitute termination of the proprietary relationship: property acquired after division of joint property will still be the joint property of spouses (subsection 18 (6)); the court cannot impose any other marital property regime for the spouses or oblige the spouses to enter into a marital property contract.

actual effect of transactions between the spouses is different from that probably desired by the spouses in their proprietary relations.^{*27}

Problems have also arisen from the applicable Family Law Act in determining the legal proprietary regime in the case when an item that belonged with the joint property of spouses is desired to be given to one spouse so that it would thereafter form a part of the separate property of that spouse. In such case, the law provides for the possibility to enter into a marital property contract^{*28}, while the applicability of section 16, pursuant to which the spouses could, during their marriage, fully or partly divide the joint property in any form, which can be done only in respect of specific items of property, remains unclear. In the first case (marital property contract) the result would be that in case of a mutual transaction between the spouses, the result would be the applicability of significantly stricter formal requirements than those generally provided for the same transaction (*e.g.* sale of a car) (notarised contract, entry in the marital property register in view of third parties). On the other hand, if joint property were permitted to be partly or fully divided under an agreement between the spouses in any form at any time during marriage, this may cause a situation in which the spouses are formally in a joint property relationship (*i.e.* they have not entered into a marital property contract within the meaning of section 9 of the Family Law Act), but have already divided all property pursuant to section 16. In such case, the provisions of neither the statutory marital property relationship nor the marital property contract fulfil their function, while third parties, including creditors, have no idea of the arrangement of proprietary relations between the spouses. A danger arises that the proprietary interests of the spouses themselves as well as those of creditors are damaged. However, such agreements must be regarded as permissible under the wording of section 16 of the presently applicable Family Law Act, insofar as the generally used interpretation methods do not yield a different result.

Due to the above problem, difficulties have arisen in practice concerning taxation of the mutual transactions of spouses.^{*29} Under tax law, the actual economic nature of a transaction serves as the basis and economic categories are applied (income and expense, accompanied by an actual change in the status of the property). As mentioned above, the bases of the Family Law Act of 1995 are the opposite when it comes to determination of joint property.

3.4.2. Solution provided in the draft law

In case of the “offset of acquisition” property relationship set out in the draft law, spouses are treated during the property regime like essentially unmarried persons as concerns their mutual proprietary relations (taking into account the above-described restrictions on disposal and other proprietary obligations to the family). This means that they can enter into transactions with each other similarly to all other subjects of law, regardless of any further demands besides those generally arising from the law of obligations. Therefore, a transaction between spouses by which one spouse transfers to the other a part of his or her property is not a marital property contract but an ordinary sale, grant or other disposal transaction.

Because during marriage the spouses do not have joint rights regarding property acquired by the other spouse, property actually transfers from one category to another under the statutory proprietary relationship provided in the draft act. Through this, transactions between the spouses acquire a clear meaning also for third parties, including from the tax law aspect.

3.5. Liability for obligations of spouses

3.5.1. Determination of liability in case of community property

A community property relationship frequently complicates the issues of liability in relations with third parties. Particularly, the issues of liability under the law of obligations may, with regard to the proprietary equality of spouses (equal rights of disposal) lead to conflicting results: if joint property were liable for all obligations of each spouse, this would mean giving an unreasonable advantage to

²⁷ However, the spouses still have the possibility to enter into a marital property contract, which can set out that property acquired from the other spouse will belong to the separate property of the first spouse (see Family Law Act subsection 9 (1) 2)).

²⁸ See the previous notes with reference to subsection 9 (1) 2) of the Family Law Act.

²⁹ See *e.g.* judgement No. 3-3-1-57-00 of the Administrative Chamber of the Supreme Court of 15 January 2001 (Riigi Teataja (The State Gazette) III 2001, 3, 22) (in Estonian).

creditors and damaging the spouse who has no debt obligations. If joint property were liable for joint debts only, this would damage the interests of creditors. But if a creditor has to file a claim against a spouse's part of joint property to satisfy a claim, the marital joint property would be divided on the grounds of circumstances completely unrelated to marriage. Such a "prerequisite" also makes it more difficult for a creditor to satisfy claims.^{*30}

Pursuant to the applicable Family Law Act, a spouse is liable for his or her proprietary obligations with his or her separate property and the part of joint property that would belong to him or her if joint property were divided. This implies that if the separate property of the spouse is not sufficient to cover the liability, joint property has to be divided, including at the creditor's request (through a bailiff). Such a solution cannot be regarded as fair to the other spouse (who is not the debtor), because the joint proprietary rights of that spouse and the spouse who is a debtor would be interfered with on grounds not related to the conjugal relationship. During execution proceedings, the right of the other spouse to possess, use and dispose of joint property is not guaranteed.^{*31}

To determine for which obligations a spouse is primarily liable with his or her separate property and for which obligations primarily with joint property, the Family Law Act sets out the assumption of obligations in the family's interests as the sole criterion (subsection 20 (2)). This is a provision that can be extremely broadly interpreted and its application is apparently not limited to transactions necessary to satisfy certain everyday needs, but also extend to greater investments (*e.g.* borrowing to buy immovable property), which depending to factual circumstances may benefit the family (and hence be in the interests of the family) or *vice versa* — damage the family (be against the interests of the family). It appears that completely different bases play a role in the creation of joint proprietary rights and obligations under the presently applicable statutory property regime. Whilst any property acquired during marriage (including property acquired on account of separate property) becomes joint property, obligations become joint only insofar as they have been assumed "in the family's interests". This can be seen as an imbalance, because the statutory marital property regime does not practically enable to increase the separate property of either spouse by natural methods during marriage.^{*32}

3.5.2. Regulation of liability in the draft law

According to the solution provided in the draft law, not only the property itself, but also the obligations of each spouse remain separated, which gives the spouse who handles his or her property rationally remarkably better protection against the other spouse's risky financial and economic transactions. Since there is no joint property, there are, as a rule, no joint proprietary obligations and no danger that one spouse's creditor could interfere with joint rights. Such a solution stresses the independent liability of the spouses as subjects of private law.

As exception to the divided proprietary liability principle are obligations arising from certain transactions made in the family's interests, which bind both spouses as solidary debtors. This particularly concerns the ordinary everyday needs of family members^{*33} and does not depend on the property regime applicable between the spouses.

4. Conclusions

One can assume from the above that community property, or otherwise said, joint ownership established by the statutory marital property law, is not necessary to protect conjugal cohabitation and the proprietary interests of family members from the legal aspect. Preservation of the property used to the family's benefit (such as the joint dwelling of the family, household property, *etc.*) can

³⁰ *E.g.* A. Lüderitz (note 5), p. 111, paragraph No. 296.

³¹ Illustrative court practice is available on the bankruptcy of one spouse. In its judgement No. 3-2-1-104-96 of 3 October 1996 the Supreme Court found that items belonging to the joint property of spouses cannot be excluded from the bankruptcy estate and they can be attached until joint property is divided – Riigi Teataja (The State Gazette) III 1996, 26, 350 (in Estonian).

³² This is only possible by entering into a marital property contract or by disposals from third persons free of charge (Family Law Act section 15).

³³ *E.g.* acquisition of food, thermal energy, lighting and clothing, health expenses, maintenance and education costs of children, as well as other needs such as recreation. Such obligations may not exceed a reasonable degree corresponding to the ordinary living conditions of the spouses. The scope of this definition is to be shaped by court practice, but it can certainly not cover major expenses targeted to the future, such as purchase of a dwelling, *etc.*

also be ensured by other means (such as restrictions on disposal).^{*34} This also covers events when the property that serves as the basis for such family life belongs under the sole ownership of one spouse and such events that the joint property regime established by the Family Law Act of 1995 does not take into account.

The main shortcoming of the community property relationship in view of today's economic and social relations is the excessive overlapping of the proprietary spheres of spouses, which in turn gives rise to complicated liability relations. It seems the most expedient to introduce such an arrangement of marital property that leaves the proprietary spheres of spouses more separate than they are presently, *i.e.* independent from the other spouse's acts that affect the status of the property. At the same time, events where the contributory acts of both spouses are required for a transaction would be limited to situations of decisive importance to both spouses and the family. The scope of the mutual proprietary rights and obligations of spouses should reflect both of their contribution to the increase in the family's property. As regards the proprietary relations of spouses, it is also important to proceed from certain economic criteria — as opposed to the ideological foundations of the ESSR Marriage and Family Code that served as the main example for the presently applicable Family Law Act.

A suitable opportunity to take account of the above aspects in an integral and balanced manner is offered by the draft Civil Code of 1940 in its acquired property offset relationship provided as the statutory marital property regime. The task in itself is not to change labels, but to try to avoid the shortcomings of the present marital property law.

The intended statutory marital property relationship described in this paper may, in its accounting details, seem more complicated and stolid than the joint property system provided in the Family Law Act of 1995. However, the fact that the law does not expressly provide for several decision criteria of joint property law and gives courts a high degree of discretion, does not mean that it is easy for courts to divide joint property in practice. Rather, clear rules help to avoid disputes.

Considering the multitude of marital property regimes and their richness in variations, one has to admit that it is not possible to create an ideal marital property system that would fully take account of the interests of all married couples and third persons concerned. Therefore, marital property law has to leave space for freedom of contract, which deserves discussion in a separate paper.

³⁴ The same concerns the provisions of subsection 19 (2) of the Family Law Act of 1995, according to which the division of proprietary rights of spouses can be made dependent on the children's interests also. Such a solution cannot be regarded as relevant insofar as this favours a vagueness in the proprietary relations of spouses. Maintenance of children and all-round protection of their interests must be ensured separately from the proprietary rights of spouses, taking into account the systems of family law.

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The Law of Property Act — Cornerstone of the Civil Law Reform

Introduction

The Law of Property Act provides bases for the law of property. This act is considered to be the first step in the creation of the new Estonian civil law. The need to create firm bases for the state and its economy emerged upon regaining independence in 1991 and adoption of the Constitution in 1992. Land reform, started at the same time, brought pieces of land onto the market, however, the Civil Code of the Estonian SSR did not provide regulation for commerce of a piece of land. In order to regulate the commerce of immovables, in 1991, the Ministry of Justice engaged Peeter Kask, a lecturer from the University of Tartu, in drafting the Immovable Property Act.^{*1} However, the draft did not meet the increasing needs of society. The main deficiency of the draft was its weak regulative power and its being a framework act; another problem was that the draft treated both the norms in private and public law in one and the same act — something characteristic of the Soviet legal order. A team under the guidance of Anre Zeno and Rein Tiivel which consisted of practitioners-students submitted an alternative draft.^{*2} At the same time, it was understood that it should be aimed towards the creation of a new comprehensive civil code. A principal commission of Civil and Commercial Code guided by P. Varul, a professor from the University of Tartu, started work in 1992. The draft of the Civil Code^{*3} which had been prepared under the guidance of professor Uluots for more than 15 years by the year of 1939, and could not be approved by the *Riigikogu* (Estonian parliament) because of the occupation, was taken as the model for the Code. The submission of this draft for the legislative proceeding of the *Riigikogu* was considered. A similar step was taken by the Latvians who effected the main parts of the Civil Code of 1938 with wording changes in 1992. The resolution of the *Riigikogu* concerning the continuity of legislation^{*4} that recommended to follow the acts which were in force before 1940 became the essential resolution of legal policy guiding the selection of sources. Estonia preferred to elaborate new drafts since the draft of the Civil Code had neither been

¹ P. Kask. Eesti Vabariigi kinnisvaraseaduse eelnõu. 1991 (Draft of the Immovable Property Act of the Republic of Estonia. 1991). Located in the Ministry of Justice (in Estonian).

² A. Zeno, R. Tiivel. Kinnisvaraseaduse eelnõu. 1992 (Draft of the Immovable Property Act. 1992). Located in the Ministry of Justice (in Estonian).

³ A. Traat. Tsiviilseadustik (Civil Code). Tartu Ülikool, 1992 (in Estonian).

⁴ Riigikogu otsus "Õigusloome järjepidevusest" (Resolution of the *Riigikogu* concerning the continuity of legislation). – Riigi Teataja (The State Gazette) 1992, 52, 651 (in Estonian).

adopted as law nor applied in practice. Society's need did not afford time to elaborate a comprehensive civil code and it was determined in favour of its adoption by books. The first law was determined to be the Law of Property Act in order to create a foundation for the emerging immovable property commerce. The complementation of the drafts of Zeno-Tiivel by provisions on movables was started by Villu Kõve and Priidu Pärna. The Government of the Republic submitted the draft to the parliament in February 1993^{*5} and the draft was passed on 9 June 1993 as the result of an expeditious proceeding.^{*6} During the proceeding period, the draft was further processed by the expert group guided by Professor Varul. The Land Register Act was passed in the autumn of 1993^{*7} and upon entry of the Law of Property Act into force on 1 December 1993, land registries commenced work.

The Law of Property Act follows the draft of the Civil Code both in its structure, content and abstract wording. The draft of the Civil Code was an advancement of the Baltic Private Law Code^{*8} (1864), that was based upon the legal family of Middle Europe and applied until the occupation, followed primarily the Swiss Civil Code while modifying the part of property law.^{*9} While compiling the draft of the Law of Property Act of 1992/93, the Civil Code was advanced primarily on the basis of the German Civil Code^{*10} although the codes of, for instance, the Netherlands and Louisiana were also analysed. Professor G. Brambring and Dr. S. Erber-Faller^{*11} delivered an expert opinion on the draft through the German Foundation for International Legal Co-operation. Still a claim can be made that the centuries-old tradition of rules of property law that follow the customs and understandings created with time are in effect again in Estonia. The phenomenon of the Law of Property Act is in the fact that it set the direction for all subsequent civil law acts and their sources. The passing of the Law of Property Act was a step of extreme importance in restoring the property relationships in private law.^{*12} The Law of Property Act was novel notwithstanding its traditional solutions since lawyers had not been in touch with the majority of the main instrumentality of property law for 50 years. Therefore, even today, the application of the property law may end up being problematic. For certain, the text of the law reflects the lack of knowledge and the chaotic nature of the period.

Things

Definition and classification of things is the issue of general provisions of civil law, however it is located in the Law of Property Act on practical grounds. Namely, the General Part of the Civil Code Act^{*13} was passed only in 1994, *i.e.* after the entry of the Law of Property Act into force, and it was necessary to regulate the objects of rights of the Law of Property Act — things — in order to establish real rights. Regulation of things in the Law of Property Act has a broader meaning that exceeds the need of the property law and establishes objects for the law of obligations, family law and succession law as well. The new draft of the General Part of the Civil Code Act also regulates things and therefore the first part of the Law of Property Act is subject to repealing.^{*14}

The main deficiency of the applicable Law of Property Act is that it is concentrated solely on things and does not establish the place of things in the system of subjects of the civil law. We do not find a general definition of things and classification into things and rights.

A thing is a corporeal object (section 7). All things that fill space in the physical sense may be treated as things. An aggregate formation has no meaning. Things are objects that have a spatial scope, are perceivable by senses and are located under the discretion and supervision of people. Things that cannot be spatially defined such as open air, flowing water, sea, cannot be considered to be things but rather as common benefits. However, the Act violates this principle. So, section 9 regards things

⁵ Vabariigi Valitsuse istungi protokoll nr. 9 2. veebruarist 1993 (Minutes No. 9 of 2 February 1993 of the session of the Government of the Republic). Located in the Ministry of Justice (in Estonian).

⁶ Asjaõigusseadus (Law of Property Act). – Riigi Teataja (The State Gazette) I 1993, 39, 590 (in Estonian).

⁷ Kinnistusraamatu seadus (Land Register Act). – Riigi Teataja (The State Gazette) I 1993, 65, 922 (in Estonian).

⁸ V. Bukovski. Svod grazdanskikh uzakonenii gubernii Bribaltiiskih s rasjasnenijami. Riia, 1914.

⁹ Schweizerisches Zivilgesetzbuch. NatR XVI, S. 1034/43.

¹⁰ Bürgerliches Gesetzbuch. RGBI, S. 195.

¹¹ G. Brambring, S. Erber-Faller. Ekspertarvamus kinnisvaraseaduse eelnõu kohta. 1993 (Expert opinion on the draft of the Immoveable Property Act. 1993). Located in the Ministry of Justice (in Estonian).

¹² D. Liiv. Asjaõigusseadus – mis see on? (The Law of Property Act — What is It?). – Ärileht, 30. juuni 1993 (in Estonian).

¹³ Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). – Riigi Teataja (The State Gazette) I 1994, 53, 899 (in Estonian).

¹⁴ Tsiviilseadustiku üldosa seaduse eelnõu, 2001 (Draft of the General Part of the Civil Code Act, 2001). Available at: <http://www.riigikogu.ee>.

which due to their nature cannot be owned by anyone and may be used by everyone as common things. Declaration of ground water to be owned by the state is also questionable (section 134).

The main classification of things is their division into movables and immovables (*res mobile, res immobiles*). This division is the starting point for the separate treatment of real rights and is expressed in differences in the creation, scope and extinguishment of a right and distinct rules of form of transactions. Commerce of movables is determined by provisions on possession, commerce of immovables — by provisions of land register. The Act follows the principle of *numerus clausus* regarding immovables — the Act provides an exhaustive classification of movables. Immovables are plots of land together with their essential parts (section 8). Things which are not immovables are movables. A special classification of movables is accessories, which serve the principal thing and are related thereto through a common economic objective and their corresponding spatial relationship (section 18). The rights and obligations whose object is the principal thing extend to the accessory as well unless otherwise provided by parties. Provisions concerning immovables may be applied to certain movables with higher commercial value. Pursuant to the Law of Ship Flag and Registers of Ships Act¹⁵, vessels with a length of more than 12 metres may be one such exception. By law, provisions on things may be applied also to rights. Such exceptions are the right of superficies of frequent commerce (section 241) and the forms of divided common ownership resulting from the Apartment Ownership Act¹⁶: apartment ownership (section 1) and apartment building lease (section 24). Property is defined through an aggregate of things, rights and obligations belonging to a person and it is important primarily in relationships of family and succession law (section 30).

A thing and its essential parts are not an object of different rights and obligations (subsection 15 (2)). This refers primarily to commerce in property law, not establishment of rights in the law of obligations. Essential parts of a thing are component parts which are permanently attached to the thing and which cannot be severed from the thing without the thing being destroyed or changed in character. This treatment is sort of narrow since it is important that the essential parts themselves are not destroyed upon severance. The essential parts of a plot of land are things permanently attached to it such as constructions, forest, other vegetation and unharvested fruit, and the real rights relating to the plot of land which belong to the actual owner of an immovable (section 16). A building erected on the basis of a real right (a servitude, a right of superficies) as well as buildings attached to a plot of land for a temporary purpose (on the basis of a right in commercial lease) are not essential parts of a plot of land. Pursuant to section 13 the Law of Property Act Implementation Act¹⁷, a significant exception is the commerce of buildings that are deemed to be movables until the entry of the plot of land under a building in the land register while returning or privatising it or while constituting the right of superficies for the benefit of the owner of the building. A building shall not be entered in the land register without land.

Possession and land register

The provisions of possession and land register create the general part for specific real rights or to the special part of property law. These are completely novel norms and they can often be underestimated in the practice. The commerce of movables is based upon the institute of possession, the commerce of immovables upon the institute of the land register. Both have been formed under the direct influence of Estonian legal traditions and the Germanic legal family.

Possession has three functions in the Estonian law of property. Firstly, the signal function pursuant to which possession indicates the ownership of movables. Pursuant to section 90, a possessor of a movable and any earlier possessor shall be deemed the owner of the thing during the possessor's possession until the contrary is proved. Secondly, the function of creating a right since the delivery of possession is a basis for the creation of the majority of rights in movables (transfer, occupation, *etc.*). Although several movables (cars, buildings, *etc.*) are registered in state registers, these entries do not have an influence of creating a right, at the same time, possession has no meaning upon the creation of immovable property ownership. Thirdly, the function of protection that provides owners

¹⁵ Laeva lipuõiguse ja laevaregistrite seadus (Law of Ship Flag and Registers of Ships Act). – Riigi Teataja (The State Gazette) I 1998, 23, 321 (in Estonian).

¹⁶ Korteriomandi seadus (Apartment Ownership Act). – Riigi Teataja (The State Gazette) I 2000, 92, 601 (in Estonian).

¹⁷ Asjaõigusseaduse rakendamise seadus (Law of Property Act Implementation Act) – Riigi Teataja (The State Gazette) I 1993, 72/73, 1021 (in Estonian).

of a movable or an immovable with the right to protect their possession. Certainly, possession is one of the transferable rights of an owner.

Possession (*possessio*) is actual control over a thing (section 32). Possession is not defined as a right and therefore it is not possible to waive possession by agreement, rather it is presumed that actual control over a thing or over the means which enable actual control over the thing is transferred (section 36). Exercise of possession does not require active legal capacity from the possessor nor a legal basis. It suffices to have intention to exercise possession, that there is visible or sensible spatial relationship between a person and a thing and readiness to protect the achieved actual relationship. Estonian law does not directly differentiate between possession of an owner and another, however there is gradual possession in the form of direct and indirect possession (subsection 33 (2)) that is created pursuant to some legal relationship (residential lease, pledge). The purpose of such gradual possession is to extend the circle of persons who apply the remedies of possession protection. Persons who serve possession and exercise actual control over a thing according to orders of another person are not deemed to be possessors.

Instrumentality of possession protection has the purpose of safeguarding legal peace and preservation of existing possession relationships and quick removal of any deviations. Possession is protected against any arbitrary action (section 40). Remedies of possession protection belong to all possessors irrespective of the fact whether their possession has a legal basis. Therefore, it may be the only protective remedy for a person to retain his or her actual position. Protection of possession may extend from the exercise of self-help against arbitrary action or using force in respect of the one who violated or deprived the possession up to the right of pursuing movables (section 41). Additionally, the possessor has the right to search for a movable that ceased to be under the control of the possessor on an immovable of another (section 42). There have been some erroneous applications in practice in exercising self-help that involves erroneous justifications sought in the insufficient legal basis of the possessor to possession, which occurs more frequently upon the expiry of commercial and residential lease agreements. Filing actions in protection of possession is a remedy of possession protection of low usage in practice that involves the reclaiming of a thing to a former possessor and where no rebuttal can be made founding it on insufficient legal basis for possession (section 43). The only rebuttal can be that the possession of the plaintiff was initially based upon an arbitrary action in respect of the remover of the possession. A person who was late with the exercise of self-help or who has no possibility to commence dispute on a legal basis due to its absence has to file an action for possession protection. Actions on possession protection can be filed within one year after the violation or removal of the possession.

Historic traditions and the draft of the Civil Code were determining in the creation of provisions of the land register. The latter followed Swiss law in modifying the system of land register. While compiling the Law of Property Act, this part was further developed following the model of the German Procedure of Land Register^{*18} which supported the abstraction principle that has created substantial conflicts in unequivocal application of the act. The land register under creation had to become the foundation and central regulator of the commerce of immovables. Substantial norms of the law of land register are stipulated in the Law of Property Act and formal ones in the Land Register Act, however, this difference could not be ultimately maintained and so procedural norms can also be found in the Law of Property Act. The substantial law of land register provides for a so-called hard system of the law of land register, formal law of land register is a part of proceedings on petition (*freiwillige Gerichtsbarkeit*). The register is maintained by land registries in courts of first instance (city and county courts), entries are made by judges and assistant judges. The latter is an institution implemented from the year 1997^{*19} corresponding to the nature of *Rechtspfleger* in the Germanic legal tradition. The creation of a judicial register was a significant advancement in fixing the facts in private law and subsequently the commercial register, the register of foundations, *etc.* have been created with courts. Although the court has to establish premises for entry during proceedings on petition and do it independently from the administrative power and be guided by law only, many think that maintenance of judicial registers is an inappropriate exercise of administrative function for the court system.^{*20} Primarily this was the opinion of judges themselves which reflects their narrow approach to the mission of judicial power under the conditions of the state based upon the rule of law.

¹⁸ Grundbuchordnung. RGBI, S. 1073.

¹⁹ Riigi Teataja (The State Gazette) I 1996, 42, 811 (in Estonian).

²⁰ Riigikohtu arvamus kohtute seaduse eelnõu (607 SE II) kohta, 5.03.2001 (Opinion of the Supreme Court concerning the draft of the Courts Act (607 SE II), 5.03.2001). Located in the Ministry of Justice (in Estonian).

A land register is maintained for immovables and related real rights. The obligation of entry exists for all immovables belonging to persons in private law. As a rule, the entry of immovables of the state and local governments is optional and it proves to be necessary in cases where their transfer is desired (section 51). Plots of land, rights of superficies, apartment ownership, apartment building leases are entered in the land register and sea vessels are entered in the ship register. The register part is maintained in the form of a fascicle and consists of four divisions (composition of an immovable, an owner, encumbrances and restrictions, and mortgages), in addition, a land registry file shall be started for each immovable to retain original documents. Maintenance of the land register has neither implemented a pure personal nor real folder principle. All plots of land owned by one owner and located in a land registry jurisdiction may not be entered on the same sheet, at the same time each plot of land may not be entered on a separate sheet. Entry of several separate plots of land in a register part would not enable their encumbrance by cadastral units. All plots of land have to be registered in the State Cadastre under the administration of the Ministry of the Environment and operations of which have been established by the Cadastral Register Act.^{*21} The cadastre establishes technical-economic regime for plots of land and entries have no legal meaning, however, the land register establishes the regime of immovables in property law and the entries have legal effect. Unlike many countries in transition, Estonia has been able to avoid joining these two registers and has laid emphasis on IT solutions and cross-usage of databases.

The land register is public and everyone has the right to examine land register information and to receive extracts therefrom (section 55). Although the complete publicity extends only to the register part and not to the land registry file, the transparency of the regime of immovables in law of property is guaranteed to third persons by law. No one may be excused by ignorance of information in the land register.

Entries have been furnished with a positive and negative effect — a right that is not entered or that is deleted does not exist and anything entered is applicable and correct (section 56). The State provides entries with a guarantee and in order to actually safeguard it, the commerce in immovable property has been subordinated to notarial and judicial review. Anyone denying the premise of lawfulness has the onus of proof. The presumption of correctness of entries is not extended to cadastral information or restrictions in public law with no entry. The application of the principle of the presumption of correctness is unclear in cases where the transfer of ownership occurs on the basis of law or an act by the state authorities (succession, compulsory execution). Since the state safeguards the correctness of entries, expiry of claims arising from a real right entered in the land register shall not be applied (subsection 58 (3)). An ultimate expression of the positive effect of an entry is the acquisition of an immovable or a real right in an immovable in good faith relying on an entry, this principle is characteristic of only some procedures of land registers in Central Europe (subsection 56 (3)). Ostensibility of law that has been created by law (*Fiktionsschutz*) has to replace the insufficient right of a transferor and create certainty for investments as a solution of legal policy. Ostensibility of law does not cure other deficiencies that exist at a transfer (insufficient right of representation or active legal capacity) and these cases do not create possibility for acquisition in good faith. An acquirer is in bad faith if he or she knew about the unlawfulness of an entry or interfered with a notation entered pursuant to a good faith acquisition. The law has to specify at which moment should the acquirer be in good faith in order to acquire based upon the ostensibility of law. Lately, opinions against acquisition in good faith have become more frequent since this has been misused to transfer several immovables against intention of owners on criminal purposes on the bases of fabricated authorisations.

It is natural for a land register that is based upon the principle of entry and perfection of the register that real rights are created if these are entered in the land register and rights are not transferred between parties to a transaction without an entry (section 58). There are exceptions to this general rule relating to bases of creation of an ownership, outside the register, there are some mortgages, rights of pre-emption and real encumbrances. The land register allows establishing real rights in a thing owned and this may be created either from the beginning or the regaining of a real right by the owner subsequently (consolidation of real rights, subsection 66 (2)).

Entries shall receive a ranking in the land register and are placed in a ranking relationship that follows the timely order of registration in the land registry journal — the one who has an advantage in time, has an advantage in a right. The order of rights is moving (sections 59–61): upon deletion of fore rights, subsequent rights move ahead in ranking. Rankings may be changed upon the agreement of holders of rights not violating interests of intermediate holders of rights, thereby the owner has the opportunity to reserve a ranking.

²¹ Maakatastriseadus (Cadastral Register Act). – Riigi Teataja (The State Gazette) I 1994, 74, 1324 (in Estonian).

In the interests of clarity and revisability of the register, only entries permitted by law may be entered — real rights and related notations. Rights of obligation and restrictions in public law shall not be entered in the land register. Notations are divided into preliminary notations, objections, notations concerning prohibition and notations (section 63). Since a right shall be transferred only upon entry, a preliminary notation allows reserving a ranking for a future establishment or deletion of a real right. A preliminary notation shall not prohibit further transfer of an immovable, however, the signal function of a notation prevents its acquisition in good faith if contrary to it. The person entitled pursuant to a preliminary notation may request the deletion of disposals contrary to the preliminary notations and this is also applicable to transfers occurred on the basis of a court judgement. Entry of an objection is an opportunity for a possibly quick response by a person who alleges the incorrectness of the land register and in such a case he or she has not to prove the incorrectness of the register. At the same time, an objection does not prevent further transfer of an immovable, but it prevents its acquisition in good faith. However, a notation concerning prohibition prohibits the transfer of an immovable or a real right contrary to the notation of prohibition and as a rule, it shall be entered to secure an action by a court ruling. A notation makes visible certain circumstances concerning real rights that are permitted by law.

Entries shall be made, changed and deleted on the basis of a registration application which shall be a declaration of intention of persons to make an entry and directed to the land registry (section 64). Additionally, the land registry controls the existence of a declaration of intention or an agreement under law of property. An entry itself is a public act where the actual implementation of an intention in private law is set to be dependent on activity of state officials. The registration procedure as proceedings on petition is by its nature a procedure based upon consents. Any party may express a change in a right, but the party concerned has to give consent to the making of the entry. If no consent is given, the interested party has to commence an action where the pursued judgement shall substitute the missing consent for registration. A confusing exception is section 70 of the Land Register Act which allows the filing of a complaint with a circuit court against the entry itself. A registration application and a consent of a concerned person are subject to notarial control. A bilateral registration application including agreement for making of an entry is presumed to be formed in case of an entry creating rights (Land Register Act section 34). Section 64 of the Law of Property Act considers a real right contract to be a bilateral registration application if it includes an expression of an intention to make an entry. This norm creates much ambiguity in the relationship of substantial law of property and formal law of land registers and needs to be amended. The need to submit agreements in law of obligations to the land registry is also unclear due to the mixed norms borrowed from diverse legal orders (Land Register Act subsection 35 (1) 1)).

Ownership

Ownership (*dominium*) is the largest real right. The inviolability of the property is secured by the Constitution (section 32). Ownership is full legal control by a person over a thing (Law of Property Act section 68). An owner has the right to possess, use and dispose of a thing, and to demand the prevention of violation of these rights. In respect of the latter, the owner has the remedy of a vindication action in addition to remedies of possession protection (section 80) and the right to file an *action negatoria* (section 89). Ownership may be restricted only by law.

Following the object of ownership, it is divided into movable property ownership and immovable property ownership. Pursuant to the Law of Property Act, first the general rules concerning the ownership are provided and thereafter the special norms concerning movable property ownership and immovable property ownership. Dissimilarities exist namely in the bases of ownership creation. Still, the biggest discussion during the drafting involved the use of the notion ownership (*omand*) since presently it is synonymous to ownership (*omandiõigus*), but pursuant to the Civil Code of the Estonian SSR^{*22} it meant the object of the ownership.

An ownership may belong to several persons and in that case it is referred to as a shared ownership. Shared ownership is divided into common ownership and joint ownership (section 70). In case of a common ownership, the shares of co-owners are determined in legal shares, in case of joint ownership the shares are not determined. If ownership belongs to several persons, it is presumed that common ownership is created in equal legal shares belonging to owners. Sections 71–79 of the Law of Property Act provide norms for common ownership. Joint ownership is created in cases provided by law and

²² Eesti NSV Tsiviilkoodeks (Civil Code of the Estonian SSR) – ENSV ÜVT 1964, 25, 115 (in Estonian).

provisions of common ownership are applicable to it as far as there are no special norms. A form of joint ownership exists between spouses in respect of property acquired during the marriage as far as they have not agreed otherwise by notarised marital property contract. If a right is owned by persons jointly (association), provisions of common ownership are applicable to it as well.

A special form of common ownership is the apartment ownership that allows the commerce of physical shares of a building as an exception. The first Apartment Ownership Act²³ was passed in 1994, a new act complemented by the provisions of building administration entered into force on 1 July 2001. The German *Wohnungseigentumsgesetz*²⁴ was taken as a model for creating the Apartment Ownership Act. On the basis of an application, an owner has the right to divide the immovable property ownership into apartment ownerships. An apartment ownership consists of a physical share (residential or business premises) and a legal share of the common ownership related to it (section 1). Provisions on an immovable are applied to an apartment ownership and therefore, independent register part shall be opened for each apartment ownership in the land register and the apartment ownership shall be transferred and encumbered through it. Similarly, it is possible to divide a right of superficies into apartment building leases. Pursuant to section 13 of the Law of Property Act Implementation Act, objects similar to the apartment ownership are included in commerce as a temporary exception — such object consists of premises and related legal share of a building formed as a result of privatisation of residential premises without land.

Diversity exists among bases of creation a movable property ownership: delivery, occupation, prescription, finding, treasure, specification, confusion, accession, acquisition of natural fruits. They can be differentiated primarily by the fact whether the ownership is created for the first time or whether it involves a transfer of ownership. Transfer, occupation and prescription have the largest value in commerce.

Movable property ownership is created by delivery of a movable if the transferor delivers possession of the thing to the acquirer and they have agreed to the transfer of the ownership (Law of Property Act section 92). Ownership creation requires both the transfer of the actual control and the real right contract. The form of the real right contract is not determined and it may also be conditional providing conditions for transferring the ownership with reservations. Until 1999, a norm expressing the causality principle from the draft of Civil Code according to which a transfer of ownership has to have a legal basis. Motivation to repeal this provision was found in the need to implement the pure abstraction principle or the independence of an ownership transfer of a transaction in the law of obligations.

There are several exceptions to the general rule of transfer. Similarly to German law, delivery of possession may be substituted with the agreement by assignment of the right to demand delivery (section 93) or leave possession with the transferor (section 94). In the latter case, it is not prohibited to use the norm with the purpose of acquisition of security ownership as provided by section 717 of the Swiss Civil Code as well as section 968 of the draft of the Civil Code. An agreement in law of obligations is sufficient if the thing is already in the possession of the acquirer (subsection 92 (2)).

Special norms for the transfer of a building as a movable derive from section 13 of the Law of Property Act Implementation Act. A building or its part may be transferred as a movable until the entry of the land under the building in the land register but not later than 31 December 2001. The transfer transaction has to be notarised and registered in the State Building Register. However, an entry in the Building Register does not have an effect of creating a right. Ownership shall be transferred pursuant to the provisions of the Law of Property Act necessitating the delivery of possession and real right contract. In practice, the transfer of ownership through its actual control poses serious difficulties.

The central position is occupied by allowing the acquisition of movables in good faith. As a resolution of legal policy, a person acquires a movable in good faith as of the time of acquiring the possession even if the transferor was not entitled to transfer ownership (subsection 95 (1)). “Ostensibility of law” created by the legislator according to the model of the German legal tradition substitutes the absent right of the transferor to transfer ownership but does not remove other legal errors (insufficient representation, active legal capacity, etc.). A thing may be reclaimed from an acquirer in bad faith any time not applying the limitation of an action. There are substantial exceptions to this general rule. Acquisition in good faith shall not be effected if the thing was stolen from the owner, lost or dispossessed in any other manner from the owner against the will of the owner. Such thing may be reclaimed from a possessor in good faith until the possessor has acquired the thing by prescription.

²³ Korteriomandi seadus (Apartment Ownership Act). – Riigi Teataja (The State Gazette) I 1994, 28, 426 (in Estonian).

²⁴ Gesetz über das Wohnungseigentum und das Dauerwohnrecht. BGBI, I 175.

Ownership is created by prescription if a person or his or her legal predecessor possesses movables in good faith and without interruption for five years as an owner (section 110). However, such right of reclaim does not exist if a thing had been acquired by public auction. Law needs to be specified to determine the moment of good faith more precisely and how it applies to alternatives of transfer.

There are fewer bases for the creation of immovable property ownership. Most important is the creation and extinguishment by entry in the land register (section 118); occupation by state and prescription are less common. Outside the land register, an ownership shall be transferred in case of succession and upon acquisition by one spouse, the ownership is created also with the other spouse. In such cases, the land register shall become incorrect and needs to be corrected. The transfer of ownership upon compulsory execution is unclear and allegedly an ownership is transferred only by entry also in case of compulsory execution (Immovables Expropriation Act section 41^{*25}). Irrespective of registration, ownership is created with the state and local governments. In case of prescription, the ownership may be created after registration when the possession that has been in good faith and without interruption for ten years becomes ownership (section 123). In addition to prescription of the land register, rare extra-land register prescription is known when a person, who has for thirty years possessed an immovable, may demand his or her entry in the land register as the owner if this is not evident from the land register (section 124).

However, the most important innovation of the ownership treatment is the provision of the real right contract (section 120) according to the model of German law and recommendation of foreign experts.^{*26} A real right contract is an agreement between the transferor and the acquirer concerning transfer of immovable property ownership or for encumbrance of an immovable with a real right. Notarisation of the agreement is presumed. All norms of the general part of civil law are applied to the transaction in law of property. As an exception, it is not permitted to conclude a conditional real right contract for transfer of immovable property ownership that could start influencing the clarity and certainty of the land register. As the existence of such agreement is necessary for the establishment of all real rights, it would be more proper to place the norm in the general part of the law of property and not in the chapter on creation of immovable property ownership. Acquisition of real rights in good faith is regulated concerning the land register as well. German experts recommended the stipulating of general provisions concerning real rights in immovables and leave special norms on each real right in the special part according to the model of the German Civil Code, however, the drafters decided to follow the draft of the Civil Code.^{*27}

In addition to the real right contract as a transaction of execution, a conclusion of a transaction in the law of obligations is presumed (primarily the contract of sale) that would create a *causa* to the ownership transfer and by which the acquisition and transfer of an immovable is required. Both agreements are usually included in the same notarised document. The Law of Property Act (section 119) provides also the requirement for notarisation of the causal transaction on the grounds that the Law of Property Act was effected before the law of obligations. The delivery of possession has no meaning in law of property in respect of immovables.

The purpose for clear distinction of the real right contract was the importation of abstraction principle to the Estonian civil law according to the model of German law. The idea that allegedly comes from Savigny has to serve legal certainty and clarity, so that errors in a causal transaction would not influence the legal status of an immovable and would allow the establishment of abstract real rights of the owner. While the causality principle recognised in many European legal orders involves invalidity of the transfer of an ownership in case of an invalid transaction in law of obligations, its absence or invalidity does not influence the legal basis of the ownership or real right contract only in some systems following the abstraction principle, except in cases which involve identical errors upon simultaneous execution of both transactions. An ownership may still be reclaimed based upon unjust enrichment. Consistency was missing while imposing the abstraction principle to the draft. Therefore, conflicts can be found in the law where the solutions following the Swiss law and causality principle do not coincide with the theory of abstract validity of an ownership of the German law. In respect of real rights in movable property, the nature of real right contract has not been clearly defined. Until 1999, section 120 of the Law of Property Act was in effect in a form that allowed the conclusion of a real right contract only on the basis of a causal transaction and section 64 of the Law of Property Act set the obligation to submit all agreements in the law of obligations to the land registry. In fact, the abstraction principle can be conclusively implemented only upon entry into force of the law of

²⁵ Kinnisaşa sundvõõrandamise seadus (Immovables Expropriation Act). – Riigi Teataja (The State Gazette) I 1995, 30, 380 (in Estonian).

²⁶ G. Brambring, S. Erber-Faller (Note 11), p. 8.

²⁷ *Ibid.*, p. 11.

obligations which would provide appropriate definitions for transfer transactions since the applicable Civil Code of the Estonian SSR did not recognise the principle of abstraction either. Regulation of unjust enrichment in the law of obligations is important as well.

Restricted real rights

Restricted real rights are divided into servitudes, rights of pre-emption, real encumbrances, rights of superficies and rights of security. It was discussed while drafting the Law of Property Act under which common headline these rights should be. An expert group under the guidance of Professor P. Varul recommended the use of a term “rights to things of another” that followed the Roman law (*jura in re aliena*).^{*28} This solution would have been too narrow in the situation where the Estonian law of property recognises real rights to one’s own thing. The notion of a restricted real right was used already by the draft of the Civil Code (Part 3 of Book 4).

Servitudes are divided into real servitudes and personal servitudes. Servitudes also presume a notarised agreement and entry in the land register. A real servitude exists between a servient and dominant immovable. Content of a real servitude is the right of the actual owner of the dominant immovable to use the servient immovable in a particular manner or the obligation of the actual owner of the servient immovable to refrain from the exercise of the owner’s right of ownership or filing claims for the benefit of the dominant immovable (section 172). A real servitude shall not require the owner of the servient immovable to perform any activity except acts that have a meaning of assisting. Term and charge of servitudes is not regulated by law and therefore this may be determined by parties. As a distinction from other European Civil Codes, the Law of Property Act provides a list of real servitudes which is, however, not exhaustive. This solution can be explained by the purpose that the text of law has to make the nature of servitudes as a completely new real rights clear to applicers. Some servitudes are obsolete and do not justify their place in law (servitude of pasturage, servitude of watering livestock).

Personal servitudes are divided into the usufruct and the personal right of use. A usufruct entitles a person to use the encumbered thing and to acquire the fruits thereof (section 201). In fact it is a commercial lease in law of property. As an exceptional restricted real right, the establishment of a usufruct is also allowed to movables and rights in addition to immovables in order to allow the creation of a comprehensive right of use. The duration of a usufruct is limited by the lifetime of a natural person or the term of 100 years for legal persons. Generally, a usufruct as a personal right is not transferable. Usufruct may be transferred to a successor if it has been agreed upon establishment of the usufruct. As such, the usufruct substitutes the inheritable right of perpetual lease which was not provided for as a real right. The stipulated right of commercial let upon the owner’s consent is an excessive restriction since it restricts the rights of usufructuary to a fruit of a thing. Several norms originating in the draft of the Civil Code were abridged while compiling the Law of Property Act and it was provided that rights and obligations resulting from a usufruct shall be determined by the transaction of establishment of a usufruct. This solution has to be considered to be a failure since such agreement shall not have influence in law of property in respect of the actual owner of an immovable.

A personal right of use provides a specific person with rights with respect to the immovable which in substance corresponds to a real servitude (section 225). The personal right to a residential building is provided separately and it refers by nature to a residential lease in law of property. A personal servitude is not transferable either, except in a case where a utility network or a construction has been constructed based upon it. This exception has been justified with needs of economic life. Establishment of personal rights of use in the benefit of owners of utility networks shall become a substantial trial for the land register since pursuant to section 15² of the Law of Property Act Implementation Act, servitudes in the benefit of the owners of the existing lines have to be established within ten years as of the registration of the plot of land.

Estonian law recognises a real encumbrance as an obligation to perform periodic registration acts in law of property the nature of which is registration acts by the actual owner of an immovable to pay periodic payments in money or in kind or perform acts (Law of Property Act section 229). Unlike a real servitude, an owner of an encumbered immovable is required to perform activity. Owner’s liability in respect of executions is limited by the immovable, but in three years after the emergence

²⁸ Tsiviil- ja kaubandusõiguse komisjoni arvamus AÕS eelnõu kohta. 1993 (Opinion of the Commission of Civil and Commercial Law concerning the draft of the Law of Property Act. 1993), lk. 3. Located in the Ministry of Justice (in Estonian).

of a right of claim, the particular obligation becomes a personal obligation of the owner. A real encumbrance may be established in the benefit of a specific person or the actual owner of another immovable. A real encumbrance may be created on the basis of a notarised transaction upon entry in the land register or it may result directly from law in case of real encumbrances in public law. In practice, the establishment of real encumbrances is most common as securities of payments for the right of superficies.

Estonian law provides for the right of pre-emption as a right of acquisition in law of property (section 256) which provides the person entitled to pre-emption with the right to take the place of the transferor of an immovable. This right may be established for the benefit of a certain person or for the actual owner of another immovable. The right of pre-emption may be established for all cases of transfer and it may also be extended to succession. A right of pre-emption is created on the basis of a notarised transaction by entry in the land register or it may result directly from law. More common establishment of the right of pre-emption in practice is its establishment concurrently with constituting the right of superficies and pursuant to law, the right of pre-emption of co-owners of an immovable and a building as a movable. Section 20 of the Law of Property Act Implementation Act provides the general right of pre-emption for local government in respect of all transferred immovables within its administrative territory until 1 January 2002. The purpose of such right of pre-emption is to safeguard the formation of real market prices in transfer transactions which would secure correct collection of fees and determination of the assessed value of land.

The exercise of a right of pre-emption has been established upon entering a transfer transaction and subsequently the transfer of an ownership to oneself. The validity of a transfer transaction may not be dependent upon the exercise of the right of pre-emption. A seller is required to submit the sale transaction to the person entitled to pre-emption and the buyer has to form his or her opinion within two months. At the same time, the right of pre-emption does not prohibit the entry of the transfer of ownership to the buyer in the land register, but this is not an acquisition in good faith in respect of the person entitled to pre-emption. Uncertainty of authors of the draft in differentiating real rights and rights of obligation is evidenced in subsection 257 (4) of the Law of Property Act according to which it was possible to establish a right of pre-emption on the basis of a transaction only for a single transfer until 1999. A provision, according to which the owner of an immovable may request the deletion of a right of pre-emption if the right of pre-emption is not exercised, is debatable (section 258).

The right of superficies is the restricted real right of the most frequent commerce in the Estonian law. As the main right of construction on the land of another, it has been used in cases where the owner does not wish to relinquish the ownership or where the transfer of an ownership is restricted by restrictions in public law. The right of superficies is a transferable and inheritable right for a specified term to own a construction on the immovable or permanently attached to it underground which is deemed to be an essential part of the right of superficies. The right of superficies may be constituted for the benefit of an existing building or a building under construction. The right of ground lease provided for in the Baltic Private Law Code may be considered to be a predecessor of the right of superficies in the Estonian law of property, however, it has been provided in the Law of Property Act following primarily the German *Erbbaurecht* example.²⁹ As the only exception among restricted real rights, provisions on immovables are applied to the right of superficies. Therefore, a register part shall be opened concerning a right of superficies by the land registry upon entry of a plot of land in the land register part through which the transfer and encumbrance of the right of superficies shall occur. In fact, apartment building leases created by the division of a right of superficies shall also be deemed to be immovables. Therefore, the nature of the right of superficies may be referred to as dual. The right of superficies may be encumbered by all restricted real rights except for the right of superficies itself. It may be agreed upon the constitution of the right of superficies that its transfer or encumbrance requires the consent of the owner of the plot of land. The right of superficies may also be constituted as an owner building lease by a unilateral application of the owner of the plot of land or by a notarised agreement. In both cases, the right is established by an entry in the land register. The right of superficies may only be established in the first ranking of the land register. The purpose of such restriction is to secure the continuation of the right of superficies in case of a compulsory execution of a plot of land. The right of superficies is a right for charge and the payment of periodic charge shall often be formulated as a real encumbrance on the right of superficies. The right of superficies may be constituted for the period of 36 up to 99 years and be extended upon the expiry of the term. Upon the constitution of a right of superficies, conditions may be agreed upon the conditions when the building lessee has to transfer the right of superficies back to the owner. This

²⁹ Verordnung über das Erbbaurecht. RGBI, S. 72.

shall be primarily applied in case of not erecting the building by a due date or non-payment of the charge for the right of superficies. Upon the end of term of the right of superficies, the building becomes again an essential part of the plot of land if the owner has not demanded for removal of it by the building lessee.

Rights of security

One of the most problematic areas of the Estonian law of property is the area of the rights of security. While compiling the Act, a possibility to regulate both personal securities and securities in law of property was considered to be done in separate acts.³⁰ The final choice still followed the traditional solution of civil codes where rights of security are a part of real rights and personal securities are a part of rights in obligations. Major amendments of the draft of the Civil Code have been done in respect of rights in securities. Rights of security are divided into the securities over movables and securities over immovables. Securities over movables are divided into possessory pledge, registered security over movables, pledge on securities and the legal right of retention in which case the creditor has the right to retain things of the debtor which have legally come into his or her possession. Real securities are divided into a mortgage and a judicial mortgage. Things, securities and proprietary rights may be objects of a pledge (section 277). Traditionally the right of security provides a claim with a meaning of a preferential claim (section 280).

The central right of security among securities over movables is the possessory pledge; although its relative importance in commerce is nominal (it is used primarily in pawnshops), the framework of the possessory pledge is also applied to other securities over movables and this involves especially the compulsory execution of claims. The possessory pledge is created by the transfer of possession of a movable and by conclusion of an agreement of establishment of a pledge which has to be formed in writing as a rule (section 282). The possessory pledge is strictly an accessory right of security. Upon non-fulfilment of the claim being secured, the pledgee shall have the right to sell the thing. A possessory pledge is convenient because of its easy sale — upon the creation of the right to sell, the pledgee can sell the thing by public auction. It is problematic only because of the fact that specific rules concerning sale by public auction are absent from the law of obligations. The norm that prohibits the transfer of a pledged thing without the transfer of the debt may be deemed to be erroneous since it does not correspond to the general nature of real rights (subsection 289 (5)). An excessive restriction is the provision in subsection 292 (3), which does not permit an agreement whereby the pledgee acquires the pledged thing for satisfaction of a claim. Its permission would be justified after the creation of the right to sell.

The registered security over movables is an essential upgrade to the draft of the Civil Code and it is difficult to find analogues to it in the legal families of Central Europe. The registered security over movables may encumber forms of intellectual property entered in the state registers (trademarks, patents, *etc.*), cars, aircrafts, and movable property of an undertaking as a general pledge. The registered security over movables resembles a mortgage since it is created upon its entry in the register and it allows the establishment of several registered securities over movables to one thing. Establishment of a pledge requires an agreement in writing since the provisions of a possessory pledge shall be applied to registered securities over movables in other respects, and its sale shall be effected by public auction without the approval of a court. The provisions of registered securities over movables are drafted in a hurry and there are substantial gaps in the norms. The norm provided in section 305 does not fit the regulation of the law of pledge pursuant to which a pledgor shall not transfer a thing on which registered security over movables is established. Upon compulsory execution of a movable, the continuation of the encumbering rights is not clear. The most important deficiency is that several of the state registers have not been initially created for the registration of information in private law and the entries in the register do not have the effect of constitution. It is not logical to provide an entry of a right of security with a meaning of creating rights while the ownership is transferred outside the register. A more detailed procedure for the registration of a right of security is absent. At the same time, it is not practical to create registers following the strict requirements of the land register. Commercial pledge created pursuant to the models of France and Scandinavia did not commence until the Commercial Pledges Act was entered into force in 1996³¹ which is substantially more regulative and pursues avoidance of conflicts of different requirements.

³⁰ *Ibid.*, p. 4.

³¹ Kommertspandiseadus (Commercial Pledges Act). – Riigi Teataja (The State Gazette) I 1996, 45, 848 (in Estonian).

For that purpose, the scope of the commercial pledge has been restricted — this does not extend to monetary funds, shares of a private limited company, shares of a public limited company, securities, forms of intellectual property, buildings, means of transport (section 2). There are more strict requirements for an establishment of a pledge — it is subject to full notarial attestation and the pledge is created by an entry in the commercial pledge register (subregister of the trade register) maintained in the first instance court. Unlike other registered securities over movables, the commercial pledge is a non-accessory one. A proper change for the future will be the registered pledge over movable to be independent of a claim and to subject it to the provisions of a mortgage instead of a possessory pledge. It is necessary to recognise several threats in respect of the registered securities over movables for a pledgor, a pledgee or a third person, the fact to which also foreign experts have drawn attention.^{*32} The regulation of a commercial pledge allows a situation where all movable property of an undertaking has been pledged but in spite of the fact it is possible to transfer this property in the frames of regular economic activity. This causes the increased need of a pledgee to interfere with the economic activity of an undertaking. Conflict of several claims may occur, especially if there are movables in the possession of an undertaking the ownership of which has not been transferred to it, this may occur especially in trade activity. The legislator has therefore knowingly tried to make the commercial pledge less attractive claims secured by a commercial pledge are after the claims secured by a pledge, claims in labour law and tax claims (section 86^{*33} of the Bankruptcy Act).

Pledge of securities is problematic. Initially it was planned to stipulate the pledge of rights in the Law of Property Act that would have embraced both the pledge of rights, claims and securities. By the speedy processing of the draft, it was not possible to elaborate the pledge of rights in full and so we can find provisions on the pledge of securities only. Although section 277 provides proprietary rights as an object of a pledge, we do not find such right of pledge in the catalogue of rights of pledge that could be applied here and the pledge of rights and claims is highly questionable. The stipulated pledge of securities does not follow the needs of real life since it regulates the pledge of documents on paper by transfer of possession. Today, the majority of securities are electronic and the norms of the draft of the Civil Code elaborated before 1940 would not work. The other problem is related to the fact that securities and their classification (warrants, promissory notes, *etc.*) have not been regulated by law so far, at the same time, the Law of Property Act provides for their pledge. The part of the Law of Property Act that regulates the pledge of rights shall be reformed. In respect of the pledge of electronic securities, the situation is so far solved by the Estonian Central Depository of Securities Act^{*34} of 2000, pursuant to section 16 of which, a pledge of securities is created upon entry in the register on the order of the account administrator. A pledge does not prohibit the transfer of securities, however, the right of pledge moves along with it.

Section 13² of the Law of Property Act Implementation Act provides that a special right of pledge can be established for a building as a movable and no counterpart to it can be found in the Law of Property Act. A pledge of a building is created upon the notarisation of the agreement of pledge, but the existence of a pledge has also to be entered in the building register. The entry has merely an informative effect. A transfer of possession of a building is not necessary. A building may be encumbered with only one such accessory right of pledge. Unlike regular securities over movables, the compulsory sale of a pledged building has to be effected on the basis of a judgement, except in a case where it has been agreed to subject oneself to an immediate compulsory execution. If the land under the building is entered in the land register during the effect of a right of pledge, the pledgee has the right to request the reformulation of a pledge as a mortgage and an entry of a corresponding preliminary notation in the land register.

Stipulation of the mortgage had a purpose of creating a simple system of rights of pledge to immovables that would be as capable of commerce as possible. The real security on the basis of pledge instruments and the dual division of rights of pledge into an accessory mortgage and non-accessory hypothecary debt provided for in the draft of the Civil Code was given up. Recommendations of foreign experts in favour of the real security as of more capability in commerce were decisive. The chapter of the draft of the Civil Code on the hypothecary debt was taken as a foundation and modified according to the model of the German law. It was still decided to name the hypothecary debt as a mortgage, as a term more widespread among people. As a result, there might be confusion in understanding the nature of the Estonian real security.

³² M. Wenckstern. Gutachtens zum Kommertzpfandgesetz. 1995. Located in the Ministry of Justice.

³³ Pankrotiseadus (Bankruptcy Act). – Riigi Teataja (The State Gazette) I 1997, 18, 302 (in Estonian).

³⁴ Eesti väärtpaberite keskreigistri seadus (Estonian Central Depository of Securities Act). – Riigi Teataja (The State Gazette) I 2000, 57, 373 (in Estonian).

A mortgage is a general right of pledge to an immovable, its essential parts and accessories, fruits, claims of residential or commercial lease, insurance benefits (section 325). The Estonian law of property recognises the combined mortgage to several immovables that shall provide a claim with a better security (section 359). A mortgage does not presume the existence of a claim to be secured which allows the establishment of an original owner mortgage for the purpose of reserving a ranking in the land register or its creation after the claim to be secured has been satisfied. In latter case, pledgees in lower rankings have a right to prohibit this, except if this is excluded by the entry. The non-accessory right of pledge is a good opportunity for the owner to maintain a continuous right of pledge on an immovable that can be relinquished in case of a need without any specific costs and that can secure cheap loans to refinance more expensive loans of lower rankings. At the same time, a mortgage does not prohibit the transfer of the immovable and does not require the transfer of a claim to a new owner. The pledge of a mortgage itself is permitted.

The mortgage is created by an entry in the fourth division of the land register on the basis of a notarised agreement. The legislator has attempted to avoid the creation of rights of pledge on the basis of law. The only exception here is the mortgage provided by section 334 to secure the expenses incurred by the pledgee on the same ranking with the main mortgage if the value of the object of pledge decreases.

A mortgage does not require anybody to perform a claim, rather it mandates to subject oneself to a compulsory execution of an immovable. In order to avoid the compulsory execution, in addition to the debtor, the claim may be performed by the owner of the immovable encumbered with a pledge or persons whose immovables are subject to rights ending in compulsory execution. Accordingly, they acquire the rights of a surety in respect of the actual debtor. The compulsory execution occurs pursuant to the procedure provided by the Enforcement Procedure Code³⁵ and may involve the appointment of a compulsory administrator or subjection to the compulsory sale. Upon establishment of a right of pledge, the law allows to subject the immovable to immediate compulsory execution which has to be entered in the land register and in such case the recognition of sale by a court is not necessary. In case of a minor encumbrance of an immovable, “freehand sale” is used where the owner of an immovable transfers a thing under the control of the pledgee. As an excessive restriction, a prohibition is provided on an agreement to settle the claim with an immovable even after the creation of the right to sell (subsection 352 (2)). Only a sale on the basis of the Enforcement Procedure Code by a bailiff engaged in liberal profession may cause the extinguishment of rights lower than the right that caused the claim for payment (section 64²⁰). But, this is inevitable to receive a reasonable price upon the transfer of an immovable. Satisfaction of claims takes place according to rankings in the land register.

A judicial mortgage (section 363) is not different from a regular non-owner mortgage by its nature. It shall be established on the basis of a judgment for the purpose of securing a claim since it will provide the claim with the status of a preferential claim. A judicial mortgage is an accessory right of pledge.

A maritime mortgage has been provided separately in the third chapter of the Law of Maritime Property Act³⁶ which resembles the mortgage provided in the Law of Property Act in general terms considering the specialities of a vessel as a movable. A maritime mortgage can only be established on vessels entered in the ship register.

³⁵ Täitemenetluse seadustik (Enforcement Procedure Code). – Riigi Teataja (The State Gazette) I 1993, 49, 693 (in Estonian).

³⁶ Laevaasjaõigusseadus (Law of Maritime Property Act). – Riigi Teataja (The State Gazette) I 1998, 30, 409 (in Estonian).

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The Concept of Ownership in Current Russian Law

Introduction

Russia's shift from a communist regime to a market economy has resulted in a fundamental change with respect to how the concepts of property and ownership are understood within different economic systems and how they are expressed in law. To this end, the legislative formulation of the right of ownership has undergone significant changes through the adoption of laws, which now govern these types of legal relations. This evolution can be traced through a series of legislative enactments. The USSR Ownership Act was the first law formulating new approaches to the right of ownership. Subsequently, the federal Ownership Act considerably expanded and developed the approaches of the previous law. Next was the implementation of section 2 of the Fundamentals of Civil Legislation of the USSR and Union Republics Act, which is applicable in the territory of the Russian Federation to the extent that it does not run contrary to new Russian laws. Finally Division 2 was added to the new Civil Code of the Russian Federation of 1994.

During this period of development, the political declarations and statements that were characteristic of the old approach to law-making were abandoned. Instead, new legal concepts and structures were canvassed in the new legislation. This new framework also established a diversity of property rights, which were not limited to the right of ownership. In the federal Ownership Act of 1990, the legislator for the first time abandoned the economic categories of the "forms of ownership" — a tendency that became more explicit in the rules enacted as the Fundamentals — and the right of ownership itself became an integral part of a broader concept of rights *in rem*. Thus, the contemporary civil law concept of real rights — the right of ownership being the most important right — was established in law. In essence, this concept reflects a clear distinction between the economic and legal understandings of the relations to which ownership gives rise.

Ownership is understood as an economic or factual relationship subject to legal formalisation. Firstly, ownership implies a human relationship to specific things. Such property is appropriated by one individual, the owner, to the exclusion of all others. Secondly, the concept of ownership also includes the attitude of the owner to the appropriated property, since people treat their own property differently from property belonging to others. The law must therefore address these two critical aspects of the ownership equation: the relations of property owners to third parties, and the owner's power over the property itself.

At the same time, it is important to recognise that the objects of ownership are commodities, which in a free market may include not only things, but also the fruits of work and services. Such objects include commodities of non-material value and the non-material products of creative activity, as well

as other rights.^{*37} Civil law relations in these matters can involve not only real rights, but also personal rights — *i.e.* obligations — and exclusive rights — *i.e.* patents and trademarks. Even under the heading of real rights alone, the relations one might have to property are not limited to the right of ownership. In other words, a commodity in the economic sense does not always constitute an object of the right of ownership in the law. Only individually determined things form the objects of ownership.

Economic relationships resulting from an appropriation occur in various forms depending on whether the entity that appropriates a thing is an individual, a group or collective, the State, or society at large. Thus there are individual, group, public, and mixed forms of appropriation. These economic forms of appropriation are traditionally called “forms of ownership”. A form of ownership is an economic concept, not a legal one. In proclaiming recognition and equal protection of private, public, and other “forms of ownership”, subsection 212 (1) of the Civil Code evokes economic categories, not legal ones. The private form of ownership, also in the terms of the Constitution of the Russian Federation, is a concept for appropriation by any private non-state, non-public persons, distinguished in this sense from public or communal appropriation (state and municipal or public ownership).^{*38}

The transfer of property under a market economy requires, as a matter of principle, that commodity owners have equal rights of alienation and acquisition in relation to property. Therefore, the principle of equality among all forms of ownership, which is of an economic and not of a legal nature, becomes necessary. However, to provide for the “equality of all forms of ownership” in the legal sense is impossible. For instance, any property, including that which is withdrawn from commerce, may be held in state ownership. The state may acquire such property in ways that are not available to natural persons and legal entities, for example, by way of taxes, duties, seizure, confiscation, and nationalisation. On the other hand, legal entities and public legal bodies are liable for their debts with all their property, whereas individuals benefit from certain exemptions established by law.^{*39}

As such, section 212 of the Civil Code mentions only the “recognition” of different forms of property and the equal protection of the rights of all owners, but not “the equality of all forms of property” as provided in the USSR Ownership Act. The equality of private and public owners is manifested through the recognition of equal legal capacity. This equality is further demonstrated by the ability of private owners, both individuals and legal entities, to own any property except property withdrawn from commerce or limited in commerce by law. Such property is not limited either in quantity or value, unless such limitations are established by law for the public benefit. Moreover, the advantages and protection given to public owners under the former legal regime are absent from the new Civil Code.

The right of ownership is the most comprehensive right, giving the broadest legal power over property. Yet ownership is not the only right *in rem*; there are other more limited real rights, all sharing characteristics with the right of ownership. Firstly, all real rights formalise the relationship between a person and a thing, giving the person an opportunity to use the thing in his own interests without the participation of other persons. Secondly, real rights may be invoked to protect other types of rights. For example, in the setting of contractual obligations, the person claiming the right to performance may satisfy his interest through some type of claim over real property. Real rights are protected by the specific features they exhibit. Finally, only individually determined things may be the object of real rights. If the specific thing is destroyed or lost, all real rights associated with it are automatically terminated. This differs from the law of obligations where the object is to control the conduct of the debtor. Where the debtor dies, the obligation is not extinguished, and it may be passed on to other persons through the mechanism of legal succession.

As long as the property exists, limited real rights continue to exist even if the owner of the property changes — for example, if the thing is sold or transferred by succession. Thus, real rights encumber a thing; they follow the thing, not the owner. This “right to follow” is thus another characteristic feature of real rights. However, limited real rights are of a derivative nature, dependant on the right of ownership as the basic real right. Therefore, in the case of absence or termination of the right of

³⁷ For instance, those formalised in the form of securities or a deposit with a credit organisation.

³⁸ The federal Ownership Act specified “the right of ownership of public organisations” along with the right of private ownership of individuals and legal entities. Today, according to subsection 213 (4) of the Civil Code, legal persons, including political parties, are private owners of the property belonging to them.

³⁹ Annex 1 to the Code of Civil Procedure of the Russian Federation.

ownership to a thing, it is impossible to establish or retain a limited real right over it as in the case, for example, of ownerless property. Finally, because limited real rights usually arise independently from the will of the owner, the nature and content of these rights is determined by law, not by contract. Therefore, the law itself establishes all the types of limited real rights and determines their scope and content. This results in the law fixing an exhaustive list, or *numerus clausus*, of limited real rights. Contracting parties can neither create a new right yet unknown to the law, nor can they change the scope of any existing real right.

Under Russian civil law, the objects of all limited real rights, with the exception of the pledge and the right of retention, are immovable objects. These rights can be divided into three groups. The first group contains the real rights of certain legal entities over the economic activity of property owned by another. These are the rights of economic management and of operative administration, which characterise the independence of property of such legal entities as unitary enterprises and institutions.

The second group confers limited real rights with respect to the use of another person's land. These rights include the right for life of inheritable possession to land belonging to individuals, the right of permanent and unlimited use of land, servitudes, and the right to develop another person's land parcel. This right belongs to those holding a right of inheritable possession or permanent use, and entails the power to erect buildings, structures, and other objects of real estate, which become the property of the developer.

The third group contains rights of limited use over other real estate, mainly housing premises. These rights are the rights of relatives of the owner of the housing premises to a limited use of the housing premises and the right to use specific housing premises — e.g. a dwelling house or another object of real estate like a land parcel — for life. The latter right arises through either contract or testamentary refusal. This right allows an individual to reside in housing premises belonging to another person, or to make limited and purposeful use of another person's real estate. It is debatable whether the right to pledge a thing — where a thing is the object of a pledge instead of a real right — and the right to withhold a thing should be categorised as real rights.

The above categories of real rights upon which Russian concepts were modelled were originally defined in German-based legal systems seen today in Germany, Austria and Switzerland. Somewhat different types of real rights are also found in French legislation and in other countries of continental Europe. A special section of the first Civil Code of 1922 was devoted to real rights. When Soviet civil legislation was codified in the 1960s, this category was omitted because the state's right to land was effectively exclusive and did not allow for the existence of other real rights, including servitudes. Real rights were reinstituted in the federal Ownership Act, and were described in detail and legally fixed in section 49 of the Fundamentals. The current Civil Code explicitly treats the right of ownership as the principal type of real right.

The right of ownership

The right of ownership is the broadest real right. It allows its holder to exclusively determine the nature and use of the property and, in the process, confers complete economic dominion over the property. In subsection 209 (1) of the Civil Code, the legal capacity of the owner is described through the use of the “triad” of legal powers: possession, use, and disposal.

The power to possess is understood as the legal authority to have the property and keep it in one's household or enterprise. The power to use the property is a legal permission to exploit it for economic or other purposes by utilising the property's useful qualities. Use is closely related to the legal power to possess, because in most cases, one cannot use property without actually possessing it. The power to dispose of property confers an authority to determine the fate of property by changing its holder, state, or designation through alienation under a contract, transfer by inheritance, destruction, or loss.

In the aggregate, these legal powers fully cover all the possibilities of acting granted to the owner by law. Suggestions that other legal powers — e.g. the power of management — could be added to this triad have been unsuccessful. A more detailed consideration of these legal powers shows that they are not independent possibilities provided to the owner, but only ways to exercise the legal powers inherent in ownership.

All three powers are concentrated in the owner. However, separately and sometimes simultaneously, they may not belong to the owner but be vested in another legal possessor of the property such as a lessee. A lessee not only possesses the property of the owner (lessor) and uses it under the contract

with the lessor, but is also entitled, with the lessor's consent, to sublease it to another person or to make considerable improvements to the property. Such actions may change the property's original state to a considerable degree, or constitute its disposal within certain limits. Thus, it can be said that the triad of powers is not really sufficient to fully characterise the rights of the owner.⁴⁰ The essence of the right of ownership lies not in the number and designation of legal powers, but in the degree of real legal power which is granted and guaranteed to the owner by the legal system. For example, the 1964 Civil Code formally granted equal powers of possession, use, and disposal to all owners. However, the legal powers of the state as an owner with respect to the nature and scope of rights could never be compared to the legal powers of individual owners. Practically speaking, the power of individual owners was subject to numerous limitations.

From this perspective, the main feature of the owner's rights in Russian civil law is the power to exercise these rights "at [the owner's] discretion" (subsection 209 (2) of the Civil Code). The owner can make an independent decision about what to do with his property and may be guided exclusively by his own interests, provided that the decision does not conflict with any statute or other legal act, and that it does not violate the rights and legal interests of other persons. This is the essence of the legal power of the owner over property.

An important feature of the owner's legal rights is that they allow the owner to exclude all other persons from any action affecting the owner's property. In contrast, the powers of any other legal possessor — even those powers having the same designation as the legal powers of the owner — are insufficient to exclude the rights of the property owner. Instead, the possessor's powers usually arise through the will of the owner and operate within the limits provided by the owner, as with, for example, a contract of lease.

On the other hand, the right of ownership is not absolute; the law establishes certain limitations to the content of the right. According to subsection 209 (2) of the Civil Code, the owner has the right with respect to his property to take "any actions not contrary to a statute or other legal acts and not violating the rights or interests protected by a statute of other persons." Thus, since under legislation housing premises are intended only for dwelling by citizens, their use for other purposes such as offices or warehouses — even by the will or with the consent of their owner — is allowed only if the classification of these premises is changed from that of housing to non-housing in accordance with the procedure provided by legislation. The owner also has no right to use his property with the intention of causing harm to another person. Thus, the legal rights of the owner are restricted by certain legal limitations of purpose.

A law or statute may also provide for restrictions on the exercise of ownership. For example, the pledgor, while remaining the owner of a pledged thing, does not have the authority to dispose of the thing without the consent of the pledgee. Moreover, the rights of the owner of immovable property acquired under a contract of lifetime support with maintenance do not include the power to alienate or dispose of the property without the consent of the recipient of the rent.

The right of ownership over land and other natural resources is subject to the greatest number of restrictions. Firstly, the very possibility of private ownership of such objects, recognised by subsection 9 (2) of the Constitution of the Russian Federation, is considerably limited with respect to land parcels and is completely excluded for a number of natural resources. Secondly, the possibility that these objects become the object of civil law transactions, including alienation, is also limited (subsection 129 (3) of the Civil Code), which restricts the owner's power to dispose of them. Thirdly, even those rights permitted by statute to owners of land and other natural resources are subject to environmental prescriptions and prohibitions and, in a number of cases, to the designated purpose of the property.

Furthermore, the "benefit" of holding property and receiving income from it must be considered along with the "burden" of bearing the expenses, costs, and risks related thereto. Section 210 of the Civil Code specifically points out the owner's responsibility to maintain the property, unless a statute or contract places this burden or a part of it on another person. For example, the protection of leased

⁴⁰ The description of legal powers of the owner as a "triad" of possibilities is typical of the Russian legal system. It was legally fixed for the first time in 1832 in vol. 10, part 1, section 420 of the Code Laws of the Russian Empire. Following in this tradition, the "triad" passed on to the Civil Codes of 1922 and 1964, and later to the Fundamentals of 1961 and 1991, as well as to the current C.C.R. There are other definitions of this right in different foreign laws. For instance, under subsection 903 (1) of the Civil Code of Germany, the owner "may dispose of a thing at his own discretion and to the exclusion of all others on it". Under section 544 of the Civil Code of France, the owner "uses and disposes of things in the most absolute manner". In Anglo-American law, scholars count up to twelve different legal powers of the owner which different persons may have in various combinations; a consequence of the nature of the common law that does not lend itself to a legally-fixed definition of the right of ownership.

property may be carried out by the lessee, or the management of a bankrupt's assets may be assumed by a bankruptcy manager.

The owner also bears the risk of damage to or destruction of his property if this occurs in the absence of fault. In fact, this risk is part of the burden of the owner. However, this risk can be transferred to other persons under a contract as well as by force of statute. For instance, such risk may be borne by a guardian who becomes the administrator of the property of an owner who is under guardianship.

The owner is entitled to transfer his rights of possession, use, and disposition while remaining the owner of the property. This occurs, for example, when an owner leases his property. Subsection 209 (4) of the Civil Code specifically addresses this situation and empowers the owner to transfer property to another person without transferring the right of ownership to the property. This device, called "entrusted administration", is a way for the owner to exercise legal powers of disposal without establishing a new right of ownership to the property.

The concept of entrusted administration provided in the Civil Code has nothing in common with the concept of the "trust". There were attempts to introduce this concept into Russian civil legislation under the influence of absolutely alien Anglo-American approaches.^{*41} With entrusted administration, the administrator — *e.g.* the guardian of the ward's property or the testamentary executor who holds the property of the succession — uses another person's property without becoming the owner. The administrator does not act for his own benefit, but in the interests of the owner, ward, beneficiary, or heir. This situation may arise either through the prescription of a statute or under a contract between the owner and the entrusted administrator. For example, the owner may, for compensation, entrust the administrator to use his securities to receive income. The entrusted administrator has the power to possess, use, and even dispose of the property. He may also perform operations with this property in his own name, but not for his own benefit.

In the case of a trust, the settlor transfers his rights or a certain part thereof to the trustee who acts in the interests of the beneficiary. It is also possible for the settlor and the beneficiary to be the same person. Each of the participants in the trust relationship has the legal powers of the owner to some degree, *i.e.* each of them is vested with a right of ownership.

Under the approach used in continental European legal systems, the trust allows the right of ownership to be split among several subjects, and for that reason it is impossible to say who the real owner of the property placed under trust management is. Under Anglo-American systems, such a situation does not purport any contradictions since the right of ownership is by definition constituted by multiple and independent rights of ownership. Such an approach is alien to continental European legal systems where a key postulate is the impossibility of establishing two equal rights of ownership in the same property. Therefore, the transfer by the owner of part or even all his legal powers to another person, including to a manager, does not lead to the loss of the right of ownership because the transfer is not limited to these legal powers, *i.e.* to the "triad".

From a practical perspective, borrowing the trust concept in the absence of the common law system of equity leads to a lack of control over the trustee's relations with the settlor who, among other things, acts as a beneficiary. It is clear, then, that negative consequences could result from a broad application of the trust concept, which was designed for the more efficient management of state and municipal property through the transfer thereof to private managers.

Remedies

The new civil legislation of Russia places particular emphasis on the protection of ownership and other real rights. In conformity with the fundamental principle of inviolability of the right of ownership, the new Civil Code creates a special system aimed at protecting the rights and interests of private owners from various encroachments on their property.

In the event of direct violation of the right of ownership through, for example, theft or unlawful expropriation, Russian legislation provides real remedies in the form of absolute claims or claims filed against any third person having violated a right *in rem*. The Civil Code traditionally provides for two real actions, which protect the right of ownership and certain rights in things. The first is true recovery action (*actio rei vindicatio*), a claim for demanding and obtaining property from another

⁴¹ See section 1, Presidential Decree No. 2296 on Trust Ownership (Trust) (24 December 1993). In connection with the adoption of Parts 1 and 2 of the Civil Code which directly regulate the relationships of property trust management, Presidential Decree No. 2296 has now lost its legal force.

person's unlawful possession. The second is negatory action (*actio negatoria*), an action for elimination of obstacles to the use of property where no deprivation of possession has occurred. Both means of protection are aimed at protecting the owner's right to the object itself. If the object is lost or cannot be returned to the owner, it is possible to speak only about compensation for inflicted losses, which is categorised as a personal action and not an action in protection of real rights. Therefore, real rights protection of property interests only has as its object individually determined things, not substituted property.

A right of ownership may also be violated indirectly as a consequence of a violation of another, often personal right. For example, a person to whom the owner transferred property under a contract might refuse to return the property to its owner or might return it damaged. This is a case for the application of real rights protection under the law of obligations. These rules are specially designed for instances when the owner is bound to the violator by relations *in personam*, most often contractual relations. These methods of protection are usually applied to the defaulting party under the contract, taking account of the specific nature of the parties' relationship. Remedies in the law of obligations are, therefore, of a relative nature and may have as their object any property, including both things and rights.

Since both of these types of remedies may apply at the same time, a question arises as to which of the two kinds of civil law protection — that of real rights protection or that of the law of obligations — is the appropriate remedy. Russian legislation does not allow the claimant to choose an action and does not allow the so-called "competition of suits" typical of Anglo-American law. In the event of breached contractual relations or other relations *in personam*, the law of obligations and not real rights should be used to obtain a remedy, since the legal relations existing between the parties are of a relative nature and not absolute.^{*42} A real action cannot be filed when an individually determined thing is absent as a subject of dispute.

Suits against state agencies or local self-governing bodies are a new and independent group of civil law remedies, which serve to protect the right of ownership. The powers that these agencies enjoy preclude the possibility of filing traditional real actions or personal actions against them in instances when they do not act as equal participants in commerce. Thus, public authorities may violate real rights of private persons or infringe upon them through lawful and unlawful actions, both of which require special means of protection for private owners.

Two types of actions are used to provide the necessary protection. First, the law allows claims for full compensation of damages inflicted upon private persons as the result of unlawful acts or omissions by state agencies, local self-government bodies, or their officials. The remedy also applies where damage is inflicted through the issuance of a regulatory or non-regulatory act which runs contrary to a statute or other legal act.

Secondly, a claim for invalidation of an unlawful act of a state or municipal agency, which contradicts a statute or other legal act, may also be made. Such actions are brought against tax and customs agencies, for example, in the event of an unjustified levy of execution against an individual's property.^{*43}

Lawful actions by public authorities, which infringe upon the interests of private owners, require special means of protection. For example, termination of a private person's right of ownership through nationalisation of his property conforms to federal law, and is therefore a lawful action. In this situation, the owner's rights are subordinated to the law and the owner has no right to claim the return of withdrawn property. However, full compensation may be claimed, including loss of income and the value of the property lost by the owner. An owner of land expropriated for state or municipal needs through a decision of executive agencies is granted the same right.

Thus, the new civil legislation of Russia provides for thorough legal formalisation of ownership relations, including comprehensive protection of the rights and interests of private owners.

⁴² This reasoning can be extended to instances when limited real rights arise due to a contract with the owner of a thing; the parties are protected by absolute real rights and not by the law of obligations, for the relation is of an absolute and not a relative nature. The owner of a thing in this instance is bound to the subject of a limited real right by contract and, therefore, in its relationship with the latter cannot resort to the law of obligations to protect his interests.

⁴³ Naturally, tax and customs relations, or relations with respect to state property management are of a civil law nature. At the same time, unjustified interference of public power into the property sphere leads in many instances to the violation of real rights, and therefore requires special means of protection. It is no accident that rules on suits against public power appeared for the first time in laws on ownership.

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Latvian Property and Collateral Law and Protection of Foreign Investments

1. Sources of law and absolute rights of the proprietor

Main sources are the Constitution of the Republic of Latvia, the Latvian Civil Law Act, and the Commercial Pledge Act. The Latvian Civil Law Act as a code of institutional system, which is similar to the French code, was restored in Latvia in its structure of 1937.

Part III of the Latvian Civil Law Act, which specifically deals with property and collateral rights, was introduced by the Act on the Time and Procedure by which the Part of Introduction, Inheritance Rights and Rights on Things of the Renewed Republic of Latvia 1937 Civil Law Act Takes Effect as of 7 July 1992.

Initially, the Constitution of Latvia did not deal with any property rights at all. Amendments of such kind were passed only in 1998, when the additional chapter 8 on fundamental human rights was introduced, which included section 105 stating that everyone has the right to property. This important amendment introduced a new understanding of property rights compared to a more conservative view reflected in the Latvian Civil Law Act.

The Latvian Civil Law Act states in section 927 that property means having total power over a thing, *i.e.* the right to possess and use it, receive all possible benefit from it, handle it and demand the return of it from any third person by claiming ownership. In addition to this general principle, section 928 declares that although property may be restricted according to private will or by the law, any of such restrictions shall be interpreted in its narrow meaning, and in case of doubt it shall always be assumed that the property is without restriction.

According to section 1038 an owner may be in possession of a thing, which belongs to him or her, receive its fruits, use it at will to increase his or her assets, and in general, use it in any way, even though it may cause a loss to another person.

Contrary to these provisions, section 105 of the Constitution states that property may not be used against the interests of society.

2. Classification of things as objects of property rights

The Latvian Civil Law Act uses common classification of things as tangible and intangible (section 841). However, in dealing with a difficult question, what could be a subject of property rights, the Latvian Civil Law Act is nearly as narrow as the early Roman law. This approach is causing difficulties each time when one is confronted with the problem of rights regarding intangible things.

Although the Latvian Civil Law Act declares that a subject of property may be anything that has not been taken out of circulation by law (section 929), this general declaration is not supported by any other norm. Even further, in dealing with particular elements of the property rights, the authors of the Latvian Civil Law Act carefully avoided using the term “property” in relation to intangibles. Thus, regarding the claim of ownership, section 1050 expressly states that the subject of a claim of ownership may be a separate item as well as an aggregate of things consisting only of tangible things, but not a thing, which is composed of both — tangible and intangible things.

There is no doubt that in light of such clearly stated limits, a claim for intangible things is out of the question — it is hardly surprising that the same narrow approach also prevails in practice. The Latvian Constitutional Court found in favour of this more narrow approach. It was a particular case of interpreting section 105 in the meaning that a person’s right to property does not include his or her right to certain claims.^{*1}

2.1. Movable and immovable things, and buildings in particular

As provided for by section 842, tangible things are either movable or immovable, “depending on whether or not they can be moved without exterior damage from one place to another”. This general principle apparently includes not only land, but, by extension, buildings as well as other permanent structures. In the Latvian legal environment this fullest sense of the word “immovable” was not only extensively used with regard to buildings, but somehow led to a phenomenon, which could be defined as separation of buildings from the land in a way which is not clearly defined by the Latvian law and is regarded in the Latvian practice as an exclusion from the common principles the Civil Law Act is based on.

It must be pointed out that the 7 July 1992 Act on the Time and Procedure by Which the Part of Introduction, Inheritance Rights and Rights on Things of the Renewed Republic of Latvia 1937 Civil Law Act Takes Effect has established a very important principle as compared with the original meaning of the Latvian Civil Law Act.

As section 968 of the Latvian Civil Law Act states, a building, constructed on and firmly attached to a piece of land, shall be considered a part of same. According to section 973 trees and other plants, which have been replanted on another person’s land, belong to its owner from the time they have become rooted in this land.

Section 14 of the 7 July 1992 Act stated otherwise — that the provisions of sections 968 and 973 of the Civil Law Act shall not be applicable in cases when a building has been built (legally acquired in another way) or the orchard (trees) has been planted on the land allocated for this purpose in accordance with the laws in effect at that time, but the ownership rights to the land have been renewed to the previous owner or his or her heirs (assignee). It soon becomes clear that this important amendment, which was initially designed as just a temporarily introduced exclusion from general principles, is here to stay permanently.

Once Pandora’s box was open, this notorious section 14 started to accumulate more and more so-called exclusions from the general principle. Soon it was discovered that the rule on buildings as separate items was also applicable to the unfinished ones, and sometimes even to the tiny remains, which laid covered deeply in the ground and, like an accident waiting to happen, were threatening the previous owners whose rights were restored by a special law. These remains and their consequences were as unpredictable and at the same time as inevitable as natural forces. It sometimes seems that the more desperately legislators are trying to extinguish these so-called exclusions, the

¹ 20 April 1999 Judgement of the Republic of Latvia Constitutional Court. C. Case No. 04-01 (99). Available at: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/04-01\(99\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/04-01(99).htm).

more difficult is the life they deliver both to the owners of the land and to the owners of the buildings separated from each other and deeply divided by this controversy.

During the denationalisation and privatisation period this controversy provided countless litigation cases and hundreds — if not thousands — of them are still waiting to be resolved.

Separation of the buildings from the land is a clear example of difficulties, which arise when an old act is taken as an orchard and planted in an adverse environment, which is fertilised by a different way of thinking. When the Act on the Time and Procedure by which the Part of Introduction Inheritance Rights and Rights on Things of the Renewed Republic of Latvia 1937 Civil Law Act Takes Effect was drafted, the authors of this bill had to take into account the fact that the land reform and denationalisation was still continuing. Therefore the reintroduction of the Civil Law Act of 1937 had a purpose to facilitate this process and not to become an obstacle in its way. The authors of this bill had also to consider that separation of the building from the land was at the time a matter of fact, which could not be averted.

As it is well known, in 1940, nationalisation was also carried out in several separate steps. Land was seized first, buildings and enterprises were seized afterwards. Denationalisation was reflecting the same order of steps, but taken the other way around.² First, the rural land reform Decree on Land Reform in the Republic of Latvia rural regions was passed in 1990. The city land reform Decree on Land Reform in the Republic of Latvia Cities was passed in 1991. The rural land privatisation Decree on Land Privatisation in Rural Regions was passed in 1992 (the rural land reform completion Decree on Completion of Land Reform in Rural Regions was passed in 1997, but the city land reform completion Decree on the Completion of Land Reform in Cities — in 1999). Decrees on privatisation of buildings always followed land reform decrees. For instance, the agriculture and fisheries privatisation Decree on Privatisation of Agricultural Enterprises and Collective Fisheries was passed in the same year of 1991.

It has to be underlined as well that the whole privatisation process — in which Latvia is notoriously behind most of the other East European countries — was in a permanent process of legislative changes, which continued from the early nineties up to 1994, when the public property privatisation Decree on the Privatisation of Objects of State and Municipal Property as well as a package of necessary supplementary laws were finally passed, under which, at long last, the privatisation of countless enterprises could take place.

The Denationalisation of Buildings in the Republic of Latvia Act was passed in 1991 and is in force from 1 January 1992. Thus, when the Civil Law Act was introduced, separation of the buildings from the land was already there. The great failure of dealing with this problem in 1992 was the fact that the legislation facing this problem did not provide a theoretical solution, but chose a shaky mode of exclusions instead. The result was that by trying to avert, not solve the problem, and by intending to sweep it under the carpet, the legislator in fact deepened the problem and, as time passed by, made it into one more and more difficult to solve.

One can only guess which way this contradiction between the law of 1937 and its contemporary legal environment could be resolved.

In general there are two extremes in proposed ways for solving this problem. One extreme is to extinguish this separation altogether and return to classical principles of the Civil Law Act of 1937. Another extreme is to re-establish *emphiteuzis* — a situation when a person who is not the owner of a piece of land is entitled to use it as his or her own in perpetuity, as he or she is an owner of the building, which was already there before the Civil Law Act of 1937 was originally introduced. Today, the difficult relationship between the owner of the building and the owner of the land under this building is solved through the so-called mandatory rental agreement between them.

To my own understanding, *emphiteuzis* is the only way to solve this problem, and it is already present in our real legal environment except for one feature; in today's situation, a person who is not the owner of a piece of land, but who is entitled to use it as his or her own in perpetuity as a building owner, is not subject to forfeiture for non-payment of a fixed rent.

This is nearly the only feature, which distinguishes the Latvian situation from the Roman or, if you like, the Feudal ownership of the Middle Ages. We can learn from history, which gives us a lesson in the form of a similar situation, which the Latvian state had already faced when the Civil Law Act was introduced in 1937. A specific procedure of buying out landlords' rights for the land was

² J. Rozenfelds. Problems of legislation on privatization in Latvia. *Wirtschafts- und Gesellschaftsrecht Osteuropas im Zeichen des Übergangs zur Marktwirtschaft*. Redaktion W. Seiffert. München: C. H. Beck'sche, 1992, pp. 355–358; Latvia: Legislation and denationalization of land. — *The Law Institute Journal*, 1993, May, pp. 258–259.

established. The owners of the buildings were reluctant to follow this procedure, and when the Latvian legal system was extinguished altogether in 1940 and 1941, the former relationship was still there.

2.2. Vessels

Another problem of the classification of things, which has led to far-reaching consequences in practice, could be found in a very short appendix to section 842. This appendix says that the railway with all its accessories shall be considered an immovable thing, but ships with all their accessories — movable things. This principle makes the implementation of the maritime lien or seizure of the vessel, as it is provided for by section 60 of the Latvian Maritime Code Act of 1994, highly unlikely due to procedural difficulties connected with the above principle which states that ships must be considered as movable things.

In practice it leads to fairly serious consequences, especially in the area of protecting rights of foreign companies and individuals who happen to deal with Latvia in the maritime area.

Let us suppose that a foreign company has a claim towards another foreign company, none of them is registered in Latvia, but the defendant is a ship owner, and the ship happens to be in the Latvian harbour.

Under the Latvian maritime law and the Latvian civil process law, the claimant is entitled to impose the lien on this ship unless the defendant pays his debt.

However the problem is that the same Latvian Civil Procedure Code does not entitle one for a claim, which could be submitted to a Latvian court towards a foreign company or an individual unless he or she has some kind of a legal entity representative or some immovable property inside the Latvian territory.

The watershed lies between the personal property and the immovable one. You cannot sue a foreigner in Latvia on the basis that he or she has some kind of assets here unless you prove that he or she owns land or other immovable property in Latvia.

It would be easy to handle such cases if only the Latvian Civil code regarded a ship as immovable. Unfortunately this is not the case. For this reason such cases, while initiated in Latvian Courts, usually fail, and such ships, after the claims to seize them are heard and rejected by Latvian Courts, quickly disappear from Latvian harbours.

I see no other possible solution of this problem but to change the principle stated in section 842 of the Latvian Civil Law Act and to declare that ships shall be considered as immovable things.

3. Pledge

The Civil Law Act states that a pledge right is a right to another person's thing (section 1278). It is a kind of purely Roman view on the pledge, contrary to the more contemporary view on this institute as a tool increasing commitment rights.

Pledge in the Civil Law Act is regulated in part III as one of the chapters devoted to property in general, or — as it is defined in the Latvian Civil Code — to the rights on things. On the other hand, commercial pledge law was from the very beginning considered as a part of the Commercial Act and initially was even included as part VII of the drafted Commercial Code of Latvia. However, later on, it was adapted as an independent law and now is not even included in the latest version of the Commercial code. The Latvian Civil Law Act distinguishes three different modifications of pledge:

- the so-called hand pledge, which is in fact a deposit of personal property as security for a debt;
- mortgage, which is related to the pledged real property;
- usage pledge of an immobile fruit bearing item, which is pledged so that the creditor has possession of it, and obtains the fruits of it.

Due to these definitions by the Civil Law Act, the authors of the Commercial Pledge Act were faced with the need to distinguish the commercial pledge from both the so-called hand pledge and mortgage.

On the one hand, commercial pledge as an institute dealing mainly with items of personal property has some similarity with the pledge as such (hand pledge). On the other hand, commercial pledge was designed to avoid handing over of the item by the grantor of a pledge (pledgor) to the person who accepts a pledge (pledgee), which inevitably makes commercial pledge similar to mortgage.

It was absolutely necessary to resolve this problem also because the implementation of the principles introduced by the Civil Law Act faced extreme difficulties in practice, especially in connection with the stated necessity to deliver the object of the pledge in actual possession of the pledgee. Interpretation of the above principles of the Civil Law Act caused hard times for the judges, especially because the Civil Law Act gives a very wide interpretation of what would be regarded as an actual possession of the item of personal property.

In practice it led to the situations that sometimes it was extremely difficult to find out who actually held the pledged item, especially if a pledgee allowed the thing to remain with the pledgor who then could be regarded as an agent of the pledgee. This, unfortunately, from time to time led to intolerable situations. For instance, one who already had granted his personal property as a pledge to another person and with a consent of the pledgee kept this property in his custody as an agent of his own pledgee, soon stepped into the pledge agreement with another person by granting the same property as a pledge again. In court practice of the early nineties it was found that sometimes all belongings of companies served as a pledge to different banks, even on as many as four consecutive occasions. No wonder that in the given situation banks were the main subsidiaries in promoting the Commercial Pledge Act.

The Commercial Pledge Act was adopted on 21 October 1998. The Act modified the principles of the pledge right under the guidelines set by the Civil Law Act.

According to section 2 of this Act, a commercial guarantee is a pledge, which, following the procedure determined by the Act, is registered in the commercial guarantees register. The Act also stated that the general provisions of the pledge right as set forth in the Civil Law Act should be applied to commercial guarantees insofar as the Act did not provide otherwise.

The new Act stated that the subject of a commercial guarantee could be any movable object and even an intangible object, which belongs to an enterprise, as well as the aggregation of the objects including all the property of an enterprise (entrepreneurial association).

This was a big step forwards as compared with the Latvian Civil Law Act, which in fact covered only tangible things but intangible things could become a subject of a pledge right only if actual possession of the thing by a pledgee was possible. Thus, although intangibles could become a subject of a pledge right in principle, necessity to prove that the intangible thing in question was in the possession of a pledgee, made implementation of this principle extremely difficult and caused a lot of disputes in practice.

However, substantial assets still could not be a subject of a commercial guarantee, a vessel or securities in public circulation as well as the claim arising from a check or a promissory note could not be a subject of a commercial guarantee.

Even if all the property of an enterprise is pledged or an obligation of objects is pledged, the above-mentioned items shall be considered as excluded from the pledged property.

It is not a very big surprise as well that we find very tough restrictions on imposing commercial pledge under this law. Being a reaction to the horrors of the early nineties, these restrictions could also be treated as an over-reaction. Given that commercial pledge like mortgage has to be duly registered in the Centralised Commercial Guarantees Register, one could see no danger in registering several consecutive commercial pledges in the same item of personal property if it is valuable enough. And a consecutive pledgee has to be aware about the status of the item, which is already registered in a publicly available register as an item of somebody else's pledge right.

However, the Latvian Commercial Pledge Act prohibits such repeated granting of an item as a second pledge. A special amendment to the Latvian Criminal Code, which was introduced as a package of amendments in current Latvian laws when the Commercial Pledge Act was passed, qualifies such action as a crime.

It must be pointed out that, notwithstanding the above shortcomings, the Commercial Guarantees Act was a big step forwards, covered a lot of unsolved problems, and it is working in practice. A lot of subjects, however, are not covered by this law and are still regulated only by the Civil Law Act. This relates first of all to immovables, given that restoration of the Land Register Act and the Recording Real Estate with Land Registers Act was adopted shortly after the Civil Law Act came into force. Mortgage rights can be registered easily, and this institution is functioning relatively well.

Some difficulties in court practice arose only in connection with immovables which, at the time when they were used as a security, were still unregistered in the land books. This caused some confusion in practice, which sometimes led to curious situations where a land unit was treated as a movable thing. However, the inherent contradictions, such as dual attitude towards land and buildings (see chapter 2.1), and proposed ways of solution of these difficulties have had a huge impact on mortgage rights. For instance, both owners — the one of the land and the one of the building have the right of

refusal if the other party decides to alienate its right in the immovable. It is unclear how and when such right of refusal can be implemented, if the immovable is pledged and the pledgee faces the necessity to sell the property.

Another problem is that mortgage rights stated by the Civil Law Act do not fit very well with the procedure of the auction of real estate as stated in the Civil Procedure Act, which sometimes in practice leads to situations when the mortgagee finds himself circumvented by other claimants, who had either weaker or later claims but were smart enough to use shortcomings of the Latvian Civil Procedure Code in their favour.

4. Protection of Foreign Investments

The Latvian Foreign Investment Act defines foreign investment as a long-term investment in the basic capital, separated by foreign investors for performing entrepreneurial activity in the Republic of Latvia.

According to section 8 of the Act, the Republic of Latvia ensures the protection of foreign investments. The compulsory alienation of foreign investments by the Republic of Latvia may only be carried out in accordance with a specific law, adopted pursuant to the Republic of Latvia 15 September 1992 Eminent Domain Act.

It has to be underlined that bilateral agreements, which are concluded between Latvia and nearly all economically developed countries of the world, define investment differently than the above-mentioned Foreign Investments Act. These bilateral agreements usually state that the term “investment” shall mean any kind of property invested by a natural or legal person of a contracting party in the territory of the other contracting party.

Such wider definition of the investment is also approved by Latvian practice of implementation of the law, as well as in international disputes.*¹

According to this principle the only condition, which must be met by a foreign investor, is that investment must be carried out in the territory of Latvia. For this reason expenditure by foreign investors, which was carried out abroad, like payments for drawings, design, patenting, *etc.* are not accepted as investments unless they are turned into real construction or industrial works on the territory of Latvia.

Such kind of disputes from time to time arise in connection with the privatisation process, sorting out*² whether subjects of privatisation, which frequently happen to be of foreign origin, meet the conditions stipulated by the purchase agreement of the Latvian enterprise.

¹ See Arbitration Award in the matter of an arbitration under article 7 (2) of the Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Latvia on the Promotion and Reciprocal Protection of Investments between Swembalt AB, Sweden, and the Republic of Latvia, dated 23 October 2000. Available at: <http://bnsnews.bns.lv/1234>.

² Privatization of hotels spa to be terminated. – The Baltic Times, 17 February 2000. See also Kemerī spa privatization stays in force. – The Baltic Times, 16 March 2000.

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Laws of Succession in Europe and Estonia: How We Got to Where We Are and Where We Should Be Heading^{*1}

1. The historical development of succession laws and current opportunity for harmonisation

1.1. Development of succession laws over time

Generally, succession law does not develop by rapid and radical changes, as for example, does contract law. Usually succession law evolves in long gentle waves, by baby steps, so that profound change may only be appreciated, in retrospect, after long periods have elapsed. This may be due to the fact that succession law does not have to respond to the more usual and more rapid changes of business and economic practices and necessities. Its roots reach deeper into fundamental concepts of justice, morals and society.^{*2}

This does not mean that economic changes never influence succession laws. Of course, inheritance was and had to be organised in quite different ways in an agrarian society, let alone in subsistence economies, as compared to the needs of an industrial society. In Europe, however, those necessary adoptions were already achieved by the great codes and developments of the 19th century.^{*3}

The great codes in Europe are children of the 19th century, the Austrian *ABGB* even to a large extent of the late 18th century. They reflect the social and economic situations of their time. But it does not

¹ Translated by Heikki Leesment.

² U. Spellenberg *et al.* Recent developments in succession law. – Law in Motion. Antwerp: Kluwer, 1997, p. 713; D. Leipold. Wandlungen in den Grundlagen des Erbrechts? – Archiv für die civilistische Praxis (AcP), 1980, 180, S. 211; H. Hetmeier. Grundlagen der Privaterbfolge in der Bundesrepublik Deutschland und in der DDR. Berlin: Duncker & Humblot, 1990, S. 13; J. N. Druey. Grundriss des Erbrechts. 3. Aufl., Bern: Verlag Stämpfli+Cie, 1992, § 2, N 11; P. Varul. Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia. – Juridica International. Law Review. University of Tartu, V, 2000, p. 114.

³ U. Spellenberg (Note 2), p. 713.

seem that the subsequent economic developments were significant enough to impose further fundamental re-orientations in succession law.^{*4}

In Estonia and other so-called developing economies the situation in this respect is entirely different. The changes in the Estonian law of succession that were effected with the passage of the new Law of Succession Act (LSA) on 15 May 1996, are sweeping, particularly as compared to the earlier statutory provisions dealing with rights of inheritance contained in the Civil Code of the Estonian Soviet Socialist Republic (ESSR). Though the changes can be appreciated in purely quantitative terms – whereas the civil code of the ESSR contained 35 sections devoted to succession, the new Estonian statute runs to 174 sections, the changes from the previous law are radical in their substantive provisions as well.

Radical changes of this scope and magnitude in the law of succession are explained by the fact that laws of succession, as they existed in socialist society, were different and unique. They can even be characterised as simplified to the maximum extent possible.^{*5} The absolutely minimal regulation of legal issues of succession is based primarily on the essential fact that property rights of the individual citizen in socialist society were severely circumscribed. Property that was capable of being inherited or passed by bequest, was small and of relatively slight value. In addition, it is important to note that in socialist society inherited property was not viewed favourably, as property received without the individual having to work for it, which encourages egoism and accumulates undue wealth into the hands of a privileged few. It was for these kinds of reasons that, under Soviet law, the designation of persons lawfully permitted to inherit from a deceased's estate was rather limited.^{*6}

In August 1991, following the restoration of Estonian independence, Estonia reasserted as a central feature of its market economy and democratic society, the right to own property, which, by its very nature and from its very origin, implies the right to inherit — “private law has always included succession law”.^{*7} The law of inheritance and succession is, in this respect, as lawful or unlawful as private property itself.^{*8} Through succession and inheritance, private property asserts and achieves its true character, as succession makes private property “perpetual”. Since succession laws permit private citizens to make provisions regarding their property upon death, it provides them complete freedom to exert dominion and control over their property even after death.^{*9}

Under principles of classical liberal thinking, the right to own property is the very foundation of financial independence and true personal freedom of action. Liberalism requires the acceptance of private inheritance and succession, because it ensures the perpetuation of private property even in the event of death.^{*10} For this reason, provisions regarding the protection of private property rights

⁴ *Ibid.*, p. 720.

⁵ C. Trilsch-Eckardt. Das tschechische Erbrecht im Vergleich zum deutschen und Reformüberlegungen. – Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV), 1996, S. 4; G. Niemeyer. Die Verfassungsgarantie des Erbrechts in der Rechtsprechung des BVerfG. – Familie und Recht: Zeitschrift für die anwaltliche und gerichtliche Praxis (FuR), 1998, S. 12–13; J. K. Tolstoi. Nasledstvennoye pravo. Utchebnoye posobie. Moskva: Prospekt, 1999, st. 6.

⁶ E. Ilus. Tsviilõiguse eriosa: Autoriseeritud konspekt E. Ilusa loengute järgi (Special Part of Civil Law: Authorised Conspect based on the Lectures of E. Ilus). Koost. A. Rammul, E. Talvik. Tartu: Akadeemilise Kooperatiivi Kirjastus, 1938, lk. 57 (in Estonian); E. Laasik. Nõukogude tsviilõiguse. Eriosa (Soviet Civil Law. Special Part). Tallinn: Valgus, 1975, lk. 447–448 (in Estonian); I. Tjutrumov. Pärimise ulatus (Scope of Succession). – Õigus, 1936, nr. 9/1, lk. 436–437 (in Estonian); J. N. Druey (Note 2), § 2, N 6–8; R. Schröder. Abschaffung oder Reform des Erbrechts. Die Begründung einer Entscheidung des BGB-Gesetzgebers im Kontext sozialer, ökonomischer und philosophischer Zeitströmung. Ebelbach: Verlag Rolf Gremer, 1981, S. 2–3; H.-G. Mertens. Die Entstehung der Vorschriften des BGB über die gesetzliche Erbfolge und das Pflichtteilsrecht. Berlin: Walter de Gruyter, 1970, S. 26–27; H. Hetmeier (Note 2), pp. 26–30; D. Leopold. Erbrecht. Grundzüge mit Fällen und Kontrollfragen. 12., neubearb. Aufl., Tübingen: Mohr Siebeck, 1998, Rdn. 51–52; U. Kangas. The Functions and the Order of Inheritance. – Scandinavian Studies in Law. Vol. 29. Ed. by A. Victorin. Stockholm: Almqvist & Wiksell International, 1985, p. 83.

⁷ J. N. Druey (Note 2), section 1, paragraph No. 1; AK-BGB Däubler, Einl. Rdn. 2. – Alternativkommentare: Kommentar zum Bürgerlichen Gesetzbuch. Bd. 6. Erbrecht (bearb. v. Buchholz, Däubler, Derleder, Dubischar, Finger, Pardey, Schaper, Teubner, Wendt). Neuwied: Luchterhand, 1990.

⁸ AK-BGB Däubler (Note 7), paragraph No. 3.

⁹ K. Zalán. Hauptprobleme des Erbrechts im ungarischen Zivilgesetzbuch. – Das ungarische Zivilgesetzbuch in fünf Studien. Herausgegeben vom Redaktionskollegium der fremdsprachigen Zeitschrift für Rechtswissenschaften der Ungarischen Akademie der Wissenschaften Acta Juridica. Unter Vorsitz von Gy. Eörsi. Red. F. Mádl. Budapest: Verlag der ungarischen Akademie der Wissenschaften, 1963, S. 319; H. Koziol, R. Welser. Grundriss des bürgerlichen Rechts. (Manzsche Kurzlehrbuch) Bd. 2. Sachenrecht, Familienrecht, Erbrecht. 10., neu bearb. Aufl., Wien: Manz, 1996, S. 285.

¹⁰ H. Brox. Erbrecht. 18., neubearb. Aufl. 2000, Rdn. 19; H. Hattenhauer. Zur Dogmengeschichte des Erbrechts – Jura (Juristische Ausbildung), Berlin, New York: de Gruyter, 1983, S. 71–72; W. Krug. Erbrecht: Eksamenskurs für Rechtsreferendare. 2. Aufl. München: Beck, 1998, S. 1; H. Koziol, R. Welser (Note 9), S. 285.

and succession rights are usually found in close proximity to one another in the constitutions of democratic countries.*¹¹

Accordingly, in 1992, when Estonia prepared its draft law on succession and inheritance, law-makers embarked on this effort with the above noted axiom clearly in focus — that the law of succession, like the law of property, should remain relatively static. For this reason, lawmakers relied upon the draft Civil Code of the former Republic of Estonia, dating back to 1940, as source material for preparation of both the new law of property as well the law of succession. The law of succession contained in the 1940 draft Civil Code was largely influenced by the German *BGB*, but also by the Swiss, Austrian and Italian civil codes. A great deal was also borrowed from the Baltic Private Law Code (BPLC).^{*12}

On the one hand, a return to laws that existed prior to the incorporation of Estonia into the Soviet Union is entirely understandable and logical. After the fall of communism, many Central and East European countries felt the strong desire to restore the legal systems and traditions that existed before World War II, as the starting point for development of current bodies of private law.*¹³ One such example would be Latvia, which, in 1992, re-enacted the complete civil code from 1937, *i.e.* from before World War II.*¹⁴ Thus, though the succession laws of both Baltic countries originate from the same legal foundation (BPLC) and were first enacted in similar time frames, their substantive provisions are markedly different in many respects.

On the other hand, it is not possible to consider such complete restoration of pre-World War II era civil codes as being a shining success in the development of law. Though succession laws in the countries of Western Europe have changed relatively little during the post-war period, they have not remained altogether stagnant. On the contrary, the last few decades have seen the incorporation of many needed changes as part of the reform of succession laws, in Europe as well as in the rest of the world.

Reforms in the last half-century in Europe have concentrated on increasing the inheritance rights of the surviving spouse and on placing children born outside of marriage on an equal legal footing with children born of marriage. These changes, for example, are the main subjects of the Austrian statute of 1989, the French draft bill of 1995, the German Acts of 1969 and 1973, the Swiss Act of 1984*¹⁵, and the Finnish Acts of 1965 and 1983.*¹⁶

Probably the one overriding common tendency in the development of succession law during the last decades is the establishment of equal rights for children born outside of marriage. An often-used argument is or was that children should not be forced to bear the consequences of their parents' actions. As informal family structures, especially non-marital cohabitation, become a more accepted way of life, there will be less need and opportunity for society to make distinctions between married and unmarried couples.*¹⁷

¹¹ O. Palandt. Bürgerliches Gesetzbuch, 58., neubearb. Aufl. München: Beck, 1999, Einl. vor § 1922, Rdn. 4; Soergel – Stein, Einl. Rdn. 5. – Soergel. Bürgerliches Gesetzbuch. Bd. 9. Erbrecht (bearb. v. Damrau, Dieckmann, Harder, Loritz, Müller, Stein, Wolf). 12., völlig neubearb. Aufl. Stand: Frühjahr 1992. Stuttgart, Berlin, Köln: Kohlhammer, 1992.

¹² P. Varul (Note 2), pp. 106–114; E. Silvet. Pärismiseaduse eelnõu põhijoontest (Commentary on the draft of the Law of Succession). – Juridica, 1995, nr. 7, lk. 282 (in Estonian). The Baltic Private Law applied from the year 1865, when Estonia was part of Tsarist Russia. The author of the law was Professor Georg-Friedrich Bunge of the University of Tartu. 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 Baltic Private Law also applied in Estonia in 1919–1940 when Estonia was an independent state. The preparation of Estonia's own civil code began at 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 (see P. Varul (Note 2), p. 108). For more about the Baltic Private Law Code see in: M. Luts. Private Law of the Baltic Provinces as a Patriotic Act. – Juridica International. Law Review. University of Tartu, V, 2000, pp. 157–167.

¹³ M. A. Glendon, M. W. Gordon, C. Osakwe. Comparative legal traditions: text, materials, and cases on the civil and common law tradition, with special reference to French, German, English and European law. 2nd ed. West Publishing Co: St. Paul, Minn., 1994, pp. 435–436; H. Köhler. Transformationsprozess in Zentral- und Osteuropa: Bedeutung der Rechtsreform. Erste Seite. – Europäisches Wirtschafts- & Steuerrecht (EWS), Heft 4/2000.

¹⁴ Latvijas Republikas Augstākās Padomes un Valdības Zinotājs, 1992, nr. 4/5, art. 51; nr. 29/31, art. 417; R. Krauze. Mantojuma tiesības. 2. papildinātais izdevums. Rīga: KIF “Biznesa komplekss”, 1997 (in Latvian); U. W. Schulze. Lettland. – Ferid/Firsching/Dörner/Hausmann. Internationales Erbrecht. Quellensammlung mit systematischen Darstellung des materiellen Erbrechts sowie des Kollisionsrechts der wichtigen Staaten. Begründet von M. Ferid, K. Firsching. Fortgeführt von M. Ferid, P. Lichtenberger. Stand: Lieferung I-XL Band I-VII, München: Beck (1997), Rdn. 1.

¹⁵ U. Spellenberg (Note 2), p. 720; J. N. Druey (Note 2), section 2, N 11.

¹⁶ U. Kangas (Note 6), p. 93.

¹⁷ U. Spellenberg (Note 2), p. 728.

It is clear, however, that Estonian law poses no problem with regard to children born outside of marriage. The right of Estonian children born outside of marriage to inherit equally with those born of married parents was guaranteed under Soviet law, as it was in other socialist countries, and the same provisions were incorporated into the current Estonian law of succession.^{*18}

Among the current issues, in the further development of Estonia's succession law, is the matter of protecting the legal rights of the surviving spouse. Jurists from the University of Amsterdam arrived at that conclusion, following their expert review and critique of the Estonian draft law. Their analysis of the Estonian provisions for protection of the surviving spouse, led them to conclude that the law does not guarantee the surviving spouse the necessary standard of living, and, if the married couple has not made suitable arrangements in the event of the death of one spouse, the survivor can be left destitute. The debate among legislators considering the draft law in the Estonian parliament did not particularly focus on this aspect of the statutory scheme, and they did not revise the draft law before passage, despite the critique provided by the Dutch experts.

This lack of concern is even more surprising considering that in the preparation of the draft law, the drafters had the clear intent to create for the surviving spouse generous provisions regarding inheritance. Following the adoption of the current law of succession, one of the primary authors of the statute, E. Silvet, as well as the counsel to the Parliamentary Legal Affairs Committee, H. Reinberg-Rits, stressed on several occasions that the Estonian succession law provides many advantages to the surviving spouse.^{*19} Unfortunately, this is true only to the extent that one directly compares the current law of succession with the statute that was operative before 1940, *i.e.*, with the BPLC and the state of succession law in Europe before World War II. This means that, in reality, the Estonian law of succession has remained unchanged in its provisions for protection of the surviving spouse since 1940. Though the German *BGB* provided the foundation for the Estonian draft in 1940, at the present, the *BGB* has undergone periodic review and development over the ensuing post-war years, and the Estonian succession law has not kept up with that development.

1.2. Harmonisation of the law of succession in Europe

It is not possible, neither at the present moment nor in the near future, to speak of a unified European Union law of succession, common throughout the Community. Thus, the above title might seem somewhat strange to lawyers. Indeed, it must be recalled that the goal of the European Community was to promote a vibrant common market and "economic activities" throughout the Community, not to promote uniform succession laws.^{*20}

Some authors even warn against excessive unification of family law and law of succession. Basically, they invoke two arguments.^{*21}

- (1) In federal countries, family and succession law are a State jurisdiction. This in fact is the case in some federal countries such as Canada and the United States of America.^{*22} With regard to Europe, it is possible to cite Spain^{*23} and the former Yugoslavia as examples. In other federal countries, such as Germany and Switzerland, it is a matter of federal jurisdiction.
- (2) Private law, especially family law and law of succession, are deeply rooted in our culture and express our way of life. The practising lawyer has to save and protect law, just as we protect our language, our monuments and landscapes. Only then can we prevent our cultural heritage from being destroyed by the all-levelling urge for unification.

¹⁸ *Ibid.*

¹⁹ E. Silvet. Eesti Vabariigi esimene oma pärimisseadus (Republic of Estonia's own Law of Succession). – Sõnumileht, 11. juuni 1996 (in Estonian); H. Reinberg-Rits. Uuest aastast jõustus pärimisseadus (Law of Succession effective from New Year). – Postimees, 3. jaanuar 1997 (in Estonian).

²⁰ W. Pintens, J. Du Mongh. Family and Succession Law in the European Union. – International Encyclopaedia of Laws. Vol. 1. R. Blanpain (general ed.). Family and Succession Law – Suppl. 1 (May 1997). The Hague-London-Boston: Kluwer, 1997, European Union – 11.

²¹ W. Pintens, J. Du Mongh (Note 20), European Union – 75.

²² At the same time, the USA is cited as an example for Europe, with the wide acceptance by a majority of the States of uniform legislation. "A greater and more successful and effective unification has been realized by the American Uniform Probate Code 1990 (amended in 1993) unifying the rules of transfer of succession. This should be set as an example for Europe, without forgetting, however, that the conditions in Europe are not as favourable as in the United States, where unification takes place within one federation". (See in: A. Verbeke, Y.-H. Leleu. Harmonization of the Law of Succession in Europe. – Towards a European Civil Code. The Hague: Kluwer, 1998, p. 187.

²³ C. T. Ebenroth. Erbrecht. München: Beck, 1992, Rdn. 72.

Despite these arguments for retaining national individuality in succession laws, it is generally considered necessary, in the further development of European Union legal standards and requirements, that national laws of succession also be harmonised among Member States. In the interest of promoting uniformity, it is necessary to be much more careful and sensitive, than, for example, in the case of contract law. Perhaps the law of succession, even more than family law, is a field reserved to local rules and customs, an area in which the desire or need for unification seems to be, at best, moderate.^{*24}

It has even been referenced in publications in the field that the need to standardise laws of succession among European Union Member States is dependent upon:

- (1) clearly defined economic justification and
- (2) the requirements of the European Convention on Human Rights.^{*25}

In a recommendation dated 7 December 1994, the European Commission requested the Member States of the European Community to facilitate the succession of small and medium companies in order to avoid their liquidation in probate, and as one response to growing unemployment in the EU. This would not only require the passage of remedial measures in company and tax laws, but also in the field of family and property law, in particular concerning restrictions on transfers between spouses, prohibition on contracting as regards a succession which has not yet occurred and the exercise of forced share (*legitima portio*) property rights to specific hereditary assets rather than to comparable value or worth in terms of money.^{*26} The stifling impact of inheritance taxes on the development of a true common market throughout Europe, and their regressive effect on beneficiaries, are two major criticisms directed currently at European succession laws.^{*27} Neither Estonia nor Latvia has so far imposed any estate or inheritance taxes. If Estonia were to consider enacting estate and inheritance taxes in the future, it should seriously analyse their effects and problems created in other countries, especially countries of the European Union. In addition to economic problems, among which widely reported are the bankrupting effects of inheritance taxes on small- and medium-sized businesses and the resulting contribution to unemployment, there is also the perceived negative impact of the law of succession itself. It is particularly damaging in reciprocal wills between spouses. In this respect, the tax law has been identified in the legal literature as a restriction on testamentary freedom.^{*28}

The adoption of the European Convention on Human Rights by Member States has resulted in equal rights of succession and inheritance by both children born of marriage and those born outside of marriage. Beyond ratification of the Convention by Member States, its provisions have assumed the force of substantive law in the European Union with the adoption of the Treaty of Amsterdam.^{*29} In addition, it would also be appropriate to identify an act, though not directly an act of the European Union, that nevertheless has influenced in several ways, the future development of successions laws in practically all European nations — namely, on 16 October 1981 the Council of Europe accepted recommendation No. R (81) 15, as a result of which Member States are urged to establish in the national law of each country provisions which will permit the surviving spouse to continue to reside in the marital home following the death of one spouse.^{*30} On the one hand, this act may be viewed by the Council of Europe as support for the development of this body of law in the indicated direction. However, for those Member States that have not enacted the necessary reforms in succession laws, this act is a further indicator of the thrust of future development in the law.

Accordingly, approaching the issue of further development of the Estonian law of succession in light of principles accepted by the majority of European states, it would be appropriate to focus on the issue of protecting the legal rights of the surviving spouse.

²⁴ W. Pintens, J. Du Mongh (Note 20), European Union – 76–77; A. Verbeke, Y.-H. Leleu (Note 22), p. 175.

²⁵ A. Verbeke, Y.-H. Leleu (Note 22), p. 173.

²⁶ *Ibid.*, p. 182.

²⁷ See N. Dautzenberg, Die Bedeutung des EG-Vertrages für die Erbschaftsteuer. – Europäisches Wirtschafts-Steuerrecht (EWS), Heft 3/1998, S. 86–93.

²⁸ U. Spellenberg (Note 2), p. 717.

²⁹ A. Verbeke, Y.-H. Leleu (Note 22), p. 182.

³⁰ W. Zankl, Das gesetzliche Vorausvermächtnis des Ehegatten. Österreichisches Rech und Rechtsvergleichung. Wien: Manz, 1996, S. 101–102; D. Heinrich, D. Schwab, Der Schutz der Familienwohnung in Europäischen Rechtsordnungen. Bielefeld: Verlag Ernst und Werner Gieseking, 1995, S. V.

2. Ensuring the right of the surviving spouse to inhabit the matrimonial domicile in inheritance

2.1. Reasons for strengthening the rights of the surviving spouse under succession law

It must generally be considered that the spouse, as a rule, is the person closest to the deceased and therefore, the protection and enhancement of the interests of the surviving spouse is fully understandable and entirely appropriate. In doing so, it is also necessary, however, to consider the perspective of surviving children and other close relatives, who likewise have an interest in having the inheritance estate remain in the family. Accordingly, several conflicting interests and perspectives converge in this question, and reaching a resolution fair to all parties is not an easy task.^{*31}

In every society the fundamental choices within inheritance law must be such that they are acceptable to the majority of the population. Also, they must not have unreasonable social consequences.^{*32}

The determination of which orientation should be taken in the further development of succession laws depends on two considerations. Initially, the following proposition can be found in the literature on succession laws, particularly analyses published in English: intestate succession law is the body of law that determines how property will be distributed if a person did not make other arrangements or if the arrangements attempted were not legally valid. In Western liberal democracies, the purpose of such rules is essentially to carry out the desires of the typical decedent. That is, intestate succession law is not designed to promote any specific social aim, such as redistribution of wealth; rather, it is the legislature's attempt to draft the will that the average person would have made.^{*33}

German legal specialists have proposed an entirely different reason as the foundation for future development of succession laws. The majority of German authors are not in agreement with the above proposition for the following reason. If the consequence of family succession laws were grounded in attempting to effect the hypothetical will of the deceased, then the law should provide maximum protection to the total freedom of the testator in determining his or her heirs, but that is not what succession laws actually provide (at least not on the European continent). The rights of family members to insist upon their forced share or minimal statutory share of the deceased's estate greatly limit the testator's freedom of action. Thus, the very foundation of succession law in countries such as Germany and France is not the hypothetical testamentary wish of the deceased, but rather a reflection of societal values of what the law should be.^{*34}

Since English law provides virtually unbounded testamentary freedom, the discernment of the assumed intent of the testator lies at the heart of English succession law and its future evolution. Principles of family succession rights and statutory shares for either the surviving spouse or other family members are rarely mentioned. This reflects the differing attitudes reflected in English and German legal literature on the regulation of deceased's estates and rights of family members under succession laws. For this reason, lawmakers in England, for example, pay greater attention to sociological research when considering reforms in succession laws than do their counterparts in Germany.^{*35}

³¹ H.-G. Mertens (Note 6), p. 64; T. Kipp, H. von Coing. *Erbrecht: ein Lehrbuch / auf d. Grundlage d. Bearb. von T. Kipp, fortgef. von H. Coing*. 14. Bearb. Tübingen: Mohr, 1990, S. 38; S. Buchholz. *Gestaltungsprobleme des Ehegattenerbrechts: Teilungsprinzip oder Nutzungsprinzip*. – *Monatschrift für Deutsches Recht (MDR)*, 1990, S. 375; D. W. Belling. *Einführung in das Recht der gesetzlichen Erbfolge*. – Jura, 1986, S. 584; M. A. Glendon. *The Transformation of Family Law. State, Law and Family in the United States and Western Europe*. Chicago, London: The university of Chicago Press, 1996, p. 239.

³² U. Kangas. *The Myth of Uniform Family and Inheritance Law. – An Introduction to Finnish Law*. Ed. by J. Pöyhönen. Helsinki: Finnish Lawyers' Publishing, 1993, p. 214; M. A. Glendon (Note 31), p. 238.

³³ M. A. Glendon (Note 31), p. 239. See also: A. Ehrenzweig, A. Ehrenzweig. *System des österreichischen allgemeinen Privatrechts*. 3., vollkommen Neubearb. u. erw. Aufl. 4. Buch. *Das Erbrecht*. Bearb. von W. Kralik. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 1983, p. 3.

³⁴ MünchKomm – Leipold, Einl. Rdn. 10. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. Bd. 9. *Erbrecht: §§ 1922–2385; §§ 27–35 BeurkG*. – G. Schlichting (Red.) (bearb. v. Brandner, Burkart, Dütz, Frank, Grunsky, Leipold, Musielak, Promberger, Schlichting, Siegmann, Strobel). 3. Aufl. München: Beck, 1997; Palandt – Edenhofer, 1999, Einl. vor § 1922, Rdn. 3; J. N. Druey (Note 2), § 4, N 13; F. Gschnitzer. *Österreichisches Erbrecht*. Zweite, Neubearb. Aufl. von Christoph Faistenberger. Wien, New York: Springer-Verlag, 1983, S. 2–3.

³⁵ The Law Commission's Report, *Distribution on Intestacy* (Law Com. No. 187, 1989) (see in: A. Borkowski. *Textbook on Succession*. London: Blackstone Press Limited, 1997, p. 3).

It has been observed that the differences between the approach employed by legal scholars in continental Europe and England result from basic differences in their legal traditions and contrasting legal philosophies underlying the two legal systems. While on the continent lawyers think abstractly, in terms of institutions; in England layers weigh things concretely, in terms of cases, the relationship of the parties' "rights and duties". Continental traditions place more reliance upon legal methodology, while the English common law tradition is grounded in precedent and the application of legal principles and societal norms in actual cases and controversies.^{*36}

The development of succession laws in continental Europe is, however, certainly influenced by the substantive provisions of English succession law and changes that have been carried into effect. Thus, Germany, for example, has recently compiled and analysed statistical data concerning problems of the surviving spouse.^{*37} Elsewhere on the continent, as in the Netherlands, for example, discussions concerning provisions for the surviving spouse have been going on for decades. Notarial professors of the Netherlands have even submitted a proposal for amendment to the law to the Secretary of Justice. This proposal is based on standard notarial practice of many decades regarding wills, in which spouses who have wills drawn up, appoint each other as sole heir and grant their descendants a claim to the estate of the surviving spouse, payable at the time of death of the surviving spouse.^{*38}

In one sense, it is thus possible to take a middle position on the issue of succession laws, because, when one considers succession laws from the viewpoint of those advocating for testamentary freedom of choice by the testator, then the rules applicable to succession and inheritance under operation of law are seen not so much as an ideal solution, as they are a necessary expedient to be employed in circumstances where the testator has not expressed his or her testamentary intent, in which event the operation of succession law should proceed from the viewpoint of the assumed intent of the average testator.^{*39}

As an historical observation, it should be noted that practically until the beginning of the twentieth century, rights of succession by family members under the laws of intestacy meant the application of Roman legal principles dating back to Justinian notions of justice.^{*40} For instance, in Austria laws providing for intestate succession for the surviving spouse were enacted by legislation by Emperor Josef II in 1786.^{*41}

Some of the main justifications for enhancing and enlarging the succession rights of the surviving spouse may be summarised as follows.

For most people it is a serious economic burden if their spouse dies and in connection with this a division of the estate is required amongst the children of the deceased. In many cases the surviving spouse will have the option to decide whether or not to remain in possession of the estate, which means that the spouse can keep the estate as a whole.^{*42} The hereditary succession of the surviving spouse serves a specific purpose: it is not only to distribute the estate but also to maintain and to support her. Therefore firstly the poor widow without dowry enjoys the inheritance in common with the children (since 1786 in Austria). The condition that the surviving spouse must be "without dowry" was set aside by later legislation, but until then the surviving spouse was only entitled to a life estate, while property devolved to her or him in the case of no surviving descendants.^{*43}

This altered the position of the wife, since it is a common fact that in the majority of cases, the surviving spouse is the wife. Thanks to the efforts of individuals and organisations who have championed women's issues starting in the 1920s and particularly since the middle of the last century, the status of the wife has been elevated to a position of eminence. The literature describes the middle

³⁶ K. Zweigert, H. Kötz, *Introduction to Comparative Law*, 2nd, rev. ed., translated from the German by T. Weir. Oxford: Clarendon Press, 1992, pp. 70–71.

³⁷ D. Leipold (Note 2), pp. 160–237.

³⁸ G. van der Burght, M. Franssen. *The Netherlands*. – *International Encyclopaedia of Laws*. Vol. 2. R. Blanpain (general ed.). Family and Succession Law (January 1997). The Hague-London-Boston: Kluwer, 1997, The Netherlands – 145.

³⁹ H. Koziol, R. Welser (Note 9), p. 286.

⁴⁰ R. Dietz. *Erbrecht*. Ein Grundriss. Bonn: Humboldt-Verlag, 1949, S. 29; K.-H. Gursky. *Erbrecht*. 2., neubearb. Aufl. Heidelberg: Schaeffers Grundriß C. F. Müller Juristischer Verlag, 1994, S. 19; U. v. Lübtow. *Erbrecht*. Ein systematische Darstellung. 1 Halbband. Berlin: Dunker & Humblot, 1971, S. 1–2; W. Brauner. Different ways of succession by customary law in Austria. – *Actes à cause de mort – Acts of Last Will*. Deuxième partie – Second Part. Europe médiévale et moderne – Medieval and Modern Europe. Bruxelles: De Boeck Université, 1993, p. 300.

⁴¹ W. Brauner (Note 40), p. 300.

⁴² S. Storm, H. V. G. Pedersen. *Denmark*. – *International Encyclopaedia of Laws*. Vol. 1. Family and Succession Laws – Suppl. 7 (October 1998). The Hague-London-Boston: Kluwer Law International, 1998, Denmark – 147.

⁴³ W. Brauner (Note 40), p. 300.

of the twentieth century as the “happy period” in the development of family law^{*44}, which continues in many respects up to the present.

Owing to the increasing recognition of individual rights by the society, which has itself brought about changes in family structures, the estate has been recognised as the joint achievement of the labour and industry of both spouses, and not as hereditary family property to be passed on at death from generation to generation. Moreover, it is customary for large family fortunes to pass inter-generationally through *inter vivos* transfers.

The matrimonial home and its contents are used by the entire family, though they undoubtedly have particular importance to the surviving spouse as a major asset that may largely determine her standard of living in widowhood. Thus, to the extent that the application of succession law and the preferences it provides to the surviving spouse help ensure the perpetuation of the same living conditions as those that existed prior to the death of the intestate spouse, they provide stability and security not only in the financial sense, but also spiritually and emotionally.^{*45}

Average life expectancy has increased substantially, which has also meant that in most instances, the death of the intestate occurs when his or her children are largely middle-aged and financially secure with their own homes and families. Thus, surviving children are not likely to depend on the matrimonial home and contents for their own habitation, which will, however, continue to be of vital importance to the surviving spouse. This fact has been stressed in the reform of succession laws in Austria, Switzerland, and England, and recognised in legal scholarship in Germany.^{*46}

The question arises why it is not possible to ensure the perpetuation of the matrimonial home for the support of the surviving spouse. Though this may be possible as a theoretical proposition of law, in practical reality, the ability of surviving children to claim their forced share under law may present insurmountable complications. For example, if the testamentary estate is comprised entirely of the matrimonial home, then the assertion of rights by children to their forced share will bring with it problems rather than solutions. The prevailing problem is that in such circumstances, there is nothing for the surviving spouse to sell in order to satisfy the demands of children for their share, and if the income of the surviving spouse is inadequate, she will have no opportunity to obtain bank financing. Often, in the writing of the will, inadequate attention is paid to whether the surviving spouse will have sufficient resources to satisfy demands for forced shares. It is incumbent on legal counsel to alert their clients specifically to these considerations when reviewing estate plans.^{*47}

Under Estonian succession law, the number of persons legally entitled to claim a forced share of the deceased's estate is “fortunately” severely limited, particularly as compared to the rest of Europe. Pursuant to the model of Soviet succession law, persons entitled to claim a forced share under Estonia's current law are the closest lawful relatives who are themselves unable to work. It is important to note, in this respect, that Estonia remains one of the few former Soviet republics to retain the anomalous provision respecting forced share for invalid relatives of the testator.

2.2. Proposed solutions

Recent reforms intended to enhance the position of the surviving spouse, both in Europe as well as in the rest of the world, have enlarged the forced share provisions under operative law, often resulting in the surviving spouse being the sole inheritor, particularly in the case of small estates. This has proven to be true, despite the fact that the institution of marriage has become increasingly temporary and unstable as compared to the previous century. Considering the frequency of divorce and the position of the spouse under succession law, commentators have expressed the opinion that the ideal marriage lasts until the death of one spouse. Yet, in the case of relatives inheriting by intestacy, no consideration is given to the length of time that they were related, nor to the closeness of their relationship during the life of the deceased.

⁴⁴ Danish Law in a European Perspective. Ed. by B. Dahl, T. Melchior, L. A. Rehof, D. Tamm. Copenhagen: GadJura, 1996, p. 168.

⁴⁵ MünchKomm – Leipold (Note 34), preliminary remark to paragraph No. 10, section 1931, paragraph No. 1; U. v. Lübtow (Note 40), p. 20.

⁴⁶ E. Feil. Pflichtteilsrecht. Kurzkommmentar für die Praxis. 2. Aufl. Wien: Linde, 1998, Rdn. 23.20; H. Koziol, R. Welser (Note 9), p. 309; W. Zankl (Note 30), pp. 103–104; M. Näf-Hofmann, H. Näf-Hofmann. Schweizerisches Ehe- und Erbrecht. Die Wirkungen der Ehe im allgemeinen, das eheliche Güterrecht und das Erbrecht der Ehegatten. Eine Einführung für den Praktiker. Zürich: Schulthess Polygraphischer Verlag, 1998, No. 2421; C. H. Sherrin, R. C. Bonehill. The Law and Practice of Intestate Succession. London: Sweet & Maxwell, 1987, p. 216; D. Leipold (Note 2), pp. 176–177; H. A. Weirich. Erben und Vererben. Handbuch des Erbrechts und der vorweggenommenen Vermögensnachfolge. 3., neubearb. Aufl. Herne/Berlin: Verlag Neue Wirtschafts-Briefe, 1991, Rdn. 35.

⁴⁷ H. Klingelhöffer. Pflichtteilsrecht. München: Beck, 1996, Rdn. 73.

At the same time, the law has reduced the circle of relatives able to share in the deceased's estate with the surviving spouse. The most far-reaching changes in this regard have been carried out by Finland, Sweden, Belgium, Luxembourg, and the Netherlands, where, in the absence of any descendants, the surviving spouse will receive the entire estate, to the exclusion of the parents, siblings and other more distant relatives. Often, the law provides, in the case of descendants, the opportunity for the surviving spouse to retain intact the property of the estate during her lifetime, with the children obtaining control and ownership only upon the death of the surviving spouse.^{*48}

Special provisions can be found in the succession laws of almost all nations, regarding the marital home and its furnishings, which guarantee the right of the surviving spouse to continue to live in her familiar surroundings. Often this right is set forth as an imperative, which means that the testator has no ability to affect this outcome through anything he may try to do in his lifetime. Succession laws can be, and have been used for a great many years, as one means of ensuring that the surviving spouse has the opportunity to obtain housing and the necessary furnishings following the death of the other spouse. As early as the first decade of the 1800s, Matthias Caloniuss emphasised the housing policy function of inheritance.^{*49}

In addition to enlargement of the intestate share of the surviving spouse, many European countries have recently included special provisions which ensure the right of the surviving spouse to continue to inhabit the marital abode included in the deceased's estate. Since the problems are complicated and extensive, it is not possible within the scope of this article to deal with the presenting issues at greater length. This question certainly requires more careful detailed examination and analysis, both in the interests of developing the Estonian law of succession, as well as the harmonisation of Estonian law with the principles accepted throughout Europe. Briefly stated, the problem of how to guarantee the ability of the surviving spouse to continue to inhabit the marital home is addressed in two ways.

One group of countries, including the European countries of Austria, Italy and Finland, grant the surviving spouse the right to use and occupy the marital home. Other countries, such as England, Ireland, and Scotland, in contrast, grant ownership of the marital home to the surviving spouse. Switzerland employs a mixed approach, which provides the surviving spouse with several options to choose among.^{*50}

Under Swiss law, pursuant to ZGB article 612a the surviving spouse may demand the house or apartment in which they cohabited, either by transfer to her ownership, or a life estate, which is protected as a property right (*Nutzniesung*), or simply the ability to reside in the marital abode without any accompanying property right (*Wohnrecht*).^{*51} Swiss law appears, in this respect, to be particularly flexible, which not only provides for the ability of the surviving spouse to continue to live as before, but also considers the interests of other inheriting parties.^{*52} For this reason, Estonia should primarily consider the example provided by Switzerland in the further refinement of her succession laws.

With regard to property contained within the matrimonial home of the family, German law provides for the surviving spouse receiving all such furnishings without it being calculated as part of the inheritance share. Estonian law (LSA section 17) in this respect is identical to that of Germany (*BGB* section 1932) and the usual furnishings of the marital home which are not part of the real property included in the deceased's estate pass to the surviving spouse.

It bears mention that Soviet succession law contained special provisions regarding furnishings of the deceased's home. Section 538 of the Civil Code provided that the usual furnishings, along with housekeeping appliances and utensils, were not to be included as part of the deceased's estate, but were received by family members, in addition to their interest in the estate, if said heirs resided with the deceased in the same domicile for at least one year.

Legal recognition of this additional benefit (the "*eełosa*" which may be translated as the "preferential legacy") as something that is received by the surviving spouse without it being calculated as part of the statutory share has long been part of German legal tradition ("*der Voraus*"), though it is not recognised under French law. It is intended to provide the surviving spouse the ability to maintain

⁴⁸ M. Savolainen, Finland. – International Encyclopaedia of Laws. Vol. 1. Family and Succession Laws – Suppl. 3 (December 1997). The Hague-London-Boston: Kluwer Law International, 1998, Finland – 113; G. van der Burght, M. Franssen (Note 38), pp. 162–163. See also B. Dostal. – Ferid/Firsching/Dörner/Hausmann. Internationales Erbrecht. Hinweise Frankreich. München: Beck, 2000.

⁴⁹ U. Kangas (Note 6), p. 93.

⁵⁰ W. Zankl (Note 30), p. 17.

⁵¹ *Ibid.*, pp. 33–34.

⁵² *Ibid.*, p. 49.

herself in the same manner and at the same economic level as before the death of her spouse.^{*53} This provision appeared in this format in the Prussian ALG, which established, in this respect, a standard for the drafters of the BGB to follow.^{*54}

Originally, the “*Voraus*” was intended to provide protection to the surviving spouse in the event that relatives of the second and third degree asserted their succession rights. The invocation of the “*Voraus*” provisions of the law reflected the realisation that furnishings and property constituting the “*Voraus*” are specifically related to the joint housekeeping that the spouses established and enjoyed during their years together, and which lie at the foundation of married life. Were that to be destroyed, the sense of loss would be especially hard for the surviving spouse to endure, since the resulting emptiness, both emotional and physical, would be compounded and even harder to suffer. The provision of the “*Voraus*” was also based on the premise that it is closer to the will of spouses that the property and furnishings contained in the matrimonial home pass to the surviving spouse, rather than being divided among more distant relatives.^{*55}

In the second half of the 19th century when the *BGB* was being finalised, the German drafters considered the inclusion of a “*Voraus*” exclusively for the benefit of the surviving spouse to be excessive, if there were also children of the marriage. The surviving spouse with children did not obtain the right of the “*Voraus*” under the *BGB* until 1958, when statutory provisions providing men and women with equal rights was enacted into law — *Gleichberechtigungsgesetz*. Until very recently, German law assumed the concept of the homemaker marriage, where the wife did not work. From this orientation, the German law provided that in the event of descendants, the surviving spouse receives the “*Voraus*” only to the extent that she has true need for it. No importance was attached to whether the inheriting descendants, in the particular case, continued to live in the matrimonial home or not.^{*56}

It can be said that, to some extent, German law-makers followed the lead of Austria in this area of law, though Germany itself provided the example for Austria in its reform of the *ABGB* in 1914. Namely, the “*Voraus*” was incorporated into the Austrian *ABGB* with the *Novelle* of 1914, following the model provided by the *BGB* in 1900. However, in contrast to the original German *BGB*, under Austrian law the surviving spouse enjoyed the right of “*Voraus*” even in the presence of descendants, but only to a limited extent, *i.e.* only when the surviving spouse could demonstrate true need.^{*57}

Accordingly, section 1932 of the *BGB* currently provides that the spouse has the right to receive the “*Voraus*”, despite the presence of children and other descendants, to the extent that is necessary to maintain himself or herself in same manner as before the death of the spouse. This means that in the case where the deceased’s estate is small, none of it passes to the descendants. Legal scholars debate whether the family automobile should properly be included as part of the furnishings and personal property of the matrimonial home. In the case of relatives of the second and third degree, the surviving spouse receives as part of the “*Voraus*” all property and furnishings contained in the home and jointly used by the couple, regardless of whether it is necessary for the maintenance of her prior lifestyle. Thus, the law draws a distinction between the minor “*Voraus*” and the major “*Voraus*”, depending on the nearness or remoteness of relatives.^{*58}

As of the present time, Austria is again a step ahead of Germany. Namely, starting in 1989 with the enactment of *ErbrÄG* (Inheritance Law Amendment Act 1989), the family’s living accommodations are included within the “*Voraus*” and the distinction between the “minor” and “major” “*Voraus*” was deleted. Although up until that time, the right of the surviving spouse to his or her “*Voraus*” largely went unnoticed, with the 1989 amendment to the law, it became of utmost importance to the surviving spouse and his or her rights under succession law. Since the matrimonial home constitutes, in the majority of cases, the most significant asset of the estate, the rights of the surviving spouse have become paramount and effectively exclude all other parties from inheriting from the estate. Thus, the era when the “*Voraus*” was relatively unimportant in economic terms is now ended in Austria with the passage of the new law.^{*59}

⁵³ U. v. Lübtow (Note 40), p. 80; W. Zankl (Note 30), p. 101; G. Boehmer. *Vorschläge zur Neuordnung der gesetzlichen Erbfolge* (BGB §§ 1924–1936). Berlin: Walter de Gruyter, 1938, S. 137.

⁵⁴ W. Zankl (Note 30), p. 101.

⁵⁵ H.-G. Mertens (Note 6), p. 73; G. Boehmer (Note 53), p. 138.

⁵⁶ *MünchKomm – Leipold* (Note 34), section 1932, paragraph No. 2.

⁵⁷ G. Boehmer (Note 53), p. 138; W. Zankl (Note 30), pp. 13, 101.

⁵⁸ C. T. Ebenroth (Note 23), paragraph No. 157; H. Rohlfing. *Erbrecht in der Anwaltlichen Praxis*. 2. Aufl. Bonn: Dt. Anwaltverl, 1999, § 2, Rdn. 151.

⁵⁹ W. Zankl (Note 30), p. III, 1.

The major change in the Austrian law with passage of the *ErbRÄG*, which also sets it apart as compared to German law, is the provision providing to the surviving spouse the entire furnishings and contents of the matrimonial home, even if there are lawful descendants. Thus, in the typical example, where the deceased's estate is comprised entirely of the matrimonial home and its contents, descendants are not able to inherit anything during the lifetime of the surviving spouse.^{*60}

The eradication of the distinction between the "major" "*Voraus*" and the "minor" "*Voraus*," and the resulting enhanced position of the surviving spouse, did not occur in Austria without controversy. One argument against this change in the law was precisely the assertion that, in many cases, it will result in the surviving spouse being the only beneficiary of the estate, with children of the marriage being left with nothing.^{*61}

A third change in Austrian succession law, also considered rather radical, particularly as compared to German law, is the provision that it does not matter whether the spouse's inheritance entitlement is based on a contract, a last will, or simply statutory intestate rules, or even in the case that the spouse is not a designated heir of the predeceased spouse, the surviving spouse is entitled to the statutory preferential legacy ("*gesetzliches Vorausvermächtnis*") (section 758 *ABGB*). This entitles the surviving spouse to obtain the chattels belonging to the matrimonial household and also includes the right to continue living in the marital home. Such entitlements can only be avoided by a valid disinheriting disposition by the other spouse, for a cause, and based on the most egregious grounds.^{*62}

By way of summarising the above analysis, it is fair to conclude that the future development of Estonian law of succession requires attention to specifically the preferential legacy provisions applicable to the surviving spouse, and in that regard, Estonia should first of all consider the law reforms carried out by Austria.

3. Conclusions

Although the law of succession is generally considered rather fixed and static, especially as compared to contract law or even family law, the last fifty years have seen many important changes in this body of law. Were one to evaluate the current state of the law from the perspective of whether Estonian law of succession has considered the thrust of current developments throughout the world, one would have to answer both affirmatively and negatively. In general, the Estonian law of succession is consistent with the accepted European principles and in some respects, on the cutting edge of legal developments, such as the Estonian provisions granting equal rights to children born of marriage and to those born outside of marriage.

The same cannot be said, however, for the provisions protecting the interests of the surviving spouse, where Estonian succession law remains far behind many European countries in its development. This is one area of succession law where the wish of European nations to harmonise their various statutes is particularly evident. One indicator of a unified direction for development of these laws is the recommendation of the Council of Europe, which would require Member States to implement appropriate solutions for ensuring the maintenance of the surviving spouse in the accustomed manner following the death of the other spouse. Since Estonia is already a member state of the Council of Europe, it would be only natural in this regard that our succession laws consider the direction of development accepted in Europe as the model to follow.

⁶⁰ *Ibid.*, S. 2; AK-BGB – Däubler (Note 7), preliminary remark to paragraph No. 50; Schwimann – Eccher, § 758, Rdn. 18. – Schwimann. Praxiskommentar zum ABGB samt Nebengesetzen. 2., neubearb. u. erw. Aufl., herausgegeben von Michael Schwimann, Band 3, §§ 531–858 ABGB, AnerbG, KärntnerG, Tiroler HöfeG, bearbeitet von B. Eccher, B. Eggemeier, H. Hofmeister. Wien: Orac Verlag, 1997. The same outcome is, in reality, achieved elsewhere. For example, research conducted in England in 1972 revealed that in only five percent of cases did the probate estate of married couples exceed in addition to the marital home more than 10,000 pounds in money or securities. (See in: C. H. Sherrin, R. C. Bonehill (Note 45), p. 216).

⁶¹ W. Zankl (Note 30), p. 102.

⁶² Austria. – European Succession Laws. Ed. by D. Hayton. Chichester, New York, Brisbane, Toronto, Singapore: John Wiley & Sons, 1991, Uptate 4 – January 1996, paragraph No. 12.13; E. Feil (Note 46), paragraph No. 23.20; H. Koziol, R. Welser (Note 9), p. 309.

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Subjective Fault as a Basis of Delictual Liability

Introduction

Fault is an element of delictual liability that contains a reproach on the person who has behaved wrongfully and has thus caused damage. So far, the law in force in the Republic of Estonia has relied on the definition of fault that was used in the Soviet civil law theory according to which fault is the relationship between a person's consciousness and the consequences of his or her action.^{*1} Hopefully, the *Riigikogu* (Estonian parliament) will pass the Law of Obligations Act^{*2} (hereinafter: LOA) in this year. The draft of the LOA is a modern draft that follows the traditions of continental Europe. Chapter 54 of the LOA regulates the infliction of damage by tort and draws a distinction between three elements of delictual liability: general elements of delict, risk liability and manufacturer's liability. In the preparation of the draft, there was no serious doubt as to whether the general elements of delict should include fault as one of the preconditions for liability because fault is generally recognised as a basis of delictual liability.^{*3} What was definitely more interesting was the other aspect of fault which concerns the objectivity and subjectivity of fault. The authors of the LOA have taken as a basis the concept of subjective fault, which means that when deciding whether a person has behaved wrongfully not only the objective circumstances but also the personal qualities of the tortfeasor should be taken into consideration.

This article aims to find out if the choice made in the LOA in favour of subjective fault is justified or not. To achieve the aim, it is reasonable to compare and analyse the corresponding legal regulations and theoretical standpoints of other countries.

Origins of the problem

It is possible to draw a fundamental distinction between two main theories of delictual liability. Firstly, there is the so-called classical theory, which claims that fault is an obligatory element for the creation of liability, and secondly, there is the so-called objective theory, which does not consider the existence of fault to be the necessary precondition for the creation of delictual liability. The LOA is based on the classical theory. However, it should be noted that the concept of fault varies within

¹ J. Ananjeva *et al.* Nõukogude tsiviilõigus. Üldosa (Soviet Civil Law. General Part). Tallinn: Valgus, 1975, lk. 421 (in Estonian).

² Võlaõigusseaduse eelnõu (Draft Law of Obligations Act). Justiitsministeerium, 2001 (in Estonian).

³ It should be noted that in the composition of the general elements of delictual liability, the LOA is largely based on the German model which specifies three elements as grounds to the creation of delictual liability: the objective elements of the act, unlawfulness and fault.

the classical theory, the variations being based namely on the approach to fault as objective or subjective fault. It is a matter of dispute on which the jurists have not reached a common view.

In case of subjective fault the focus is on the tortfeasor, on his or her individual qualities and peculiarities. However, this approach may often lead to a contradiction between theory and practice. Namely, it cannot always be assumed that when making the judgement, the judge is actually able to evaluate adequately the personal qualities of the tortfeasor, and yet it is on this basis that the diligence standards for this specific person are established. Therefore, the development of the law of tort led to the exclusion of personal qualities from the evaluation of a person's behaviour.

In case of the so-called objective fault the emphasis is laid on the violation of a behavioural norm. Here, the behaviour of a person is evaluated according to the question of whether he or she should have been able to foresee and avoid the infliction of damage. The answer to the question is generally found on the basis of the behavioural standard of a normal, reasonable man in the same situation in which the damage was caused on this specific occasion.

The concept of fault in the civil law in force in the Republic of Estonia

The Civil Code of the Estonian SSR passed on 12 June 1964⁴ (hereinafter: Civil Code) does not provide the definition of fault. Section 227 of the Civil Code provides intention and incautiousness as types of fault. The Soviet civil law theory explained fault as the relationship between the tortfeasor's consciousness and the consequences of his or her action. Thus, the question was posed whether the person wished or did not wish the consequences to emerge, whether he or she foresaw the consequences or had to foresee them.⁵

Levels of incautiousness (incautiousness and severe incautiousness) were determined on the basis of specific circumstances. The aspects that were taken into account were the nature and conditions of the action as well as the personal qualities of the tortfeasor.⁶

It can be concluded from the above that the law in force as a law reflecting the standpoints of the Soviet civil law theory relies on the concept of subjective fault with an emphasis on personal qualities rather than the violation of a behavioural norm. Judging the fault on each specific occasion, the primary task is to evaluate how the person himself or herself understood his or her action and whether he or she as an individual was not only obliged to foresee but was actually able to foresee that his or her behaviour might result in damage.

In my opinion, a great drawback of the Soviet law theory and thus also of the law in force is the overestimation of one aspect of negligence — the subjective attitude of a person to his or her action and its consequences. Resulting from this, not enough attention has been paid to the issue of whether and to what extent the person was able to avoid damage or mitigate the damaging consequences. Besides this, it is questionable if in case of unaware passivity it is possible to speak about the subjective attitude of a person to his or her action (inaction).

The concept of fault in the legal orders of continental European countries

In the civil law theory of the Federal Republic of Germany there is a multitude of opinions on the issue in question.

Sentence 2 of subsection 276 (1) of the Civil Code of the Federal Republic of Germany⁷ (hereinafter: *BGB*) provides that a person is negligent if he or she fails to fulfil the general duty of care (*allgemeine Verkehrspflichten*). This is the concept of objective fault. J. Esser claims that since negligence, for the

⁴ Eesti NSV tsiviilkoodeks (Civil Code of the Estonian SSR) – ENSV Ülemnõukogu Teataja 1964, 25 (234) lisa (in Estonian).

⁵ J. Ananjeva *et al.* (Note 1), p. 421.

⁶ *Ibid.*, p. 422.

⁷ Bürgerliches Gesetzbuch. 6. Aufl. München: C. H. Bech, 1991.

purposes of sentence 2 of subsection 276 (1) of the *BGB*, is connected only with the general duty of care, the fault is no longer a precondition for liability in the sense of personal reproachability.^{*8}

B. S. Markesinis explains the fulfilment of the general duty of care provided in sentence 2 of subsection 276 (1) of the *BGB* as follows: "It means doing something which a reasonable man would not have done, or not doing something which a reasonable man would have done". He claims that similar to common law, the standard of diligence in the law of the Federal Republic of Germany is objective and its test — *bonus pater familias* — sufficiently wide, leaving ample room for legal creativity. If a tortfeasor belongs to the representatives of a profession, he or she must exhibit the diligence required from the representatives of this specific profession. As a rule, the personal limitations of the tortfeasor are not taken into consideration, which the German authors often illustrate with the example of an amateur driver, who makes a mistake of the kind which a driver with his or her experience would not have been able to avoid in the first place.^{*9}

Having emphasised the objective standard of the test, Markesinis adds that in pursuit of equalisation, there is still room for certain subjective elements in the determination of the existence of fault. Namely, the tortfeasor's behaviour is evaluated against the background of the behaviour of the hypothetical reasonable man who has been put in the same external situation as the person who has caused damage.^{*10}

The author of this article believes that what was mentioned above does not add a subjective element to the concept of fault from the point of view of the personal qualities and abilities of the tortfeasor.

Evaluating the justification of the concept of objective fault, Markesinis notes that the objectification of negligence is in itself an intrusion into the principle of fault, but at the same time it is needed as a factor ensuring the modern law of tort.^{*11}

P. Schlechtriem maintains that it is necessary to exhibit the "required" but not the "usual" diligence. According to the prevailing theory, the general duty of care is objectified and it requires the observance of standards applied to a specific profession. Therefore, there is no individual measure on which the obligated person could rely and claim that he or she was unable to meet the standards applicable to his or her profession due to his or her insufficient training, being in a bad mood at the specific time, etc.^{*12}

According to Schlechtriem, it is extremely debatable if the violation of these objectified standards of diligence has to be accompanied with a subjective reproach in order to presume the creation of liability. He refers to the fact that the prevailing theory does not require the subjective reproachability.^{*13} Based on the administration of justice and the prevailing view, the internal negligence (different from criminal law) is determined not according to the individual abilities of the tortfeasor but according to the abilities of the communication circle in which the tortfeasor acts. In most cases, the result of the objectification of internal diligence this way achieved is that the requirements come closer to external and internal diligence.^{*14} Schlechtriem adds that a new theory tends to treat the violation of objective ("external") standards of diligence only as a basis to the determination of tort^{*15}, while the reproach for fault must be accompanied with subjective reproachability as a violation of internal diligence.^{*16}

One of the representatives of the trend that considers both the external diligence and the subjective reproachability (from the point of view of internal diligence) to be necessary is E. Deutsch, who holds

⁸ J. Esser, H.-L. Weyers. Schuldrecht. Band II. Besonderer Teil. 7., neuarbeitete Aufl. Heidelberg: C. F. Müller Juristischer Verlag, 1991, S. 561.

⁹ B. S. Markesinis. A Comparative Introduction to the German Law of Tort. Oxford: Clarendon Press, 1986, p. 44.

¹⁰ *Ibid.*, p. 45.

¹¹ *Ibid.*

¹² P. Schlechtriem. Võlaõigus. Üldosa (Law of Obligations. General Part). 2., ümbertöötatud trükk. Tallinn: Õigusteabe AS Juura, 1994, lk. 107 (in Estonian).

¹³ *Ibid.*, p. 108.

¹⁴ P. Schlechtriem. Võlaõigus. Eriosa (Law of Obligations. Special Part). 4., ümbertöötatud trükk. Tallinn: Õigusteabe AS Juura, 2000, lk. 262 (in Estonian).

¹⁵ About different theories of the determination of tort in the Federal Republic of Germany see: K. Kraavi. Generaaldelikti võrdlus Prantsuse ning Saksa õiguses ja võlaõiguseaduse eelnõus, piiritlemine alusetu rikastumisega (Comparison of general tort in French and German law and in the draft Law of Obligations Act; determination with unjust enrichment). Lõputöö. Juh. dots. H. Sepp. Tartu, 1999, p. 24–33 (in Estonian).

¹⁶ P. Schlechtriem (Note 12), p. 108.

the view that diligence is formed by a behaviour programme consisting of external and internal components.

The external or objectively required diligence lies in appropriate behaviour. Behaviour can be considered appropriate if behavioural norms are followed or a required attitude to the benefit of law is expressed.^{*17} According to E. Deutsch, the civil law generally deems behaviour to be negligent if it fails to meet the objectified and typified requirements for diligence, which result from the principle of “objective undertaking”: each person is expected to fulfil the duty of care which is commonly expected from him or her or his or her position. For this purpose, the so-called “groups of duty” (*Verkehrsgruppen*) have been composed on the basis of different professions and risk areas. The representatives of a certain profession must observe the diligence of a proper representative of the profession. Nevertheless, there are exceptions to the objectively required diligence — old people and youngsters are not subject to normal requirements of diligence, for their diligence has to be evaluated in the context of their own kind.^{*18}

In Deutsch’s opinion, however, the internal or subjectively possible diligence reflects an intellectual/emotional process that may consist of several parts. The internal diligence is based on the sense of the possible realisation of the necessary elements of the act, and thus also on the observance of external diligence. A person must control himself or herself in a way that would enable the realisation of the behavioural obligation resulting from external diligence.^{*19} Thus, according to the aim of the norm, it is possible that the subjective/individual obligation of diligence is violated. A person can only be obliged to behave in a way that he or she is able to behave in. Physical, intellectual and emotional abilities are presumed only if they really exist.^{*20}

Deutsch finds that negligence only exists when both the external and the internal diligence (in the sense of personal reproachability) have been violated. If the external diligence has not been observed, we are dealing with a violation of an obligation. As a rule, it can be said on the basis of empirical knowledge that in this case, the internal diligence has also been violated.^{*21}

In Deutsch’s view, it is necessary in case of violation of the defence law to check the disregard of internal diligence at the third element of delictual liability, which is the fault. Upon violation of external diligence (which must be proved by the damaged person), the violation of internal diligence is presumed.^{*22}

The fact that the different approaches of Deutsch and Schlechtriem to fault may lead to different solutions in specific cases is illustrated by the example in which it is asked if a doctor can be reproached for negligence if his or her hand is trembling during an operation because he or she went to play tennis right before work. During the operation, the doctor observes his or her internal diligence and controls his or her behaviour as required — which is why the only violation is that of the external diligence obligation. E. Deutsch believes that in this case, the doctor cannot be reproached for negligence.^{*23} Schlechtriem, on the contrary, finds that in this event the subjective fault of the doctor lies in undertaking an activity at which he or she is unable to meet the objective standards of diligence^{*24} required for the activity — it is the so-called undertaking fault.^{*25}

Thus, it can be claimed on the basis of legal literature that so far, the theory of objective fault has been generally accepted in the law of tort of the Federal Republic of Germany, but several distinguished jurists have lately started to have doubts about its expediency. While Schlechtriem supports the concept of objective fault, Markesinis basically “comes to terms” with the concept of objective fault, considering it necessary for the modern law of tort. Deutsch, on the other hand, is a convinced supporter of the so-called “double fault” concept.

Articles 1382 and 1383 of the French civil code (*Code Civile*) establish the general clause of delictual liability. Article 1382 prescribes that any damage wrongfully caused to another person is liable to be

¹⁷ E. Deutsch. *Academia Iuris. Unerlaubte Handlungen, Schadenersatz und Schmerzensgeld*. 3., ergänzte Aufl. Köln-Berlin-Bonn-München: Carl Heymanns Verlag KG., 1995, S. 65.

¹⁸ *Ibid.*, p. 68.

¹⁹ *Ibid.*, p. 65.

²⁰ *Ibid.*, p. 68.

²¹ *Ibid.*, p. 65.

²² *Ibid.*, p. 66.

²³ *Ibid.*, p. 65.

²⁴ If the “average” doctor had been able to perform the operation successfully, the theory of objective fault would really suggest that we recognise the wrongful behaviour of the doctor whose hand was trembling.

²⁵ P. Schlechtriem (Note 12), p. 108.

compensated by the tortfeasor. Thus, unlike the general practice of German civil law, the unlawfulness resulting from damage to the benefit of law is not the most important precondition for delictual liability. What matters is the violation of the behavioural obligation to avoid causing damage to another person. The intentional infliction of damage in itself is against the obligation, but any violation of an obligation generally paves the way for fault. Article 1383 provides that a person is not only liable for damage caused intentionally, but also for damage caused negligently and incautiously.^{*26}

In French civil law theory, the principles of the classical and the objective theory are opposed, the latter of which represents an innovatory approach to the foundations of liability law.

Similar to their German colleagues, the supporters of the classical theory divide the concept of fault into two elements: the objective fault and the subjective fault. The theory of objective liability, which says that the tortfeasor's fault is not at all necessary for the creation of liability, has also received remarkable support.^{*27}

The concept of fault in common law

British jurists P. J. Cooke and D. W. Oughton note that the subjective study of each person's abilities and competence would not be sufficient and efficient.^{*28} It is the dominating opinion that obligations applied to the acting party have no place in the law of tort.^{*29} Therefore, decisions on fault are made on the grounds of the forms of expression of external behaviour. The standard behaviour, which is the target, is described as the "behaviour of the reasonable man" in the law of England as well as the United States of America. The reasonable man is a fiction to which the judge gives a meaning in each separate case on the basis of his or her set of values.^{*30} The reasonable man knows the things that are generally known at the time.^{*31} Negligent behaviour is that below the required standard which has been established to protect other persons from an unreasonable risk of damage. This standard of behaviour has been usually measured in the light of what the reasonable man with common foresight would have done under the same circumstances.^{*32} D. Howarth poses a control question or a test, the answer to which enables to solve the issue of fault in each specific case, the question being: "How would the reasonable man behave?" It has often been said that the reasonability of the tortfeasor's behaviour is the matter of fact.^{*33}

The question of what kind of behaviour can be expected from an underage person has been a matter of dispute. In the judgement of the court case *McHale v. Watson* it was noted that the correct diligence standard for an underage tortfeasor is of the kind that is expected from a reasonable minor of the same age, intelligence and experience.^{*34} In addition to this, the standard of the reasonable man has certain subjective features if the person has a physical disability: in that case, the basis is the behaviour of a reasonable man with a similar physical disability.^{*35}

With regard to the question if fault has to do with the relation of the tortfeasor's consciousness to the cause of damage, J. G. Fleming has claimed that it is important to proceed from the fact that negligence is not a state of mind but rather a kind of behaviour that is below the standard which is considered normal or is required in the society. He maintains that the subjective meaning of a person's fault has long been renounced in favour of the impersonal standard — how the reasonable man would have behaved under the same circumstances.^{*36}

²⁶ C. Autexier, H. J. Sonnenberger. Einführung in das französische Recht. 3., umarbeitete Aufl. Heidelberg: Recht und Wirtschaft, 2000, S. 138.

²⁷ K. Kraavi (Note 15), p. 12–13.

²⁸ P. J. Cooke, D. W. Oughton. The Common Law of Obligations. London-Edinburgh-Butterworths, 1984, p. 169.

²⁹ D. J. Cooke, D. W. Oughton. The Common Law of Obligations. 2nd ed. London-Dublin-Edinburgh: Butterworths, 1993, p. 173.

³⁰ P. J. Cooke, D. W. Oughton (Note 28), p. 169.

³¹ E. J. Kionka. Torts. 2nd ed. Minn: West Publishing Co. St Paul, 1933, p. 137.

³² J. G. Fleming. The Law of Torts. 9th ed. The Law Book Company Limited, 1992, p. 105.

³³ D. Howarth. Textbook on Tort. Bittenworths-London-Dublin-Edinburgh, 1995, p. 37.

³⁴ D. J. Cooke, D. W. Oughton (Note 29), p. 174.

³⁵ E. J. Kionka (Note 31), p. 138.

³⁶ J. G. Fleming (Note 32), p. 102.

Markesinis also believes that there is a crucial difference between negligence as a state of mind and delictual negligence. Different from intention and recklessness, negligence as a state of mind means the failure to foresee the consequences of an action that creates the risk of damage to other persons.^{*37} Foresight is one side of the concept of the violation of an obligation. The violation of an obligation^{*38} exists if the defendant's behaviour is also unreasonable in the sense of the non-observance of a proper diligence standard.^{*39}

G. H. L. Fridman asserts that for several reasons it cannot be said that the law of tort is firmly based on the idea that liability may not be created without fault, be it intention or negligence. On the other hand, wrongful behaviour may not always lead to delictual liability, either: there is no congruence between wrongful behaviour and delictual liability and there is no reason to believe that such a congruence will eventually occur.^{*40} According to Fridman, the use of subjective fault is not justified for the above-mentioned reasons.

Consequently, it can be claimed on the basis of special literature that in common law, similarly to the Federal Republic of Germany, the concept of objective fault is dominating and it seems to be relatively deeply rooted and steady in legal science as well as in the administration of justice. There are no sufficiently convincing arguments that would lead the common opinion to the acceptance of subjective fault.

The concept of fault in the draft Law of Obligations Act

Section 1155 of the LOA provides the definitions of intention, negligence and severe negligence. Pursuant to the first sentence of subsection 1155 (2) of the LOA, a person is negligent if he or she fails to observe the general duty of care expected from him or her under certain circumstances, taking into consideration, among other things, the situation, age, education, knowledge, abilities and other qualities of the person. Pursuant to the second sentence of subsection 1155 (2) of the LOA, severe negligence is the considerable non-observance of the general duty of care expected from a person. Subsection 1155 (3) of the LOA provides that intention is a person's wish for the unlawful consequences of his or her behaviour to realise. Subsection 1155 (1) provides an important rule about the division of the duty to prove the fault, according to which the tortfeasor will not be liable for the damage he or she has caused if he or she proves that he or she is not guilty of causing the damage, unless otherwise provided by law.^{*41}

Thus, the LOA has abandoned the approach to fault that was favoured in the Soviet legal theory (see above). It should be noted that the abandonment of the hitherto dominating approach is well justified because the approach that considers the fault to be the tortfeasor's attitude to his or her unlawful act and its consequences represents subjectivity in the extreme. In addition to this, it is obvious that what has occurred in a person's consciousness cannot be objectively grasped and evaluated by other persons, including judges as the main administrators of justice, and that the respective judgements have to be made on the basis of circumstantial evidence.^{*42}

On the basis of the comparison and analysis of the concept of negligence contained in the LOA and in *BGB*, we can draw the conclusions below. Taking as a basis the first two clauses of subsection

³⁷ B. S. Markesinis, S. F. Deakin. *Tort Law*. 4th ed. Oxford: Clarendon Press, 1999, p. 75.

³⁸ *Ibid.*, p. 74. The concept of obligation in the view of Markesinis has been sometimes used in a different and more specific meaning: for the diligence obligation to be created in a specific case, the occurrence of damage must be foreseeable namely in connection with the individualised damaged person.

³⁹ B. S. Markesinis, S. F. Deakin (Note 37), p. 75.

⁴⁰ G. H. L. Fridman. *Torts*. London-Ontario-Canada: Waterlow Publishers, 1990, p. 18.

⁴¹ On account of the limited volume of this article, the problems of the division of the duty to prove the fault will not be tackled here.

⁴² It can be noted that there is no fundamental difference between the solution of a case according to the LOA or the present law: if a person behaved incautiously according to the Civil Code, we would in most cases deduce from the LOA that he or she has behaved negligently. Both regulations take account of the specific person and first of all his or her personal qualities. The only difference lies in the different meaning given to the concept of fault, but both the LOA and the Soviet civil law theory proceed from the concept of subjective fault.

1155 (2), we will come to the first part of the definition of negligence, which says that negligence is the non-observance of the general duty of care expected from a person under certain circumstances. Virtually the same meaning has been given to the concept of negligence in the second sentence of subsection 276 (1) of the *BGB*. The difference stems from the fact that the LOA prescribes directly that a person's situation, age, education, knowledge, abilities and his or her other qualities must also be taken into consideration when determining the degree of care generally expected from the person.

The enumeration of aspects to be considered is the cause of a split between the standpoint that is generally accepted in German legal science and practice and what has been provided in the LOA: while the German civil law theory relies on the diligence standards established for the specific profession (the fault is objective), the LOA considers it necessary to provide general guidance to the administrators of justice (not leaving the solution of the matter to theory, either) and enacts the concept of subjective fault taking into account the individual abilities and other qualities of a person.

In my opinion, professional standards of diligence have to be taken into account in some cases on the basis of the LOA, too, as it is done in the legal practice of the Federal Republic of Germany. The definition of negligence provided in the second sentence of subsection 1155 (2) of the LOA does not exclude the possibility. For this purpose, groups of the respective typical cases have to be established by legal practice. An example could be a case in which a hiker who has been trained for this is negligent when making a campfire and the forest catches fire. In this case, we could proceed from the diligence standard of hikers as a social group. In the event of the violation of the standard, it should be considerably harder for the tortfeasor to prove his or her innocence than it would be for a casual hiker who does not belong to a hiking club and who has not been trained for hiking.

Although I consider the subjective approach to fault to be more reasonable, the following analysis of the pros and cons of this approach should enable the readers of this article to evaluate whether or not the decision made in the LOA is justified.

The first argument in favour of objective fault could be the fact that objective fault has been accepted in all countries studied.^{*43} Therefore, the opposite position of the LOA would need a special justification. Secondly, it is reasonable to claim that the determination of subjective fault in each separate case would be definitely more complicated and time-consuming than the establishment of behavioural standards for our own "reasonable man". Consequently, it is more comfortable to implement the objective fault in practice. It has also been claimed that checking the subjective fault (if we assume its possibility) in each separate case is not sufficient and efficient. The last (although, perhaps artificial) argument could be the fact that in case of the fault of a legal person, for instance, it is not possible to take subjectivity into consideration.^{*44} This, on the other hand, would lead to different solutions in the determination of the fault of natural and legal persons, although pursuant to the first sentence in section 12 of the Constitution of the Republic of Estonia, everyone is equal before the law. Thus, the supporters of objective fault could raise a question of the unequal treatment of people that occurs together with the application of subjective fault.

Despite the arguments above, I still support the theory of subjective fault. First of all, we should take into consideration the discussion among German scientists. As was mentioned earlier, the dominating opinion is no longer absolute in Germany — several well-known jurists (*e.g.* E. Deutsch) wish to abandon the concept of objective negligence.

I think that an important argument in favour of subjective fault lies in the fact that the society is not entitled to require a person to behave in a manner in which the person is subjectively unable to behave and then impose liability on him or her for the non-observance of the kind of behaviour that is impossible for the person. This takes us to the following argument according to which only the consideration of the personal qualities of an individual in the determination of his or her fault can result in real liability for fault and in a fair judgement. The objectification of negligence, on the other hand, would often lead to the violation of the principle of fault, as a result of which the so-called

⁴³ Similar to the principles commonly accepted in the Federal Republic of Germany, in France and in common law, the liability in the codes of the three Scandinavian countries (Finland, Sweden and Norway) is based on personal fault, *i.e.* on the so-called rule of fault. The standard of diligence in the law of these countries is completely objective, even children and mentally ill people may have behaved wrongfully in this sense. See W. V. Gerven, J. Lever, P. Larouche, C. v. Bar. *Common Law Europe Casebooks. Torts. Scope of Protection*. Genevieve Viney. Oxford: Hart Publishing, 1998, pp. 44–45.

⁴⁴ The liability of a legal person may arise from (1) the delict of a member of the organisation — in this case, the main emphasis is on the fault of the natural person as a tortfeasor, or (2) from organisational deficiencies — in this case, it is not possible to consider the subjective fault at all.

faultless liability for fault might occur, which should not be allowed at least until we recognise fault as a basis of delictual liability.

Hence, even if the use of the concept of objective fault in practice is a comfortable solution, it is difficult to find an answer to the question of what remains of delictual liability if we remove personal reproachability from the essential elements of delictual liability.

The definition of fault as provided in the LOA must also be favoured for the reason that the consideration of the tortfeasor's personal qualities helps to achieve a more fair judgement in separate cases (at least if certain persons are involved such as children, disabled persons, elderly people, but probably also other persons).^{*45}

To conclude, it is worthwhile referring to two jurists whose ideas are worthy of support. So, for instance, T. Honore believes that the standard of objective diligence has more in common with risk liability than with the real principle of fault because it makes a person liable for mistakes which he or she is subjectively unable to avoid.^{*46} Markesinis is also right when he asserts that the objectification of negligence is an intrusion into the principle of fault. In practice, the theoretical distinction between delictual liability and risk liability is often very vague. This change has been accompanied with the transformation or even unnaturalness of the traditional doctrine and the concept of fault.^{*47}

As an objection to the assertion of the advocates of objective fault that the checking of subjective fault is not sufficient and efficient (if it is possible at all), it should be remarked that as a rule, the supporters of objective fault also acknowledge the need to take into consideration the subjective peculiarities of certain persons (*e.g.* underage people, disabled persons).^{*48} It could be asked why it is possible and acceptable to take into consideration the personal qualities of certain people and why it is impossible or at least insufficient in case of all the others.

Conclusions

The authors of the LOA have made a choice between subjective and objective fault at a time when the issue of the concept of fault is an object of discussion in many countries.

Although there are strong arguments in favour of both, the author still supports the solution of the LOA whereby subjective factors are taken into consideration for the determination of fault in case of delictual liability.

On the grounds of arguments provided in the main part of the article, another interesting conclusion can be drawn: namely, while the arguments in favour of subjective fault are theoretical in nature, the arguments that support objective fault are of a more practical nature. I believe that the concept of objective fault cannot be considered justified for the sole reason that this is the more efficient and comfortable way to administer justice. Efficiency and comfort should not be the arguments that make us abandon the traditions of the law of tort and distort the principle of fault as the main basis of delictual liability.

Since the LOA has not yet been passed by the *Riigikogu*, it is the optimum time to have a wider discussion on the issue herein tackled. Knowing the differences in the solution of separate cases resulting from the objective and subjective approach to fault and the importance of the issue for the law of tort as a whole, it is difficult to overestimate the need for relevant discussion prior to the final resolution of the matter.

⁴⁵ In favour of the supporters of objective fault, it should be said that the correction of the judgement from the point of view of fairness is also possible pursuant to subsection 129 (1) of the LOA which provides that the court may decrease the legal compensation for damages if, taking into consideration the circumstances and mainly the nature of liability, the relationship between persons and their financial situation, including insurance, the full compensation for damages would be extremely unfair to the obligated person or reasonably unacceptable for any other reason.

⁴⁶ S. R. Perry, Symposium: Corrective Justice and Formalism: the Care One Owes One's Neighbors: the Moral Foundation of Tort Law. – Iowa Law Review, 1992, p. 14.

⁴⁷ E. Deutsch (Note 17), p. 45.

⁴⁸ About common law, see: P. J. Cooke, D. W. Oughton (Note 28), p. 174; E. J. Kionka (Note 31), p. 138; about the Federal Republic of Germany, see E. Deutsch (Note 17), p. 68.

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Law Applicable to Persons Pursuant to Draft Private International Law Act

The draft Private International Law Act planned to enter into force together with the drafts of the new Law of Obligations Act and the General Part of the Civil Code Act is currently at its second reading in the *Riigikogu* (Estonian parliament). Unfortunately, the volume of this article is too limited to introduce the draft as a whole. Therefore, I would like to focus on a topic that was a subject of many discussions during the preparation of the draft and that is internationally the least harmonised issue of all: what kind of law should be applied to subjects of law, *i.e.* to natural and legal persons.

Whilst in the international law of property the principle *lex rei sitae* is applied and accepted in the whole world and the principle *lex loci delicti* is almost everywhere the basis for the determination of law applied to the infliction of damage, in the case of persons two fundamentally different traditional theories have developed, and at least now there is no sign of one theory completely surrendering to the other. Thus, the law applied to a natural person (*i.e.* the personal statute) is determined either by the domicile or nationality of the person, depending on the country; the determination of the passive and active legal capacity of legal persons is generally based on the theory of location or incorporation. These fundamental choices had to be made also during the preparation of the new draft Private International Law Act of Estonia; therefore, I will now try to give an overview of the reasons for the preference of one or another solution and the consequences that the choices will have. I would like to pay special attention to the issues of law applicable to legal persons as so far this not-at-all irrelevant subject has been neglected in Estonian legal literature, and several theories and standpoints that have long been accepted elsewhere may at first glance seem somewhat unaccustomed.

1. Law applicable to natural persons

1.1. Principles of domicile and nationality. Habitual domicile

As mentioned above, two fundamentally different options exist for the application of the legal order of a certain country to natural persons: the basis can be either the principle of domicile or the principle of nationality. Disputes about the advantages and disadvantages of these two theories are the most heated discussions ever held on the theory of private international law. The principle of domicile (*lex domicilii*) is taken as the basis mainly on the Anglo-American legal territory, but also in Switzerland

and in some Scandinavian countries; the principle of nationality (*lex nationalis*) dominates in the rest of Europe.

One of the main advantages of the principle of domicile is considered to be the fact that a person is bound to a legal order that surrounds the person and that is known to him or her. Another positive aspect is the simplification of the work of courts where the national law can then be applied more frequently (to be discussed in detail below). The supporters of the principle of nationality, in turn, consider a person's nationality to be an easily determined connecting factor that rarely changes throughout the person's life and that excludes possible manipulations with regard to the change of domicile and the concurrent change of personal statute.

Despite the dominance of the principle of nationality, the triumph of which at the end of the previous century was largely induced by the development of nation states and the resulting national view of the world, the importance of the principle is gradually diminishing. This can be traced in the development of German and Swiss law of the conflict of laws which served as a basis for the preparation of the new draft Private International Law Act of Estonia, but most of all in the unification of private international law in the conventions of the Hague Conference on Private International Law where the practice of taking the connecting factor of nationality as a point of departure has been limited considerably since 1951.

The concept of habitual domicile^{*1} used in the conventions established by the Hague Conference on Private International Law can be considered the modern trend that increasingly gains importance. Such a connecting factor is employed, for example, in the Convention on Law Applicable to Maintenance Obligations^{*2} of 1973, in the Hague Convention on the Form of Wills^{*3} of 1961 as well as in the later Hague conventions such as the Convention on the International Protection of Adults adopted in 2000. In addition thereto, the Rome Convention on the Law Applicable to Contractual Obligations of 1980 that is in force between the EU Member States also uses the habitual domicile as the connecting factor.^{*4} Since the above-mentioned Hague conventions are the *loi uniforme* type of conventions — *i.e.* they replace fully the national conflict of laws rules of the Member States — it is obvious that the importance of the notion of habitual domicile is growing in the whole world, including the countries that have traditionally followed the principle of nationality. This has also now been acknowledged in the German legal writing where the principle of nationality has been so far observed with extreme conservatism.^{*5}

But what exactly is meant by the habitual domicile of a person? Both domicile and nationality are concepts long known to everyone, their meaning is at least theoretically relatively easy to guess. Habitual domicile, however, seems to be rather strange at first glance. Why is it so that different conventions have abandoned the concept of domicile and have started to use a new connecting factor, unknown until that time?

The main reason for this is the extremely varied definition of the concept of domicile in different countries. Some countries allow a person to have only one domicile, while some allow several domiciles. Some countries require that a person should have lived at the place of domicile for a particular period of time. Yet other countries require that a person should be nationally registered to belong to a certain territorial unit in order to create a domicile. As a result, a concept not present in traditional legal regulations has been searched for a long time, and in the last decades the concept of habitual domicile has proved to be the one. This apart, despite the increasingly frequent use, the concept has never been defined in international conventions. Nevertheless, in 1972 the Council of Europe did issue a recommendation for the uniform interpretation of the concept of habitual domicile^{*6} in which it has been provided, among other things, that a person's length of stay at the place of domicile as well as other personal and financial circumstances that indicate a constant connection between the person and his or her domicile are to be taken into account when determining the habitual domicile, emphasising that the existence of a habitual domicile does not depend on the existence of a domicile permit.

¹ In German: *gewöhnliche Aufenthalt*, in Estonian: *harilik viibimiskoht*.

² Estonia became a party to the Convention in 1999. – Riigi Teataja (The State Gazette) II 1999, 24, 140 (in Estonian).

³ Estonia became a party to the Convention in 1998. – Riigi Teataja (The State Gazette) II 1998, 38, 1087 (in Estonian).

⁴ See article 4 (2) of the Convention.

⁵ J. Kropholler. *Internationales Privatrecht*. Tübingen: Mohr, 1997, S. 267.

⁶ Council of Ministers Resolution of 18 January 1972.

1.2. The choices of Estonia

Looking back at history, it can be said that the principle of domicile has almost always been favoured in Estonia. The principle of *lex domicilii* rather than the principle of nationality was taken as a basis already in the Baltic Private Law Code that entered into force in 1865 and that can be considered the first code in force on the territory of Estonia that contained the conflict of laws rules.⁷ The principle survived in the draft Civil Code of 1940 that was largely based on the Baltic Private Law Code, and today it is contained in sections 130 and 131 of the General Part of the Civil Code Act. The only period of time in which — clearly for political reasons — the principle of nationality has been at least partially in force in Estonia was the Soviet period.

Knowing the historical background, the transfer from the principle of domicile to the principle of nationality would have meant an extremely fundamental change in the foundations of the Estonian private international law as a whole. Yet there was no actual need for this. On the contrary, the enforcement of the principle of nationality in a country where the citizens of foreign countries form a large percentage of the population would render the work of courts much more complicated. It is namely the principle of domicile that generally leads to the application of *lex fori* or the law of the court's state of location because a person's domicile is more likely to coincide with jurisdiction than his or her nationality. This means, for example, that in the case of Finnish citizens residing in Estonia, the court will not have to determine and apply the law of the person's state of nationality, in this case Finland, but it may proceed from the familiar national legislation.⁸ Consequently, the abundance of the citizens of foreign countries residing in Estonia, which was the reason for keeping the principle of *lex domicilii* already in the draft Civil Code of 1940⁹, was also the main argument in the preparation of the draft Private International Law Act, and it can be claimed firmly that the law of a person's state of domicile is and will be the basis for the determination of a natural person's "statute" in Estonia.

1.3. What country's law determines the existence of a domicile or nationality?

What country's law should the court hearing the matter take as the basis for the determination of the existence of a domicile in one or another country? Should it be done pursuant to the national law, *lex fori*, or based on the law of the person's presumable state of domicile? In other words, if an Estonian court had to decide whether a person has a domicile in Sweden, would it be done according to the definition of domicile provided in Estonian or in Swedish law? As indicated above, the concept of domicile may have extremely varied meanings in different states, which is why the opinions concerning the existence of a domicile may differ *toto caelo*.

We have now reached the issue that is called qualification in the theory of private international law. To put it otherwise, which country's law is taken as a basis for defining various legal concepts and institutions (e.g. what is meant by active legal capacity, immovables, limitation period). In respect of qualification, we can also speak about two different approaches: the approach based on the principle of *lex fori* (the law of the court's state of location) and on the principle of *lex causae* (the law presumably applicable to the legal relationship). Judging by the approach generally accepted in literature, the qualification of the concept of domicile is mainly based on the principle of *lex fori*, which, in other words, means that in qualification the court proceeds from the national law.¹⁰ According to the position expressed in the contemporary Estonian legal literature, too, the meanings of domicile and location are based on the definitions given in sections 21 and 40 of the General Part of the Civil Code Act where, among other things, a rule has been set out, providing that if several places in different states may be deemed the domicile of a person, the domicile of the person is in

⁷ Article XXVIII; J. Kitsing. Uue Tsiviilseadustiku ruumiline kehtivus. (Territorial Applicability of the New Civil Code). – Õigus 1936, nr. 5, lk. 227 (in Estonian).

⁸ Against this background, it is somewhat astonishing that the Estonian-Russian and other legal assistance agreements concluded in the initial years of our newly regained independence stem from the principle of nationality instead of the principle of domicile.

⁹ A. Piip. Konfliktnormide ühtlustamine Balti riikides (Harmonisation of Conflict of Laws Rules in the Baltic States). – Õigus, 1937, nr. 8, lk. 344–346 (in Estonian).

¹⁰ The principle of *lex fori* also applies to the qualification of the majority of other institutions. Münchener Kommentar zum Bürgerlichen Gesetzbuch. Bd. 10. München: C. H. Beck'sche Verlagsbuchhandlung, 1998, Rdn. 460.

the state of the person's nationality.*¹¹ This principle has been clearly expressed in section 7 of the draft Private International Law Act, according to which the basis for the determination of a natural person's domicile is the definition of domicile provided in Estonian law and not in the law of the presumable state of domicile.*¹²

A different approach is adopted when determining a person's nationality, in which case the definition of the concept of nationality under *lex causae* or the law of the presumable state of nationality is decisive. This, too, is a widely acknowledged principle*¹³ arising from the need to respect the other country's exclusive right to decide on the country's nationality. Since on some occasions, the connecting factor in the draft Private International Law Act is also the nationality of a natural person (e.g. in sections 26, 49 (2), 60 (2)), the principle of *lex causae* is expressly established in section 8 of the draft. Pursuant to this provision, the nationality of a natural person is determined according to the law of the state whose nationality is being decided; in the case of persons with several nationalities, the decisive nationality is that of the state to which the person has the closest connection.

2. Law applicable to legal persons

2.1. Theory of location and theory of incorporation

Similarly to the fundamental difference between the principle of domicile and the principle of nationality applicable to natural persons, different theories exist about the statute of a legal person, which should determine the conditions on which "a legal person comes into existence, lives and dies".*¹⁴ In the legal transactions of different countries, mainly the following two theories are used for the determination of law applicable to legal persons:

- (1) the theory of location, which today is the point of departure for Estonia and the majority of the states in Western Europe;
- (2) the theory of incorporation, which is taken as the basis by the states of the Anglo-American legal system, but also by the Netherlands and Switzerland (although with significant limitations).

According to the **theory of location**, the personal statute of a legal person is the law of the state in which the directing body of the legal person is located. This law determines the creation and termination, the passive and active legal capacity, the bodies, and the internal relations of the legal person as well as the liability and legal representation of the legal person. Proceeding from the theory of location, the legal persons having its seat in one country but founded under the laws of another country (e.g. offshore companies) have no passive civil legal capacity.*¹⁵

The main advantage of the theory of location is undoubtedly the hindrance of the penetration of exceedingly liberal foreign company law and the resulting protection of national legal transactions, creditors and minority shareholders. It would be inefficient to impose on companies strict capital requirements and a thorough regulation for the guarantee of the maintenance of fixed capital, *etc.*, in order to protect the creditors if the requirements could be ignored by founding a one-hundred-dollar "mailbox company" and thereby participating in economic activities. The theory of location enables the state to exercise control over the companies operating on the state's territory and require that the economic activities on the territory should be conducted in compliance with the requirements of the local law.*¹⁶

The theory of location raises doubts about the transfer of the seat of a legal person from one country to another without dissolving the company and re-founding it in the course of the process. Thus, for

¹¹ H. Pisuke. Rahvusvahelise eraõiguse sätted. (Provisions of Private International Law). – Juridica, 1994, nr. 8, lk. 201–204 (in Estonian).

¹² Jurists of the time reproached the Baltic Private Law Code and the draft of 1940 for the lack of such clear principle. U. Lender. Rahvusvahelise eraõiguse normidest tsiviilseadustiku eelnõus (Provisions of Private International Law in the Draft Civil Code). – Õigus, 1936, nr. 3, lk. 139 (in Estonian).

¹³ G. Kegel. Internationales Privatrecht. 6. Aufl. München: C. H. Beck'sche Verlagsbuchhandlung, 1987, S. 296; Münchener Kommentar (Note 10), paragraph No. 488.

¹⁴ C. v. Bar. Internationales Privatrecht. Bd. II. Besonderer Teil. München: C. H. Beck'sche Verlagsbuchhandlung, 1991, S. 459.

¹⁵ Kommentar zum Bundesgesetz über das Internationale Privatrecht. Zürich: Schulthess Polygraphischer Verlag, 1993, S. 1341.

¹⁶ To be more precise, it should be noted that here the exceedingly liberal company law does not denote low taxes but only the non-existence or extreme lenience of company law requirements for minimum capital, *etc.*

instance, a company founded and entered in the commercial register in Germany cannot move its seat to Austria without damage to the existence of the company. The reason therefor is simple: at the moment the seat is transferred to Austria, the personal statute of the company changes — from that moment onwards, it is Austrian law. But Austrian law, which also proceeds from the theory of location^{*17}, demands adherence to the requirements of law in force in the legal person's state of location (*i.e.* Austria) and an entry in the Austrian register as prerequisites for the creation of the legal person.^{*18}

According to the **theory of incorporation**, the personal statute of a legal person is the law of the state under the legislation of which the legal person has been founded and where it is located pursuant to the articles of association. This law also determines the passive legal capacity of the legal person. Thus, the existence of a legal person depends only on adherence to the requirements prescribed by the law of its state of foundation, whereas the legal person need not have an actual seat in the same state.

The main positive aspects of the theory of incorporation are the simplicity and clarity of determination of the applicable law as well as legal certainty regarding the fact that the passive legal capacity of a company that has once been validly founded will not be doubted later (which could damage the interests of creditors). Besides this, the theory of incorporation allows to transfer the location of a legal person from one country to another without dissolving the legal person and re-founding it in the course of the process, which undoubtedly serves as a favourable factor with regard to international economic activities.

As a rule, the Continental European countries have avoided a transfer from the theory of location to the theory of incorporation. This is due to the desire of the countries with highly-developed company law to protect their legal transactions and ensure the adherence to the strict requirements established by the national company law.

The efforts to unify these fundamentally different approaches have not succeeded to date. The Hague Convention of 1956 concerning the recognition of the legal personality of foreign companies did not enter into force because of the small number of ratifications. The same initiative of the European Union in 1968 was a failure.

2.2. The choices of Estonia: the theory of location or the theory of incorporation?

Perhaps the most fascinating part of the draft Private International Law Act is the regulation of law applicable to legal persons in part 3 of the draft. It can be considered intriguing mainly because the draft allows, under certain conditions, to claim that the offshore companies operating in Estonia have no passive legal capacity at all. Although the new draft Private International Law Act has, in fact, opted for the theory of incorporation on the grounds of the established practice of law in force, the simplicity of determination of the applicable law and legal certainty (pursuant to subsection 12 (1) of the draft, a legal person is subject to the law of the state in which it has been founded and entered in the register), Estonian law is applied to a foreign legal person if the legal person is managed from Estonia (subsection 12 (2) of the draft).

Thus, the draft has combined the theory of incorporation with the theory of location if it can be proved that the legal person is managed from Estonia.^{*19} If the legal person is managed from Estonia, it means that the passive legal capacity of the legal person is also determined by Estonian law (in keeping with clause 3 of section 13 of the draft). However, pursuant to Estonian law, the passive legal capacity of a legal person in private law commences as of its entry in the commercial register or in the non-profit associations and foundations register, which is why a company founded, for example, in the Virgin Islands cannot be considered to be created at all according to the Estonian law and consequently it cannot be a subject of law, either.

Naturally, the regulation is no wonder-remedy for offshore companies or tax evasions through such companies as in practice it is still relatively difficult to prove that a legal person is managed from

¹⁷ See article 10 of the Private International Law Act of Austria.

¹⁸ Considering the Centros judgement of the European Court of Justice, the validity of the approach in the case of the EU Member States has become questionable.

¹⁹ The same solution has been favoured in article 25 of the new Private International Law Act of Italy.

Estonia. This is also demonstrated by the fact that despite analogous regulations in the applicable law (section 134 of the General Part of the Civil Code Act), the author has no information about any cases in which the question has been raised in court practice. On the contrary, the theory of incorporation seems to be dominant in court practice and disputes about the passive legal capacity of a foreign legal person have only been held with regard to whether a company allegedly founded in Bermuda really exists in the local register and if it has been founded in compliance with the local regulations.^{*20} But nevertheless, the draft creates a theoretical possibility and legal regulation for contesting whether such a pseudo foreign company is a subject of particular law or not.

Virtually the same result is achieved in Germany, where the theory of location has been applied. Namely, it is presumed in German court practice that the actual location of a legal person coincides with its location under the articles of association. This means that the party who, in a dispute about the passive legal capacity of a foreign legal person, claims that the legal person's actual location is elsewhere must prove it.^{*21}

When the application of the theory of location leads to the conclusion that a legal person founded in a foreign country but having an internal location does not actually have any passive legal capacity at all, there is reason to inquire about the fate of transactions concluded by the legal person. In this event, it is possible to proceed from subsection 125 (4) of the draft General Part of the Civil Code Act which provides for the liability of a person without the right of representation also if the transaction was concluded on behalf of a non-existent person. Consequently, there is the option of the personal liability of the person who concluded the transaction on behalf of a legal person and in some cases there is the option to treat the company without passive legal capacity as a civil law partnership.

It should be remarked that the position of the law in force, according to which only foreign **legal persons** are recognised in Estonia, is not justified. While in Estonia it seems that there is a cult of legal persons, *i.e.* legal persons are founded even if it is not expedient at all, in other countries also the associations that do not have the status of a legal person may have passive legal capacity (*e.g.* general partnership in Germany), and there is no reason to exclude them from the regulation. Pursuant to the new draft Private International Law Act, the provisions concerning legal persons are also applied to other organised associations of persons or property units (subsection 17 (1) of the draft). Law applicable to contracts is applied to contractual associations that have no organisational structure and passive legal capacity (subsection 17 (2) of the draft) and it is the task of the court to draw a distinction between a company with passive legal capacity and a contractual association in each specific case.

The provisions of section 135 of the applicable General Part of the Civil Code Act which says that foreign legal persons are recognised in Estonia and they have passive legal capacity and active legal capacity equal to that of Estonian legal persons has been abandoned in the draft. Such a provision has caused confusion at least among the authors of the draft as to whether and to what extent applicable Estonian law actually stems from the theory of location. Naturally, the exclusion of the provision does not mean that foreign legal persons will be unable to conclude transactions, open bank accounts, *etc.* in the future. If a legal person has been founded in accordance with the law applicable to the legal person and it has the passive and active legal capacity, it is sufficient for the legal person to participate in Estonian legal transactions. Consequently, it is important to determine a person's passive and active legal capacity: after its existence has been determined, the foreign legal person in question is recognised as a subject of law with all possibilities arising therefrom.

2.3. The consistency of the theory of location with European Union law

The consistency of the theory of location with the freedom of establishment (articles 43–48 of the EC Treaty) has long been discussed in the European Union law. Despite the continuous harmonisation of substantive company law within the European Union, there are still wide discrepancies between the Member States in this area. The agreement between the Member States on the mutual recognition of companies completed in 1968 has not entered into force to date, and the future prospects for its entry into force are close to none.

²⁰ See, *e.g.* judgement No. II-2-197/99 of the Tartu Circuit Court.

²¹ J. Kropholler (Note 5), p. 488.

Pursuant to article 48 of the EC Treaty, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall be subject to the freedom of establishment. Consequently, the EC Treaty prescribes that all companies founded in a Member State and having an office or principal place of business in a Member State — but not necessarily in the same Member State — should be recognised.^{*22}

2.3.1. *Daily Mail* judgement

Until 1999, such interpretation was disregarded due to the *Daily Mail Case* of 27 September 1988.^{*23} Adjudicating the case, the European Court of Justice said in its head note:

“The Treaty regards the differences in national legislation concerning the connecting factor required of companies incorporated thereunder and the question whether — and if so how — the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions, which have not yet been adopted or concluded. Therefore, in the present state of Community law, articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.”

The court case in question was provoked by reasons related to tax law: namely, the British Inland Revenue refused to give the necessary permit to a company incorporated in England who wanted to transfer its actual location to the Netherlands due to tax incentives. The European Court of Justice did not consider the act of the English Inland Revenue to be contrary to European Union law. In German legal literature the dominant opinion is that in this judgement the European Court of Justice recognised the admissibility of the theory of location also within the European Union^{*24} by declaring the provision of English law that renders the change of a company’s location contingent on a permission granted for this to be in accordance with freedom of establishment.^{*25} This generated enthusiasm among the supporters of the theory of location who claimed that despite the principle of freedom of establishment, the European Union also allowed the Member States to protect themselves by means of the theory of location. Nevertheless, 11 years later the European Court of Justice made a judgement in which a contrary tendency — abandonment of the theory of location and the triumph of the theory of incorporation — was spotted.

2.3.2. *Centros* judgement

Throughout Europe, heated discussions were provoked by the *Centros* judgement of the European Court of Justice made on 9 March 1999.^{*26} In the abundance of articles and comments that followed, the prevailing opinion was that it was a revolutionary judgement for international company law by which the European Court of Justice made a fundamental decision in favour of the theory of incorporation and extended the principles of the *Cassis de Dijon* judgement to freedom of establishment of companies.^{*27}

In this judgement, the Court of Justice declared the refusal of the Danish court register to make an entry concerning the branch of an English “mailbox company” to be contrary to European Union law. In this case, a Danish couple wanted to register the branch of a private limited company founded under English law in Denmark with the aim to engage in economic activities in Denmark. In the course of the proceedings, the married couple did not conceal that the reason for the use of an English form of company was that the capital requirements therefor were considerably lower: 100 pounds for the English private limited company, but 200,000 Danish kroner for the Danish private limited company. The plaintiffs also admitted that the English company they founded had never been engaged

²² *Ibid.*, p. 494.

²³ Judgement C-81/87 of the European Court of Justice.

²⁴ G. H. Roth. Gründungstheorie: Ist der Damm gebrochen? – Zeitschrift für Wirtschaftsrecht, 21/99, S. 861; C. v. Bar (Note 14), p. 459.

²⁵ A. Flessner. Schiffbruch der Interpreten und Statuten. – ZEuP 2000, S. 2. It should be mentioned that the author of the article is convinced that the judgements referred to have no connection with the preference of the theory of location or the theory of incorporation and she considers it to be simply the misinterpretation of most authors.

²⁶ Judgement in C-212/97 *Centros v. Erhvervs-og Selskabsstyrelsen* of the European Court of Justice.

²⁷ E. Verlauff. Ausländische Gesellschaft für inländische Aktivität. – Zeitschrift für Wirtschaftsrecht, 21/99, S. 867.

in economic activities in England and they planned to do business only through the Danish branch. The plaintiffs claimed that the Danish commercial register violated freedom of establishment guaranteed by the EC Treaty, and indeed — the European Court of Justice in this case ruled as follows: “It is contrary to articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there.”

Only in the cases of fraud, the judgement allows a Member State to use additional collateral instruments for creditors.^{*28}

At first glance, such wording seems to say nothing about the legal status of the company. The judgement also carefully avoids mentioning the theory of location or the theory of incorporation.^{*29} But an in-depth analysis shows that **permitting the entry of the branch automatically means the affirmation of the passive legal capacity of the English company** since only a legal person with passive legal capacity can have a branch. In other words: the provision that allows a Member State to refuse to recognise that a company founded in another Member State is a subject of law for the reason that the actual location of the company in question is not in the same Member State is not in compliance with the European Union law. It can also be concluded from the above that it is impossible to establish a requirement in the national law by which only a branch of such a foreign legal person can be entered in a register that has a certain amount of minimum capital.

Thus, it can be said that in the *Centros* judgement the European Court of Justice decided in favour of the theory of incorporation within the European Union, making “jurisdiction shopping” permissible upon the foundation of legal persons within the Union.

It is extremely interesting that only a couple of months later, on 15 July 1999 the Austrian Supreme Court made a similar judgement in an analogous court case^{*30}. In that case, a company newly founded in England wished to establish a branch in Austria and enter it in the Austrian commercial register. Similarly to the *Centros* judgement, the register refused to enter such a branch. The court of the first instance and the court of appeal supported the approach based on article 10 of the Austrian Private International Law Act that stems from the theory of location. The Austrian Supreme Court, in turn, followed the *Centros* judgement of the European Court of Justice and, recognising the superiority of the European Union law, considered the Austrian conflict of laws rules to be contrary to the European Union freedom of establishment.^{*31} Here, the Austrian Supreme Court goes even further than the European Court of Justice, adopting expressly the position that the theory of location is inconsistent with the principles of the European Union concerning freedom of establishment.

On the one hand, the *Centros* judgement of the European Court of Justice will definitely result in the more frequent use of “pseudo foreign companies” and it may even lead to the transfer of the Delaware syndrome to Europe. On the other hand, the judgement of the European Court of Justice still leaves a possibility for states to protect themselves from the exceedingly liberal company law in some other manner. This can be done, for example, by demanding bank guarantees from companies with a small fixed capital or by accepting the additional liability of partners.^{*32} The restraints must only be transferred from the foundation phase to the operating phase of the company.

For Estonia, the principles deducible from the *Centros* judgement may become relevant upon accession to the European Union. While the determination of law applicable to legal persons could be considered to be in the competence of the Member States until the aforesaid judgement and every state could basically choose a legal regulation suitable to the state, then in the case of the persistence of principles contained in the *Centros* judgement, the permissibility of the theory of location within the European Union will become doubtful. Thus, unless the European Court of Justice decides

²⁸ That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in co-operation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established on the territory of the Member State concerned.

²⁹ Moreover, the judgement did not even refer to the earlier *Daily Mail* judgement. Nevertheless, it is assumed in literature that the European Court of Justice must have been aware of the consequences that its judgement entailed from the point of view of international company law. G. H. Roth (Note 24), p. 872.

³⁰ RS U OGH 1999/07/15 6 Ob 124/99z.

³¹ I. Rappaport. Companies in General. – The Journal of Business Law, November 2000, p. 631.

³² Namely the countries in which there are extremely low minimum capital requirements have developed the principles of the partners’ additional liability for the company’s obligations: for example, the English “lifting the veil” principle. E. Verlauff (Note 27), p. 875.

otherwise in the meantime, it may happen that Estonia will have to abandon the principle provided in subsection 12 (2) of the new draft Private International Law Act at least with regard to companies founded in the Member States of the European Union. It will naturally not prevent the persistence of the aforesaid possibility with regard to companies founded in other countries but operating in Estonia. Nevertheless, taking into consideration the hitherto liberal practice and the development of Europe it seems unlikely that the possibility to dispute the passive legal capacity of a company offered by the theory of location will be used very often after the entry into force of the draft as an act. But still, even a few court decisions of the kind could possibly contribute to some purification of Estonian business affairs — be ready to give it a try!

Why Do We Fear Civil Law in Labour Law?

Introduction

Discussion concerning the nature of labour law and its position in the legal system has been an ongoing debate since the emergence of contemporary labour law and it lacks a specific resolution to date. The resolution of the relationship between labour law and civil law has always led primarily to the opinion that labour law is a separate branch of law and it would be better to keep the relative importance of civil law at a minimum in applying labour law provisions, whereas at best, the application of civil law in labour law should be fully precluded. It is apparent, above all, in the approaches of labour law activists that they fear that civil law may be implemented in labour law. This rationale has always been founded on the idea of protecting the employee as the weaker party in an employment relationship. Upon reforming Estonian labour law, the discussion has also focused on the labour law activists' claim that labour law must be a separate branch of law, whereas the application of civil law principles is pointless and contrary to the people's legal awareness. The fear of abuse on the part of the employer is so deeply rooted in people that any attempts to introduce more freedom of contract in employment relations lead to fierce resistance while the attempts are not regarded as a serious topic in further discussions.*¹

1. Labour law and civil law

1.1. Development of private law and labour law

The development of labour law cannot be viewed separately from the general development of private (civil) law. Without comprehending how civil law develops, we are unable to get a clear idea of how labour law develops and what the main distinction between labour law and general civil law is.

Industrial production, the development of which commenced at the end of the 18th century, at the beginning of the 19th century inevitably brought about changes in the contemporary employment relations. Although the first codes of private law appeared at the beginning of the 19th century, they do not reflect the transformed conditions in public life as a whole. It is understandable as the preparation of the codes lasted over a relatively long period of time and therefore the rapid changes in society could not be taken into account in laws. As a result, the contemporary employment relations

¹ P. Hanau. *Arbeitsrecht in der sozialen Marktwirtschaft*. – Festschrift zum 125jährigen Bestehen der Juristischen Gesellschaft zu Berlin. D. Wilke (Hrsg.). Berlin, New York: Walter de Gruyter, 1984, S. 228.

are not reflected in civil codes. This, however, does not mean that the development of employment relations was not reflected in the civil codes at all. Thus, various civil law codes reflect contracts concerning provision of services.^{*2} Although the above-mentioned provisions remained too scarce to regulate the relations between workers and manufacturers, they still serve as a basis for the development of contractual employment relations. The formation of public law rules that has been emphasised in relation with labour law and its developmental peculiarities has determined the development of labour law outside civil codes. However, here we must make a distinction between industrial work and work that was not done in factories. The enforcement of protection rules was primarily related to industrial work and it was, first and foremost, aimed at preventing the exploitation of minors and women. It established borders for the application of freedom of contract to industrial work. The works performed in households were not included in this regulation and the enforcement of protection rules was neither necessary nor important in this area. Thus, stressing the enforcement of public law rules as a particular feature of the development of the employment relationship, only one aspect of the development of employment relations is stressed. The development of employment relations in Estonia is no exception. The Baltic Private Law Code contained general rules concerning how and under what principles the employment relationship should be regulated. In addition thereto, the Russian Industrial Work Act, governing the legal position of factory workers upon performing their work, was also in effect on the territory of Estonia.^{*3} Yet before the Industrial Work Act was passed, individual legal instruments were adopted that regulated primarily the work of minors and women in factories.^{*4} However, the enforcement of these protection provisions does not lead to the establishment of labour law as a separate branch of law beside general civil law. Many years will pass until we can speak of labour law as a uniform branch of law. In 1920–1930s, labour law develops into an independent branch of law; it is primarily due to the fact that the public law protection rules play an increasingly important role and the private law rules remain in the background. An extreme example is Soviet Russia where all the provisions governing dependent employment relationships are assembled into a common labour code. The labour code serves as an example where the state actually regulated all necessary working conditions, and in such a system labour law had nothing in common with private law.

In the case of Soviet labour law, the questions of whether labour law in fact existed in such a system was justified. Proceeding from the regulatory level, a separate branch of law — labour law — had been created and the regulatory expression of that branch of law was the labour code. Examining the content of the issue, labour law did not exist in such a system — the parties lacked an opportunity to freely negotiate the more important working conditions, freedom of collective agreement did not apply, the parties could not organise strikes and lock-outs to ensure that their demands be satisfied. Consequently, the elements of labour law characteristic of social market economy were not there. This testifies that Soviet labour law attempted to restrict the likelihood of people adopting decisions and agreeing on issues independently. The total control exercised by the state over the working conditions and the behaviour of the parties to employment relationships were integral parts of the system.

Although in the 1920–30s, the opinion that labour law is public law becomes increasingly prevalent, its connections with private law are still pointed out. Thus, according to the comments on the Workers' Employment Contract Act of Estonia, the workers' employment contract is a civil law contract, the position of which is regulated by a separate act.^{*5} In theory, however, labour law was viewed as public law.^{*6}

The development of the Estonian labour law system is inevitably related to the development of Russian labour law. From the establishment of Soviet power until the restoration of Estonia's independence, the development of Estonian labour law was a part of the development of the labour law legislation of the Soviet Union. Thus, the division of law into private and public law was not recognised and the implementation of civil law principles was out of question. In the Soviet legal theory, the borderline between labour law and civil law was drawn according to the goals of the particular branch of law. The goal of civil law was to regulate work results in the form of, e.g. contract for services, whereas the main function of labour law was to regulate the work process or working

^{*2} See e.g. the facsimile publication of *Tsiviilseadustiku 1940. a. eelnõu* (Civil Code. Draft 1940). Tartu, 1992, sections 1929–1945 (in Estonian).

^{*3} G. Tavits. The Position of Labour Law in the Private Law System. – *Juridica International. Law Review*. University of Tartu, V, 2000, pp. 126–127.

^{*4} E. Khokhlova (Sost.). *Kurs rossiskogo trudovogo prava v 3-kh tomakh*. Sankt-Peterburg, 1996, st. 34.

^{*5} J. Põllupüü, A. Kallas. *Töölise töölepingu seadus määruste, seletuste ja lisadega* (Workers' Employment Contract Act with Regulations, Explanations and Annexes). Tallinn: Rahva Ülikooli Kirjastus, 1937, § 3, komm. 4 jj. (in Estonian).

^{*6} A.-T. Kliimann. *Õiguskord* (Legal Order). Tartu: Akadeemilise Kooperatiivi Kirjastus, 1939, lk. 143 (in Estonian).

conditions, how work had to be carried out.^{*7} The analyses of the period did not discuss the question of whether labour law was civil law or not. Labour law was regarded as a separate branch of law. At the same time, it was admitted that civil disputes were disputes arising from labour, family and civil law relationships.^{*8}

During the first years after the restoration of Estonia's independence the prevailing opinion was that labour law served as an independent branch of law and it was an area of law that, being a part of private law, still contained many legal provisions of public law nature. Until 1997, it was not actually discussed that the provisions contained in contract law could be applied in labour law.

The distinctive features of labour law have been primarily emphasised in relation to the fact that labour law provisions serve as protecting the employee, and as the provisions protecting the employee are unilaterally binding, it is impossible to use the civil law principles when regulating employment relations. Such an approach, however, is not correct as the civil law principles need to be taken into account when regulating both individual and collective employment relations.

1.2. Functions of labour law

Working methods are different and this may be due to the fact that the legal regulation of employment relations may also differ. Work is always a person's purposeful intentional activity that is, above all, aimed at creating values. Work may be performed in a subordination relationship with the person providing work, whereas work may also be performed in equal relations with the person providing work. Depending on the nature of the relations between the employee and the person providing work, the legal regulation must also differ.

As a rule, labour law in its historical development serves as a cornerstone and mirror of the existing political government system. The various periods of labour law are determined each time by the existing government forms and government ideologies.^{*9} According to the applicable constitutional principles and forms of organising the state — *e.g.* tsarist state, National Socialism, Estonian SSR, Republic of Estonia, *etc.* — different ways of organising employment relations may be distinguished.

Labour law is an essential element of the industrial society. In the developed industrial society, labour law performs several equivalent functions: it protects socially weaker and economically subordinated employees with regard to minimum standards; through collective autonomy, it creates prerequisites for the fair levelling and harmonisation of the conflicting and common collective interests of the parties in the labour market; in the interests of the competitiveness of the national economy it promotes effective production of goods and services, which involves minimum conflict; in addition to that, labour law ensures the stability of the state and society through resolving the particular interests and conflicts of the parties in the labour market.^{*10}

For the employee, the employment contract is the most important transaction during his or her life; the employee renders to the employer his or her working abilities and capacity; of the remuneration the employee must ensure support to himself or herself and his or her family. Therefore, it must be guaranteed that the employee is remunerated according to the work performed, that hazards are not posed to his or her health when working, that he or she maintains his or her job. Theoretically, it would be possible to guarantee all this by particular agreements within the employment contract.^{*11} Freedom of contract is applicable only when both parties are equal and equally strong. Unfortunately, in the case of the employment contract it is not so as the employee is traditionally the weaker party to an employment contract and consequently he or she cannot affect the employment contract in the manner as the employer. Labour law attempts to mitigate inequality in various ways: by restricting freedom of contract, by recognising collective agreements and by involving employees in decision-

⁷ A. Pasherstnik. *Teoritieskiye voprosy kodifikatsi obshesojuznogo zakonodatelstva o trude*. Moskva: Izdatelstvo Akademi Nauk SSSR, 1955, st. 22; L. Gintsburg. *Sotsialisticheskoye trudovoye pravootnosheniye*. Moskva: Nauka, 1977, st. 46.

⁸ Eesti NSV tsiviilprotsessikoodeks. Ametlik tekst koos muudatuste ja täiendustega seisuga 1. mai 1990 (Code of Civil Procedure of ESSR. Official text with amendments and supplements as of 1 May 1990). Tallinn: Olion, 1990, § 1 lg. 2 (in Estonian). The same principles are established by the applicable Code of Civil Procedure, see tsiviilkohtumenetluse seadustik (Code of Civil Procedure) (adopted on 22.04.1998; entered into force 01.09.1998) section 1 (2). – Riigi Teataja (The State Gazette) I 1998, 43–45, 666; last amended: Riigi Teataja (The State Gazette) 2000, 55, 365 (in Estonian).

⁹ H. Brox, B. Rühens. *Arbeitsrecht*. 14. Aufl. Stuttgart: Kohlhammer, 1999, S. 3.

¹⁰ *Ibid.*, p. 5.

¹¹ *Ibid.*, p. 6.

making procedures.^{*12} Although the employee and employer are equal from the legal point of view, social imbalance will lead to inequality between the employee and employer.

An employment relationship is a form of shaping private autonomy. A contract between the employer and employee serves as a legal basis for performing the promised work. The dependency of the employee is nothing but the outcome of the transactional formation of a legal relationship. Employment contract law constitutes the main part of labour law. The employment contract contains, above all, the basis for performing work in an employment relationship, be the content thereof determined by law, a collective agreement or an individual agreement. The sphere of validity of labour law is not determined by an individual and his or her legal position but by contract law.^{*13}

Upon legal regulation of employment relationships, the already existing patterns cannot be discarded. It is not so much about whether an employment contract is regulated by a separate law or within the framework of contract law. Rather, it is important that the regulation be comprehensible. If people are used to having an unambiguous regulation system for all issues, it is the task of the legislator to ensure that it is so. At the same time, the regulation may not hinder the normal development of relations between individuals. When ensuring legal regulation, one must avoid two extremes — regulation may not be too detailed on the one hand, and regulation may not be too general on the other hand. The level of detail in regulating employment relationships is primarily dependent on two criteria:

- (1) economic conditions;
- (2) strength of the employee and employer organisations and their ability to regulate employment relationships.

2. Employment contract as civil law contract

An employment contract serves as the basis for the creation of a labour law relationship. The voluntary nature of performing the work and the existence of an employment contract in private law are important features in identifying a labour law relationship. Consequently, it is important to bring freedom of contract into focus in employment relationships. The voluntary nature of the work performed is manifested in the employment contract. We can speak about an employment contract as a bilateral transaction. The intention of an individual, manifested in his or her expression of will, plays an important part in the transaction. The expression of will must conform to the actual, freely developed will of the individual. The above-mentioned principles that are used in civil law will be applied also in labour law.

An employment contract is a private law contract. We interpret the private law contract as a situation in which the general provisions of contract law are applicable to the contract. Thus, an employment contract can be regarded as a civil law contract. However, an employment contract has not been always regarded as a civil law contract. Although different views exist about the legal nature of a relationship established under an employment contract, the view that an employment contract is a relationship under the law of obligations is predominant.^{*14}

The reason why an employment contract may be regarded as a civil law contract arises from the fact that the provisions governing employment contracts are found in civil codes.^{*15} Although over time they have been supplemented with various individual acts, falling within the sphere of public law, employment contracts have established themselves in civil codes. The obligational nature of a labour law relationship is indicated by the fact that employment contracts are governed by the law of obligations.^{*16} However, this cannot be the only criterion.^{*17} Here we cannot disregard the aspects of the historical development of legal regulation. The origins of the employment contract as a civil law

¹² *Ibid.*

¹³ *Ibid.*, p. 48.

¹⁴ B. Boemke. Neue Selbständigkeit und Arbeitsverhältnis: Grundsatzfragen sinnvoller Abgrenzung von Arbeitnehmern, Arbeitnehmerähnlichen und Selbständigen. – Zeitschrift für Arbeitsrecht, 1998, No. 3, S. 320; W. Zöllner, K. Loritz. Arbeitsrecht: ein Studienbuch. 5. Aufl. München: Beck, 1998, S. 151–155.

¹⁵ See e.g. § 611 ff. O. Palandt. Bürgerliches Gesetzbuch. Bearbeitet von Bassege, P. u.a. 60. Aufl. München: Beck, 2001.

¹⁶ H. Hammen. Die Gattungshandlungsschulden: Inhalt der Schuld, Haftung und Haftungsbeschränkungen bei fehlerhafter Leistung, dargestellt am Beispiel der Arbeitspflicht eines Arbeitnehmers und der Pflichten eines Vermögenverwalters. Frankfurt am Main: Vittorio Klostermann, 1995, S. 168.

¹⁷ W. Gast. Das Arbeitsrecht als Vertragsrecht. Heidelberg: Rv Decker; C. F. Müller, 1984, S. 52 ff.

contract go as far back as to Roman private law.^{*18} In Roman private law, various consensual contracts — *locatio conductio* — were used. According to the purpose of the contracts, they were divided into *locatio conductio rei*, *locatio conductio operis* and *locatio conductio operarum*. Of these contracts, *locatio conductio operarum* served as a predecessor of the contract of service (contract of employment). In ancient Rome, working for remuneration (*operae illiberales*) was considered inappropriate for a free man. Special remuneration, so-called *honorarium* was paid for the work performed by free men (e.g. teaching of fine arts, lawyer's and physician's services). The relationship of a physician and lawyer with his or her clients was referred to as *mandatum*.^{*19} With regard thereto, work was divided into two — physical labour and intellectual work. In the German Civil Code and the Estonian Civil Code^{*20} the distinction was no longer made.^{*21} The origins of employment contracts in Roman private law have given ground to the claim that labour law as a whole dates back to Roman private law, not to the 19th century when the development of factory legislation commenced.^{*22} Nevertheless, it is evident that the modern labour law as we know it in the present day has its start, first and foremost, in the evolvement of factory legislation during the industrial revolution period. With regard to both legal theoretical and practical treatment, it is correct to relate the employment contract as a private law contract to Roman private law and associate it with civil law contracts. Thus, from the historical perspective, the employment contract is related to civil law and civil law contracts.

3. Employment relationship as lasting obligational relationship

A private law relationship is either proprietary or related to an individual and his or her legal position. The relationships related to an individual and his or her legal position are relationships involving the provision of welfare to an individual, and these rights and duties have been regulated in detail by family law.

As a labour law relationship does not fall within this regulation complex, it may be regarded as a proprietary relationship. A proprietary relationship is a relationship in the law of obligations or in the law of property. A legal relationship in the law of property is related to the legal object serving as a thing whereas its existence is immediately dependent on the legal object. A relationship in the law of obligations is not related to the legal object serving as a thing and thus the existence of a relationship in the law of obligations is not related to the above-mentioned legal object. Consequently, a labour law relationship can only be a relationship in the law of obligations. A labour law relationship as a relationship in the law of obligations is immediately also a private law relationship.^{*23}

A labour law relationship has been characterised as a lasting relationship in the law of obligations. A lasting obligational relationship, in its turn, can be characterised so that the performance due is in the form of lasting activities or a repetitive individual activity performed over a longer period.

It appears from the feature “repetitive” that an obligational relationship which is not lasting is, in its existence, dependent on the content of the duty to perform agreed upon and expires after the duties have been performed (actual performance). A lasting obligational relationship, however, is not dependent on the rights and obligations arising therefrom by its nature. It does not expire automatically. A labour law relationship as a lasting obligational relationship does not expire with the completion of the duties to perform work and pay remuneration, arising from the labour law relationship. A lasting obligational relationship requires a particular basis for termination.^{*24}

It follows from the provisions concerning the termination of an employment contract that a labour law relationship is a lasting obligational relationship. With regard to these provisions it is expected that a labour law relationship does not expire with its actual performance but a specific basis is necessary for terminating a labour law relationship each time. These bases and their impact on the

¹⁸ H. Honsell, *Römisches Recht*, 2. Aufl. Berlin, Heidelberg, New York: Springer, 1992, S. 128 ff.

¹⁹ R. Richardi, *Der Arbeitsvertrag im Zivilrechtssystem*. – *Zeitschrift für Arbeitsrecht*, 1988, No. 3, S. 223.

²⁰ See e.g. Civil Code (Note 2), sections 1929–1945.

²¹ E.g. according to *BGB* subsection 611 (2), any type of service may be the object of the contract of service, see O. Palandt (Note 15), 2001.

²² R. Trinkner, M. Wolfer, *Modernes Arbeitsrecht und seine Beziehungen zum Zivilrecht und seiner Geschichte*. – *Betriebs-Berater*, 1986, No. 1, S. 4–9.

²³ H. Hammen (Note 16), p. 171.

²⁴ *Ibid.*, pp. 172–173.

termination of a labour law relationship are regulated in detail in individual acts. As a rule, employment contracts are concluded for an unspecified term and therefore the termination of an employment contract is not related to the arrival of the deadline but the employment contract can be terminated on the bases prescribed by law. Although employment contracts are generally concluded for an unspecified term, they can be entered into for a specified term, *i.e.* until the completion of a particular construction project. In such cases, the employment contract concluded may be regarded as an employment contract concluded for a specified term and consequently it terminates due to the expiry of the term. The way of determining the term will remain for the parties to the employment contract to decide; however, it does not change the nature of the employment contract. It is still an employment contract concluded for a specified term. For example, an employment contract concluded for a term expiring with the completion of a particular construction precludes that the contract is based on teamwork in the course of which every worker is expected to contribute to the completion of the construction. Thus, the employment contract may, on the one hand, expire for a particular worker before the actual completion of the construction. On the other hand, in such a case it need not be an employment contract concluded for a specified term. An employee may be employed by a contract concluded for an unspecified term while their task is to perform particular works during the construction. The employer will decide on the assignment of the employee to a particular construction project under his or her authority according to the conditions of the employment contract.

In the case of relationships in the law of obligations the temporal feature is particularly important. As every lasting relationship in the law of obligations requires a particular fact of completion, the notion gives rise to a need for a specific period between the creation and termination of such a relationship. Relationships in the law of obligations that are not lasting by nature may last for some time but need not necessarily be of a lasting nature.^{*25} Relationships in the law of obligations that are not lasting by nature expire when the obligations serving as their content have been discharged, *i.e.* a contract between a dentist and patient to fill teeth will expire after the task has been completed. Such contractual relationship is not a lasting obligational relationship although the dentist may need a whole day to complete the work agreed upon. Such a relationship does not require a special completion element. All employment relationships that do not expire due to a special element are not lasting obligational relationships. Thus, they cannot be treated as labour law relationships since duration is the constituent feature of labour law relationships.^{*26}

An employment contract as a civil law contract obliges both parties to perform financially appraisable acts. An employment contract may be regarded as a mutual agreement as both parties perform their acts in order to receive consideration. Such exchange of performances constitutes the content of the respective legal relationship and can, in principle, be expressed as “no work, no remuneration”. The Soviet era has rendered us a saying “no work, no food” which actually means that if no work is done, wages cannot be paid.

Such a synallagmatic approach leads to the conclusion of a contract as the employee assumes an obligation to receive remuneration and the employer employs the employee in order to achieve personal financial success. Reciprocity dictates the expiry and performance of the contract. Remuneration is determined according to the act performed. Consequently, the labour law relationship is aimed at the economic exchange of the employee’s work result for the remuneration given by the employer. Thus, an employment contract serves as a synallagmatic contract.^{*27}

As in the case of other agreements, an employment contract requires the existence of an offer and acceptance. The employer offers a vacancy and if the employee accepts it, the contract has been concluded. Under the employment contract, the employee undertakes to work for a specified or unspecified period as a subordinate to the employer, whereas the employer, in his or her turn, undertakes to pay remuneration. On the basis of the employment contract, a bilateral relationship in the law of obligations is created, in which work and remuneration for work are exchanged for each other. Since the mutual obligations are of a lasting nature, the contract of employment is a lasting relationship in the law of obligations.^{*28}

²⁵ Daily cash transactions could serve as examples here.

²⁶ H. Hammen (Note 16), p. 175.

²⁷ H. Wiedemann. *Das Arbeitsverhältnis als Austausch- und Gemeinschaftsverhältnis*. Karlsruhe: C. F. Müller, 1966, S. 9–10.

²⁸ W. Zöllner, K.-G. Loritz. *Arbeitsrecht: ein Studienbuch*. 5. Aufl. München: Beck, 1998, S. 154–156.

3.1. Performance of work — individual or generic obligation?

Speaking about a labour law relationship as a relationship in the law of obligations, we should determine whether it concerns a generic or an individual obligation, *i.e.* whether the promised performance can be limited on the basis of individual or generic features. The type of the obligation — an individual or a generic obligation — depends on the transaction; in most cases, on the contract.^{*29}

If a worker is employed, *e.g.* as a mason, joiner, *etc.*, his or her duty of employment can generally not be determined by individual features. The obligations arising from such formation of contract are generic obligations. Here we have to mention, however, that the object of the employment contract, *i.e.* or the work performed is not determined specifically but through general, that is generic features. The individual specification of the work that the worker is obliged to perform under the employment contract is not possible since it is not usually clear at the time of concluding the contract what performance — serving as best for achieving the object of the contract — will be required of the worker in six months or two years. Insofar as the circumstances of the performance have not been individually determined but only agreed on as “the framework” and the individualisation of the performance is carried out by the employer, the duty of employment serves as an obligation with generic features.^{*30}

The classification of work performance as a generic or individual obligation is debatable. We may agree with the opinion that it is appropriate to distinguish between the individual and generic obligation primarily in the case of things and goods. We may speak of things with individual features and things with generic features. When it comes to work performance, such distinction is unnecessary. By concluding an employment contract, an employee assumes an obligation to perform work. With regard thereto, it is expected that, arising from the object of the contract, the employee assumes a duty to perform the best work. The employer’s expectations are also aimed at the best work to be performed by the employee as a result of the object of the employment contract. When concluding an employment contract, the tasks of the employee — the work that the employee will be obliged to perform — are agreed upon. No alterations can be made to the duties of the employee without the employee’s consent. The individual specific tasks to be carried out by the employee in the course of his or her employment can be specified both by the employer and the employee. The main goal is to perform the tasks in the best manner possible. Consequently, the determination of the performance of work as an individual or a generic obligation is neither necessary nor feasible.^{*31}

3.2. Features of employment contract

An employment contract is characterised by four typical features.

Under the employment contract, an employee is obliged to work and render to the employer his or her working abilities and capacity. Unless otherwise determined by the agreement between the parties or actual circumstances, the employee must perform his or her task personally. The work must be work performed by a natural person and it must be an activity in the positive sense even when it is actually not an active activity.^{*32} Establishment of on-call time could serve as an example here. During on-call time, an employee must be at the disposal of the employer and if necessary, perform the orders given by the employer. This is a case of exceptional regulation of working time as the employer pays additional remuneration to the employee for on-call time. In fact, on-call time means that the employee is not actively involved in performing his or her tasks but during on-call time, he or she is ready to commence work.

With regard to an employment contract, the type of work is not important. Work comprises both manufacturing operations and activities aimed at the satisfaction of a particular need. Work may be

²⁹ Objections have been made to the treatment of work performance as a generic obligation. So it has been claimed that a distinction between an individual and generic obligation can be made only in the case of goods, not in human work; an individual is not obliged to do any kind of work but only the best work required by the object of the contract, see H. Hammen (Note 16), p. 181.

³⁰ H. Hammen (Note 16), p. 182.

³¹ Conditionally, we may say that performance of work is an individual obligation as particular tasks to be performed by the employee are agreed upon in the employment contract. The performance of any other tasks within the framework of that particular employment contract is, in principle, unfeasible.

³² M. Rehinder. *Schweizerisches Arbeitsrecht*. 13. Aufl. Bern: Stämpfli und Cie AG, 1997, S. 34. *E.g.* Availability for work presumes that the employee is not actively involved in some activity.

physical and intellectual. Thus, an employee is not responsible only for the actual outcome but, above all, for rendering his or her working abilities and capacity to the employer.

An important feature of an employment contract is the relation of the performance of work (contractual duty to perform) to a specific term or else it is performed without a specified term.^{*33} In the framework of a lasting relationship in the law of obligations, the employee is obliged to engage in his or her contractual performance (work) repeatedly. The performance of the employment contract is not restricted to a single transaction aimed at reciprocal exchange (e.g. transfer deeds). It is characteristic of the employment contract that the work performed is related to a particular number of repetitive performances during a particular period. At the same time, it is not important whether the above-mentioned individual performances have been agreed upon earlier or not. Thus, the labour law relationship does not expire with its performance as it is in the case of, e.g. gratuitous contract or may also occur in other contracts concerning performance of work; the labour law relationship terminates with the expiry of the term or termination of the contract on the bases prescribed by law.

A distinction must be made between the duration of a particular contract and working time. Working time characterises the amount of work demanded of an employee over a particular period. In the case of an employment contract it is not important that the employee be fully at the employer's disposal during the labour law relationship. Also a contract under which an employee is obliged to work part-time may be regarded as an employment contract. In this respect, the law equalises working full-time with working part-time. However, it cannot be precluded that contracts are concluded for a specified term in order to disregard labour law provisions. To avoid such a situation, the legislator must clearly define the occasions when it is possible to conclude employment contracts for a specified term. In general, employment contracts are concluded for an unspecified term.

Working under an employment contract must be performed for remuneration. Payment of remuneration is a consideration and at the same time also the employer's main duty. An agreement concerning the remuneration is one of the essential conditions of an employment contract. Unless a specific amount of remuneration is agreed upon in an employment contract, the applicable Wages Act provides that the minimum remuneration must be guaranteed to an employee. The legislation of some countries prescribes such remuneration as is common for such work.^{*34} We should consider the inclusion of such a principle in the Estonian legislation. The provision would definitely be more favourable than the current minimum wage since the ordinarily paid remuneration is higher, as a rule.

When describing the duty to pay remuneration, the temporal feature is irrelevant, *i.e.* an employment contract will continue to be an employment contract even when remuneration is not determined according to the amount of time worked but in some other manner, *i.e.* as piece rates or wages.^{*35}

Having concluded an employment contract and commenced work at the position, the employee subdues himself or herself to the employer's orders; he or she subdues himself or herself to the employer's authority and is therefore both legally and economically dependent. Consequently, the subordination of an employee to the employer's authority and the employee's duty to obey may be referred to as the typical features of an employment contract.^{*36} This feature is characteristic of a labour law relationship and it is used to distinguish between the employment contract and other contracts that are aimed at performing work. The employer has a right, arising from the employment contract, to determine where, when and how work must be performed; within the framework of the employment contract, the employer disposes of the employee's working abilities and capacity to meet his or her general needs and goals. Thus, the employment contract is characterised as a contract aimed at the application of working abilities and capacity determined by a stranger.^{*37}

Under the employment contract, an employee subdues his or her working abilities and capacity to the employer and the employer pays to the employee remuneration for disposing of and using his or her working abilities and capacity. From the legal and social perspective, any contractual relationship includes complicated relations between two parties. The treatment of the employment contract as a civil law contract is justified both by the historical development of this contract and the nature of the employment contract. An employment contract as a civil law contract provides the parties with more opportunities to form their employment relationships. Under circumstances where the legal regula-

³³ *Ibid.*, p. 35.

³⁴ *Ibid.*, p. 68.

³⁵ *Ibid.*, pp. 36–37.

³⁶ *Ibid.*, p. 34.

³⁷ *Ibid.*

tion of the employment contract is insufficient, the parties may apply the overall principles of civil law contracts.

Generally, it has been attempted to take the legal regulation of the employment contract to as concrete a level as possible in order to avoid recourse to the civil law provisions. The legal regulation of employment relationships need not prove sufficient even in the case of the optimum regulation and thus, in relation to the employment contract, there will always be an option to rely on the overall principles of civil law in borderline situations. When regarding the employment contract absolutely separately from the other civil law contracts, it would mean that, *e.g.*, the principles of representation, offer and acceptance, *etc.* need to be developed separately for labour law. The development of separate provisions becomes unnecessary when we apply the provisions provided for civil law contracts to employment contracts. In the case of employment contracts, the specific areas concerning employment contracts when compared to the other civil law contracts require to be regulated first of all. In other words, upon the legal regulation of employment contracts, those particularities must be expressed that are not governed by civil law or where it is necessary, proceeding from the specific characteristics of an employment contract and labour law relationship, to diverge from the principles of civil law contracts. Due to the social protection aspect of the employee, it must be specified with regard to employment contracts how the employee is employed, what the employer's right to be informed about the employee's past is, what the employee's and employer's specific obligations in the employment relationship are, how the employer can exercise his or her authority, what the limits to the employer's authority are. In the case of employment contracts, their termination is socially the most sensitive area and additional regulation is definitely required here.

Historically and with regard to its content, the employment contract is a subcategory of civil law contracts, whereas the situation does not differ nowadays either. Although a separate code of rules, focusing on all the aspects related to the employment contracts, has evolved therefor, it does not mean separation from the regulation of civil law contracts. In the case of employment contracts, the following principle prevails: if an adequate solution cannot be found in the particular regulation of labour law, the overall principles of civil law contracts will be applied.

4. Labour law is contract law?

An employment contract is a bilateral contract. Thus, an employment contract may be regarded as a relationship in the law of obligations, aimed at the exchange of work and wages. Through the employee's right of defence, the obligations in public law are imposed on the employer in order to implement the legal provisions intended to protect the employee. The provisions prescribed by law to protect the employee are mandatory by nature. The employee's right of defence is exerted by means of the state supervision, by duress and punishment or fines and irrespective of the employee's will. Due to this function, it belongs to the sphere of public law. Nevertheless, all aspects of the labour law relationship related to the employment contract cannot be regarded as contract law. The labour law relationship comprises very many circumstances that, although related to the employment contract, are regulated outside contract law. Here the legal regulation of holidays as well as working and rest time could serve as examples. Within the framework of contract law, it is only generally possible to determine that the employer is obliged to grant a holiday to the employee during a particular period. Also, in the framework of contract law, it can be generally determined that the employee's working time may not exceed a particular standard for working time and the employer must pay to the employee additional remuneration for additional work. However, it is the provisions outside contract law that regulate more precisely how working and rest time are organised, holidays are granted and what classes of holidays exist. These are provisions in public law the non-compliance with which entails sanctions in public law.

Although the principles applicable to civil law can be, to a certain extent, applied to the employment contract, and labour law is actually a part of the private law system, labour law can still not be considered as contract law. Even if the parties could freely agree upon all the working conditions, particular minimum provisions would evolve under collective agreements to which the parties must adhere. The establishment of absolute freedom of contract in labour relations is not currently feasible. However, one must also examine the development of civil law as a whole. In civil law, we can no longer speak of an extensive freedom of contract today, since numerous restrictions (*e.g.* standard conditions, consumer protection, protection of the lessee upon the termination of a residential lease relation) have been added to the conclusion, formation and termination of the contract in civil law regulation. Consequently, the employment contract law and contract law are not as fundamentally different as they are considered to be. However, labour law will remain an independent branch of law primarily due to the possibility of collective regulation of employment relationships. This is a specific feature of labour law that is not evident in contract law.

Conclusions

The fear of the application of civil law principles to labour relations is primarily related to uncertainty about the consequences that the application of these principles may entail. It is understandable as it is impossible to plan extensive liberalisation of employment relations without a thorough analysis. However, this attitude is, to a large extent, caused by the fact that civil law is understood as total freedom of contract and opportunities for the parties to do anything in such a system. Nevertheless, in civil law as a whole, private autonomy has been subjected to various restrictions and thus it is not possible to speak of absolute freedom of contract in civil law. In an employment relationship, the freedom of contract remains even more limited than in other contractual relationships. As long as there is a dependent salaried workforce, the special status of labour law in the private law system will continue to exist.

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Textbook of Pandects or New Style of Legislation in Estonia?

Introduction

I would like to start with some quotations and the reader could try to guess their origin:

(1)“A servitude of footpath grants the right to walk or ride on a bicycle on a footpath through a servient immovable.”

“A servitude of livestock path grants the right to drive livestock and walk on a livestock path through a servient immovable. To facilitate the driving of livestock, an entitled person may build a fence or obstacles at the edge of the path if this is possible without causing damage to the owner of the servient immovable. A servitude of livestock path does not grant the right to pasture animals on the servient immovable.”

“A servitude of roadway grants the right to drive by vehicle on a road through a servient immovable. A servitude of roadway includes a servitude of footpath.”

(2)“A servitude of projection grants the right to build on one’s construction a balcony, shelter or other such part which projects over the immovable of a neighbour.”

(3)“A servitude of stillicide grants the right to permit water from rain or snow to flow from the roof of one’s construction to the immovable of another both from the eaves and by a pipe.”

It suffices for examples although the list could be further supplemented. Those who thought that the extracts originate from some 19th century pandect book were wrong. All the quotations have been taken from the applicable Estonian Law of Property Act.¹ The first excerpt quoted subsections 186 (1)–(3) (servitude of way), the second section 194 (servitude of projection) and the third section 195 (servitude of stillicide). The law defines yet other individual types of real servitudes in a similar manner. Section 188 concerns servitude of lines, section 189 servitude of aqueduct, section 190 servitude of access to water and watering of livestock, section 191 servitude of pasturage, section 192 servitude of support, section 193 servitude of wall, section 196 servitude of height, section 197 servitude of light, section 198 servitude of prospect, and section 199 servitude of protective zone. However, such causal regulation does not imply as if the Estonian Law of Property Act lacked general provisions concerning real servitudes. Sections 172–177 point out the definition of real servitude and provide the conditions for the creation and extinguishment thereof. Sections 178–185, in their turn, determine the conditions of and limitations to the exercise of real servitudes. Thus, already these general provisions contain a rather detailed regulation of the institute of real servitudes. Hence it is

¹ Asjaõigusseadus (Law of Property Act), passed 9 June 1993. – Riigi Teataja (The State Gazette) I 1993, 39, 590; last amended Riigi Teataja (The State Gazette) 1999, 44, 509 (in Estonian).

natural to ask why the law contains a separate division of the individual types of real servitudes. Such a way of posing questions is supported by the fact that the last section of that division renders the previous ones pointless in fact. Namely, section 200 states plainly: “In addition to the real servitudes provided for in this Act, other real servitudes which correspond to the definition and content of a real servitude may be established.”

Consequently, sections 186–199 do not provide an extensive list of legally recognised real servitudes. Thus, the inclusion of the regulation of the individual real servitudes in the law cannot be regarded as application of the *numerus clausus* principle that is characteristic of the law of property. Also, it cannot be claimed in the case of any type as if their particular regulation was in the position of a special provision amending the general provisions of real servitudes. Therefore, it is not *lex specialis derogat legi generali* that has motivated the compilers of the Law of Property Act to include these provisions in the Act.

An answer to the question why the Estonian Law of Property Act contains such causal regulation of the individual types of servitudes cannot be found in the commentary provided by the main authors of the Act either. The commentary states plainly that it is matter that does not belong to the Act: “Sections 186–199 should have been deleted from the draft as most of the servitudes provided are no longer applicable today. Some of the types of the servitudes provided (servitude of lines, servitude of wall, servitude of support, servitude of way, servitude of aqueduct) partly repeat the immovable property ownership restrictions set out in the Law of Property Act and their practical use will continue to decrease.”² Thus, the theorists themselves claim that the regulation of individual real servitudes should have been excluded from the Act. The more relevant becomes the question of why this was not done. Or what has given rise to the idea of such detailed regulation, which is rather unique when compared to the civil codes of other countries? This article attempts to answer these questions by firstly providing an historical explanation and then pointing out some general trends in the Estonian legislative technique and policy.

19th-century legacy

The Law of Property Act, adopted in 1993, was the first part completed of the planned new Civil Code.³ The curt words of P. Varul actually perfectly convey the drama and decisiveness accompanying the completion of the draft: “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 Act and its entry into force on 1 December 1993 was the cornerstone.”⁴ The choices mentioned concerned, above all, the possible standards and models for developing reform laws. Alongside with considering foreign solutions, the earlier history of Estonian private law was also examined. What concerns the legal regulation of the individual types of real servitudes observed here, we can seek no encouragement for such approach from any modern foreign code. At this point, it seems that the earlier civil law legislation of Estonia came to be the choice.

For the first time in the history of Estonian private law, a detailed regulation of the individual types of real servitudes has been namely presented in the private law codification of the Baltic provinces, in the Baltic Private Law Code (BPLC), approved in 1864 and entered into force in 1865.⁵ It was a codification of the rights of the higher estates of the local provinces (Germ. *Estland, Livland, Kurland*). The indigenous people of the Baltic provinces Estonians, Livonians and Latvians, constituted the peasantry in the 19th century and their private law was either common-law based or regulated by means of the agrarian reform laws. The BPLC was one of the codes completed in the course of

² P. Pärna, V. Kõve. *Asjaõigus: Kommenteeritud väljaanne* (Law of Property: Commented Edition). Tallinn, 1996, lk. 301 (in Estonian).

³ About the general course and points of departure of the Estonian private law reform: P. Varul. *Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia*. – *Juridica International. Law Review*. University of Tartu, V, 2000, pp. 104–118.

⁴ *Ibid.*, p. 104.

⁵ The original version of the code was prepared in German: *Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht: Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II.* St. Petersburg, 1864. The Russian version was also compiled and published immediately: *Svod mestnyh zakonov i gubernij ostzejskih. Cast' tretja. Zakony grazdanskije.* St. Petersburg, 1864. The references below are made to the German original of 1864.

the general codification movement in Russia in the 19th century.^{*6} After the establishment of the independence of the Republics of Estonia and Latvia during the First World War, the estate differences were abolished in both countries and the BPLC was proclaimed applicable to the entire population. In Latvia, the BPLC became invalid in 1937 when a new Civil Code was adopted. The BPLC still served as the major model therefor. In Estonia, a new draft Civil Code was completed in 1936, it was elaborated and processed until 1940.^{*7} The Soviet occupation discontinued the work and the new code was not adopted. Thus, the BPLC was in force in Estonia until 1940. The BPLC was naturally among the models that were observed when compiling the 1936/40 draft. Consequently, it is historically justified that this code serves as a point of departure for opening the historical background of the current private law reform.^{*8}

The draft BPLC was drawn up by the former professor of provincial law of the University of Tartu Friedrich Georg von Bunge (1802–1897). His general conceptual views on the analysis of local provincial rights on the scholarly and legislative level may be summed up as follows. The main postulate was that only the existing law was to be codified. Thus, the BPLC intended in no manner to reform the private law of the Baltic provinces. Originally, it was not Bunge who set up the task in this manner. The entire Russian codification movement of the 19th century proceeded from the same principle. The problem was simply more acute with regard to provinces entitled to special rights. These provinces had been annexed to Russia under a clause that the historically developed local law was to continue to remain valid. Thus, the task to assemble the already existing private law and avoid innovation was already provided for Bunge so to say from outside. Moreover, he adopted it also as his internal belief and attempted to implement it in his scholarly work and codification in as detailed manner as possible.^{*9} This has given rise to the extremely causal provisions and regulations in the BPLC. The BPLC provisions concerning real servitudes generally originate from Roman law and thus this part provides less drastic examples than family law or law of succession.^{*10} Here one may, however, find regulations drawn primarily from the local common law, which serve as a good example of Bunge's regulatory method. An example of the regulation of servitude of cutting:

“Von der Hölzungsgerechtigkeit.

1156. Die Hölzungsgerechtigkeit besteht in dem Rechte, für den wirtschaftlichen Bedarf des herrschenden Grundstücks – nicht auch zum Verkaufe – aus einem fremden Walde Holz beziehen zu dürfen.

1157. Der Berechtigte ist nicht auf Brenn- und Nutzholz zum Bedarf seines Grundstückes beschränkt, sondern darf auch Bauholz fällen, sofern letzteres nicht ausdrücklich ausgeschlossen ist.

1158. Der Berechtigte, überhaupt zu möglicher Schonung des dienstbaren Waldes verpflichtet, darf seinen Bedarf nicht auf mehrere Jahre voraus, sondern nur für jedes Wirtschaftsjahr

⁶ A. E. Nolde provides a detailed overview of the codification procedure of the private law of the Baltic provinces: A. E. Nolde. Očerki po istorii kodifikatsii mestnykh grazhdanskikh zakonov pri grafe Speranskom. Vypusk II: Kodifikatsiya mestnogo prava pribaltiiskikh gubernii. St-Petersburg, 1914. For the Baltic Private Law Code, see also B. Dölemeyer. Das Privatrecht Liv-, Est- und Kurlands von 1864. – Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. Vol. 3. Part 2. H. Coing (Ed.). Munich, 1982, pp. 2076–2098.

⁷ In 1992, A. Traat published the draft Civil Code as of 1940 in facsimile print. Thereby, the unique and source the access to which had been limited was reintroduced into circulation for scholars.

⁸ See e.g. the brief historical introduction “Balti Eraseadusest Asjaõigusseaduseni” (From Baltic Private Law Code to Law of Property Act) by P. Pärna, V. Kõve (Note 2), pp. 9–11 or P. Varul (Note 3), p. 108. However, when determining the nature of the BPLC system, Varul is a little mislead. The BPLC does contain the four last books of the pandect system (in German: *Pandektensystem*) but it lacks the general part. The introduction to the BPLC concerning the territorial and estate particularism of the private law in the Baltic provinces and the implementation and interpretation of the provisions of the code cannot be regarded as a general part in respect of the five-book pandect system.

⁹ About some more important points of Bunge's method of treating provincial private law: M. Luts. Private Law of the Baltic Provinces as a Patriotic Act. – Juridica International. Law Review. University of Tartu, V, 2000, pp. 157–167. Bunge's juridical concept has been analysed in detail in Estonian in the thesis by M. Luts. Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus (Casual and Patriotic: the Jurisprudence of Local Law by F. G. v. Bunge). Tartu, 2000, pp. 133–214 (in Estonian); the findings have been presented in German in the summary: Zufällig und vaterländisch: die Provinzialrechtswissenschaft von F. G. v. Bunge, pp. 264–273.

¹⁰ See e.g. in the part of family law the mutual proprietary rights of spouses according to the county law of *Livland* and *Estland* and according to the town law and land law of *Kurland* (in separate divisions, the same is further divided: about country clergy who do not belong to hereditary nobility; according to the town law of *Livland*; according to the town law of *Estland*; according to the town law of *Narva*) section 44: “In Liv- und Estland ist der Ehemann keinesweges befugt, auf den Namen der Ehefrau oder ihrer Erblasser stehende Schuldforderungen, ohne ausdrückliche Genehmigung der Frau, zu erheben, zu cediren oder zu verpfänden. Alle Verfügungen dieser Art sind nichtig. Wohl aber hat er das Recht, dergleichen ausstehende Forderungen, wenn deren Sicherheit bedroht ist, oder das Interesse der Ehefrau es aus andern Gründen erheischt, vorläufig zu kündigen und auszuklagen. In Curland dagegen bedarf der Ehemann sowohl zur Kündigung und zur Cession von schuldverschreibungen, als auch zur Erhebung von Capitalien, gar keiner besondern Legitimation, namentlich auch keiner Cession derselben von Seiten der Ehefrau.”

besonders, nehmen. Auch ist er verbunden, das Holz, welches er gefällt hat, in demselben Wirtschaftsjahre abzuführen, damit der Nachwuchs nicht leide.

1159. In Estland darf in einem der Hölzungsgerechtigkeit unterliegenden Walde von beiden seiten nur mit eigener Kraft das Holz gefällt und abgeführt werden.

1160. Der Hölzungsberechtigte darf, in Ermangelung entgegengesetzten Bestimmung oder Gewohnheit, das aufgehauene Holz in dem dienstbaren Walde bis zur Abfuhr aufstapeln lassen. In Estland darf das Stapelrecht nur ausgeübt werden, wenn es ausdrücklich ausbedungen worden.

1161. Der Berechtigte darf seinen Bedarf nur aus den von dem Eigenthümer des dienenden Waldes ihm angewiesenen Stellen des letzteren nehmen, und ist der Eigenthümer zu betreffender Aufsicht berechtigt. Ausnahmen von dieser Regel gelten nur im Falle besondern Vorbehalts.

*1162. Ist in Estland die Hölzungsgerechtigkeit "bis auf den letzten Stamm" bestellt, so ist der Eigenthümer des dienenden Grundstücks dadurch nicht gehindert, den ganzen Wald umzuhauen und zu Feld oder Wiese zu machen. An den wieder nachwachsenden Bäumen kann aber auch in diesem Falle das herrschende Grundstück die Dienstbarkeit wieder ausüben."*¹¹

Judging by the references, all these provisions are of common law origin. Just as his teacher Dabelow, Bunge treated the law of people or custom as well as court practice as common law. According to the *ius commune* doctrine prevailing earlier, it meant the compulsoriness of the common and continuing adjudication practice of higher courts on the lower courts.¹² Bunge granted to such practice an even stronger position than the earlier common law tradition. It was to be binding not only on lower courts but also on legal doctrine.¹³ This way, the 19th-century local practice, in its turn, became the rich source wherefrom the codification was to derive provisions according to Bunge. As the servitudes as legal institutions originated from Roman law, the courts of the Baltic provinces applied the principles of *ius commune* in this respect. This is also the reason why one may encounter in Bunge's summary of law that otherwise carefully focused on local origin, primarily in the books on the law of property and the law of obligations, paragraphs of Roman law provisions.¹⁴

Numerous references, above all, to Digests but also to the other parts of *Corpus iuris civilis* have given ground to claims as if Bunge had guided Roman law to its triumph in the Baltic provinces¹⁵ or carried out a new wave in the reception of Roman law.¹⁶ In fact, Bunge did not need to make any efforts for the sake of the reception of Roman law or to encourage it. The court practice of the Baltic provinces took a good care of it at the beginning of the 19th century. The majority of the practitioners yet in business had received their legal training in German universities¹⁷ primarily in the course of Roman law studies. Although the University of Tartu, reopened in 1802, accommodated as many as three provincial law chairs during the first decades, the systematic teaching of local laws was not particularly successful at first.¹⁸ Also in the 1830s when Bunge himself taught provincial law, the standard of teaching ran highest in Roman law in the faculty. Thus, it is not surprising that Bunge's colleague, the Romanist Carl Otto von Madai observed Roman law as a rather dangerous rival to the provincial law:

"Gerade da wo, namentlich das Römische Recht, als ein recipirtes, ein Bestandteil des geltenden Rechts geworden, ist es dringend notwendig, möglichst scharf und genau den Umfang seiner Anwendbarkeit zu bestimmen. Die innere Durchbildung, die das Römische Recht auszeichnet, die

¹¹ The passage continues with some provisions of Roman law origin concerning cutting servitude, followed by a separate subsection "Besondere Bestimmungen über die Hölzungsgerechtigkeit in den Kronforsten Curlands" (sections 1165–1175).

¹² See e.g. and for details C. C. Dabelow. Die Praxis sowohl überhaupt, als in den Russischen Ostsee-Provinzen besonders, kritisch beleuchtet. – Jahrbuch für Rechtsgelehrte in Russland. Vol. 2. G. E. Bröcker (Ed.). Riga, 1824, pp. 230–234.

¹³ More precisely M. Luts. Private Law (Note 9), p. 163–166; M. Luts. Zufällig (Note 9), pp. 265–266.

¹⁴ As the sections of the BPLC have been supplied with references to the sources, it is relatively easy to identify the origins of particular rules. The trustworthiness of these references, however, is another question. To date, nobody has studied it and compared the regulations of the BPLC with the references.

¹⁵ A. Ylander. Die Rolle des römischen Rechts im Privatrecht der Ostseeprovinzen Liv-, Est- und Kurland. – Zeitschrift für vergleichende Rechtswissenschaft, 1918, Vol. 35, S. 441.

¹⁶ See e.g. J. Jegorov. Retseptsija prava v istorii Estonii (XIII–XIX vv.). – Studia iuridica 2. Acta et commentationes universitatis Tartuensis, 1989, Vol. 847, p. 104.

¹⁷ In 1710, the University of Tartu, established by Gustav Adolf, King of Sweden, in 1632 ceased to operate due to the Great Northern War. The university was reopened in Tartu only in 1802.

¹⁸ For details, see 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. 130–133; closer details in M. Luts. "Eine Universität für Unser Reich, und insbesondere für die Provinzen Liv-, Ehst- und Kurland": Die Aufgaben der Juristenfakultät zu Dorpat in der ersten Hälfte des 19. Jahrhunderts. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung, 2000, Vol. 117, pp. 608–620.

*Bestimmtheit seiner Prinzipien, die nicht zu verkennende Consequenz die überall wohlthätig hervorleuchtet, machen dasselbe stets zu einem gefährlichen Nebenbuhler einheimisch provinciel-
ler Rechte. Unwillkürlich wendet der Richter /.../ gerade dieses vorzugsweise an, mit Hintan-
setzung einheimischer Rechtsbestimmungen. /.../ Während das Römische Recht nur ein subsidiäres
und Hilfsrecht sein sollte, wird es meist umgekehrt zur Hauptgrundlage, so dass das einheimisch
provincielle Recht den Character eines subsidiären und ergänzenden gewinnt. Solchem Misstande
und Unrecht kann aber nur dadurch vorgebeugt werden, wenn die Darstellung der provinciel-
len Rechte dasjenige, was von dem Römischen Recht ein integrierender Theil des ganzen Rechtszus-
tandes geworden, mit aufgenommen, und so durch die Verwebung zu einem gemeinsamen Ganzen
in seine festen Grenzen gewiesen wird.”¹⁹*

By a careful selection and rewriting of Roman law provisions in his provincial law codification, Bunge did thus no more than determined very clearly the borders as to when and to what extent Roman law could be applied in courts from that time onwards. In that sense, it was not a new wave of reception. Rather, Bunge’s activities were aimed at limiting the actual reception.

Regulation of the individual types of real servitudes apparently served the same purpose (sections 1118–1198) after presenting the general principles (sections 1089–1102 on servitudes in general and sections 1103–1116 on real servitudes in general). Moreover, the part of servitudes of cutting quoted above indicates that such detailed regulation enabled Bunge to include all local peculiarities in the code. However, such move in the case of the BPLC does not mean as if the presentation of the individual types of servitudes provided an exhaustive list of real servitudes permitted by law. Sections 1117 and 1181 clearly demonstrate that the BPLC allows to establish other real servitudes according to the general principles:

“1117. Diejenigen Felddienstbarkeiten, für welche noch besondere Bestimmungen gelten, sind: 1. die Wegegerechtigkeit; 2. das Hut- und Weidegerechtigkeit; 3. die Heuschlagservitut; 4. die Wassergerechtigkeit; 5. die Hölzungsgerechtigkeit; 6. die Bienengerechtigkeit. Andere Felddienstbarkeiten, wie z. B. das Recht auf dem dienenden Grundstücke Kalk zu brennen, Steine zu brechen, Sand und Lehm zu graben, Kohlen zu brennen, Theer zu schwelen, Rohr zu schneiden, Früchte zu sammeln, auf fremden Gewässer zu fahren und Holz zu flößen, darin zu fischen u. s. w., haben den gemeinschaftlichen Charakter aller Dienstbarkeiten.

1181. Die gewöhnlichen Hausdienstbarkeiten sind: 1. das Trag- und Lastrecht; 2. das Tramrecht; 3. das Recht zu überragendem Bau; 4. das Traufrecht; 5. das Recht des Aufgusses; 6. die Baugerechtigkeit; 7. das Lichtrecht und 8. das Recht der Aussicht. – Alle diese Servituten werden, wo nicht besondere Bestimmungen für sie gesetzlich festgestellt oder bei der Bestellung angeordnet sind, nach dem allgemeinen Regeln über Dienstbarkeiten beurtheilt. Auch noch andere Dienstbarkeiten, als die genannten können durch Verzicht auf die beschränkenden Befugnisse entstehen, welche die Beziehung auf Bauten einem Nachbarn gegen den andern zustehen.”

Thus, *numerus clausus* is not applicable to the regulation of the real servitudes in the BPLC. However, the presentation of the local peculiarities indicates that Bunge used this step to implement the rule *lex specialis derogat legi generali*. The same principle was yet observed by the compilers of the 1936/40 draft Civil Code. When the draft preparation committee undertook the second reading of the part of the law of property in September 1927²⁰, it proceeded from the Estonian translation of the BPLC with regard to real servitudes. Moreover, the explanatory memorandum, drawn up by professor Jüri Uluots in 1936 says that “the specific rules to characterise the particular type of individual real servitudes (sections 1022–1032²¹) rely on the applicable law (*i.e.* on the BPLC — M.L.).”²² However, the BPLC regulation was not included in the draft verbatim and in all its details. The minutes of the committee reveal the principles from which the compilers of the draft proceeded at that point. The relationship between the general and specific provision continued to play an important part. The committee discarded the BPLC rules that did not contain rules diverging from

¹⁹ C. O. Madai (Rezension). F. G. Bunge, Das Liv- und Esthländisches Privatrecht. – Kritische Jahrbücher für deutsche Rechtswissenschaft. Hrsg. von A. L. Richter u. R. Schneider, 1841, Vol. 5, S. 845.

²⁰ Tsiivilkomisjoni protokollid nr 151–350 (Civil Committee minutes No. 151–350). 21. mai 1926 – 4. aprill 1929. – Tü Raamatukogu, Käsikirjade ja harulduste osakond, fond 164, säilik 8, leht 335 (University of Tartu Library, Section of Manuscripts and Rara), Stock 164, Item 8, p. 335 (in Estonian).

²¹ Sections 1054–1064 in the final draft of 1940.

²² Seletuskiri tsiivilseadustiku 1936. aasta eelnõu juurde (Explanatory memorandum accompanying draft Civil Code of 1936). Koost. J. Uluots. – Tü Raamatukogu, Käsikirjade ja harulduste osakond, fond 164, säilik 17, leht 61 University of Tartu Library, Section of Manuscripts and Rara), Stock 164, Item 17, p. 61 (in Estonian).

the general principles.^{*23} Bunge had included them in the code only in the interests of integrity and outlining the applicability of Roman law.^{*24}

As of 1927, the relevant sections of the draft Civil Code were largely nothing but the translation of the BPLC. The wording of the final version of 1940 differs significantly from that draft although the content is basically the same. Many of the real servitudes regulated separately in the BPLC have been excluded from the draft of 1940 (servitude of mowing, right to keep bees, *etc.*). Although the precepts in conformity with sections 1117 and 1181 of the BPLC^{*25} have not been included, it may be presumed that general rules apply to the individual types not included in detailed regulation. However, several types of servitudes excluded from detailed regulation (servitude of cutting, servitude of projection, servitude of higher building, servitudes of light and prospect) have been, once again, regulated as separate types in the draft of 1940. At the same time, we cannot say that they contained specific provisions that modified or abolished the general rules in any manner. Thus, the regulation of the individual types of real servitudes in the Civil Code was to serve some other purpose. This is also directly expressed in the explanatory memorandum accompanying the draft. These specific rules were necessary for “characterising^{*26}” the individual types of real servitudes. Consequently, these provisions were not used to pursue any regulatory goal. Rather, they served to exemplify the general rules of real servitudes.

For the same purpose, these provisions have been included in the applicable Law of Property Act of Estonia. The admission that these sections should have been excluded from the Act is followed by a reservation: “However, the individual types of servitudes help to clarify the notion of the servitude.”^{*27} The same sentence continues with a smart observation that should have been taken into account at the time of drafting the Act: “/.../ but it should have been the task of theoretical writing.” This bitter confession points out a general trend in the modern Estonian legislative technique and style.

Didactic legislation

The textbook-like presentation of individual types of real servitudes in the Law of Property Act, as observed in greater detail here is only one example of a general trend in Estonian legislation. After the re-establishment of independence in 1991, significant changes have occurred in the Estonian social and legal order. It is obvious that a decisive transfer to market economy, building of the rule of law, *etc.* also necessitates a decisive legal reform. At least legislation appears to be the means to elicit a rapid change in the existing order. However, at this point we will not examine in detail the extent to which this idea conforms to reality. The author’s certain scepticism concerning this issue has obviously become apparent already. In this context, it suffices to say that transitional societies attempt to carry out a legal reform primarily through legislation.

The Estonian reform laws generally stand out by their unusual textbook-like style. Firstly, it is evident in numerous legal definitions. The attempt to formulate legal definitions becomes apparent in all areas of law, not in private law only. Secondly, Estonian legislation stands out by the detailed nature of regulation. I do not intend to claim as if the 19th century Baltic-German casuistic approach, such as represented by the BPLC, was still continued in Estonia to date. However, the current style of legislation in Estonia is distinguishable by its detailed nature.^{*28} To a certain extent, it is caused by the pursuit of change of the transitional society. The history of Estonia and naturally also the history of law have seen several turns of tide during the 20th century, so that it is difficult to speak about a

²³ Civil Committee minutes (Note 20), pp. 214, 217, 220.

²⁴ At the same time, the BPLC contains several systematisation errors that arise from inadequate knowledge of Roman law. In the case of the servitudes of height and light, they have been pointed out by C. Erdmann. *System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland*. Vol. 2. Riga, 1891, pp. 297–299.

²⁵ As of 1927, they were to be included. In section “Other field servitudes”, the sample list of section 1117 of the BPLC has been supplemented with servitudes of mowing and cutting and the right to keep bees. Of urban servitudes, only servitude of support, servitude of stillicide (“servitude of eavesdroppings”) and “servitude of pouring out slops” had been included as individual types of servitudes. Servitudes of projection, higher building, light and prospect, on the contrary, were mentioned only in section “Other house servitudes”. The general rules of servitudes were to be applicable to all of them. Civil Committee minutes (Note 20), pp. 215, 218.

²⁶ Explanatory memorandum (Note 22), p. 61.

²⁷ P. Pärna, V. Kõve (Note 2), p. 301.

²⁸ For a closer look, the Estonian draft Penal Code could serve as an example: E. Samson. *Eesti karistusseadustiku üldosa eelnõust* (On the Estonian Draft General Part of Penal Code Act). – *Juridica*, 1998, No. 2, pp. 61–62 (in Estonian), who also emphasises the positive features of such detailed regulation style.

developed tradition in jurisprudence and practice. Consequently, upon developing reform laws, a particular didactic function has been assigned thereto. Thus, the Estonian reform law legislator has shouldered much of what belongs to the tradition of legal dogmatics elsewhere. The authors of the Law of Property Act also claim that the presentation of individual types of real servitudes in the Act serves a didactic purpose as it is an unknown phenomenon to jurists with the Soviet legal order background. It appears that the theorists have forgotten that as all jurists, their first year curriculum included a mandatory subject the Foundations of Roman Private Law. So all Soviet jurists were provided with an overview of the nature of servitudes and their various types at the university.

The use of law in its didactic function is facilitated by yet another phenomenon that has gradually established itself in Estonian legal practice. Namely, we lack the publishing tradition when it comes to legislative materials and therefore or irrespective thereof we also lack the tradition of using thereof. Although the Law of Property Act has been in force already from 1993, the explanatory memorandum and working materials of the committee have not been published to date.^{*29} Only the materials produced with regard to the preparation of the Constitution (1992)^{*30} and the initial alternative drafts^{*31} have been published. The publication of the reasons of the draft Penal Code^{*32} before the adoption of the Code by the Parliament^{*33} may be regarded as a landmark in itself. However, these are but a few examples that emphasise the general trend even more strongly. Thus, it is not surprising that attempts are made to include in the laws all this that would be left to the realm of explanatory memorandums, *etc.* in a different tradition. Here we disregard the question of whether obstructed access to legislative materials hinders the operation of law, not to mention the application of the principles of study of legal methodology.

To date, it has not been studied in Estonia if and in what manner these circumstances influence the actual performance of the legal reform in the end. The legal-historical experience tends to show that a casuistic and textbook-like legislative style need not yield the best and expected results. The need of a transitional society for rapid and decisive reform should not overshadow the other essential conditions that ensure the functioning of a modern legal system. One of them is the principle of efficiency of the legislative style that the Law of Property Act, abandoning the servitude of cutting but retaining, for example, the servitude of watering of livestock, violates.

²⁹ The situation has improved with later drafts as the explanatory memorandums are usually available on the Internet.

³⁰ Põhiseadus ja põhiseaduse assamblee. Koguteos (Constitution and Constitutional Assembly. Collected Articles). Tallinn, 1997, 1296 lk (in Estonian).

³¹ Taasvabanenud Eesti põhiseaduse eellugu (Pre-Story of Constitution of Reindependent Estonia). Tartu, 1997 (in Estonian). This publication also contains the so-called pre-constitutional acts.

³² M. Ernits, P. Pikamäe, E. Samson, J. Sootak. Karistusseadustiku üldosa eelnõu: Eelnõu lähtealused ja põhjendus (Draft General Part of Penal Code Act: Bases and Reasons). Tallinn, 1999 (in Estonian).

³³ Karistusseadustik (Penal Code), passed 6 June 2001. – Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian).

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Private Law Instruments in the System of Environmental Control

The main factor presently influencing the Estonian environmental law is preparation for accession to the European Union. The adoption and implementation of the EC environmental law is a serious challenge for our legal system, economy, and also for our administrative capacity. This article examines some of the problems directly or indirectly related to the harmonisation of Estonian environmental law with European Community law. The paper focuses on the private law instruments of environmental risk control mainly for two reasons. Firstly, the private law regulatory instruments are presently acquiring quite an important role in the system of environmental risk control, and secondly, the private law issues of environmental risk control have been discussed relatively little in literature.

The posing of the problem by relating the implementation of European Community environmental law and private law may seem unjustified. It is known that like environmental law in general, the European Community harmonisation measures are of a public law nature. The doubt should thus be dispelled and the following question should be investigated — what is (or should be) the role of private law in the implementation of EC environmental law? The task is not so onerous. It suffices to bring three examples of private law regulatory mechanisms, or at least mechanisms substantially affected by private law.

- Pollution trading, which has been applied or has been attempted to be applied both in single countries and globally. The best known example is the Kyoto protocol, in which the system is seen as an important means of solving the global warming problem.*¹
- Environmental agreements, which have been lately increasingly used to define the environmental protection goals, and also to ensure the enforcement of environmental requirements. The environmental agreements are discussed in detail below.
- The environmental (civil) liability scheme, the application of which in regulating environmentally hazardous activities has yielded relatively good results in certain cases. The topics of environmental liability are also further discussed below.

¹ See Foundation for International Environmental Law and Development. FINAL REPORT: "Designing Options for Implementing an Emissions Trading Regime for Greenhouse Gases in the EC". Available at: <http://www.field.org.uk/fieldmain/climate.htm>.

Naturally, the list is not exhaustive and does not nearly provide a full picture of the role of private law in today's environmental control system.*³

When discussing the role of private law in the implementation of EC environmental law, particular attention should be drawn to two aspects. These pertain to:

- the basic obligations of a Member State in the implementation of EC law and the implementation methods;
- the integration principle laid down in article 6 of the EC Treaty.

So, what are the main obligations of a Member State in ensuring the implementation of the EC environmental harmonisation measures? To clarify the issue, a number of references are provided below to the EC Treaty and also to the positions and declarations of the Court of Justice and of other institutions.

In the given context we should start with article 249 of the EC Treaty, which provides: “/.../A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of **form and methods**”⁴ (author's accentuation — H.V.).

This provision is to be read together with article 10 which provides: “Member States shall **take all appropriate measures** to ensure fulfilment of the obligations arising out of this Treaty and facilitate the achievement of the Community's tasks. They shall **abstain from any measure** which could jeopardise the attainment of the objectives of this Treaty” (author's accentuation — H.V.).

The Court of Justice has assumed the position that:

- the freedom of choice of methods as set out in article 249 does not release a Member State from the general obligation to choose “the most suitable forms and methods”;
- the transposition requirement does not imply the obligation to establish special provisions copying the wording of a directive;
- a Member State has fulfilled its transposition requirement if the legal order of the state ensures the achievement of the goals provided in a directive and is sufficiently clear and precise for that purpose.*⁵

Declaration No. 19 on the implementation of Community law was added to the EU Treaty, which stresses:

“/.../it is central to the coherence and unity of the process of European construction that each Member State should fully and accurately transpose into national law the Community Directives addressed to it within the deadlines laid down therein. Moreover, the Conference, while recognising that it must be for each Member State to determine **how the provisions of Community law can best be enforced in the light of its own particular institutions, legal system and other circumstances**, but in any event in compliance with article 189 of the Treaty establishing the European Community, considers it essential for the proper functioning of the Community that the **measures taken by the different Member States should result in Community law being applied with the same effectiveness and rigour as in the application of their national law**” (author's accentuation — H.V.).

Protocol 30 to the Treaty of Amsterdam, concluded in Maastricht, which deals with the application of the principles of subsidiarity and proportionality, points out: “Regarding the nature and the extent of Community action, Community measures should **leave as much scope for national decision as possible**, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, **care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems**” (author's accentuation — H.V.).

³ The majority of private law-related pollution control measures belong to the Economic Incentive Systems for Environmental Control. The main components of the system are tradable residuals quota or credit systems, market-based information strategies, liability for environmental damage, transferable development rights, mitigation banking, risk bubbles.

⁴ The EC environmental harmonisation measures are mainly established in the form of directives; the share of regulations in this area of policy is negligible.

⁵ J. Jans, *European Environmental Law*. Groningen: Europa Law Publishing, 2000, pp. 135–137.

⁶ J. Jans (Note 4), p. 152.

It can be said from the theoretical aspect that transposition of the EC law has been correct and exhaustive, if after the entry into force of the national measures implementing a directive the directive loses its relevance. In such a case, all the goals set out in the harmonisation measures can be achieved through the legal order of the Member State.⁷ A directive has to be addressed only if problems arise in the interpretation of national law. It should be added that until the entry into force of the implementing legislation of a directive, a Member State has to abstain from all measures that may damage the achievement of the goals of the directive in the future. Thus, a Member State has the right and obligation to ensure the implementation of a directive by applying the instruments, terminology and administrative arrangements of its own legal system.

Two main conclusions can be drawn from the above.

- The obligations of a Member State in the implementation of environmental policy are not limited to the formal transposition of directives to its own legal order. As said, the due transposition of a directive does not consist in exact copying of its provisions in a separate act or legal provision, but it suffices to create a general legal context that enables persons to exercise the rights arising to them from the directives and to protect such rights in court. Formal copying of the provisions of a directive can even cause confusion. National legal systems are different and the use of certain wordings can be misleading.⁸
- A Member State has to ensure not only the implementation of the environmental harmonisation measures established in the form of directives (or regulations), but also the achievement of the general objectives of EC environmental policy⁹ as set out in article 174 (1) of the EC Treaty. The European Commission has stressed that if a country has harmonised its law with the EC environmental *acquis*, the environmental control obligations of the country are by far not completed. The EU environmental *acquis* apparently does not cover more than a half of the legal instruments necessary for adequate environmental protection today.

Considering the central role of private law in the shaping of a country's economic environment, it is obvious that this area of law forms an integral part of the above "general legal context". The freedom of choice of "form and methods" of the implementation of directives as provided in article 249 of the EC Treaty enables Member States to apply the "most suitable means" of achieving the goals of EC law. If the goal of an EC environmental directive is to control certain environmentally hazardous activities, without prescribing the exact implementation methods, a Member State is free to choose whether to apply an environmental permits and pollution charges system, to impose punishment pursuant to criminal procedure, or to apply an environmental civil liability scheme to control such activities and prevent material damage. Relevant examples can be found in the natural habitats directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora), the goal of which is to contribute to ensuring biodiversity, to determine areas of conservation to this end and to establish the necessary protection regime in such areas. Article 6 (1) of the Directive provides:

"For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites".

It is thus up to a Member State to decide what measures to apply in ensuring the implementation of the Directive. As we see, contracts are a part of such measures.

The potential role of private law in environmental risk control should also be regarded in the context of the integration principle laid down in article 6 of the EC Treaty. Article 6 provides: "Environmental protection requirements must be integrated into the definition and implementation of the Community

⁷ Transposition is a process whereby the rights given to and obligations imposed on persons pursuant to directives are incorporated into national law. The national law also has to contain measures to protect the rights of persons, if the directive grants to the competent authorities the right to act, but under the specified conditions (or pursuant to certain conditions or restrictions) and if exercise of such a right under such conditions may result in damaging the lawful rights and interests of persons. The above is reasoned by the need to ensure the right of persons to contest, in a court of their country, the activity of public authority as influenced by Community law. The obligation to incorporate the provisions of a directive into national legislation does not merely require repetition of the text of the directive in national law, but rather the obligation to ensure that such transposition leads to the result pursued by the directive ("*effet utile*"). The "result" may, in this context, cover certain aspects of protection, preservation and improvement of the quality of the environment.

⁸ J. Jans (Note 4), p. 152.

⁹ The main goals of the EC environmental policy are (1) preservation, protection and improvement of the quality of the environment, (2) protection of human health, (3) prudent and rational utilisation of natural resources, and (4) implementation of measures at international level to deal with regional or worldwide environmental problems.

policies and activities referred to in article 3, in particular with a view to promoting sustainable development”.

This is a rather unique requirement in the general context of the Treaty. Similar provisions can be found in article 151 of the Treaty: “The Community shall take cultural aspects into account in its action under other provisions of this Treaty”, article 152: “A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities” and article 153: “Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities”. As one can see, the integration principle is laid down much less clearly and much more “mildly” for other policies. The only policy area comparable to environmental policy in this respect is the protection of public health. But a clear difference exists even here. The integration requirement for environmental policy has a much higher position in the hierarchy of the provisions of the Treaty, as it is included in the first part setting out the main principles. The requirement to ensure the protection of human health is still placed in division XIII concerning public health. It has been thought that the placement of the environmental integration requirement in a position comparable to the other basic principles of EC functioning (subsidiarity, proportionality, *etc.*) is not only a clear political sign that recognises the importance of environmental policy^{*10}, but also an important legal definition that gives environmental policy “certain added value” when conflicting with other policies.^{*11} But it should be stressed that the majority of authors^{*12}, as well as the Court of Justice practice, do not directly confirm the existence of such added value. The dominant opinion is that no hierarchy can exist in respect of the policies declared in article 3 of the EC Treaty. One has to agree with the opinion that the principle of proportionality has to be taken into account in the implementation of the integration principle, which in this case means that incorporation of environmental concerns into other policies (*e.g.* in imposing certain trade restrictions) does not go further than absolutely essential for the achievement of a particular environmental goal.^{*13} Such interpretation is also supported by the Court of Justice in the *ADBHU* case.^{*14}

The integration principle is not solely characteristic of the EC Treaty, but belongs to the fundamental bases of contemporary environmental policy and reflects the endeavour to make the applicable law “greener”.^{*15} The integration principle should not thus be limited to the policy level; environmental concerns should be incorporated into the entire legal system, having again regard to the principle of proportionality. Several countries have taken this path by incorporating environmental concerns into the system of law of property, law of obligations, insurance law and certain other areas of private law.^{*16} Such examples can also be found in Estonia. For instance, section 25 of the Environmental Impact Assessment and Environmental Auditing Act^{*17} provides for the requirement of environmental audit for certain transactions with immovables.

When addressing the environmental risk control systems affected by private law, one has to bear in mind that the “ability” of private law is unfortunately limited in this context. Already at the beginning of last century the British economist A. C. Pigou formulated a theory^{*18}, the content of which is briefly the following. In a market economy context, environmental problems arise as the result of market failure. Environmental damage occurs because polluters of the environment do not have to bear the social expenditure (damage) that the pollution created by them causes to other persons.^{*19} One of the reasons for such a situation is the fact that it is almost impossible to determine effective and precisely delimited property rights of the common resources (such as ambient air, fish resources, flora, *etc.*). If this were possible, non-owners should agree upon the establishment of restricted real rights or find another similar property law solution in order to enter the sphere of ownership of another

¹⁰ G. van Calster, K. Decetelaere. Amsterdam, the Intergovernmental Conference and Greening the EU Treaty. – European Environmental Law Review, 1998, p. 14.

¹¹ See S. Bär, R. Krämer. European Environmental Policy After Amsterdam. – Journal of Environmental Law, 1998, pp. 318–319.

¹² See L. Krämer. EC Environmental Law. London: Sweet and Maxwell, 2000, p. 15.

¹³ See J. Jans (Note 4), pp. 18–19.

¹⁴ Case 240/83 *ADBHU* (1985) ECR 531.

¹⁵ See V. Kuhlmann. Making the Law More Ecocentric: Responding to Leopold and Conservation Biology. – Duke Environmental Law & Policy Forum, Fall, 1996, pp. 133–165.

¹⁶ See German Environmental Law for Practitioners. Ed. H. Schlemminger, H. Wissel. Munich: C. H. Beck, 1996, pp. 176–181, 193–195, 247–251.

¹⁷ Keskkonnamõju hindamise ja keskkonnanäiditeerimise seadus (Environmental Impact Assessment and Environmental Auditing Act). – Riigi Teataja (The State Gazette) I 2000, 54, 348 (in Estonian).

¹⁸ See A. C. Pigou. The Economics of Welfare. – AMS Press, 1978, pp. 172–203.

¹⁹ See T. Anderson, J. Grewell. From Local to Global property: Privatising the Global Environment?: Property Rights Solution for the Global Commons: Bottom-up or Top-Down. – Duke Environmental Law & Policy Forum, Fall, 1999, p. 74.

person. In such a situation the polluter would be interested in reducing pollution.^{*20} Market failure can therefore be largely attributed to the “failure” of private law. Contemporary private law is concerned with the division of resources rather than their preservation. However, this does not imply that private law should not be placed in the service of environmental protection to a greater extent than it has been done so far. Private law instruments certainly have their role in the general legal context, the goal of which is to ensure sustainable development. Environmental law in its archaic form is known to originate from private law, more specifically from the institute of neighbourhood rights. Regulation concerning pollution control only later took a sudden turn toward public law. Estonian environmental legal regulation is almost entirely of a public law nature. In conclusion, it should again be stressed that the goal is not to exclude or exaggerate different methods, but to combine them in the correct manner.^{*21} Environmental protection is and will be primarily an area of public law, but private law should be increasingly employed to prevent environmental damage. Private law instruments (*e.g.* neighbourhood rights or environmental civil liability) work best in a situation where specific sources of pollution can be clearly identified and their impact is relatively local. It is also clear that private law is not an appropriate instrument to handle the pollution problems caused by different sources and damaging the rights of many persons.

The advantage of private law instruments and economic incentives is believed to lie in the fact that they are largely self-regulated and flexible (to choices)^{*22} and the final goal — a clean environment — is achieved more quickly and with less public expenditure^{*23} than in the case of “command and control measures”. This is partly true, but most of the above instruments are not automatic, but take effect in a certain legal framework. An example is the system of pollution trading, where spontaneous market order cannot by far be relied on solely. One of the reasons for imposing regulation and particular market restrictions is the fact that pollution trading could in certain cases (if one company or the state buys up the polluting right) be accompanied by a local increase in pollution load beyond the established maximum levels, although the overall pollution load may reduce.^{*24}

The main advantage of alternative instruments to the command and control measures lies in their flexibility. The system of pollution trading directly or indirectly attributes a price to each “pollution unit”, but leaves the polluter the opportunity to decide on reducing the quantity of pollution caused by it and also on the methods and time span of reduction. In order to ensure economic viability together with the quality of the environment, companies should be left with as great as possible freedom to decide on the application of flexible, innovative and economically efficient methods to reduce or prevent pollution. The prevalence of centralised command and control inhibits the environmental innovation of companies. Ireland is a good example of how the development of “green industry” has driven the entire country to rapid economic growth.

The following part of the paper focuses on the details of two environmental risk control systems related to private law: environmental agreements and environmental civil liability.

Environmental agreements

Environmental agreements between companies or their associations and the state are gaining popularity. Several factors trigger such agreements — the economic aspects of meeting the increasingly stringent environmental requirements, the sometimes inefficient legal regulation, *etc.* However, the main reason behind the environmental agreements is the above-described need for self-regulation and flexible solutions.^{*25}

A variety of different environmental agreements exist. These may:

- be concluded on the local, national or regional (*e.g.* European Union) level;

²⁰ See L. de Alessi. Private Property Rights as the Basis for Free Market Environmentalism. — *Who Owns the Environment*. Ed. P. Hill, R. Meiners. Lanham: Rowman and Littlefield Publishers Inc, 1998, pp. 1–3.

²¹ R. V. Percival *et al.* *Environmental Regulation. Law, Science and Policy*. Boston: Little, Brown and Company, 1996, pp. 131–138.

²² See A. A. Schmid. *Environmental Law and Economics*. — *The Elgar Companion to Law and Economics*. Ed. J. G. Backhaus. Northampton: Edward Elgar Publishing, 1999, pp. 203–204.

²³ See B. Ackerman, R. Stewart. *Reforming Environmental Law*. — *Stanford Law Review*, 1985, Vol. 37, p. 301.

²⁴ See T. Tietenberg. Tradeable Permits for Pollution Control When Emission Location Matters. What Have We Learned? — *Environmental and Resource Economics*, 1995, Vol. 5, p. 95.

²⁵ See E. Rehinder. *Environmental Agreements: A New Instrument of Environmental Policy*. European University Institute, Jean Monnet Chair Paper, RSC No. 97/45. Available at: <http://www.iue.it/PUB/JMChP.html>.

- regulate general or specific environmental issues;
- involve or not involve public authorities.

By their legal nature, the environmental agreements can be divided into legally binding (contracts, covenants) and non-binding ("gentlemen's agreements") on the parties. The practice varies by country. According to Reh binder, non-binding agreements prevail in Germany, Austria, Belgium and France, binding agreements predominate in the Netherlands and Portugal, and both are almost equally used in Sweden and Denmark.^{*26}

Entry into the environmental agreements brings about a number of legal issues.

Firstly, the use of the environmental agreements as a means of transposing EC environmental directives. Having regard to the position of the Court of Justice, which requires transposition of EC law through general mandatory provisions^{*27}, the environmental agreements should not be accepted as means of transposing directives. However, exceptions exist. The environmental agreements of the state and industry can be used for transposition if accompanied by other public law measures. Several Member States apply the principle that if the majority of members in an association of undertakings join an agreement, the state may also enforce the agreement with regard to the remaining members. In some cases the possibility to use the environmental agreements is provided in the directives.

It should also be noted that both the Commission and the Council have lately supported the extended use of the environmental agreements as a means of implementing the environmental policy of Member States and of the Community (Commission Recommendation 96/733^{*28}). At the same time, the Commission has provided clear guidelines and defined the formal and substantive requirements with which the agreements used for transposition of directives must comply.

In all cases, the environmental agreements are required to:

- be concluded as written agreements, subject to the enforcement mechanisms of civil or administrative law;
- contain exact quantitative specifications and deadlines for application;
- be published in an official publication;
- provide for clear and exact supervision and publicity mechanisms and mechanisms of regular reporting to competent authorities;
- provide for the procedure for generalisation, assessment and verification of the performance results;
- contain the requirement to provide information to third parties on the same bases and under the same conditions as provided in the directive on access to information on the environment (90/313/EEC);
- provide for the possibility to apply sanctions (fines, compensation for damage, revocation of environmental permit);
- exclude unilateral termination of the agreement by the industry.

If all these conditions are fulfilled, the environmental agreements and the "normal" instruments of legal regulation do not differ significantly.^{*29}

One has to agree with the position of J. Jans that the last and most important condition still remains — a directive must allow the use of the environmental agreements. Directives usually provide that Member States effect the legal and administrative provisions required for the compliance with the directive by the specified term. This standard formulation quite apparently refers to generally mandatory legal provisions, and not to privately initiated "agreements".^{*30} The answer to the question of whether environmental agreements are an acceptable means of transposing EC law is no rather than yes.

Another problem concerning environmental agreements is related to their compliance with the principles of competition law. The following environmental agreements may be held to be contrary to the prohibition of agreements that distort competition as provided in article 81 (1) of the EC Treaty:

- agreements whose goal is to develop common technical standards or product labelling systems;

²⁶ *Ibid.*, p. 4.

²⁷ Case 361/88 *Commission v. Germany* (1991) ECR I-2567.

²⁸ COM (96) 561 final; Recommendation 96/733/EC, OJ 1996, L 333/59.

²⁹ J. Jans (Note 4), pp. 147–148.

³⁰ *Ibid.*, p. 148.

- agreements whose goal is to develop common less polluting products and technologies;
- agreements in which the energy consumption of products is agreed to be reduced to a certain level;
- agreements in which a common waste collection or recycling system is agreed to be created.

Pursuant to article 81 (2) any prohibited agreements are automatically void. Agreements may be permitted if they contribute to improving the production or distribution of goods or to promoting technical or economic progress in a manner that outweighs the potential distortion of competition. It must be admitted that the Commission, which takes decisions on the acceptability of such agreements, has taken a rather critical view of the environmental agreements from the competition aspect.^{*31}

Environmental agreements can result in a dominant position on the market. An example is an agreement on a common system of accepting and recycling used packaging^{*32}, which constitutes a dominant position if alternative systems do not exist. At the same time, a dominant position is not *per se* incompatible with the Treaty — what is prohibited is the abuse of the dominant position. Unlike article 81, article 82 does not allow for any exceptions. Any cases of abuse of the dominant position are prohibited.

The main problem thus is the proportionality of competition distorting environmental measures. The Commission has been chiefly guided by the following criteria when assessing proportionality:

- an agreement must have a direct environmental goal;
- an agreement must allow the actual (not hypothetical) achievement of such goal;
- the goal could not be attained by other, less distorting measures;
- distortion of competition must be proportionate to the environmental benefit.

Environmental liability

The following part of the paper deals with certain issues related to the private law aspects of environmental liability. But before focusing on the main topic, neighbourhood rights should be addressed that also play an important role in the prevention of environmental damage.

Section 143 of the Law of Property Act provides that the owner of an immovable may not spread gas, smoke, steam, odour and other nuisances to another immovable if this is contrary to the environmental protection requirements or significantly damages the use of other immovables. The significance of damage to the use of another immovable largely depends on the planning or the intended purpose of such immovables. When the immovables are in the same town, one in a mainly industrial and another in a residential area, the level beyond which the nuisance is prohibited is very different. Noise level that is completely ordinary and permitted in an industrial area might be prohibited in a residential area, whose main purpose excludes activities related to the noise level equivalent to that of an industrial area. To prevent arbitrary action and violation of the neighbourhood rights, it has become a tradition lately that many damage preventing procedures are public and everyone whose interests an activity may violate can participate in the decision-making process or at least is entitled to receive relevant information. An example is the public procedure for planning, publication of the applications for and issue of pollution permits, or the dependence of the issue of building permits on the neighbours' consent, if there is reason to believe that the building may cause adverse effects, *etc.* If the nuisance is contrary to the environmental protection provisions, it is clearly unlawful behaviour, in which case the owner of the neighbouring immovable may demand the elimination of the nuisance and claim compensation for the caused damage. The situation is more complicated when the nuisance is not directly contrary to any environmental standards, but the use of the immovable in accordance with its intended purpose is nevertheless materially damaged. In such case the consequences depend on weighing the expenses of eliminating the nuisance and the caused damage. If the damage exceeds the expenses of eliminating the nuisance, the owner of the affected immovable may demand elimination of the nuisance and compensation for the caused damage. However, if the expenses of elimination exceed the damage, the owner of the immovable may only claim compensation. It should be added as a comment that regard has to be paid not only

³¹ See *e.g.*: Decision 82/731 of 17 December 1981, *Navewa-Anseau*, OJ 1982, L 167/39.

³² See EC XXIIIrd Competition Report, § 240.

to the environmental protection requirements, but also to the provisions regulating the use of the immovable, particularly the requirements arising from planning.

In common law countries the principles similar to the above arise from the *Rylands v. Fletcher* case. The *Rylands v. Fletcher* case brought about application of the strict liability scheme, the essence of which lies in the principle that if the owner of an immovable brings into or maintains in its premises something that does not naturally belong to the plot of land and that can be assumed to cause damage to the neighbours, the owner must compensate for all the related damage. The land owner is thus presumably liable for damage caused by a source of pollution located on his or her land and escaping therefrom, regardless of whether the negligence of the possessor of the source and the causal relationship between the negligence, the escape of the source of pollution and the damage done is proved or not.^{*33}

The scheme arising from the above neighbourhood rights and the *Rylands v. Fletcher* case has actually gone beyond the scope of purely private law and has also acquired a place in the contemporary international environmental law as well as in the sustainable development concept.

From the viewpoint of the development of international environmental law, the turning point was the UN Environmental Conference in Stockholm in 1972, in which 113 countries reached a common understanding in the relevant basic principles of environmental protection.^{*34} In this context, particular reference should be made to the 21st principle of the Stockholm Declaration, which is worded as follows: "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".

This principle has been later frequently repeated in various international conventions, resolutions and other sources of international law, including the 1992 Biodiversity Convention and the 1997 Kyoto Protocol of the Convention on Climate Change. The principle essentially originates from the well-known *Trail Smelter* case.^{*35} It can thus be said that neighbourhood rights exist not only for neighbouring immovables but also between countries.

But this is not all yet. The principle of sustainable development is also directly related to the neighbourhood rights. Sustainable development has been defined as a method of development that satisfies the needs and endeavours of the present generation without jeopardising the similar rights of future generations. It can thus be said that a certain neighbourhood right exists in time or between generations, which in English terminology is known as intergenerational equity.^{*36}

Returning to environmental liability, it must be admitted that rather than targeting compensation for damage the contemporary environmental policy aims at prevention of damage. The following main goals of environmental civil liability (further to compensation for damage) should be pointed out:

- implementation of the polluter pays principle, imposing on the polluter the encumbrance of incurring the expenses of pollution control;
- acting as an anti-stimulus to the polluter for the prevention of further environmental damage.

Environmental considerations (including the risk of environmental proprietary liability) have become an important factor influencing the economic activities of companies, particularly as regards transactions with immovables, bank loans, insurance and commercial lease relationships. The assessment and management of environmental (liability) risks has become a routine procedure for these types of transactions.^{*37}

The peculiarities of environmental damage and its causing mechanism render the application of several civil liability principles problematic in some cases. The peculiarities that cause the need to modify the usual liability schemes particularly include:

- the cumulative and binary nature of environmental damage, which makes identification of the tortfeasor difficult;

³³ E. T. James. An American Werewolf in London: Applying the Lessons of Superfund to Great Britain. – The Yale Journal of International Law, 1994, Vol. 19, No. 2, pp. 364–366.

³⁴ See A. Kiss, D. Shelton. International Environmental Law. London: Graham & Trotman, 1991, pp. 40–41.

³⁵ Arbitral Award in the *Trail Smelter* Case, (11 March 1941), 3U.N.R.I.A.A. 1911.

³⁶ See S. Tai. Future Generations and International Law (Emmanuel Agius & Salvion Eds., 1998). – Georgetown International Environmental Law Review, Fall, 1998, pp. 232–234.

³⁷ J. T. O'Reily. US Environmental Liability Risks. London: Graham & Trotman, 1995, p. 127.

- difficulties in establishing the causal relationship as the environment is a non-linear system not characterised by the usual cause and effect relationship, but a complex set of causes and effects;
- the time factor, due to which environmental damage (including damage caused to human health) may become apparent only after years or even decades. Problems concerning past environmental damage therefore require solving.

It would be wrong to say that the environmental civil liability scheme is as unique as to always require completely independent regulation. Similar problems arise in other cases of damage, when risks inherent in particularly hazardous items or activities actualise. In such cases, strict liability, *i.e.* liability in which case the person who controls the risk is liable for damage regardless of his or her fault is applied. Strict liability is the most adequate liability scheme for environmentally hazardous activities. Upon environmental damage, a major advantage of the strict liability scheme is the presumption of a causal relationship. Subsection 1162 (2) of the Estonian draft Law of Obligations Act provides: "Where a dangerous facility or thing is, according to the circumstances, capable of causing the damage incurred, the facility or thing is presumed to have caused the damage. This does not apply if the facility or thing has been operated in compliance with requirements and no disturbance has occurred in its operation." Such a presumption makes solving of the causal relationship issue easier for the injured party in the case of environmental damage. Otherwise it would be difficult (if not impossible) for the injured party to prove the "origin" of pollution, if, for instance, ground water or ambient air were polluted.

Strict liability stimulates polluting industries to apply further safety measures and reduce the emissions or the volume of waste. Strict liability does, however, have a number of disadvantages. Such risk can be born and managed only by economically successful companies, while the less successful are forced to leave the market. The problem is particularly acute in the transition countries of Central and East Europe. It has been stated that the application of the strict liability standard may impede foreign investments. On the one hand, such arguments are partly correct and the concern justified, whilst on the other hand, it is quite natural that economically and technologically weak companies should not be allowed to operate in areas involving an increased risk that can be presumed to cause material damage.

Upon environmental pollution or other damage, the environmental damage *per se* or the damage related to the deterioration of the quality of the environment also needs to be compensated for further to the damage caused to other persons and their property. The most important peculiarity of environmental liability is related to this problem. Section 127 of the Estonian draft Law of Obligations Act provides:

"(1) Upon causing damage by an environmentally hazardous activity, the damage related to the loss or deterioration of the quality of the environment shall be compensated for further to the damage caused to a person or the person's property insofar as compensation for the former is not covered by compensation for the latter. Compensation may be claimed for such damage up to the scope of the cost of measures taken in good faith or provided by law for restoration of the environmental condition, the goal of which is to recover the destroyed or damaged parts of the environment or to replace same with equivalent parts.

(2) Further to the provisions of subsection (1), the cost of measures applied to prevent damage or alleviate the consequences of damage and the damage caused by application of such measures shall also be compensated for".

Similar principles have been provided in the law of many other countries³⁸ and in international conventions. However, upon careful examination of such provisions paradoxical conclusions can be reached. The regulation, pursuant to which environmental damage *per se* is to be compensated for within the scope of costs (to be) incurred to restore and replace the environment and to eliminate the consequences, may cause the tortfeasor to fully and finally destroy the environmental object. In such case, the tortfeasor need not pay anything as the environmental object is irrecoverable and irreplaceable.³⁹ This rather provocative argument proves that in the case of environmental proprietary liability, private law regulation has to be complemented by public law regulation, which establishes the bases and methods for determination of compensation upon destruction of environmental objects whose recovery and replacement is impossible.

³⁸ M.-L. Larsson. The Law of Environmental Damage. Liability and Reparation. – Kluwer Law International, 1999, pp. 490–492.

³⁹ It is clear that a large part of the environmental objects are irreplaceable. It would mean the same as replacing a Picasso painting with a copy.

To summarise the above, it should be stressed that the strict environmental liability schemes applied in the developed countries since the 1980s have radically changed the behaviour of undertakings and particularly the obligations of land owners. In countries such as the USA, where this aspect of civil liability is developed to perfection, environmental risk analysis has become an integral part of many business transactions. The actual market situation — including pressure from lenders, contract partners and consumers — requires that companies pay more and more attention to the environmental protection considerations even in countries where environmental civil liability schemes are not perfectly effective yet.

It should also be noted that although environmental civil liability is generally regarded as an effective legal instrument of pollution control, one should not believe in it as a panacea that treats all illnesses. Civil liability is not applicable to many types of pollution, such as pollution of ambient air by municipal waste or the exhaust gases of cars. It should also be understood that despite the attempts to achieve effective and applicable environmental civil liability schemes, court matters in this regard are slow and the decisions might not be productive from the aspect of environmental protection.

Several other aspects have to be taken into account when incorporating environmental considerations into other areas of law. The priority of environmental protection in state policy and in the eyes of public opinion is particularly important in this respect. Public opinion is often influenced from the outside. This is also the case in Estonia, where the outlook of accession to the European Union has placed environmental issues among the priorities. Environmental protection is one of the areas, the regulation of which inevitably has to have regard to not only the political, economic and social interests dominating at the particular moment of time, but also to the readiness of the public for such regulation.^{*40} Our society, which is undergoing radical economic, social and political reforms, must find a consensus to the question of which efforts to protect and improve the environment are to be regarded as tolerable and which are not. Both aspects have to be taken into account when searching for an effective environmental law method — to ensure the preservation of quality environment, capable of guaranteeing life, and to remain within the scope of environmental protection expenditure acceptable to the society. This formula is also applicable when determining the balance of private law and environmental protection.

⁴⁰ Pursuant to the sustainable development principle, the interests and needs of future generations also have to be taken into account in all these respects.

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Legal Status of Religious Communities in the Realms of Public and Private Law

1. Social facts

In the 1920s and 1930s, before Soviet occupation, Estonia was more or less religiously homogenous. Most of the population, approximately 76%, belonged to the Estonian Evangelical Lutheran Church (hereinafter: EELC).^{*1} The second largest church was the Estonian Apostolic-Orthodox Church (hereinafter: EAOC). Today approximately only 17% of the population are officially connected with different Christian churches. In 1994 and in 1998 two broad surveys were organised about religious life in Estonia. According to the results, the number of people believing in God has grown from 37% to 49%. At the same time, the number of people identifying themselves as atheists has grown from 1% to 6%. Forty-five per cent identified themselves as Lutheran. According to one unofficial estimation “Christian beliefs are mixed with pagan world view” in Estonia. It means that although 45% identify themselves as Lutheran, their actual beliefs do not always reflect church teachings. The EELC has been the dominant church in Estonia since the middle of the 16th century and many Estonians traditionally identify themselves as Lutheran. This does not necessarily mean that they have any connection with the institutional structures of the church nor does it always reflect their religiosity. In 1999, the Estonian population was estimated to be 1,445,580. Official membership of the EELC was approximately 177,233.^{*2} This number includes both the active and passive members of the church. For example, in 1997 only 54,481 members had paid their annual membership fee.^{*3} Although results of surveys and presented figures leave considerable room for any kind of interpretation, they hopefully reflect, to some extent, the objective reality of religious life in Estonia.

¹ According to the national census of 1934, there were 874,026 Evangelical Lutherans in Estonia from a total population of 1,126, 413. See <http://www.einst.ee/society/Soreligion.htm>, 2.02.2000.

² Information about current membership of religious organisations is based on data from the Ministry of Internal Affairs last up-dated on 31 December 1999. It has to be mentioned that religious organisations are not obligated to provide the Ministry of Internal Affairs with statistical information of their membership. Religious organisations have voluntarily informed state officials about the number of their adherents.

³ There has been argued often that low membership of the Church is due to Soviet occupation and atheistic education. This is only the partial truth. It might be interesting to mention that the Evangelical Lutheran Church experienced confrontation between German and national clergy in the 1920s and 1930s, when Estonia was an independent state for the first time in its history. The numbers presented suggest that the Lutheran Church could be regarded as the national Church of Estonia. However, it would be more accurate to say that the Lutheran Church of Estonia was on the verge of becoming a truly national Church when the Second World War and Soviet occupation following the war put a definite stop to that development. See also M. Ketola. Some aspects of the Nationality Question in the Lutheran Church of Estonia, 1918–1939. – Religion, State and Society, Oxford: Keston Institute, 1999, Vol. 27, No. 2, p. 239.

The EAO has 58 congregations and approximately 18,000 members.^{*4} The Roman Catholic Church has seven congregations with approximately 3500 members. In the 19th century the Free Faith Movement (“*priilus*”) was a breeding ground for the Baptist (1884), Adventist and Methodist denominations. In the first independence period 1918–1940 the Pentecostal Movement was introduced. During the Soviet occupation Baptists and other free churches (Adventists and Methodists) were forced to join the Union of Evangelical Christians and Baptists according to the model of Russia. The Pentecostal Movement and Jehovah’s Witnesses were banished. Today, the Union of Evangelical Christians and Baptists has 89 congregations with approximately 6500 members, the Episcopal Methodist Church has 24 congregations with approximately 2000 members and the Union of Adventists of Seventh Day has 18 congregations with approximately 2000 members. At the end of Soviet occupation and later, several Christian congregations have been registered in Estonia, the most influential being the Estonian Christian Pentecostal Church which has 39 congregations and approximately 3500 members, the Word of Life Congregation (*Livets Ord*), the Charismatic Episcopal Church (approximately 300 members) and some others. The Church of Jesus Christ of Latter-day Saints (the Mormons) has approximately 482 members, the New Apostolic Church has ten congregations and 2086 members and the Union of Congregations of Jehovah’s Witnesses has eleven congregations with about 3846 members. Jewish and Muslim communities practised their religion in Estonia under Tsarist rule already. The Jewish community has three independent congregations. There are approximately 2500 Jews in Estonia. Before the Second World War there were two synagogues in Estonia, currently there are no synagogues and no Rabbis. The Estonian Islamic Congregation has approximately 1467 members and is quite unique in nature. In the same congregation there are both Sunnis and Shiites. In 1995, thirteen believers left the congregation and formed the Estonian Mussulman Sunnite Congregation. These thirteen people left the Estonian Islamic Congregation not because of religious reasons but rather because of personal misunderstandings. The first mosque is under construction.^{*5} The registered congregation (House of Taara and Mother Earth People of Maavald) of confessors of the Estonian native religion has approximately 287 members and three congregations. These are only a few statistics to give a picture of the pluralistic religious life of Estonia. All together there are seven churches, eight associations of congregations and 60 so-called single congregations registered by the Ministry of Internal Affairs in the Register of Churches and Congregations in accordance with the Churches and Congregations Act (hereinafter: CCA). In addition to that, 35 religious societies are registered in accordance with the Non-profit Organisations Act in the Register of Non-profit Organisations.

At the beginning of the 1990s, after regaining independence, Estonia experienced what can be called a “return of the religious”, which was quite common in all Eastern European post-communist societies. These processes were partly an expression of national identity and partly a reaction to the suppression of individual freedom by the Soviet regime. But the religious enthusiasm caused by independence ended quickly and the extensive growth of the membership of religious organisations stopped. Estonia can be considered as quite a secularised country today.

2. Historical background

Christianity is most likely to have arrived in Estonia before 1054. Estonia was christianised by the middle of the 13th century, through the crusades and other coercive methods. Bishop Albert and the Order of the Sword Brethren combined forces so that the knights of the Order could conquer the land and the priests could baptise the people. As a result of the conquest the Pope as the head of the universal church became the highest suzerain of Estonia. The Pope personally took the Estonian neophytes under his protection, establishing a church state in Estonian territory. In the 17th century, when Estonia came under the sovereignty of Sweden, systematic ordering of the life under the Lutheran Church began and the Catholic Church was practically expelled from Estonia. The Reformation turned the church-state relationship upside-down to that of state-church, more precisely, land-church.

⁴ The Orthodox Church is deeply divided into the Estonian and Russian parts. It has been proposed that a major part of Orthodox believers belong to the Estonian Orthodox Church. The exact data is missing. The Estonian Orthodox Church, subordinated to the Moscow Patriarchate, has not been registered. The issue is connected with the conflict between these two Orthodox Churches one of which is descendent *in jure* of the EAO of 1923–1940 (subordinated to the Ecumenical Patriarchate of Constantinople) and the other one (subordinated to the Moscow Patriarchate) was established with the help of Soviet occupation in 1945 eliminating the EAO Synod in Estonia.

⁵ In accordance with some unofficial estimations there are approximately 10,000 Muslims in Estonia, but they are rather more occupied with the preservation of their national and ethnic roots (like Tatars, Azerbaijanis, Kazakhs, Uzbeks, representatives of peoples of the Northern Caucasus and other mainly Muslim nationalities) than with religious questions.

The history of law on religions in the Republic of Estonia can be divided into four main periods. The first one started with the formation of the independent state in 1918 and with the adoption of the 1920 Constitution, which set forth the principle of strict separation of state and church. The 1920 Constitution was followed by the 1925 Religious Societies and Their Associations Act (hereinafter: the 1925 Act), which reinsured the idea of equal treatment of all religious organisations and the separation of state and church. The 1930s saw significant political changes in Estonian society, which can be illustrated by characteristics such as the centralisation of the state administration, concentration of power, the deficit of democracy and the expansion of state control. In 1934 the Churches and Religious Societies Act (hereinafter: the 1934 Act) was enacted by decree of the State Elder (President), not by parliament. This Act set forth different legal treatment for churches and other religious societies. The status of churches, especially large churches, was to a certain extent similar to the status of a state church. The government of all churches was subjected to control of the State. According to Subsection 84 (1) b) of the 1938 Constitution the leaders of the two most important and largest churches gained *ex officio* membership in the *Riiginõukogu* (Upper House of Parliament).

The third period started with the Soviet occupation of Estonia. The law on religions in the Soviet Union was based on the 1918 Leninist decree on the separation of church from state and school from church. The bizarre fact is that the separation of state and church (resp. religious organisations) was actually non-separation, because of state control over every aspect of the religious organisations, their leaders and, sometimes, even their members. In 1977 a new decree on the General Statute of the Religious Collectives was adopted, but the basic principles remained the same.

The fourth period begins with the regaining of independence at the beginning of the 1990s and with the adoption of the 1992 Constitution. The religious freedom clauses in the 1992 Constitution were followed by the 1993 Churches and Congregations Act. The draft Act on Churches and Congregations (hereinafter: the draft Act) is presented to Parliament. Although Estonia is re-establishing its legal order on the principle of restitution, taking into account the legal situation before the Soviet occupation, it should also take account of new developments and obstacles and the principles of European and international law.

3. Legal sources

In Estonia the right to freedom of religion is protected by the Constitution of 1992 and by international instruments that have been incorporated into Estonian law. Starting with protection by international instruments, section 3 of the Estonian Constitution stipulates that universally recognised principles and standards of international law shall be an inseparable part of the Estonian legal system. Section 123 states that if Estonian acts or other legal instruments contradict foreign treaties ratified by the *Riigikogu* (Estonian parliament), the provisions of the foreign treaty shall be applied. Estonia is party to most European and universal human rights documents. Under section 3 of the Estonian Constitution the universally recognised principles and standards of international law are adopted into the Estonian legal system and do not need further transformation. They are superior in force to national legislation and binding for legislative, administrative and judicial powers.

The Estonian Constitution provides express protection to freedom of religion. Section 40 sets out that: "Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious associations. There is no state church. Everyone has the freedom to practise his or her religion, both alone and in a community with others, in public or in private, unless this is detrimental to public order, health or morals." Section 40 of the Constitution is supplementary to section 45 concerning the right to freedom of expression, section 47 concerning the right to assembly and section 48 concerning the right to association.

The legal sources of the law on religions in Estonia are as follows:

- (1) provisions set forth in national law (the Constitution of the Republic of Estonia, the Non-profit Organisations Act, the Churches and Congregations Act and the other acts directly or indirectly regulating the individual and collective freedom of religion);
- (2) provisions set forth in international law;
- (3) the interpretation of fundamental freedoms and rights in the administration of justice

(including decisions of the European Court of Human Rights and the European Court of Justice^{*6}).^{*7}

4. Basic categories of the system

As stated before section 40 of the present Constitution states *inter alia* that “there is no state church”. The 1920 Constitution of the Estonian Republic set out that “there should be no state religion”. The 1920 statement followed clearly from the principle of the separation of state and church. Subsection 1 (2) of the 1925 Religious Societies and their Associations Act stated that all religious organisations had to be equally protected and that none of them could receive preferential treatment or support from the state.^{*8} All religious organisations, including churches, had equal status with other private legal persons.^{*9} Under the 1920 Constitution there was general consent that religious societies of public law would violate the principle of strict separation of state and church, although the strictness of separation itself was not followed very strictly afterwards. The 1938 Constitution stipulated that “there is no state church” but added that the “state can grant status in public law to large churches”. Large churches were churches with over 100,000 members. The churches with a membership greater than 100,000 were the Estonian Evangelical Lutheran Church and the Estonian Apostolic-Orthodox Church. The 1938 Constitution set forth the possibility of granting status in public law to large churches. Whether the aforementioned churches had status in public law is debatable. Although the 1992 Constitution sets forth the separation of state and church it has not been interpreted in administrative practice as a very strict separation. The co-operation between state and church (resp. religious communities) has been accepted to a certain extent.^{*10} The Constitution does not *expressis verbis* provide legal grounds for co-operation, but it can be deduced from the positive obligation of the State to guarantee the freedom of religion set forth in section 40. The other matter is whether all forms of co-operation can be accepted in the light of the constitutional principles. The Estonian constitutional practice is relatively short and not all the nuances of the relationship between state and church (resp. religious communities) have been settled. Despite that some principles of the relationship can be derived from the Constitution.

Section 40 of the Constitution has to be interpreted in conjunction with the other sections of the Constitution. Sections 11, 12, 13 and 19 especially need to be taken into account with respect to the state and church (resp. religious communities) relationship. The principle of equality is anchored in the first sentence of the first paragraph of section 12 of the Constitution, which sets forth that all persons shall be equal before the law. Which means that equal persons have to be treated equally and unequal persons unequally. Subsection 12 (2) of the Constitution sets forth the principle of non-discrimination, prohibiting discrimination *inter alia* on the bases of religion or belief. As the Constitution protects both the individual and the collective freedom of religion these principles also have to be applied to religious communities. The principle of non-discrimination is a special equality right and is deemed to protect minorities. Section 11 of the Constitution sets forth that: “rights and liberties may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society, and their imposition may not distort the nature of the rights and liberties.” Thus, every case of restriction of religious liberty has to be justified and pass the test of proportionality.

^{*6} The decisions of the European Court of Justice are the legal source as far as its decisions can be considered as value decisions, because Estonia does not yet belong to European Union.

^{*7} See also K. Merusk, R. Narits. *Eesti Konstitutsiooniõigusest* (About Estonian Constitutional Law). Tallinn, 1998, p. 169 (in Estonian).

^{*8} Riigi Teataja (The State Gazette) 1925, 183/184, 96 (in Estonian).

^{*9} E. Maddison. *Usühingute ja nende liitude õiguslik iseloom* (Legal Character of Religious Societies and their Associations). – *Eesti Politseileht*, 1926, nr. 11 (221), lk. 161–162 (in Estonian).

^{*10} For example, according to the Prime Minister’s order the co-ordination of the prisons’ chaplaincy is delegated to one of the Estonian Evangelical Lutheran Church Diaconal Centre’s; the Estonian Council of Churches is annually financed from the state budget, *etc.* There is an established committee of experts for development of co-operation between the Estonian Government and the Estonian Evangelical Lutheran Church. The committee consists of members of the Estonian Government administration and representatives of the Estonian Evangelical Lutheran Church. See Riigi Teataja (The State Gazette) I 1999, 15, 250 (in Estonian).

Subsection 19 (1) of the Constitution states that: “All persons shall have the right to free self-realisation.” Subsection 19 (1) can be interpreted as the additional guarantee for autonomy of religious organisations.^{*11} Moreover section 13 of the Constitution states that: “All persons shall have the right to the protection of the state and of the law /.../. The law shall protect all persons against arbitrary treatment by state authorities.” This means that both the individual believers and religious organisations are protected against unconstitutional and unlawful interference into their affairs. Section 15 adds the right of recourse to the courts if person’s rights or freedoms have been violated. The self-realisation of religious organisations is restricted by subsection 19 (2) of the Constitution stating that: “In exercising their rights and liberties and in fulfilling their duties, all persons must respect and consider the rights and liberties of others and must observe the law”.

5. Legal status of religious bodies

Section 6 of the General Part of the Civil Code Act divides legal persons into legal persons in private law (non-profit organisations, foundations and profit-making organisations) and legal persons in public law (state and local government). Section 36 of the Code states that legal persons may be founded pursuant to Acts. Although the Code does not mention any legal persons in public law other than state and local governments, they can be founded and many of them are founded pursuant to an Act. Section 20 of the 1993 CCA states that churches, congregations and associations of congregations are non-profit organisations. It is possible to found public non-profit organisations.^{*12} Although the CCA does not mention anything other than a church, congregation and association of congregations as being non-profit organisations, the Non-profit Organisations Act and the Churches and Congregations Act are generally considered to be related as *lex generalis* and *lex specialis*. The proposed law defines the aforementioned organisations clearly as non-profit organisations in private law. Thus, generally under Estonian law, religious organisations (including churches) are viewed as legal persons in private law. Whether it is possible under the current law to consider religious organisations, or at least some of them, as legal persons in public law is debatable. Some religious organisations have characters of corporations in public law. It has to be mentioned that some scholars find it explicit that since there is no state church in Estonia, all churches have to be considered as legal entities of private law. Like the principle of separation of state and church in Germany is broken by section 140 of the *Grundgesetz* in conjunction with subsection 137 (5) of the Weimar Constitution, which allows religious societies in public law under certain circumstances, section 14 of the 1938 Estonian Constitution allowed the State “to grant status in public law to large churches”. The present Constitution — like the 1920 Constitution — does not have the additional clause that the state can grant status in public law to large churches. The absence of the additional clause can be interpreted as the state not having the authority to grant status in public law to any religious organisation.^{*13} The former interpretation is too narrow and sets unnecessary restrictions to religious liberty. Taking into account the constitutional principles it is more likely to be unconstitutional to grant status in public law only to large churches.

In the process of drafting the new Churches and Congregation Act debates about preferential treatment of some religious organisations intensified. Some attempts to set up sort of preferential legal treatment for the EELC and EAOC have appeared. It was proposed to complement the draft act with the provision according to which the state will enter into agreements with the EELC and EAOC

¹¹ Autonomy in administrative law and theory is generally understood as the right to self-government and the right to issue regulations. Both of these components have to be present for autonomy. A regulation is viewed as a generally binding precept issued in a definite form which governs an abstract number of cases and impersonally creates rights and duties. A regulation is therefore substantive law. The right to issue regulations means the delegation of legislation. In Estonia the regulations of autonomous subjects can be either *praeter legem* or *intra legem* regulations. See also K. Merusk. The Right to Issue Regulations and its Constitutional Limits in Estonia. – *Juridica International. Law Review*. University of Tartu, I, 1996, p. 42. Nevertheless, the essence of church (religious organisation) autonomy is debatable in Estonia. See M. Kiviorg. Church Autonomy and Religious Liberty. – *Juridica International. Law Review*. University of Tartu, IV, 1999, pp. 93–99.

¹² K. Merusk. Avalik-õiguslik juriidiline isik avaliku halduse organisatsioon (Public Legal Person in the Public Administration). – *Juridica*, 1996, nr. 7, lk. 177 (in Estonian).

¹³ See also M Ernits. Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia. – *Juridica International. Law Review*. University of Tartu, IV, 1999, pp. 11–34.

recognising them and their congregations and convents as public legal persons.^{*14} This mainly relied upon the argument that these churches had such kind of legal status before the 1940 Soviet occupation according to the 1934 Act and the 1938 Constitution, which is debatable. Another argument for setting up different legal treatment for the aforementioned churches has been that traditional churches, like the EELC and the EAOC as private legal persons, cannot organise themselves under the present law in accordance with their own understandings of their internal organisation (primarily because of their Episcopal structure), which is again debatable. Thus, the proposed recognition of these two churches as public legal persons were badly grounded and the real purpose of the proposal was not clear. In relation to the above, an alternative was also discussed. There was a proposal to add churches, congregations and associations of congregations to the list of persons in private law in the General Part of the Civil Code. The purpose of the latter was to distinguish these religious communities from so-called ordinary non-profit organisations to ensure that their special nature is taken into account. It should also be said that under the present law the internal structure and management of religious organisations is mainly left in their sphere of autonomy. For example, now there are seven registered churches and all of them need to have an episcopal structure, not only EELC and EAOC. According to the legal definition of a church set forth in section 2 of the CCA, an episcopal structure is prescribed to all churches. Moreover, as far as the autonomy of the religious organisations is anchored in the constitutionally protected freedom of religion, the internal structure of all religious organisations should be protected.

The aforementioned proposal to the draft law basically divided religious organisations into three categories, which had different rights. The first category has already been discussed. Into the second category fell other churches and associations of congregations that the state could (but did not have to) on the bases of proposal of the Ministry of Internal Affairs, enter into co-operation agreements. The real distinction between the legal treatment of churches that will be public legal persons and churches that will have co-operation agreements with the state had been left open. In theory the co-operation agreement can also grant status in public law. With the co-operation agreement the state can delegate public functions and obligations to religious organisations. The main known distinction is that agreements with the aforementioned churches had to be signed but entering into the co-operation agreements was at the discretion of the Government. According to one possible interpretation of the proposed law, agreements with other religious organisations (single congregations and religious societies) will not be possible.

In the context of Estonia it is rather difficult to determine whether the social needs or traditions (incl. legal traditions) exist or whether it is strong enough to justify different legal treatment of some religious organisations.^{*15} Furthermore, it is arguable whether the position of the mentioned churches in society is equal and non-equal compared to other religious organisations.^{*16} On the other hand, it has to be pointed out that the EELC has a considerable role, for example, when it comes to public expressions of faith and it is the largest registered religious organisation in Estonia. Nevertheless, this cannot be the bases for the aforementioned different legal treatment.

The agreements between the state and religious communities can be entered into for different purposes. The nature of agreements can also be different. Some of these agreements are considered to be international treaties (such as the agreements negotiated between the state and the Holy See for the Roman Catholic Church), while others are *sui generis*, but are treated as being in a category similar to that of international treaties (such as the agreements concluded between the German state and the Evangelical Church and the Catholic dioceses). The agreements between the state and religious organisations may also have the nature of administrative agreements or co-operation agreements under civil law. The purpose of the agreements may vary from co-ordination and co-operation on issues of public interest to contracting for the specific religious needs of a religious community. The agreements between religious organisations and the state can only be welcomed. But the constitutional principles of equal treatment and non-discrimination have to be taken into account. Furthermore the (co-operation) agreements between the state and religious organisations

¹⁴ In Estonian administrative law and theory it is accepted that under the authorisation of the law the state may delegate some of its functions to other persons. It is generally understood that one of the conditions of a public legal person is fulfilment of the delegated public functions under the supervision of the state. Thus, the concept of a public religious corporation is somewhat different from the German concept. Although, the essence of the public religious corporation is arguable in Estonia. See M. Kiviorg. *Religiooniõigus. Individuaalne ja kollektiivne usuabadus* (Law on Religions. Individual and Collective Freedom of Religion). Tartu, 2000 (in Estonian).

¹⁵ See also statistics presented at the beginning of the present paper.

¹⁶ Playing with statistical information may seem cynical because there is more to be taken into account for comparison of religious organisations, for example, their contribution to formation of the national identity or Estonian culture. But it is still problematic to say that EELC with 177,233 members is equal to EAOC with 18,000 members and EAOC is more equal compare to the non-registered Estonian Orthodox Church with membership estimated to be much larger than the membership of EAOC.

are allowed by the present Estonian law. So the practical need for further regulation is debatable. As was mentioned earlier, not all the details of the state and religious organisations' relationship are worked out (if not to say that there is no clear conception of the relationship). The agreements are one possibility to take into account the specific religious needs of different religious organisations and the opportunity for the state to carry out its positive obligation to guarantee freedom of religion. The different question is whether there are alternatives for agreements (administrative acts, special laws).

Subsection 9 (2) of the Constitution extends the rights, liberties and duties listed in the Constitution to legal persons, to the extent that this is in accordance with the general aims of the legal persons, and with the nature of such rights, liberties and duties. Also the organisational formations with partial legal capacity that are not legal persons may be holders of basic rights. The protection of basic rights extends to them only to the extent of their legal capacity.^{*17} Although the Constitution does not make any distinction between public and private legal persons, it has been suggested that public legal persons cannot be holders of basic rights listed in the Constitution. Also private legal persons cannot be holders of basic rights as far as they perform functions of public power. The aforementioned reasoning can easily and unnecessarily restrict the individual and collective freedom of religion. There is no general consensus in Estonian discussion opposite to German that churches (religious organisations) enjoy the protection of basic rights even if they are legal persons in public law. As stated before, in the process of drafting the new Churches and Congregation Act the idea was proposed to give status in public law to two churches. Which in accordance with some explanations of the idea does not necessarily mean integration of these churches into the state's structure or delegation of functions of public power to these churches, but rather the extended recognition of their internal structure. It would be very problematic to exclude these organisations from constitutional protection of freedoms and rights.

6. Religious communities as actors in the public sphere

6.1. Religious education

Section 37 of the Constitution creates the bases for the entire school system and states *inter alia* that the provision of education shall be supervised by the state. The Estonian school system contains mainly state schools. At the moment there are only two small private church schools (Catholic School and School of the Word of Life Congregation). Thus, the main place for possible religious education is public schools. In accordance with the law there are provided and prescribed possibilities for organising religious education. This can be viewed as evidence of not very strict separation of state and church in Estonia.

According to section 4 of the Education Act, the study and teaching of religion in general education schools is voluntary and non-confessional. Religious education is compulsory for the school if fifteen pupils wish to be taught. The principles and topics of religious studies are set out in the curriculum approved by the Ministry of Education. Religious studies in schools is considered as an elective subject both for pupils and for teachers, and is a subject where the views and contributions to the development of humanity of various religions are taught, thus providing knowledge of different religions. In the primary classes parents decide about the participation of their children in religious studies lessons, at the gymnasium level pupils decide this independently. The teachers of religious studies have to have both theological and pedagogical preparation. Confessional introduction is provided for children by Sunday schools and church schools operated by congregations. Today there is no alternative subject in the curriculum for pupils who do not attend religious studies lessons. There have been debates to reorganise the voluntary religious education into compulsory education to give a non-confessional overview of Christianity and other world religions and to help pupils to understand the impact of different religions on world culture and, perhaps most importantly, to prepare them for the life in the pluralistic and multicultural world. There are various factors that retard the reorganisation of religious education. One of the concerns opposing the reorganisation goes back to some negative experiences of the first days of religious education in public schools after the re-gaining of independence. When schools became open to religious education, many eager

¹⁷ M. Ernits (Note 13).

people without pedagogical experience and professional skills rushed to teach it.^{*18} Sometimes religious education turned into confessional instruction in schools. Unfortunately individual failures have been exaggerated and generalised.

6.2. Faculty of Theology in the State University

The Faculty of Theology has existed at the university since 1632. In 1940 the Soviet authorities abolished the theological department. In 1941 German occupation forces did not allow the reopening of the faculty. However permission was granted to form a Theological Examination Commission at the Consistory. This provided an opportunity for students to complete their degree. After the Second World War, it was decided to continue theological schooling and the Examination Commission was formed into the Theological Institute of the Estonian Evangelical Lutheran Church, which is operating to this day. In 1991 the Faculty of Theology was reopened at University of Tartu. It offers higher theological education, but does not automatically authorise the graduate to serve in the church. This situation is solved in co-operation with the Theological Institute of the EELC. The Faculty of Theology as a part of public university is fully funded by the state budget.

The aims of the Faculty of Theology have been set as follows:

- (1) to prepare a core of highly qualified theologians for the Estonian Evangelical Lutheran Church, the Estonian educational system and social work;
- (2) to study theology, history of religions and Middle Eastern culture and history in conjunction with internationally renowned specialists;
- (3) to help Christian theological thinking consummate its place in Estonian culture.

6.3. Religious assistance in public institutions

The realisation of religious freedom in prisons is regulated by section 5 of the CCA, according to which prisons must ensure that their inmates, if they so wish, may practise their religion according to their religious beliefs, if this does not disturb the prison or the interests of the other inmates, and that the services are organised by a church or congregation which has permission therefore from the local government or authority. Accordingly to the Government order co-ordination of the prisons' chaplaincy is delegated to one of the organisations operated by Estonian Evangelical Lutheran Church. The prison chaplains are in principle considered as civil servants. The institution of chaplaincy is inter-denominational and ecumenical. This can be considered problematic in respect of equal treatment that only people from the member-churches of the Estonian Council of Churches are entitled to serve as chaplains. Although the former does not mean that any other religious organisation does not have access to prisons at the request of a prisoner. According to section 98 of the Code of Enforcement Procedure, the prisoner has the right to meet with a member of clergy, and the prison must create conditions for the satisfaction of the religious needs of prisoners and for contacts with the clergy or an authorised representative of their confessions.

Freedom of religion in the armed forces is regulated by only one provision in section 5 of the CCA, according to which the officer of the unit shall guarantee conscripts the opportunity to practise their religion, if they so wish. The chaplaincy in the armed forces is more or less regulated in the same way as prison chaplaincy. According to one unofficial source of information there have been problems in the army guaranteeing the freedom of religion when it comes to the celebration of public holy days. Conscripts are required *in corpore* and not dependent of their religious beliefs to attend services in the Estonian Evangelical Lutheran Church.

Section 5 of the CCA regulates the realisation of religious freedom in medical and care institutions. According to the Act, medical and care institutions must make it possible for their residents, if they so wish, to practise their religion according to their religious beliefs, if this does not disturb the order in these institutions or the interests of the other residents.

¹⁸ See also P Valk. Development of the Status of Religious education in the Estonian School. European and Local Perspectives. – Conference on Law, Religion and Democratic Society, Estonia, University of Tartu, 1999.

6.4. Matrimonial and family law

Currently, no church or congregation in Estonia has the right or authorisation to register marriages of the civil validity. The family law will likely to be amended in the near future. The draft Act passed its first reading in Parliament. It is proposed that the Family Law Act will be complemented with the provision which sets forth that the Ministry of Internal Affairs may, in accordance with the conditions and procedure established by Government, delegate to a clergyman of a church, congregation or association of congregations the obligations of a registry office. It is not entirely clear how the registration of marriages with civil validity will be financed. According to the proposal the training of clergy will be carried out by the state. Clergymen will not get any salary for performing functions of a registry office. Both the state and religious organisations have some concerns, whether the churches, congregations and associations of congregations will be capable of carrying out the obligations of a registry office. Also there has been concern that the proposed law gives the possibility to carry out registration of marriages of the civil validity to too wide a range of people and religious communities.

7. Conclusions

Although individual and collective freedom of religion is protected in Estonia, many aspects of state and church (resp. religious communities) relationship are in a process of development. There are symptoms of hesitation and lack of knowledge on both sides — State and religious communities — that obstruct the formation of conception of state-church relationship. It is problematic to agree with the position that the statement “there is no state church” means strict separation of state and church. The term “state-church” describes a certain type of church-state relationship, which is not allowed in the Estonian legal order. The co-operation between state and religious organisations has to be welcomed if it takes account constitutional principles of non-discrimination and equal treatment. This does not also exclude the possibility of recognising or granting status in public law to religious communities. But reasons for establishing and the essence of public religious corporation has to be clarified in the Estonian context.

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The Civil Law Institutes as Part of Criminal Law

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

1. Principle of uniformity of legal order

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

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

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

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

2. Bases of criminal law

2.1. Material definition of crime and civil law remedy

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

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

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

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

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

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

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

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

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

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

⁷ In German: *Sozialschädlichkeit geringfügig ist*.

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

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

2.2. Liability – common basic institute?

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

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

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

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

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

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

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

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

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

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

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

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

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

3. General part of criminal law

3.1. Level of necessary elements of criminal offence

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

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

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

3.2. Unlawfulness

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

¹⁸ C. Roxin (Note 3), p. 114.1.

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

²⁰ *Ibid.*, p. 127.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁰ M. Kurm (Note 29), p. 35.

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Compatibility of the Estonian Penal Law to the Need for Protection of Financial Interests of the European Union

1. Introduction

The objective of this study is to analyse and assess compatibility of the Estonian penal law to the need for protection of financial interests of the European Union.

The compatibility is assessed on three levels:

- (1) a description of the status quaestionis of the financial protection of the EU financial interests in Estonia (*lex lata*). This level describes the law as it stands with respect to the given question. It explains how the financial interests of the EU are protected under the Estonian positive law;
- (2) a description of the short-term perspectives in view of accession (*lex ferenda*). This level describes the Estonian efforts to make its legislation compatible with the *acquis communautaire*. It describes the laws that have been adopted and the draft legislation that has been proposed with this objective;
- (3) a description of the long-term perspectives (*lex desiderata*). This level addresses the question of the compatibility of the *Corpus Juris* 2000 with the current Estonian legal order. The following question are addressed: would there be legal obstacles to the introduction of the *Corpus Juris* in the Estonian legal order and, if so, can these obstacles be overcome and how.

1.1. *Acquis communautaire*

1.1.1. Treaty bases

Following the entry into force of the Treaty of Amsterdam on 1 May 1999, the main basis in Community law for the fight against fraud is provided for by article 280 (ex 209a) of the EC Treaty. The other main strand of Treaty *acquis* is Title VI of the Treaty on European Union (as amended by the Amsterdam Treaty) concerning police and judicial co-operation in criminal matters.*¹

1.1.2. Pre-accession pact on organised crime

“Fifteen principles” of the Pre-accession Pact on Combating Organised Crime*² encompass the essential elements of a co-operation strategy between the EU and the accession states in the combating of organised crime. Given the connection between organised crime and fraud against the EU budget it is appropriate to list these principles here. Principle 2 contains an important commitment by the accession countries to adopt and implement relevant international criminal conventions. Principles 12 (on corruption) and 13 (money laundering) are also relevant in the context of this study.

1.1.3. The most important third pillar *acquis*

On the same date as the Pre-accession Pact was adopted, the Council of the European Union published a list of “third pillar” *acquis* (and associated texts) extending *inter alia* to the fields of the fight against organised crime, fraud and corruption, police and judicial co-operation in criminal matters, plus human rights instruments.

The list of “third pillar” *acquis* published contemporaneously with the Pre-accession Pact was drafted in 1998 and after the date some new documents have been published:

- the Convention on Mutual Assistance in Criminal Matters between the EU Member States which was adopted by Council Act of 29 May 2000*³;
- a statement of European Union priorities for Policy Objectives in Foreign Law Enforcement Policy*⁴;
- a Commission “Scoreboard” regarding implementation of the five-year programme of measures for completion of the “Area of Freedom, Security and Justice” established by the Amsterdam Treaty, published by the Commission in March.*⁵ The Scoreboard will be updated once during each EU Presidency;
- an EU Strategy Paper published in May 2000 on “The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium”.*⁶

1.1.4. First pillar instruments

There are a number of “first pillar” instruments on combating fraud against the Community budget. The most important of the instruments relating to fraud are:

- **Council Regulation 2988/95 (EC, EURATOM)** of 18 December 1995 on the protection of the European Communities financial interests*⁷;
- **Council Regulation 2185/96 (EC, EURATOM)** of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities*⁸;

¹ OJ 1997, C 340, 10/11.

² Pre-accession pact on organised crime between the Member States of the European Union and the applicant countries of Central and Eastern Europe and Cyprus, approved by the JHA Council on 28 May 1998, OJ 1998, C 220, 15/07.

³ OJ 2000, C 197, 12/7, pp. 1–2.

⁴ Council, 6 June 2000, Doc 7653/00.

⁵ Brussels, 24.03.2000, COMM (2000) 167 final.

⁶ OJ 2000, C 124, 3/5, pp. 1–33.

⁷ OJ 1995, L 312, 23/12, pp. 1–4.

⁸ OJ 1996, L 292, 15/11, pp. 2–5.

- **Regulation 1073/99 (EC) of the European Parliament and the Council** of 25 May 1999 concerning investigations conducted by the European Anti-fraud Office (OLAF)^{*9};
- **Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.**^{*10}

1.2. *Lex lata*

The question as to what is *lex lata* is a confusing issue, because the answer may be different, depending on whether one looks at it from the perspective of the EU or from the perspective of national legal systems. From the perspective of the EU, an impressive number of international instruments exists that, directly or indirectly, protect the financial interests of the Union. Many international conventions on the subject exist, not only in the EU (“Third Pillar Conventions”) but also in the Council of Europe. Both the EU and the Council of Europe have drafted conventions dealing with issues such as extradition, mutual assistance in criminal matters, execution of foreign sentences, *etc.* Some of these conventions have been widely ratified by all member states, others still need to be ratified. A prominent example is the “PIF Convention” of 1995^{*11}, which has not yet been ratified by **all** member states. Quite often, ratification is lagging behind because member states have failed to adopt the necessary domestic legislation. The paradoxical result of this is that while the EU requires the candidate states to adopt these conventions (ratification, domestic implementation) as part of the *acquis communautaire*, many of the current EU member states still need to adopt elements of the *acquis* themselves. For example, the execution of foreign penal sentences is impossible under most domestic laws of the EU member states, even though a convention on the subject exists since the 1970s. On the other hand, all EU member states have ratified and implemented the 1957 Convention on Extradition.

1.3. *Corpus Juris*

The *Corpus Juris* was drafted in 1997^{*12} and revised in 2000, after an in-depth study of the compatibility with the proposed system in the 15 member states.^{*13} Although *Corpus Juris* does not, as such, belong to the *acquis communautaire*, it incorporates many elements of the *acquis* and it integrates elements of the criminal procedure systems of the 15 member states.

The “vertical” system proposed in the *Corpus Juris*, based on a European Public Prosecutor with Union-wide jurisdiction in the **European legal area**, is meant to overcome the problems inherent in traditional co-operation between states (extradition, mutual assistance, *etc.*), which is of a more “horizontal” nature. The *Corpus Juris* proposes a more “vertical” system based on a European Public Prosecutor who would have investigative and prosecutorial powers throughout the Union. For example, if a European arrest warrant would exist (article 25ter *CJ* 2000), extradition would become superfluous and all the current obstacles to the inter-state surrendering of suspects and convicted criminals (fiscal exception, double criminality, economic exceptions, *etc.*) would disappear. In the same way, letters rogatory (*e.g.* requesting searches and seizures) would be replaced by European Enforcement orders and drastically replace traditional mutual assistance in criminal matters.

At this stage, the *Corpus Juris* belongs to the *lex desiderata*, whereas the *lex lata*, from a European point of view, constitutes a labyrinth of conventions with varying success as to ratification. Until these conventions have been effectively ratified and implemented by the states, domestic legislation in the field of co-operation in criminal matters remains crucial. Paradoxically, the adoption of the *Corpus Juris*, even though it is now only a long term *lex desiderata* project, may be an easier solution from a pragmatic point of view than the ratification and implementation of the labyrinth of conventions that constitute the *acquis communautaire*.

⁹ OJ 1999, L 136, 31/05, pp. 1–7.

¹⁰ OJ 1991, L 166, 28/6, pp. 77–83.

¹¹ OJ 1995, C 316, 27/11.

¹² M. Delmas-Marty. *Corpus introducing penal provisions for the purpose of the financial interests of the European Union*. – Economica, 1997.

¹³ M. Delmas-Marty, J. Vervaele (eds). *The implementation of the Corpus Juris in the member states*. – Intersentia, 2000.

1.4. The scope of the study

This study focuses on offences which apply or might apply to protecting the Community budget. To this end, the analysis breaks down into two stages. *The first stage* gives consideration to how national legislation, including draft legislation currently before the *Riigikogu* (Estonian parliament), complies with the “*acquis communautaire*”.

At this stage the following issues are analysed:

- (1) provisions of Estonian law designed to protect Estonian national financial interests, with a view to assessing their protective function;
- (2) extent of application of these national provisions in like manner to protecting the financial interests of the Community;
- (3) compatibility of the national provisions concerned with the instruments constituting *acquis communautaire* in this field, viz.:
 - the Convention of 26 July 1995 on the protection of the European Communities’ financial interests (“PIF Convention”)*¹⁴;
 - the Second Protocol of the PIF Convention*¹⁵;
 - the Convention on laundering, search, seizure and confiscation of the proceeds from crime (Council of Europe) of 8 November 1990*¹⁶
 - the Action Plan of 28 April 1997 to combat organised crime*¹⁷;
 - the EU Strategy Paper of May 2000*¹⁸;
 - the Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.*¹⁹

The second stage of the analysis aims to assess the compatibility of the Estonian law with the provisions described in articles 1 to 4 of the *Corpus Juris 2000*.

The study analyses not only offences that directly injure financial interests but the offences which are often regarded as the “prerogative” of the civil servant, due to the fact that they assume a particular function — public (or similar) office — on the part of the perpetrator, as well. Offences of this kind have important implications for the protection of national financial interests (and possibly also those of the Communities). Apart from the fact that they may signal the mismanagement of public funds, offences of this kind are often found in the criminological context to dovetail with offences which are immediately detrimental to financial interests. Consequently, it is essential to take such offences into account when devising an effective system to protect financial interests, even if this leads us to consider the importance of these provisions in protecting other fundamental interests which might equally arise at Community level, such as impartiality and a properly functioning administration of state affairs.

2. Fraud

2.1. Present legal framework

The submission to a competent authority of incomplete or incorrect declarations concerning facts which might influence a decision to grant aid or subsidy or to cancel a fiscal debt, in the event that such a submission might be detrimental to national finances is punishable in Estonia. In the Estonian Criminal Code*²⁰ (ECC) general fraud (section 143) and tax fraud (section 148¹) are separate types of offence. Subsidy fraud is not a separate offence and is punished as general fraud.

¹⁴ Note 11, pp. 48–52.

¹⁵ OJ 1997, C 221, 19/07, pp. 12–22.

¹⁶ European Treaty Series, No. 141.

¹⁷ OJ, 1999, C 251/ pp. 1–18.

¹⁸ Note 6, pp. 1–33.

¹⁹ OJ 1998, L 351/2, pp. 1–2.

²⁰ Riigi Teataja (The State Gazette) I 1999, 38, 485; last amended Riigi Teataja (The State Gazette) 2000, 57, 373. Major Estonian legal acts (including Criminal Code, Code of Criminal Procedure, etc.) are available at: <http://www.legaltext.ee/indexen.htm>.

In the cases of **general fraud (ECC section 143)** a person receives another legal or physical person's property, property right or other proprietary benefit through deception. General fraud is punishable by a fine, detention or up to three years' imprisonment, in aggravated cases by up to six years' imprisonment.

The criminal offence is completed if the offender **has received a proprietary benefit**. The submission to a competent authority of incomplete or incorrect declarations concerning facts that might influence a decision to grant aid or subsidy **constitutes an attempt** to commit a general fraud.

In the cases of **tax fraud (ECC section 148¹)** a person submits to a taxation authority false or incomplete information or fails to submit required information. Tax fraud is punishable by fine, detention or up to three years' imprisonment. The tax fraud is completed by submission of the declaration or failing to submit one, no actual proprietary benefit is required.

The failure, having requested or received a subsidy or some other fiscal benefit, to comply with an obligation to inform the competent authority of any change relating to important circumstances which might influence a decision to grant the said subsidy, aid or fiscal benefit, or to refuse, decrease, cancel or recover it, in the event that this decision affects national financial interests is neither a crime according to the ECC nor a punishable offence.

The misappropriation of funds intended as a subsidy or aid that have been obtained by regular means is general fraud (ECC section 143) if the misappropriated funds were already obtained with a purpose not to use them for the purpose declared in the application for the subsidy or aid. If the intention to misappropriate the funds arose later, the misappropriation is neither a crime nor a punishable offence.

ECC section 143 is applicable in like manner to protecting the financial interests of the European Communities. ECC section 148¹ applies only to the acts and omissions which are in violation of the Estonian Taxation Act and therefore is not applicable to protecting the financial interests of the European Communities. The submission to a competent authority of incomplete or incorrect declarations concerning facts which might influence a decision to cancel a fiscal debt, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, is punishable as general fraud (ECC section 143).

The Estonian law on fraud partially conforms to the definition in article 1 of the PIF Convention. There are no disagreements with the first clauses of paragraphs 1 (a) and 1 (b). In respect of expenditure any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities and in respect of revenue any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities constitutes a criminal offence punishable by penalties involving deprivation of liberty which can give rise to extradition.

But the Estonian law on fraud does not comply with the second and third clauses of paragraphs 1 (a) and 1 (b), non-disclosure of information in violation of a specific obligation, with the same effect, and the misapplication of such funds for purposes other than those for which they were originally granted and misapplication of a legally obtained benefit, with the same effect is not a criminal offence.

2.2. The provisions of the new draft Estonian Penal Code

In the new draft Estonian Penal Code (DEPC)^{*21} there are separate sections for subsidy fraud (section 221) and tax fraud (section 404).

The subsidy fraud (section 221) will criminalise both the fraudulent obtaining of a subsidy (submission of a false or incomplete declaration will still be only an attempt) and misappropriation of a

²¹ The Draft Estonian Penal Code is right now before the Riigikogu. Bill No. 119 SE II-3. Available at: <http://www.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=991610004&login=proov&password=&system=ems&server=ragne1>, 10.11.2000 (in Estonian). After this paper was written, the text of the DEPC was amended and a new version of the new Estonian Penal Code was adopted by the Riigikogu on 6 June 2001 (published 6 July 2001, Riigi Teataja (The State Gazette) I 2001, 61, 364) (in Estonian). It has not been decided yet when exactly the new code will enter into force. The amendments concerning the issues of this paper have been taken into account during the editing phase of the paper.

legally obtained subsidy. The penalty is a fine or up to five years' imprisonment, *i.e.* the penalties are decreased as compared to ECC section 143.

The failure, having requested or received a subsidy or some other fiscal benefit, to comply with an obligation to inform the competent authority of any change relating to important circumstances which might influence a decision to grant the said subsidy, aid or fiscal benefit, or to refuse, decrease, cancel or recover it is not a criminal offence according to the DEPC.

Most of the types of conduct addressed by article 1 of the *Corpus Juris* 2000 are subject to sanctions under the ECC. Omitting to provide information to the competent authority in breach of a requirement to provide such information is neither a criminal offence under the ECC nor under DEPC. There are no significant obstacles to amend the DEPC and include the wording of the *CJ* article 1 paragraph 1 (b). Diverting Community funds (subsidies or grants) obtained legally is not a criminal offence under the ECC; the DEPC (section 221) criminalises the act.

The punishments provided by the ECC (section 143 — general fraud, up to six years' imprisonment) and DEPC (section 221 — subsidy fraud, up to five years' imprisonment) are lower than the punishments in *CJ*. The Estonian penal policy is generally changing towards shorter custodial sentences, but as the popular opinion prefers more severe punishments, the increase in possible maximum period of incarceration for fraud would face no major criticism from any influential opinion leaders. The punishments for crimes in the area of receipts are close to the *CJ*. Section 148¹ of the ECC provides in cases involving 1,000,000 or more Estonian kroons (approximately 65,000 euros) of avoided taxes for up to seven years' imprisonment, but as *CJ* considers fraud committed in the context of a conspiracy to be aggravated fraud and ECC section 148¹ does not, therefore in cases involving lesser amounts of avoided taxes the ECC has lower maximum sanctions. In the DEPC tax fraud (section 404) is punishable by up to ten years' imprisonment.

As for the idea of criminalising the risk created (*CJ* article 1), the Estonian penal provisions are not in line with this purpose, because in general fraud presenting misleading information is only an attempt. As the DEPC is still under discussion in the *Riigikogu* it is feasible to change the wording of section 220 to exclude the actual proprietary benefit from the constitutive elements of subsidy fraud. In tax fraud, presenting misleading information is already a fully completed crime.

The definitional elements would not cause great problems in the implementation of this *CJ* article. The major obstacles would lie within the assimilation of gross negligence to intentional fault. For general fraud intent is required. Tax fraud may be punished even if the misleading information was provided negligently, but in this case precondition is that administrative punishment has been earlier applied for a similar offence. It is feasible to criminalise reckless and gross negligent inaccurate declarations in the area of subsidies as well.

3. Fraud related to the award of contracts (market rigging)

3.1. Present legal framework

There is no special type of offence concerning market rigging in the Estonian criminal law. The general provisions on fraud (section 143), bribery (sections 164, 165) or extortion (section 142) are applicable under their normal conditions of punishability. Illegal cartels are regulated and sanctioned in the Competition Act.^{*22} Section 4 of the Competition Act prohibits all agreements and co-operative activities that have a purpose or in result hinder free enterprise or restrict, hamper, limit or distort free competition. The legal persons engaging in the prohibited activities are subject to an administrative fine in the amount of up to five percent of the legal person's last economic year net realisation (Competition Act subsection 45 (2)). The physical persons that have breached the Competition Act may be subject to an administrative punishment if they have committed an offence listed in the Code of Administrative Offences.

Provisions of the Competition Act prohibit all activities that hinder free competition notwithstanding whether the activity hinders free competition inside Estonia or internationally and whether the goods

²² Riigi Teataja (The State Gazette) I 1998, 30, 410; last amended Riigi Teataja (The State Gazette) 1999, 89, 813.

or services involved are offered to an Estonian counterpart or foreign, international or supranational institution.

The Estonian provisions are not fully compatible with article 2 of the *CJ*. Estonian provisions prohibit all the activities mentioned in *CJ* article 2, but the breach of the Competition Act does not constitute a crime.

3.2. The provisions of the Draft Estonian Penal Code

The DEPC (25 October 2000 version) did not criminalise the market-rigging either. As the Estonian public opinion is very much favouring free competition, the change in the DEPC criminalising market-rigging faced no significant opposition. The text of the DEPC has been amended and in the version of the new Estonian Penal Code adopted by the *Riigikogu* on 6 June 2001 (it has not been decided yet when exactly the new code will enter into force) four crimes against competition were introduced.

Section 400 makes agreements restricting competition punishable by up to three years' imprisonment. There may arise some doubts whether market-rigging should be punishable by up to seven years' imprisonment as the *CJ* suggests. Section 400 will be applicable to any agreements restricting competition, including tenders in the context of adjudication process governed by Community law. The difference from article 2 of the *Corpus Juris 2000* is that *CJ* criminalises making a tender, but new section 400 criminalises agreement already before any tender is made.

4. Money laundering and receiving stolen goods

4.1. Present legal framework

Money laundering is, according to ECC section 148¹⁵, a criminal offence punishable by a fine or detention or up to four years' imprisonment. The act is punishable by two to seven years' imprisonment if committed:

- (1) by a group of persons, or
- (2) repeatedly.

Money laundering is punishable by three to ten years' imprisonment if committed:

- (1) on a large-scale^{*23} basis, or
- (2) by a criminal organisation.

Money laundering is defined in section 2 of the Money Laundering Prevention Act^{*24} as conversion or transfer of or other legal procedures concerning assets, acquired directly through criminal offences, with a purpose of or resulting in concealing the real ownership or illicit origins of the assets.

Receiving stolen goods is criminalised as well. Acquisition or distribution of property knowingly obtained through criminal activities (ECC section 203) is punishable by a fine or detention or up to one year imprisonment. Same acts, if committed on a regular basis, are punishable by detention or up to two years' imprisonment and if committed on a large scale, punishable by detention or up to three years' imprisonment.

Both money laundering and receiving are of a general application (are not restricted to any category of criminal offences). All criminal offences detrimental to Community finances are triggering ECC sections 148¹⁵ and 203 mechanisms.

²³ The *Riigikohus* (Estonian Supreme Court) has interpreted the phrase "on a large-scale basis" to characterise criminal offences involving assets equal to "major proprietary damage" (Case No. 3-1-1-21-99; Riigi Teataja (The State Gazette) III 1999, 10, 106) (in Estonian)). "Major proprietary damage" is defined as "damage exceeding 100 times the minimal monthly wage, established by the Government of the Republic at the time the crime was committed" (Act on the New Version of the Criminal Code, Riigi Teataja (The State Gazette) 1992, 20 287; last amended Riigi Teataja (The State Gazette) 1996, 31, 631) (in Estonian)). Since 1.01.2000 the minimal wage is 1400 Estonian kroons (Minimal Wages Regulation, Riigi Teataja (The State Gazette) I 1999, 88, 881) (in Estonian)) and hence, the phrase "on a large-scale basis" means today involvement of assets having value not less than 140,000 Estonian kroons (ca 9000 EURO).

²⁴ Rahapesu tõkestamise seadus (Money Laundering Prevention Act) – Riigi Teataja (The State Gazette) I 1998, 110, 1811.

The Estonian Money Laundering Prevention Act (MLPA) is congruent with the provisions of EC Directive No. 91/308 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering. The definition of money laundering is narrower in the Estonian MLPA than in Directive 91/308/EEC. It does not include the second and third paragraphs of the definition in the Directive. The activities mentioned in the second paragraph (the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, *etc.*) are criminalised as aiding if the activities were promised to the perpetrator before the criminal offence was executed. If not promised before, the activities are criminalised as concealment of criminal offence (ECC section 180) only if the criminal offence is punishable by more than eight years' imprisonment. The activities mentioned in the third paragraph (the acquisition, possession or use of property, *etc.*) are criminalised as receiving (ECC section 203).

The ECC is incompletely congruent with the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests (1997) — the activities listed in the second paragraph of the definition of money laundering in Directive 91/308/EEC are not criminalised if the assets result from a criminal offence punishable by up to eight years' imprisonment and the activities were not promised beforehand.

There are the same incompatibilities with the *CJ* — article 3 paragraph 1 b) is, if not promised beforehand, criminalised only if the assets result from a criminal offence punishable by more than eight years' imprisonment. The sanctions provided in the ECC are lower — receiving (ECC section 203) is punishable only by up to two years' (three years' if committed on a large scale basis) imprisonment. Money laundering, in the narrow sense, (ECC section 148¹⁵) has lower potential punishments in the case if the money laundering is committed by a single person and does not involve large amounts of assets (ECC subsection 148¹⁵ (1)).

4.2. The draft Estonian Penal Code

The DEPC does not change the situation significantly. The definition of money laundering will remain incompatible to Directive 91/308/EEC. The sanction for unaggravated money laundering (DEPC subsection 407 (1)) is increased to five years (hence, there will be no incompatibility in money laundering sanctions).

Receiving (DEPC section 213) will remain a distinct criminal offence punishable by up to one year (three years' if committed by a group of persons or in conspiracy, for at least a second time, or on a large scale) imprisonment.

The scope of both money laundering and receiving will remain to be of general application, including the proceeds of all criminal offences.

Concealment will be punishable if promised beforehand (aiding) or if the original offence is punishable by more than five years' imprisonment. The incompatibility with the *CJ* is decreasing, but there will still remain uncriminalised the not-promised-beforehand concealment of criminal offences punishable by up to five years' imprisonment.

The compatibility of the Estonian money laundering and receiving provisions with Directive 91/308/EEC, the Second Protocol to the PIF Convention and the *CJ* will be most practical to achieve through the modification of the definition of money laundering in the Estonian Money Laundering Prevention Act in the line of the Directive. The modification would bring about criminalisation of all activities mentioned in *CJ* article 3 without any need for changes in the text of the ECC or DEPC. In Estonia receiving (fencing) has not attracted much attention as a prerequisite and facilitator of theft and other crimes and therefore it is punishable today (and according to the DEPC as well) by relatively low sanctions, but the increase of sanctions for typical receiving will most probably face no major opposition. The main opposition to the change will most probably be against introducing high potential punishments (up to five years' imprisonment even in unaggravated cases) for using the proceeds of crime (*e.g.* a 18-year-old daughter living in her father's apartment while the utilities once were paid by her father from the proceeds of a petty theft and the daughter knows it).

5. Conspiracy

5.1. Present legal framework

Section 196¹ of the ECC criminalises the general offence of conspiracy. Membership in a criminal organisation, *i.e.* a permanent organisation consisting of three or more persons who share a distribution of tasks and whose aim is or whose activities are directed at the execution of criminal offences in the first or second degree (ECC section 196¹), is punishable by three to eight years' imprisonment. Forming an organisation specified above, recruiting of members thereto or leading such organisation or a part thereof is punishable by five to ten years' imprisonment. A member of a criminal organisation who did not participate in the preparation, attempt or execution of any of the criminal offences committed by such organisation shall be released from punishment if he or she voluntarily gives notice of his or her membership in such organisation.

Conspiracy embraces only criminal offences in the first and second degree, meaning that **only crimes punishable by imprisonment** are considered. Conspiracy is a crime notwithstanding whose interests the crimes intended to commit or committed are detrimental to, hence the offences detrimental to the Community financial interests are embraced as well.

Conspiracy is distinguished from participation in an offence by its permanent nature. If a criminal offence is committed in conspiracy, the perpetrators are punished both for committing the criminal offence and for conspiracy.

Section 196¹ of the ECC is in full compliance with the Joint Action of 21 December 1998 adopted by the Council on the basis of article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (JAonOC).

According to article 1 of the JAonOC an organisation of **more than two persons** may be a criminal organisation. ECC section 196¹ uses a different wording (**three or more persons**), but the meaning is exactly the same. JAonOC uses the expression **structured association** — ECC section 196¹ uses a different expression **a distribution of tasks**, but the meaning of the expressions is not excessively different. JAonOC uses the expression **established over a period of time** — ECC section 196¹ uses a different expression **permanent**, but the meaning of the expressions is not excessively different. According to the JAonOC offences committed by the criminal organisation should be punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty — wording of ECC section 196¹ is even broader including all offences punishable by imprisonment.

The wording of section 196¹ is quite similar to the wording of article 4 of the *CJ*. Both require membership of three or more persons. *CJ* uses the term **stable**, section 196¹ has been translated using the term **permanent**, but the Estonian term “*püsiv*” has a very close meaning to stable. The other attribute used in *CJ* is **operational**, meaning most probably that the organisation has to be able to function in the intended manner. Section 196¹ of the ECC does not require the organisation to be operational. Even if the permanent/stable organisation is not likely to function in the intended manner, the organisation may be considered to be a conspiracy. Section 196¹ requires that there should be **a distribution of tasks** inside the organisation. Article 4 of the *CJ* does not explicitly require a distribution of tasks, but it may be implied from the expression operational, it is impossible to have an operational organisation without any distribution of tasks. The wording of the purpose of the organisation is quite similar as well:

- *CJ* — **carrying out several offences**;
- section 196¹ — **execution of criminal offences** (in plural).

All the offences listed in *CJ* article 4 qualify for ECC section 196¹ as all the *CJ* offences are punishable by imprisonment.

5.2. The draft Estonian Penal Code

The DEPC criminalises conspiracy as well — sections 265, 266. But as in the DEPC conspiracy is designed to be an extremely serious crime punishable by up to 12 years' imprisonment (organisers up to 15 years), the offences considered have to be serious criminal offences punishable by **more than 5 years** imprisonment. As the JAonOC obliges to criminalise organisations acting with a view to committing criminal offences punishable by deprivation of liberty or a detention order of a maximum of at least **four years**, DEPC sections 265 and 266 are not criminalising all the organisa-

tions referred to in the JAonOC. As organised crime is of utmost public concern in Estonia and the draft in its current version is actually decriminalising various crime-oriented organisations, the needed change in the draft (to comply with the JAonOC) would face no major opposition. After the changes DEPC would comply fully with *CJ* as well.

6. Corruption

6.1. Present legal framework

In the ECC there are four distinct offences corresponding to passive corruption:

- (1) ECC section 164. An official who, personally or through an intermediary, receives property, proprietary rights or other proprietary benefits as a bribe for performing or refraining from performing an act in the interests of the person who gives the bribe, and the official is required to perform or can perform such act using his or her official position, shall be punished by up to four years' imprisonment and deprivation of the right of employment in a particular position or operation in a particular area of activity, in aggravated cases by up to seven years' imprisonment.^{*1}
- (2) ECC section 164². An act of corruption is the making of undue or unlawful decisions or performance of such acts, or failure to make reasoned and lawful decisions or perform such acts by an official through the use of his or her official position for receiving income derived from corrupt practices or other self-serving purposes and is punishable by a fine or deprivation of the right of employment in a particular position or operation in a particular area of activity, in aggravated cases by up to six years' imprisonment.^{*2}
- (3) ECC section 166³. The acceptance of a more than adequate remuneration determined by an Act or other legislation for the provision of services or making of decisions by an official, or acceptance of remuneration for services without charge is punishable by up to two years' imprisonment together with deprivation of the right of employment in the particular office or operation in the particular area of activity if (1) significant proprietary damage or other serious consequence to the rights or interests of a person, the state or a local government protected by law has been caused thereby, or if (2) administrative punishment has been imposed on the offender for the same act.^{*3}
- (4) ECC section 161. Intentional misuse by an official of his or her official position, if it significantly violates the rights or interests of a person, enterprise, agency or organisation, which are protected by law, or national interests, is punishable by a fine or up to three years' imprisonment.^{*4}

There are two offences corresponding to active corruption:

- (1) ECC section 165. Giving a bribe is punishable by up to four years' imprisonment, in aggravated cases by up to seven years' imprisonment.

¹ This definition includes both, acts in the performance of the public servant's function in a manner which contravenes his or her official duties and acts where the person has acted in accordance with his or her duties. Unsuccessful solicitation is only an attempt. This definition does not include acts of public servants in return for non-proprietary benefits.

² This definition was designed for offences where there is no active bribery. But as the definition does not explicitly state that the self-serving purposes may not be achieved via acts of a person who is interested in the undue or unlawful decisions or performance of acts, it may be considered that this definition may be interpreted to include all acts of passive bribery that are not covered by ECC section 164 (*i.e.* the cases in which the gained benefits were of non-proprietary character). But this definition includes only undue and unlawful acts. Hence, accepting illegal non-proprietary benefits for due and lawful acts is not covered by this definition.

³ This definition was designed for offences where there is no active bribery, the remuneration is offered in good faith, but as the definition does not explicitly state that it includes only remuneration offered in good faith, it may be possible to interpret the section as criminalising also passive bribery not criminalised by ECC sections 164 and 164². The problem is whether it is possible to interpret remuneration to include non-proprietary benefits. There are no court cases on the point and most probably the courts would not accept the interpretation.

⁴ This definition was designed also for cases not involving active bribery. But as the definition does not explicitly state that it includes only misuse of office that does not involve active bribery, it may be possible to interpret the section as also criminalising such passive bribery not criminalised by ECC sections 164 and 164². The problem is that only significant violations of interests trigger ECC section 161 mechanisms. There is no difference whether the advantages are solicited, offered or accepted before the public servant acts in his or her public capacity or the public servant acts first and receives benefits thereafter. But it has to be proven that there is a link between the act and the benefit. If the public servant had no knowledge that he or she will receive a benefit afterwards, it may be considered to be passive bribery only if it can be proven that the benefit was offered to achieve future favourable acts by the public servant.

- (2) ECC section 165¹. Giving a bribe to an official of a foreign state or an international organisation is punishable by up to four years' imprisonment, in aggravated cases by up to seven years' imprisonment.

As both these sections depend on the definition of bribe given in ECC section 164, only proprietary benefits trigger the mechanisms of ECC sections 165 and 165¹.

The provisions criminalising active bribery make no difference as to whether the public servant involved is a national or a foreign or a public servant of an international organisation, only the numbers of respective sections are different. The wording of ECC section 165¹ does not mention officials of supranational organisations (like EC), but most probably the term international organisation will be interpreted to include transitional organisations as well.

It is not entirely clear whether passive corruption by a foreign official is punishable according to ECC section 164. The English translation of ECC section 160 defines an official as a person who has an official position in an agency, enterprise or organisation based on any form of ownership and to whom administrative, supervisory, managerial, operational or organisational functions, or functions relating to the organisation of movement of tangible assets, or functions of a representative of state authority have been assigned by the state or the owner. In the Estonian language definitive articles are not used. Therefore the definitive article before the word state is not from the Estonian original text, but from the interpretation of the translator. But, as the Legislator found necessary to establish a distinct active bribery section for criminalising giving bribes to foreign officials, the most likely interpretation will be that the foreign official accepting a bribe in Estonia cannot be punished according to ECC section 164. If the Estonian courts accept the interpretation, the Estonian law on bribery will be in conflict with the Criminal Law Convention on Corruption (1999) articles 5 and 9 to 12, that requires criminalisation of active and passive corruption involving a public official of any other State or official or other contracted employee of any international or supranational organisation, *etc.*, and does not comply with the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union articles 3 and 4 that require criminalisation of passive bribery of officials of European Communities and officials of the Member States. The sanctions for non-aggravated passive and active corruption are lower in the ECC than in the *CJ*.

6.2. The draft Estonian Penal Code

The draft Estonian Penal Code (DEPC) criminalises both passive (sections 303 and 304) and active corruption (sections 307 to 310) and makes no difference of what kind of benefits are accepted/offered (all non-proprietary benefits (advantages) will trigger sections 303 to 304 and 307 to 310 mechanisms as well as proprietary ones).

The DEPC makes differences between cases in which the advantages are accepted/offered for an action/omission in the performance of the public servant's function in a manner which contravenes his or her official duties (section 304 — passive corruption and sections 308 and 310 — active corruption) and acts where the person has acted in accordance with his or her duties (section 303 — passive corruption and sections 307 and 309 — active corruption).

The DEPC explicitly criminalises *a posteriori* corruption. It is not required that the official involved should be aware about the future advantage at the time he or she acted in his or her public capacity, if he or she understands that the advantage accepted/offered *a posteriori* was for the earlier action/omission in his or her public capacity it will suffice.

As the DEPC (25 October 2000) made the same distinction between giving bribes to Estonian officials and foreign/international officials.⁵ The new version of the Estonian Penal Code (adopted on 6 June 2001; not yet in force) does not include distinct offences of bribing foreign/international officials. The definition of official (section 288 / former section 298) was not amended. Therefore, it is not clear whether the sections criminalising bribing foreign officials were removed to imply that corruption (active and passive) involving foreign officials will be punishable via the same sections as corruption involving Estonian public officials and officials of private legal persons or to decriminalise bribing foreign officials. The second interpretation is not likely in the current political

⁵ The DEPC does not explicitly criminalise giving a bribe to an official of a supranational organisation, but the term "official of an international organisation" will be interpreted to include supranational organisations. There will be no opposition to amending the DEPC to explicitly include officials of supranational organisations as well.

situation, but it is closer to the text of the new Penal Code. If the second interpretation prevails, the DEPC will not comply with the Criminal Law Convention on Corruption (1999), the EU Convention on Corruption involving EC Officials (1997) and the *CJ*. An amendment criminalising passive corruption by foreign, international and supranational officials will most probably face no opposition.

The sanctions for corruption are increased in the DEPC — non-aggravated corruption may be punished by up to five years' imprisonment and aggravated corruption (*e.g.* in conspiracy or on a large scale) by two to ten years' imprisonment.

7. Misappropriation of funds

7.1. Present legal framework

According to the Estonian Criminal Code (ECC) there are two distinct criminal offences corresponding to misappropriation of funds:

- (1) wrongful appropriation through taking possession or wasting or abuse of office (ECC section 141¹), punishable by a fine or detention or up to four years' imprisonment, in aggravated cases by up to eight years' imprisonment;
- (2) intentional misuse by an official of his or her official position, if it significantly violates the rights or interests of a person, enterprise, agency or organisation, which are protected by law, or national interests (ECC section 161), punishable by a fine or up to three years' imprisonment.

In the cases of misappropriation, ECC section 141¹ is applied if an offender (or some other person) has wrongfully obtained any goods. Section 161 of the ECC is applied if an offender (or some other person) has wrongfully profited from a settlement of a fiscal dept.

The same provisions apply in the cases in which the Community funds are involved. The only obstacle being that if the official involved is a foreign, international or supranational official, he or she can be punished for wrongful appropriation through taking possession or wasting the property trusted to the person (some acts described in ECC section 141¹), but not for wrongful appropriation through abuse (the other acts described in ECC section 141¹) of office or abuse of office (ECC section 161) because as the general definition of an official (ECC section 160) most probably does not include foreign, international and supranational officials (see discussion in the paragraph on corruption, 1.2.5.1), these categories of officials cannot be prosecuted for abuse of office.

The sanctions provided for abuse of office (ECC section 161) and non-aggravated misappropriation (ECC subsection 141¹ (1)) are lower than in the *CJ*.

7.2. The draft Estonian Penal Code

The draft Estonian Penal Code does not change the situation much. Wrongful appropriation by an official is punishable by a fine, detention or up to three years' imprisonment (DEPC subsection 212 (2) 3)), but there is no extra subsection for aggravated wrongful appropriation by an official. Therefore the DEPC sanctions are lower than the ECC sanctions especially in the cases involving groups, large amounts of assets or conspiracy.

The abuse of office charge is applicable for misappropriation cases in which the offender (or any other person) does not gain any property, but wrongfully profits from settlement of a fiscal dept (DEPC section 299). The abuse of office is punishable by a fine or detention or up to five years' imprisonment. As there is no aggravated abuse of office charge in the DEPC, the DEPC is having lower potential punishments than the *CJ*.

The definition of an official is in the DEPC the same as in the ECC, therefore the DEPC faces the same insurmountable obstacles in criminalising foreign, international and supranational officials as the ECC is facing today.

8. Abuse of office

8.1. Present legal framework

In the Estonian legal system any abuse of power on the part of a public servant which affects funds under his or her management is criminalised as abuse of office (ECC section 161) if the perpetrator cannot be charged for some other more serious crime (accepting a bribe, wrongful appropriation, *etc.*).

The misuse of official position is defined as a criminal offence that requires:

- intentional misuse by an official of his or her official position and,
- that misuse must cause a significant violation of the rights or interests of another physical person, enterprise, agency or organisation, which are protected by law, or national interests.

If an intentional misuse of a person's official position causes significant violation of the European Community financial interests the misuse will be punished as a misuse of office (ECC section 161).

As the general definition of an official (ECC section 160) most probably does not include foreign, international and supranational officials (see discussion in the paragraph on corruption, 1.2.5.1), these categories of officials cannot be prosecuted for misuse of office under ECC section 161.

Section 161 of the ECC mostly complies with *CJ* article 7. The disagreements being that the foreign, international and supranational officials cannot be prosecuted under ECC section 161 and that ECC section 161 requires **significant** violation of rights or interests, but *CJ* article 7 will be triggered by any violation of the Communities' financial interests. Section 161 of the ECC provides for lower potential maximum punishment (up to three years' imprisonment) than the *CJ*.

8.2. The draft Estonian Penal Code

The draft Estonian Penal Code makes only minor changes in criminalising abuse of office. Section 299 of the DEPC is a little bit broader the phrase: public interest is substituted for the phrase in the ECC national interests and the resulting significant violation of rights or interests is outside of the constitutive elements if the aim of the abuse was the significant violation. The maximum potential punishment is increased to five years (three years in ECC section 161).

The definition of an official is the same as in the ECC, therefore the foreign, international and supranational officials are most probably not covered.

The potential maximum punishment for abuse of office has been increased in the DEPC as compared to the ECC (up to five years' imprisonment), but as there is no aggravated abuse of office charge in the DEPC, the *CJ* still has higher potential maximum penalties.

9. Conclusions

The Estonian penal law is for the most part compatible to the need for protection of financial interests of the European Union. The new draft Estonian Penal Code will eradicate several discrepancies existing in the current Estonian Criminal Code.

There are still some provisions that need to be amended:

- omitting to provide information to the competent authority in breach of a requirement to provide such information is neither a criminal offence under the ECC nor under the DEPC. There are no significant obstacles to amend the DEPC and include the wording of *CJ* article 1 paragraph 1 (b);
- as for the idea of criminalising the risk created (*CJ* article 1), the Estonian penal provisions are not in line with this purpose, because in cases of general fraud presenting misleading information is only an attempt. It is feasible to change the wording of DEPC section 220 to exclude the actual proprietary benefit from the constitutive elements of subsidy fraud;
- major obstacles would lie within the assimilation of gross negligence to intentional fault. For general fraud intent is required. Tax fraud may be punished even if the misleading information was provided negligently, but in this case precondition is that administrative punishment has earlier been applied for a similar offence. It is feasible to criminalise reckless and gross negligent inaccurate declarations in the area of subsidies as well.

- the definition of money laundering in the Estonian Money Laundering Prevention Act is narrower than in EC Directive No. 91/308;
- as the Joint Action on Organised Crime obliges to criminalise organisations acting with a view to committing criminal offences punishable by deprivation of liberty or a detention order of a maximum of at least **four years**, DEPC sections 265 and 266 are not criminalising all the organisations referred to in the JAonOC. As the organised crime is of utmost public concern in Estonia and the draft in its current version is actually decriminalising various crime-oriented organisations, the required change in the draft (to comply with the JAonOC) would face no major opposition.

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On the Scope of Competitiveness of Court Proceedings in the Draft Code of Criminal Procedure

Orientation towards competitiveness of court proceedings is among the most attractive elements of the reform of criminal procedure, which is presently being prepared in Estonia. In accordance with that orientation, the draft Estonian Code of Criminal Procedure (hereinafter: the Draft) provides, in section 15, for the competitiveness of judicial proceedings. In that section of the Draft, we can read that in judicial proceedings, the functions of prosecution, defence counsel and adjudication of a criminal matter will be performed by different parties. Other parts of the Draft also contain several substantial “signs” referring to the characteristics of competitive judicial proceedings. At this point, non-exhaustive reference could be made to *e.g.* cross-examination (section 289); the two-file system (section 265); the criminal defence counsel’s mandatory participation in the procedure (subsection 42 (4)); the dispatch of a copy of the criminal file to the defence counsel (section 221); the parties’ independent right to present lists of the persons whose appearance before the court they apply for (subsection 224 (2) and subsection 225 (1)); the option that court hearings can, in many respects, be “shaped” by the parties’ applications; the judge’s right, but not an obligation, to order collection of further evidence on the judge’s own initiative (subsection 298 (1)).

However, it must be admitted that in reality, the above-listed signs by themselves need not make criminal proceedings competitive. For example, a definite division of functions between different participants in proceeding is, naturally, an elementary condition for the competitiveness of court proceedings. Cross-examination is certainly characteristic of competitive judicial proceedings, although in the so-called inquisitional procedure applied in Germany, cross-examination is also permitted by law (section 239).¹ The two-file system provided in the Draft may also be of assistance to ensure competitiveness of judicial proceedings. At the same time, it must be noted that the positive effect of the two-file system will not be fully realised unless the stages of the pre-trial and court

¹ It is true, however, that according to specialist literature, cross-examination is not used in German practice (T. Kleinknecht, K. Meyer, L. Meyer-Grossner. *Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*. 43rd revised ed., Munich: Beck, 1997, section 239, paragraph No. 1; C. Rozin. *Strafverfahrensrecht. Ein Studienbuch*. 22nd ed. Munich: Beck, 1991, section 17, C). It has been stated that Anglo-American cross-examination does not fit in the structure of German criminal procedure, because this would leave the president of the court aside from presiding over the discussion of the matter (C. Roxin, section 42, D III).

proceedings are sufficiently separated from each other. The Draft provides for the principle that the judge of preliminary investigation prepares a completely separate file for court proceedings from some materials of the criminal file prepared as a result of the pre-trial investigation (section 265 of the Draft). According to the Draft, the file prepared for the court proceedings does not contain evidential information collected as a result of the pre-trial investigation. Nevertheless, the separation of the stages of the pre-trial and court proceedings will be relatively imaginary if results of the pre-trial procedure can be disclosed very easily during the court hearing.

Since the preparation of the new draft Estonian Code of Criminal Procedure is said to be based on the Italian model of criminal procedure², it must be mentioned, as an aside, that according to specialist literature, a strict separation of the stages of preliminary investigation and the main proceedings was, for the Italian legislator of the reform, the central point of the new law of criminal procedure. Moreover, practical importance is statedly attached to the requirement that the court file of the main proceedings should contain substantially less information than the prosecution's file.³ The preliminary investigation and the main proceedings have been separated with such a strict line in order to prevent the direct use of the prosecution's investigation results in making the judgement.⁴ Apparently, the creation of the new Estonian criminal procedure should also be aimed, to a considerable extent, at the requirement that the results of the pre-trial investigation, and, in particular, testimonies given in the course thereof, should not be disclosed too easily and not be used subsequently in making the judgement.

As regards the competitiveness of criminal proceedings, the text of the Draft should, *inter alia*, be read with a view to such substantial fulcra which could be characterised by the general keywords of "contradictoriness", "right of confrontation" and "equal opportunities of the parties".

Since the Draft provides for only the competitiveness of judicial proceedings, particular attention should be paid to how much and how the court hearings and the judgement can be influenced by the results of the pre-trial investigation, or, in other words, whether and to what extent the stages of the pre-trial and court proceedings are separated from each other. The less those stages are separated, the more difficult it will be to achieve judicial proceedings with an optimally balanced competitiveness based on equal opportunities of the parties.

In the case of the inquisitional model of criminal procedure, which is presently applicable in Estonia, results of the pre-trial investigation have a very strong influence on the court hearing and the judgement. This becomes particularly evident through those provisions of the applicable law that permit the disclosure of evidence collected during the pre-trial investigation to quite a large extent. In that respect, it is, in many cases, permitted to disclose testimonies given by witnesses and victims during the pre-trial proceedings (sections 246 and 247 of the Code of Criminal Procedure) and, hence, to turn such testimonies into evidence without the presence of the defence counsel, *i.e.* without examination by the defence counsel. As, in the case of the procedure presently applicable in Estonia, the accused cannot actively participate until the stage of the court proceedings, the active role of the accused in examining the evidence is, in many cases, limited to participation in the evaluation of pre-trial evidence in the court proceedings, either personally or through the defence counsel. One of the advantages of the future Estonian criminal procedure could be the fact that, in comparison with the present situation, the accused will have a much greater say also in the collection of evidence. This means that at least in the case of testimonies by an adverse witness, which is regarded as collection of evidence, the accused will be provided with the opportunity to be, at least once during the proceedings, confronted with the adverse witness, *i.e.* to examine or have examined the prosecution's witness. Such option would also be a precondition for the realisation of equal opportunities of the parties in criminal proceedings. At the same time, the opportunity of the accused to be confronted with an adverse witness could be regarded as a substantial element in establishing the truth.

The following paragraphs take a closer look at some provisions of the Draft which, besides other provisions, will have a serious influence on the actual competitiveness of judicial proceedings in the future.

² See P. Pikamäe. Itaalia kriminaalmenetluse mudel – võimalik lähtepunkt Eesti kriminaalmenetluse reformiks (Italian Model of Criminal Procedure — a Possible Model for the Reform of Criminal Procedure in Estonia). – *Juridica*, 1999, No. 2, p. 86 (in Estonian).

³ See E. Amodio. Das Modell des Anklageprozesses im neuen italienischen Strafverfahrgesetzbuch – *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1990, 102, Vol. 1, p. 189.

⁴ *Ibid.*, pp. 179–180.

1. Disclosure of pre-trial testimonies of witnesses at cross-examination

Subsection 290 (1) of the Draft provides that in order to verify the reliability of the testimonies of a witness, the court may, at the request of a participant in proceeding, order the disclosure of a testimony given by a witness in the pre-trial investigation if the testimony is in contradiction with a testimony given at a cross-examination.

Here, the principal issue lies in the question of which evidential importance will be borne by testimonies disclosed in such manner. Will those disclosed testimonies have an equal evidential importance in comparison with testimonies given in a court session?

This question arises from the clause “to verify the reliability”, which is present in subsection 290 (1) of the Draft. That clause directs attention to the objectives which may serve as grounds for the disclosure of a testimony given by a witness in the pre-trial investigation. However, there is the problem that witness’ pre-trial testimonies disclosed before the court for the purpose of verification of their reliability, because of such testimonies being in contradiction with subsequent testimonies given in a court session (cross-examination), can principally be provided with a different procedural meaning under the law.

There is an option that such testimonies disclosed in a court session could be statutorily accepted as an evidential basis for, essentially, making the judgement (as in the event of disclosure of testimonies given by witnesses in the pre-trial investigations under subsection 246 (1) 1) of the presently applicable Code of Criminal Procedure).

Another option would be to provide the disclosed testimonies with only such meaning that reference thereto would serve as grounds for contesting the truthfulness of the content of testimonies given by a witness in a court session (cross-examination) while those disclosed testimonies, together with the substantial information contained in those testimonies, could not be used as evidence in making the judgement. That second option could be rather topical particularly in the case of a procedural scheme aimed at maximum observance of the principles of separation of procedural stages and immediacy of court hearings and at preventing substantial use of pre-trial results in making the judgement.

Regrettably, the Draft does not contain any provisions with a more detailed explanation of whether and how those testimonies given in the pre-trial investigation and disclosed before the court can be used as evidence.

By the way, *e.g.* the text of the new Italian Code of Criminal Procedure contained the principle that pre-trial testimonies (explanations) used as a basis of a “reproach” about the contradictoriness of testimonies cannot be used as evidence even if they are read aloud by a party. At the same time, the Italian Code of Criminal Procedure also provided that such explanations may nevertheless be evaluated by the court in order to verify the reliability of the person under examination (article 500 (3) *c.p.p.*⁵).

Principally, in the Italian criminal procedure, those so-called reproachable testimonies were to serve not as evidence but, rather, as an element of evaluation of evidence and, thus, an aid to decide about the reliability of testimonies given by a witness in the court session. The only exception concerned explanations collected by investigation authorities during searches or at the offence scene immediately after the offence. Such explanations could have served as a basis of reproach before the court and, hence, acquired an evidential value (*ratio legis*: an increased believability of testimonies in those circumstances), and the respective investigation material would have become a part of the judge’s file (article 500 (4) *c.p.p.*).⁶

At this point, it is also important to note that by Judgement No. 255/92 of the Italian Court of Constitutional Review, the provision (article 500 III *c.p.p.*) whereunder testimonies (explanations) used as grounds for reproach cannot serve as evidence was declared unconstitutional. Allegedly, that Judgement of the Court of Constitutional Review definitively repealed the separation of procedural stages and the principle of contradiction. At the same time, it must be stressed once more that

⁵ *c.p.p.* = *Codice di procedura penale*. See *Codice di procedura penale, con leggi complementari*; *Italianische Strafprozessordnung mit Nebengesetzen*. Zweisprachige Ausgabe. Übersetzer und Herausgeber: M. W. Bauer, B. König, J. Kreuzer, R. Riz, H. Zanon. Bozen: Verlagsanstalt Athesia, 1991.

⁶ A. Honert. Der italienische Strafprozess: die Fortentwicklung einer Reform. – *Zeitschrift für die gesamte Strafrechtswissenschaft* 106 (1994), H. 2, S. 435.

separation of procedural stages was, for the Italian legislator of the reform, the central point of the new law^{*7} and article 500 *c.p.p.* was one of the key norms of the procedural reform.^{*8}

Hence, after the amendment that followed the judgement of the Italian Court of Constitutional Review, the following picture prevailed: if a witness' testimonies before the court deviated from the explanations provided during the investigation, the prosecution would be able to use this as a basis for reproach. As a result of the reproach, the investigation results would acquire a full evidential value.^{*9}

Returning to the provisions of the draft Estonian Code of Criminal Procedure, it must be admitted that according to the present wording of the Draft, testimonies given by a witness during the pre-trial investigation and disclosed in a court session can be freely used as a basis of the judgement, equivalently to testimonies given before the court. The clause "verification of reliability" does not specify the evidential importance of disclosed testimonies. Such regulation may be conducive to a situation in which a cross-examination is conducted but, if it does not develop towards a result desired by one of the parties, pre-trial testimonies can be disclosed in the event of a contradiction between testimonies, and those testimonies can be used as an evidential basis in making the judgement. That kind of regulation creates conditions which are very favourable for a substantial use of pre-trial results in judgements. This, however, means that in reality, the separation of procedural stages is, in many respects, imaginary. As the principle of separation of procedural stages is a very important criterion with respect to competitiveness of criminal proceedings, consideration could be given to establishing a regulation whereby disclosed testimonies could be evaluated by the court in order to verify the reliability of the person under examination. The judgement could be based not on the content of the disclosed testimonies but, rather, on the examinee's explanations received as a result of a "reproach about contradiction in testimonies". In addition, a disclosed record containing a witness' testimonies should be regarded not as documentary evidence but only as an aid to examination.

2. Disclosure of pre-trial testimonies of witnesses in court (except cross examinations)

2.1. Disclosure upon witness' refusal to testify

In accordance with subsection 292 (1) of the Draft, disclosure of a testimony given by a witness in the pre-trial investigation may be ordered by the court at a party's request if the witness refuses to testify before the court.

In view of that provision, I should like to ask whether the permissibility of disclosure of a witness' testimony should not be differentiated on the basis of whether such refusal is expressed by a witness who has the right of refusal to give testimony for personal reasons under section 65 of the Draft or by a witness who does not enjoy such right.

The Draft expressly permits to disclose earlier testimonies of a witness who, under section 65, has no right of refusal to testify but who nevertheless refuses to testify before the court. However, if a witness has given testimonies during the pre-trial investigation and exercises the right of refusal to testify in a court session, there will be a question, with regard to disclosure of earlier testimonies, of to what extent such person is provided with the option to use the immunity of witness, which is principally recognised in the Draft. Naturally, it may be argued that a person could have used the immunity of witness and it was that person's mistake not to use the right of refusal to testify during the pre-trial investigation. One must also agree with the reasoning that a witness testimony once given cannot be undone. At the same time, it must still be admitted that apparently, the disclosure of a witness testimony given by a person who had decided to use the right of refusal to testify before the court does not assist to the realisation of the purpose for which the immunity of witness is established. It seems that the provision of the immunity of witness by law has been motivated by the objective to protect witnesses from such forced situations in which they must tell the truth but have the fear of thereby harming persons close to them or causing harm to themselves.

⁷ *Ibid.*, p. 436.

⁸ *Ibid.*, p. 435.

⁹ *Ibid.*, p. 436.

By providing for the immunity of witness in the law, the legislator can essentially express a position whereby the ascertainment of material circumstances in criminal proceedings need not be conducted at any price and by any means. These are situations in which the witness' personal interest in not testifying against their next of kin should be provided with a certain preferential status with regard to the public interest in the ascertainment of material circumstances in criminal proceedings. In light of the above, it would be rather strange if, on the one hand, a witness is protected by means of the immunity of witness provided for in the law but, on the other hand, there are attempts to restrict this right of the witness through disclosure of his or her prior testimonies in a court session, if possible. In such attempts, too little attention is paid to the aspect of protecting the relations between witnesses and persons close to them, and the interest in the ascertainment of material circumstances is pursued in criminal proceedings at the price of possibly damaging the relations between the witness and persons close to him or her.

Here it should be noted that, for example, in Austria or Germany, the ascertainment of material circumstances in criminal proceedings does not have to occur at the price of sacrificing the immunity of a witness. Hence, in Austria, a witness may refuse to testify at any of the successive questionings. Even if the witness uses the right of refusal to testify only in the main proceedings, the minutes of the earlier questionings of that witness may not be disclosed.^{*10} Likewise, in Germany, the testimonies of a witness who was questioned prior to the main proceedings and who used the right of refusal to testify only in the main proceedings may not be disclosed (section 252 *StPO*).

It seems that the development of the future Estonian criminal procedure should follow the principle, applied in the criminal procedures of Germany and Austria, that the minutes of the prior questionings of a witness may not be disclosed if the witness exercises the right of refusal to testify as late as in the court proceedings. The development should be based on the conception that ascertainment of material circumstances in criminal proceedings should not be conducted on the account of the principle of the immunity of witness.

There is another and maybe even more important reason why the future Estonian regulation of criminal procedure should contain a clause whereunder the minutes of the earlier questionings of a witness are not disclosed and not used in making the judgement if the witness exercises the right of refusal to testify as late as in the court proceedings. Namely, in the event of disclosure of the minutes of earlier questionings of a witness, it is not possible to guarantee the accused's right to examine a witness of the prosecution or have such witness examined. It should be kept in mind that according to article 6.3 (d) of the European Convention on Human Rights, everyone charged with a criminal offence has the right to examine, or have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The judgement of the European Court of Human Rights in *Unterpertinger v. Austria* (1986) should arouse care with regard to disclosure and use of earlier testimonies if the accused or the defence were practically unable to examine the questioned person.

2.2. Disclosure upon non-appearance to court session

In accordance with subsection 292 (2) of the Draft, disclosure of a testimony given by a witness in the pre-trial investigation may be ordered by the court at a party's request if the witness has failed to appear before the court with no substantial reason therefor.

In view of the above-mentioned provision, it should first be observed that, whether the reason for non-appearance is substantial or not, the accused will be deprived of the option of being confronted with a so-called adverse witness in the event of disclosure of the pre-trial testimony of the witness. More specifically, the counsel of the accused will not be able to examine the adverse witness. Therefore it is difficult to speak about ensuring balanced equal opportunities between the prosecutor and the defence counsel in criminal proceedings.

Naturally, the regulation of the question regarding the disclosure of pre-trial testimonies of witnesses must also be considerably based on the objective of achieving efficiency in criminal proceedings, but not too much on the account of the defence opportunities. It is understood that the law should allow disclosure of pre-trial testimonies of witnesses before the court in particularly exceptional cases — for example, if a witness cannot be questioned in a court session because of his or her death or a serious long-term illness. However, there is the question of what should be understood as “a substantial reason” referred to in subsection 292 (2) of the Draft.

¹⁰ W. Platzgummer. Grundzüge des österreichischen Strafverfahrens. 2., neubearb. Aufl. Vienna, New York: Springer, 1989, S. 80.

While looking for an answer to that question from the Draft, it cannot be left unnoticed that substantial reasons for non-appearance of a summoned person are listed in subsection 170 (2) of the Draft. However, there is a further question of who is “a summoned person” for the purposes of that provision. Does this also include witnesses? A *prima facie* answer would be negative. This section 170 is included in Division III, which is entitled “Summons of Participants in Proceeding”. However, in accordance with subsection 17 (2) of the Draft, participants in proceeding include the suspect and the accused and the defence counsel, and the victim and a defendant. A witness is not, and maybe should not be, a participant in proceeding. Thus, the provisions of Division III should not concern witnesses. A discussion of how a witness is summoned according to the Draft would go beyond the subject matter of this article. Therefore, as regards the above question, it could just be mentioned that, also, in the part concerning judicial preliminary proceedings, only the procedures for summoning the prosecutor and participants in proceeding are provided (section 266). Hence, although section 170 seems, *prima facie*, to extend only to participants in proceeding, it can still be recognised that section 136, which regulates compelled attendance, contains a reference to the substantial reasons specified in section 170. However, as compelled attendance may also be applied to witnesses in accordance with a provision in subsection 136 (1), it can be deduced that substantial reasons provided in subsection 170 (2) also extend to witnesses.

It thus seems that as regards a witness’ non-appearance before the court with a substantial reason, it is important, in a certain sense, to pay attention to the fact that substantial reasons for non-appearance of a summoned person are, according to subsection 170 (2) of the Draft, as follows:

- (1) absence which is not related to absconding of the criminal proceedings;
- (2) belated receipt of the summons;
- (3) illness of the person or serious illness of a person close to him or her;
- (4) other circumstances considered as substantial by a preliminary investigator, the prosecution or the court.

At the same time it must be admitted that the above-listed reasons for non-appearance could be substantial in the sense that in the event of non-appearance for those reasons, compelling means should not be applied to the summoned person, or the summoned person should not be punished for non-appearance. However, this list of substantial reasons should not be a basis for deciding about the permissibility of disclosing pre-trial testimonies.

The first two reasons, *i.e.* “absence not related to absconding of the criminal proceedings” and “belated receipt of the summons”, are particularly questionable. In practice, those reasons can occur very often but they can also be “induced” relatively easily for one purpose or another. Thus, the permissibility of disclosure on those conditions can, in practice, lead to a situation in which the disclosure of pre-trial testimonies is not an exception but, rather, a rule. In that event, little is left of the competitiveness of judicial proceedings in reality. On the basis of the objective that judicial proceedings should provide competition based on balanced equal opportunities of the parties, also “in essence”, the disclosure of witness’ pre-trial testimonies should only be allowed in the event of death or long-term illness of the witness or in the case of another unremovable impediment. Additionally, disclosure of pre-trial testimonies could be permissible if the defence counsel and the accused agree thereto. In other cases, however, the accused should be provided with the option to be confronted to adverse witnesses, allowing the defence counsel to examine the witness.

The law should provide, as one basis for disclosure of witness’ testimonies, for the court’s option to disclose, at a party’s request, testimonies given by a witness in the pre-trial proceedings if the witness fails to appear before the court and if the materiality of the witness’ testimonies in the criminal proceedings does not correspond to the time used to allow the examination of the witness before the court or to the difficulties related to getting the witness before the court.

This would mean that a mere fact of absence would be insufficient to serve as grounds for disclosure of witness’ testimonies, provided that the absence is not related to absconding from the criminal proceedings. Moreover, disclosure should then not be based merely on the fact that the witness’ non-appearance before the court was caused by a belated receipt of the summons or only the fact that the witness fell ill or a person close to the witness was seriously ill. Those reasons for a witness’ non-appearance should be of weight as grounds for disclosing the witness’ testimonies only on the condition that the judge has regarded the importance of those testimonies as not corresponding to the time used to allow the examination of the witness before the court or to the difficulties related to getting the witness before the court.

In that respect, the disclosure of the pre-trial testimonies of the prosecution’s main witness for the reason of the witness’ non-appearance should be avoided to the maximum possible extent. The concept “prosecution’s main witness” means, for that purpose, a witness whose testimonies can be a major basis for a convicting judgement. Hence, if the question of disclosing the testimony of a main

witness arises in connection with the main witness' non-appearance to a court session with a substantial reason, the disclosure of the testimonies could nevertheless be considered only in the event of an unremovable impediment (death of the witness, long-term illness of the witness, *etc.*). In other cases, the defence counsel should have the opportunity of examining the prosecution's main witness even if the court session must be postponed for that purpose.

Naturally, as a counter-argument to the above position, reference may be made to the danger that on those conditions, court hearings may become burdensomely long, and the efficiency of court proceedings can be prejudiced. Indeed, that danger exists and cannot be completely precluded.

2.3. Disclosure if whereabouts of witness could not be determined

Subsection 292 (3) of the Draft provides that disclosure of a testimony given by a witness in the pre-trial investigation may be ordered by the court at a party's request if the whereabouts of the witness could not be determined.

With that regard, it can be noted with satisfaction that this provision is principally different from the formulation in subsection 246 (1) 3) of the presently applicable Code of Criminal Procedure, whereunder testimonies given by a witness in the pre-trial investigation may be disclosed if the whereabouts of the witness is unknown. These are two conditions of disclosure, quite different in their undertones. The condition of the Draft that "if the whereabouts of the witness could not be determined" apparently presumes certain active efforts to determine the whereabouts of the witness. However, the condition "if the whereabouts of the witness is unknown" in the presently applicable Code of Criminal Procedure can be understood so that not knowing the whereabouts of the witness will be sufficient, irrespective of whether anything is done to determine the witness' whereabouts. Thus, the application of the basis of the disclosure provided for in subsection 292 3) of the Draft precludes that the efforts made to determine the whereabouts of the witness be established.

Hence it can be said that this basis for disclosure has been formulated well in the Draft.

3. Participation of defence counsel in court proceedings

We can talk about the actual competitiveness of judicial proceedings only if the defence counsel's participation in the court proceedings is mandatory, among other requirements. The defence counsel's mandatory participation in the court proceedings is a very important precondition for providing the accused with opportunities equal to those of the prosecutor.

3.1. Commencement of defence counsel's mandatory participation

In accordance with subsection 42 (4) of the Draft, the defence counsel's participation in the court proceedings is mandatory.

However, implementation of this provision may involve the question of when the defence counsel's mandatory participation specifically commences. On the one hand, the wording of subsection 42 (4) could give rise to a deduction that the defence counsel's mandatory participation commences with the court proceedings, but on the other hand, according to the purpose of some other provisions of the Draft, the obligation of the defence counsel's participation should begin considerably earlier. Thus, the obligation of the defence counsel's participation could commence from the moment when the prosecution declares the conclusion of the pre-trial proceedings (subsection 220 (1) and (3) of

the Draft)¹ — more specifically, from the moment when a copy of the criminal file must be sent to the defence counsel (subsection 220 (3)). The defence counsel's mandatory participation should, nevertheless, begin no later than at the moment when the prosecution is ready to provide the defence counsel with the statement of charges together with a list of persons whose appearance before the court is requested by the prosecution. The need for the defence counsel's mandatory participation from that moment arises from section 225 of the Draft, whereunder the defence counsel presents, within three days after receiving a copy of charges, the court with a list of those persons whose appearance before the court is requested by the defence counsel. However, the defence counsel can be presented with a copy of charges only after a defence counsel has been appointed, and it is only thereafter when the defence counsel can present the court and the prosecution with a list of persons whose appearance before the court is requested by the defence counsel.

In order to avoid ambiguity, the Draft could be somewhat more specific about when the defence counsel's mandatory participation in criminal proceedings begins in connection with the counsel's mandatory participation in judicial proceedings.

3.2. Continuation of court hearing upon non-appearance of defence counsel

Subsection 271 (2) of the Draft provides that if the defence counsel does not appear to a court session and the accused does not apply for the continuation of the session, the session will be postponed.

In view of that provision, it should be asked what happens if the accused applies for the continuation of the session. In that event, the court session must go on without the defence counsel. That provision is apparently a derogation from the requirement of the defence counsel's mandatory participation, and the possibility of such derogation can also be deduced from that part of subsection 42 (4) which reads: ".../ unless otherwise provided in this Code."

Naturally, at this point it may be further asked how the competitiveness of a court proceeding can be ensured without the participation of the defence counsel. Will a cross-examination be conducted and how will that be done? However, it is more important than those and several other questions to direct attention to the fact that if the defence counsel does not appear before a court session and the accused, nevertheless, applies for the continuation of the session, this may essentially constitute a so-called compelled waiver of criminal defence counsel. In that event, such waiver may, with great probability, be caused only by the reason that the defence counsel has not appeared before the court session while the accused wishes, for some reason, that the proceedings end in a judgement as soon as possible. In reality, this essentially means that the accused is not provided with the opportunity to use the assistance of a defence counsel.

The structure of the inquisitional model of proceedings allows to compensate, to some extent, for the absence of the defence counsel by means of the court's obligation to make active efforts to determine the truth, although even in the inquisitional procedure, the judge's assistance to the accused's defence counsel can prove to be questionable in many cases.² Nonetheless, the judge's assistance in compensation for deficiencies of the accused's defence can be even more questionable in competitive court proceedings, where the judge does not have the obligation to completely, and in all respects, ascertain all material circumstances. This may result in a situation in which the court proceedings are no longer balanced, because, as a rule, an accused is not able to stand against a prosecutor on equal terms. Although, in this respect, the accused's decision that the session be continued without the defence counsel's participation is formally voluntary, we should not forget about the fact that this may essentially mean a compelled waiver of defence counsel while the accused, lacking legal knowledge, may not be able to evaluate the possible actual consequences of his or her decision.

¹ As an aside, it must be admitted that according to the formulation in section 220 of the Draft, the prosecution, after receiving the criminal file, declares the conclusion of the pre-trial proceedings, but the following provisions (sections 222, 223, 224, 225) indicate that the conclusion of the pre-trial proceedings will still continue thereafter. For example, the resolution of parties' applications and the preparation of the statement of charges are conducted within the pre-trial procedure — more specifically, at the conclusion of the pre-trial proceedings. This gives rise to the question of when the pre-trial proceedings are, after all, concluded — either by the declaration of the conclusion thereof or at the actual end of such a conclusion process.

² On this issue, see also M. Sillaots. *Kaitsja võimalikust rollist ja seisundist Eesti tulevases kriminaalmenetluses* (On the Possible Role and Status of Defence Counsel in the future Estonian Criminal Procedure). – *Juridica*, 2000, No. 2, p. 84 (in Estonian).

In that context, decisive importance should be attributed to public interest in the balancedness of court proceedings, and therefore, court sessions should be postponed if the defence counsel fails to appear before the court, regardless of the accused's application for continuation of the court session.

Conclusions

In order to ensure essential competitiveness based on equal opportunities of the parties in court proceedings, the Draft should provide more restrictions with regard to the disclosure of testimonies given by a witness in the pre-trial investigation and to the use of such testimonies in making the judgement. The provisions of the Draft should more extensively cover the accused's right to examine, or have examined, witnesses of the prosecution.

The defence counsel's mandatory participation in court proceedings is a substantial precondition for the competitiveness of the court proceedings.

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Constitution of the Republic of Estonia in the Light of Accession to the European Union

1. Importance of the problem and the need for discussion

Next year the Constitution of the newly independent Estonia will become 10 years old. Noteworthy is the fact that the Constitution has not been amended at all during the first decade. This refers either to the successful quality and stability of Estonia's most important in-force legal document or to an over-sophisticated procedure of amendment of the Constitution and inability to achieve the political consensus for adoption of necessary amendments.

Estonia has substantially developed during the ten-year period. The government's priorities in foreign policy have also become more specific, and Estonia's joining the European Union has become one of them. The latter climaxed in 1995 in the presentation of application for accession to the European Union and the entering into force of the Association Agreement in 1998.^{*2} By the present moment more than half of the chapters of accession negotiations have been temporarily closed.^{*3} An inevitable question arises of how a Constitution passed ten years ago can hold out against such fast development in foreign policy, which is, though, also closely intertwined with domestic policy, and what would the best approach be in order to achieve a balance between political objectives, the will of people and juridically correct legitimation that would satisfy both politicians and lawyers and what is most important — also the Estonian people.

¹ This article expresses purely personal positions.

² On 28 November 1995, the Prime Minister of the Republic of Estonia presented an official application to the Commission of the European Union on Estonia's wish to join the European Union. The Association Agreement between European Communities and their member states and the Republic of Estonia or the Europe Agreement was signed on 12 June 1995 and it entered into force on 1 February 1998 (Riigi Teataja (The State Gazette) II 1995, 22–27, 120).

³ For an overview of Estonia's accession negotiations with the European Union see the homepage of the Ministry of Foreign Affairs of Estonia. Available at: [http://www.mfa.ee/euro/english/_Accession negotiations](http://www.mfa.ee/euro/english/_Accession%20negotiations) (2.04.2001).

Lack of knowledge may sometimes lead to development of false opinions, the results of which will be difficult to cure later. Thus we have reached a deplorable situation where there should be enough general information for everybody on Estonia's pursuit into the European Union and the nature of the European Union, but important legal and constitutional issues have mainly been left to experts of the field or those enthusiastic eurosceptics looking for cons against joining the European Union.^{*4} Politicians have the utmost caution in their attitudes towards the topic. Nevertheless the Constitution touches us all, *i.e.* the whole of the Estonian people into whom the supreme state power has been vested pursuant to the Constitution.^{*5} It is the people who will most probably make the final decision upon joining the European Union and amendment of the most important chapters of the Constitution, if necessary.

When the Committee of Expert Legal Review of the Constitution of the Republic of Estonia^{*6}, formed during the reign of the preceding government, after the presentation of its report in 1998 invited lawyers and politicians to discussion, the reaction to it remained modest.^{*7} Concerning seminars on the Constitution of the Republic of Estonia and the European Union, only two of them are worth mentioning: the *Riigikogu*'s (Estonian parliament) event on amendment of the Constitution in a more general sense that took place in Haapsalu in December 1999, and the round table on EU law organised a year later by the Ministry of Justice "On the need for amendment of the Constitution of the Republic of Estonia in relation with Estonia's accession to the European Union" with the participation of German and French experts, which was followed by a broader discussion in the National Library with the assistance of the European Union Information Secretariat.

It may be concluded from the above that the relation between the Constitution of the Republic of Estonia and the European Union and issues related to possible amendment of the Constitution are important problems that need comprehensive juridical as well as political analysis and a broader discussion relying on it.^{*8}

The author of this article is going to clarify the present situation for the purposes of better orientation in sophisticated constitutional issues that accompany joining the European Union, and give one possible vision of legally appropriate constructions in respect of these problems, presenting therewith exclusively personal opinions. First it will be considered whether the ongoing process of integration of Estonia into the European Union, *i.e.* the process preceding joining the European Union, is legitimate. Then it will be discussed how it is possible to interpret the valid Constitution dynamically, following the principle of equability of the Constitution at the same time. Thereafter it will be analysed whether the 1992 Constitution of the Republic of Estonia enables Estonia to become a member of the European Union and explained in what way the Constitution should be amended, if it turns out to be necessary, and how to carry it through. At the same time experience of the member states of the EU will be presented for comparison, although intentions of other candidate states on the issue will not be given closer analysis due to limited space and relatively incomplete data available. In the end the joining of Estonia with the European Union will be observed in a broader context than amendment of the Constitution, considering the possible referendum preceding the accession to the European Union.

⁴ See *e.g.* Euroopa Liit, skeptiku vaatenurk (The European Union: the Sceptic's Viewpoint). K. Kulbok (Ed.). Tallinn: Ühendus Eurodesintegratsioon, 2001, p. 15 (in Estonian).

⁵ The Republic of Estonia Constitution, section 1.

⁶ In May 1996, under the leadership of the former Minister of Justice Paul Varul, an Expert Legal Review Committee of the Constitution of the Republic of Estonia was formed, the task of which was to prepare for amendment of the Constitution. The Committee consisted of nine members: in addition to the Minister of Justice, justices of the Supreme Court, the Legal Chancellor, solicitors, legal counsellors and professors. The Committee was assisted by workgroups. The account of the Expert Review Committee is available in the homepage of the Ministry of Justice. Available at: http://www.just.ee/_Õigusloome (2.04.2001).

⁷ The only article published in *Juridica* as a response: A. Albi. Euroliit ja kaasaegne suveräänsus. Üks võimalikke vastukajad põhiseaduse ekspertiisikomisjoni üleskutsele aruteluks (The European Union and contemporary sovereignty. One possible response to the invitation to discussion of the Expert Review Committee of the Constitution). – *Juridica*, 2000, No. 3, pp. 160–171 (in Estonian).

⁸ The author is hereby glad to point out that unlike politicians, the former Chairman of the Supreme Court, the present Estonian Justice at the European Court of Human Rights R. Maruste has expressed a specific position while emphasising in his presentation at the international conference "Protection of human rights in Estonia and in Europe" that took place on 6 April 2001 in the National Library the need for discussion on the issue of amendment of the Constitution and supporting the proposals for amendment made by the Expert Legal Review Committee of the Constitution.

2. Legitimacy of the process of integration of Estonia into the European Union (i.e. the process preceding accession to the European Union)

The issue of possible amendment of the Constitution has often been associated with the process preceding Estonia's joining the European Union and the legitimacy of the latter has been called into question.^{*9} Here we have to proceed from the following:

- political expression will by the government of the Republic of Estonia and the Association or the Europe Agreement ratified by the *Riigikogu* as representatives of the people,
- the Europe Agreement as the legal basis of relations between the European Union and Estonia,
- legal validity of Estonia's objective to join the European Union,
- compliance of the Europe Agreement with the Constitution,
- other legal acts,
- as well as legally not binding documents that constitute basis for Estonia's preparation for accession to the European Union.

The Europe Agreement^{*10} ratified by the *Riigikogu* created a new, substantially broader framework for relations between Estonia and the European Union as compared to the previous Agreement on Free Trade. Association is the strongest bond that exists between the European Union and third states. The Europe Agreement is a legally binding document that regulates Estonia's relations with the European Union until Estonia becomes a member state of the European Union.

It follows from the Preamble of the Europe Agreement that Estonia's final objective is to become a member of the European Union, and association helps Estonia to achieve this end according to the opinions held by the parties. The former Legal Chancellor Eerik-Juhan Truuväli has said that the position expressed in the Preamble of the Europe Agreement is a political expression of will of the Government of the Republic of Estonia who signed the Agreement and of the *Riigikogu* who ratified it, which has no legal consequences for the achieving of such end. However, the importance of preambles should not be forgotten at interpretation of agreements.^{*11}

Beside the Preamble, article 1 of the legally binding Europe Agreement provides:

"1. An association is hereby established between the Community and its Member States, of the one part, and Estonia, of the other part.

2. The objectives of this association are:

/.../ to provide an appropriate framework for the gradual integration of Estonia into the European Union. Estonia shall work towards fulfilling the necessary requirements in this respect."

The Association Council founded on the grounds of the Europe Agreement is the highest political body according to the Agreement, which convenes on the level of ministers and is authorised to deal with whatever issues considered necessary by the parties to raise.^{*12} In accordance with article 111 of the Europe Agreement the Association Council has the power to take decisions for the purpose of attaining the objectives of the Association Agreement. The decisions taken are binding on the Europe Agreement parties which shall take the measures necessary to implement the decisions taken. The Association Council may also make appropriate recommendations.

But is the Europe Agreement itself in harmony with the Constitution? From the pro forma legal aspect the answer to this question may only be affirmative. The first paragraph of section 123 of the Estonian Constitution prohibits entering into international treaties which are in conflict with the Constitution. Accordingly, the concluded and entered into force Europe Agreement does comply with the Constitution. No one raised the question of possible conflict between the Europe Agreement and the Estonian Constitution before the coming into force of the former.

⁹ This applies both to the opinion of the Expert Legal Review Committee of the Constitution and A. Albi (Note 6), pp. 169–170.

¹⁰ See Note 1.

¹¹ See for more: J. Laffranque. Eesti assotsiatsioonileping Euroopa Liiduga. Juriidilised, eelkõige konstitutsioonilised aspektid (Estonian Association Agreement with the European Union. The legal, primarily constitutional aspects). – *Juridica*, 2000, No. 4, pp. 224–237 (in Estonian).

¹² Articles 3 and 109 of the Europe Agreement.

In accordance with clause 5 of subsection 4 (1) of the Constitutional Review Proceedings Act^{*13}, the Supreme Court may perform review only on foreign treaties that have not entered into force. The proposal may be made according to subsection 6 (1) of the same Act by the President of the Republic (does not proclaim the ratification act of the foreign treaty) and the Legal Chancellor (for checking the compliance of foreign treaties with the Constitution — as towards a signed foreign treaty or bill of ratification of a treaty). No review can be performed over an already entered into force act of ratification of a foreign treaty, because this would be in conflict with the first and second paragraphs of section 123 of the Constitution.^{*14}

Thus, as no constitutional institution doubted in compliance of the Europe Agreement with the Constitution before the entering into force of the foreign treaty, it follows that the Europe Agreement complies with the Constitution, and no constitutional review may be performed over the already entered into force foreign treaty. At entering into force of the Europe Agreement, the Agreement became a part of internal law, which is superior in case of its conflict with Estonian laws or other legal acts according to the second paragraph of section 123 of the Constitution.

According to article 27 of the Vienna Convention on the Law of Treaties^{*15}, which Estonia joined in 1991, a party of an international treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty. In accordance with article 46 of the same Convention, a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

However, in addition to the Europe Agreement, some other legal acts may be pointed out that serve as basis for preparation of Estonia's accession to the European Union, and from which the legal bases for responsibilities related to European integration of the three state powers and of institutions and the obligation to take into account the European law arise.

In respect of legislative power, this is best reflected in the adoption of the State Budget Act, pursuant to which the budget shall provide the financial means foreseen for European integration on the level of law.^{*16} The *Riigikogu*, in its second composition in a row, however, has decided on the grounds of the *Riigikogu* Rules of Procedure Act to form a European Affairs Committee as a special committee of the *Riigikogu*, whose tasks include assisting at attaining of the objectives of association between Estonia and the European Union on a parliamentary level, co-operation with the Government of the Republic on a regularly basis for the attaining of the association purposes, holding of contacts with the European Parliament and representing the *Riigikogu* as a delegation to the Parliamentary Committee created in accordance with article 115 of the Europe Agreement, holding of contacts with other institutions of the European Union, and giving recommendations to members of the Government for their work in the institutions of the European Union and the Association Council.^{*17}

Obligations of the executive power are directly reflected in the Government of the Republic Act^{*18}, pursuant to section 49 of which a minister, as head of a corresponding ministry, shall monitor the purposeful use of funds, aid and grants allocated by the European Union. Pursuant to section 59 of the same Act, the area of government of the Ministry of Justice shall include, among other things, the ensurance of the harmonisation of Estonian legislation to European Community law, and pursuant to section 84, a county governor shall ensure the purposeful use of funds, aid and grants allocated by the European Union.

General organisation of European integration has been fixed by the Government of the Republic Order No. 79-k of 30 January 1996 "Application of primary measures necessary for integration of the Republic of Estonia into the European Union".^{*19}

¹³ Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Proceedings Act) – Riigi Teataja (The State Gazette) I 1993, 25, 435 (in Estonian).

¹⁴ On the possible actual situation where the ratified by the *Riigikogu* and entered into force international treaty and the Estonian Constitution are in conflict, and possible solution of such a situation, see J. Põld. Põhiseaduslikkuse järelevalve menetluse algatamine halduskohtus (Initiation of Procedure of Constitutional Review by an Administrative Court). – Kohtuniku käsiraamat. Tartu: Sihtasutus Eesti Õiguskeskus, 1998, p. 11 (in Estonian).

¹⁵ Riigi Teataja (The State Gazette) II 1993, 13–14, 16.

¹⁶ Seadus 2001. aasta riigieelarve (2001 State Budget Act) – Riigi Teataja (The State Gazette) I 2001, 4, 11 (in Estonian).

¹⁷ Riigi Teataja (The State Gazette) I 1999, 47, 536 (in Estonian).

¹⁸ Vabariigi Valitsuse seadus (Government of the Republic Act) – Riigi Teataja (The State Gazette) I 1995, 94, 1628 (in Estonian).

¹⁹ Vabariigi Valitsuse 30.01.1996 korraldus nr. 79-k "Eesti Vabariigi Euroopa Liitu integreerumiseks vajalike esmaste abinõude rakendamine" (Government of the Republic Order No. 79-k of 30 January 1996 "Application of primary measures necessary for integration of the Republic of Estonia into the European Union") – Riigi Teataja (The State Gazette) I 1996, 8, 170 (in Estonian).

The Statutes of ministries follow from the Government of the Republic Act. Thus, for instance, the scope of competency of the Ministry of Justice includes, in accordance with the Statute of the Ministry^{*20}, the development of primary foundations of legal policy and methods of harmonisation at harmonisation of Estonian law to the European Union law.

Harmonisation of the Estonian law to the European Union law is also reflected in the Technical Rules for Drafts of Legislative Acts^{*21}, pursuant to subsection 16 (3) of which, if a Directive of Regulation of the European Union has been considered at preparation of a draft of legislative act, the number of Directive or Regulation and a publication note shall be presented as a technical remark in the European Communities Official Journal.

In the form of Supreme Court judgements, the judicial power has also accepted the need to take the European law into account.^{*22}

As legally not binding documents that help to conduct and interpret the European integration process of Estonia, Estonia's application for becoming a member state of the European Union, action plans of the Government of the Republic for Estonia's integration into the European Union (beginning from the year 1996)^{*23}, the position of the European Commission on Estonia's application for accession to the European Union (July 1997), and the Commission's annual accounts^{*24}, accession negotiations^{*25} — screening sheets on the basis of which the Ministry of Foreign Affairs gives information to the Government of the Republic, accession partnership^{*26}, the White Paper^{*27}, documents of the European Commission, of other EU institutions and member states are worth mentioning.

Besides, the people have elected the *Riigikogu* at free and democratic elections, supporting those representatives who ratified the Europe Agreement and parties who are for accession to the European Union.

Thus, although it may be stated that the process of European integration is not sufficiently legitimate^{*28}, this subjective statement cannot be measured with objective juridical criteria, as the process of preparation for accession to the European Union is legitimate at least pro forma, as derived from prior legal and political foundations and conclusions made on the grounds of them, and the relevant activity of our state power is thus also justified.^{*29} Although transition periods are discussed at accession negotiations, no sovereignty is yet directly waived; this will finally become true only through an accession agreement and the entering into force of the latter. The critique concerning the civil-servants-focused nature of the accession negotiations may sometimes be justified, but indeed foreign communication in any country inevitably belongs mainly to the field of activity of the government and the head of state.^{*30} Domination of executive power may be avoided through giving a permanent overview of the course of accession negotiations to the *Riigikogu*, although unfortunately the European Affairs Committee of the *Riigikogu* has no legislative power^{*31}, and this is why the

²⁰ Justiitsministeeriumi põhimäärus (Statute of the Ministry of Justice) – Riigi Teataja (The State Gazette) I 1997, 1, 7 (in Estonian).

²¹ Õigustloovate aktide eelnõude normitehnika eeskiri (Technical Rules for Drafts of Legislative Acts) – Riigi Teataja (The State Gazette) I 1999, 73, 695 (in Estonian).

²² See e.g. Order No. 3-3-1-97 of 24 March 1997 of the Administrative Law Chamber of the Supreme Court. – Riigikohtu lahendid 1997. Tallinn: Juura Õigusteabe AS, 1997, pp. 41–48.

²³ See the homepage of the Office of European Integration: <http://www.eib.ee> (2.04.2001).

²⁴ The European Commission's regular report on Estonia's progress at accession to the European Union, 8 November 2000. See the homepage of the European Commission at: <http://www.europa.eu.int/comm/enlargement/> (2.04.2001).

²⁵ Order No. 56-k of the Government of the Republic (Riigi Teataja (The State Gazette) I 1998, 13, 172) (in Estonian), serves as foundation for accession negotiations.

²⁶ See Regulation 622/98 of the Council of the EU, OJ L 85, 20 March 1998, p. 1, on this matter.

²⁷ Valge raamat. Assotsieerunud Kesk- ja Ida-Euroopa riikide ettevalmistamine integreerumiseks Euroopa Liidu siseturgu (The White Paper. Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the European Union). Tallinn: Eesti Õigustõlke Keskus, 1996 (in Estonian).

²⁸ See A. Albi. Europe Agreement and European Integration in Estonia — Constitutional Aspects. – The Process of Estonia's Integration into the Western Economic System — International Legal Issues. P. Cramér (Ed.). Göteborg: Centre for European Research, Göteborg University, 2001, pp. 47–120. Opinions of the same author were also expressed at the presentation of the publication on 30 March 2001 in the Faculty of Law of the University of Tartu.

²⁹ Unlike the opinion of the Eurosceptics who find that Estonian civil servants are engaged in anti-state activity, see Note 4, pp. 12–13.

³⁰ Pursuant to clause 1) of section 87 of the Constitution of the Republic of Estonia, the Government of the Republic executes the foreign policy of the state and pursuant to clause 7 manages relations with other states; pursuant to clause 1) of section 78 of the Constitution, the President of the Republic of Estonia represents the Republic in international relations.

³¹ See Note 16 above on the *Riigikogu*'s resolution on formation of the European Affairs Committee where the tasks of the Committee are presented.

knowledge and interventions of the *Riigikogu* in spheres related to European law remain marginal. In this respect the *Riigikogu* should itself demonstrate initiative and interest, and not behave in a manner hindering the implementation of or ignoring the obligations arising from the Association Agreement ratified by the same *Riigikogu*.^{*32} Legal acts of the European Union have been actually indeed taken into account in Estonian legislation so far, but only the Estonian *Riigikogu* and other Estonian state authorities pass laws and other legal acts directly applicable to the inhabitants of Estonia. Legal acts given in Brussels will apply on us directly only after accession.

In my opinion, two moments should be differentiated in this respect: accession to the European Union and preparation for accession. Accession is a desired, but not obligatory consequence of the ongoing process of European integration — *i.e.* preparation for accession must not yet mean accession. Therefore the integration process also does not need a separate constitutional authorisation. On the accession itself, a public discussion would be necessary, amendment of the Constitution, if necessary, and through this, clarification of the will of the people that will decide upon accession. Therefore it is unreasonable to spend more energy on doubting the legitimacy of an already ongoing process, and it should be attempted to guarantee the legitimacy that has remained weaker in the European integration process so far via timely ensuring of approval or non-approval of accession to the European Union by the people.

3. Nature of the European Union and different interpretation of the concept of Estonian independence

The treaties constituting the foundation of the European Union — the Treaty of Foundation of European Coal and Steel Community, the Treaty of Foundation of European Atomic Energy Community, the Treaty Establishing the European Community and the Treaty on European Union^{*33} — are all international treaties in their essence. At the same time, the European Union has become an integration organisation that is creating supranational law in the first pillar of the European Union (in the three above associations), forming therewith a specific European legal order *sui generis* that is different from an internal legal order for its different set of purpose and perspective. The states waive a certain portion of their sovereignty to the European Union, and this is why European law is superior to internal law in a sphere within the scope of competence of the European Union and directly applicable on certain conditions.^{*34} This is how it works, for instance, at passing a decision with a qualified majority. Generally no conflict should occur between a constitution of a member state and European law. If this still becomes evident, European law should be applied according to the position of the European Court of Justice.^{*35} European law should actually be seen not as standing on a higher level of hierarchy, but as a parallel autonomous legal order bound with internal law via a provision of constitution of a member state allowing for membership of the given state in the European Union. The issue varies from one member state to another.

³² For example, a technical remark on the EU legal act taken account of at drafting the act is sometimes left out from a law passed by the *Riigikogu*. The requirement of a technical remark is set though by the Technical Rules of the Government with the purpose to gain better information about how much and in what manner Estonia has harmonised its law with the European law. See for more on this matter: J. Laffranque. Influence of European Community Law on Estonian Law and, in particular, Law-making. – *Juridica International. Law Review.* University of Tartu, IV, 1999, pp. 86–92.

³³ The foundation treaty of the ECSC was signed on 18 April 1951 in Paris; entered into force on 25 July 1952; valid for 50 years; will become invalid on 23 July 2002. There is no Estonian translation of the foundation agreement of ECSC. The EURATOM and treaty establishing EEC (later renamed as the European Community) was signed on 25 March 1957 in Rome (the so-called Roman treaties) and entered into force on 1 January 1958. See the treaty establishing EURATOM in Estonian in the homepage of Eesti Õigustölkke Keskus at: <http://www.legaltext.ee>. The EU treaty was signed on 7 February 1992 in Maastricht; entered into force on 1 November 1993; now in the redaction of the Amsterdam Treaty (2 October 1997; entered into force on 1 May 1999). See the EC foundation treaty and the EU treaty in the book: *Amsterdamile leping. Konsolideeritud lepingud* (Amsterdam Treaty. Consolidated Treaties). Tallinn: Eesti Õigustölkke Keskus, 1998 (in Estonian).

³⁴ The European Court of Justice in its verdict in the *Van Gend en Loos* case has stated the following: “The European Economic Community will form a new legal order within international law in the interests of which nation states have restrained their sovereign rights, although in few spheres of life, and the subjects of which do not include only its member states, but also their citizens. Regardless of legal acts of the member states, the law of the Community not only binds individuals, but is also meant to grant them rights that will become a part of their legal heritage.” Legal case 26/62 *Van Gend en Loos*, ECR 1963, 1. On the superiority of Community law see also case 6/64 *Costa v. ENEL*, ECR 1964, 1251.

³⁵ European Court of Justice, case 11/70, *Internationale Handelsgesellschaft*, ECR 1970, 1125.

Pursuant to section 1 of the Constitution of the Republic of Estonia, Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. In accordance with the second sentence of the same section, the independence and sovereignty of Estonia are timeless and inalienable. In the first place, the principle of sovereignty of people emphasises the people as the carrier and source of state power, and its role.^{*36} The Committee of Expert Legal Review of the Constitution finds that the concepts **independence** and **sovereignty** are often identified as one and the same in international legal practice, which gives reason to assume that section 1 of the Estonian Constitution has the same meaning as the norms of constitutions of other countries ensuring the existence of the state and its sovereign status in international communication expressed often via the use of the term sovereignty.^{*37}

The Expert Review Committee still relies to a great extent on the meanings prescribed to the terms independence and sovereignty by the Estonian law scholar Artur-Tõeleid Kliimann before World War II, while coming to the conclusion that although the European Union does not threaten Estonia's independence, it does have an impact on the sovereignty of the state.

The PhD student of the European University-Institute Anneli Albi recommends reviewing the interpretations made by the Expert Review Committee. While the Expert Review Committee proceeds at interpretation of the Constitution in addition to obsolete definitions of the concepts independence and sovereignty mainly from the historical method of interpretation, according to which it was important at the time of adoption of the Constitution in the context of becoming newly independent that the Republic of Estonia ensure its independence as related to Russia, then according to Albi's position, the present priorities of Estonia are voluntary accession to Western organisations founded on co-operation in the spheres of economy and security, and this is why the Constitution should also be interpreted as required by the new era.^{*38}

Reality, however, is never black-and-white; and thus the static, verbatim interpretation of the text of the Constitution or, on the other hand, an extremely liberal treatment of it must also not be approached from just one unique perspective. The text of the Constitution is undoubtedly the starting point for its interpretation, but besides this the Constitution also sets limits to interpretation itself. Theoretically the interpretation of a constitution is as natural as interpretation of any other law^{*39}, but this of course depends on the person interpreting the constitution and the validity of such an interpretation. Undoubtedly, any applier of the Constitution inevitably interprets the Constitution, but the interpretations by the Constitutional Review Chamber of the Supreme Court, if it performs constitutional review over a law or a lower legal act, possess special value.^{*40}

The Supreme Court in its creation of legal principles and interpretation of law in practice relies among other things on generally accepted principles of international law, including principles characteristic of the European Union.^{*41} Besides the Court prescribes an interpretation value to the Preamble of the Constitution also.^{*42} The latter has been considered in the context of the European Union by the Committee of Expert Review of the Constitution, which holds the justifiable position that the Preamble of the Constitution does not hinder the development of statehood and needs no amendment.^{*43} Indeed, there is no need for supplementation of the aspect of the European Union into the

³⁶ K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). Tallinn: Juura Õigusteabe AS, 1998, lk. 22 (in Estonian).

³⁷ See the Expert Review Committee account (Note 6), p. 2.

³⁸ A. Albi (Note 7), p. 165.

³⁹ See R. Narits. Tõlgendamisest Kontinentaal-Euroopa õiguskultuuris. – Euroopa Nõukogu. Riigikohus. Seminari konstitutsioonikohtute organisatsioon ja tegevus ettekanded (On Interpretation in the Legal Culture of Continental Europe. – European Council. The Supreme Court. Presentations at the seminar "Organisation and activity of constitutional courts"). Tartu: Atlex, 1995, p. 46.

⁴⁰ See the Constitutional Review Proceedings Act (Note 13), pursuant to section 2 of which the court of constitutional review shall be the Supreme Court.

⁴¹ See e.g. Resolution No. 4-1-5-94 of 30 September 1994 of the Constitutional Review Chamber of the Supreme Court (Riigi Teataja (The State Gazette) I 1994, 66, 1159) (in Estonian); the Regulation No. 3-3-1-97 of 24 March 1997 of the Administrative Law Chamber of the Supreme Court (Note 22) that refers to the 1994 resolution in which the Court has said that the general principles of law developed by the institutions of the European Council and the European Union derived from general principles of law of the member states with highly developed legal culture should be taken account of at development of general principles of Estonian law. The Chairman of the Supreme Court Uno Lõhmus has stated at the international seminar "Protection of human rights in Europe and in Estonia" held in the Tallinn National Library on 5 April 2001 that the Supreme Court interprets international law generally in such a way as to ensure the compliance of internal law with international law. At the same time there is no significant experience of interpretation of the Constitution, there are few research works on the issue and comments on the Constitution.

⁴² See e.g. Resolution No. 3-4-1-7-98 of 4 November 1998 of the Constitutional Review Chamber of the Supreme Court – Riigi Teataja (The State Gazette) I 1998, 98/99, 1618 (in Estonian).

⁴³ See the Expert Review Committee's account (Note 6) on the Preamble of the Constitution.

Preamble, as the European Union as a supranational organisation is not an end in itself, but will be a natural part of both Estonia's foreign and domestic policy in case of accession becoming a reality.

There is no doubt that the world has become and is becoming more and more global. International co-operation is often observable and interpretable as part of sovereignty, but drawing a frontier between an integration organisation and the coming to an end of sovereignty of a country is relatively sophisticated.^{*44} Of course, the bringing of the Constitution into compliance with the changed reality must be acquiesced. There is no sense in relying on an obsolescent text or an illusory vision of sovereign nation states when the rest of Europe talks of a global era, bidding the nation states farewell, the death of nation states and even an end to democracy, sacrificing the former principles in the name of a new universal collective identity.^{*45} Just as the rights concerning primary rights and freedoms must be interpreted in a broader manner (e.g. the prohibition of reproductive cloning of humans may be derived relying on the principle of human dignity), it is also possible to give a broader interpretation to section 1 of the Constitution in the same way.^{*46} However, this kind of approach may be applied only within the limits to the extent of which the people, to whom the supreme power of the state is vested and as the possessor of the constitutional power itself, sees the change of meaning of sovereignty in contemporary Europe. If for example the Republics of Finland and France may be regarded as sovereign states from the point of view of Estonian people, regardless of their belonging to the European Union, then there cannot be talk of complete alienation of sovereignty in case of Estonia's accession to the European Union either, but rather of a change of meaning of the concept of *sovereignty*, of delegation of a certain portion of sovereignty. The interpretation of the Constitution must satisfy the requirements of actual social reality, which implies going beyond the text of the Constitution and seeing values above or behind the text.^{*47} Sovereignty as a term of state law is not a purely legal concept, but presumes a political approach.

Thus a more dynamic interpretation of the Constitution should be supported. At the same time, it cannot be decided whether it is enough for ensuring the legitimacy of accession to the European Union to update the interpretation, before it has been checked whether a direct conflict may be found in the provisions of the effective Constitution as to principles arising from the essence of the European Union or not. Indeed in accordance with the equability principle of the Constitution, the Constitution ought to be interpreted in such a manner that would not conflict with other norms of the Constitution.

In order to do this, the current nature of the European Union itself should be analysed more deeply and an answer to the question of whether the 1992 Constitution enables Estonia to join the European Union should be found. Namely, without allowing for a possibility for a broader interpretation of the concepts of independence and sovereignty, representatives of the Constitutional Expert Review Committee have found that the treatment of the European Union presented in the report completed in 1998 does not correspond to reality any more — meanwhile the European Union has changed, as they say, putting into question referring to it as a confederation.^{*48} According to the opinion of the Constitutional Expert Review Committee the Constitution ought to give permission for accession to such a European Union that constitutes in itself a union of states, and not a federation or a unitary state. Still it cannot be alleged at the current moment that the European Union already constitutes in itself a federation.^{*49}

⁴⁴ M. Vunder. Eesti Vabariigi põhiseadus ja Euroopa Liit. Uurimustöö. 1996 (The Constitution of the Republic of Estonia and the European Union. A Research Account. 1996). In the Ministry of Justice in the form of a manuscript, p. 5 (in Estonian).

⁴⁵ See E. Denninger. Vom Ende nationalstaatlicher Souveränität in Europa. — Juristenzeitung, 2000, pp. 1121–1126, particularly p. 1122.

⁴⁶ Välisministeeriumis 2000 valminud analüüs Eesti õiguse vastavusest EL põhiõiguste hartale (An analysis completed by the Ministry of Foreign Affairs in 2000 on the compliance of Estonian law with the Charter of Fundamental Rights of the EU). In the Ministry of Foreign Affairs in the form of a manuscript, analysis of article 3 of the Charter, p. 11 (in Estonian).

⁴⁷ K. Merusk, R. Narits (Note 36), pp. 50–51.

⁴⁸ Lauri Madise at the 4 December 2000 round table of the Ministry of Justice on the EU law "On the need for amendment of the Constitution of the Republic of Estonia in relation with Estonia's accession to the European Union".

⁴⁹ See J. Laffranque. Kas ühinev Euroopa vajab ühtset konstitutsiooni? (Does the integrating Europe need a common constitution?). — Juridica, 2000, No. 7, pp. 471–481 (in Estonian).

4. Possible ways for amendment of the Estonian 1992 Constitution

4.1. The need and essence of amendment of the Constitution

Through applying a broader and more dynamic interpretation, it may be stated of course that the effective Constitution of the Republic of Estonia allows for Estonia's accession to the European Union. At the same time, as it has been said already, in this case we would have to do with violent interpretation of the Constitution ignoring cumulative effect of the norms of the Constitution. Namely, doubts have emerged in case of some sections of the Estonian Constitution whether these norms may be interpreted in such a way that no conflict would occur with the supranationality of the European Union. Sections 1, 3, 29, 31, 48, 59 and 111 of the Constitution of the Republic of Estonia may be pointed out as examples.^{*50} If it cannot be alleged with absolute certainty that there is no conflict whatsoever between these sections and the legal nature of the European Union, amendment of the Constitution may turn out to be inevitable. This is actually not a problem that relates exclusively to the European Union. Although a part of the European Union is unique in its nature — supranationality — similar issues may also emerge at accession to any other international organisation or institution (*e.g.* accession to the Statutes of the International Criminal Court^{*51}). If such doubts about possible conflict between the Estonian Constitution and international or European law arise, it logically should be proceeded from the first paragraph of section 123 of the Constitution, which prohibits entering into international treaties that are in conflict with the Constitution of the Estonian Republic. The wording does not specify whether the signing or ratification of such treaties, *i.e.* undertaking commitments by one state initially as towards other countries or also as towards the given state itself, has been meant under entering. As has been mentioned above, the Supreme Court, pursuant to the Constitutional Review Proceedings Act, performs review over foreign treaties which have not yet put into force. If a doubt about conflict is justified and finds certification by the Supreme Court, there are three options for further development: not to enter into a foreign treaty at all creating such organisation, institution or law; to enter only in such case if it is possible at negotiations between the parties to arrive at a compromise under which it is possible to avoid conflict with the Constitution; or as the third option — to amend the Constitution before accession to the treaty. In the case of the European Union, application of the first or the third option will be most probable. In case of ascertained conflict, the possibility to take an easier route vanishes — to leave the Constitution intact and to proceed, for instance, from section 120 of the Constitution, pursuant to which the procedure for relations with other states and with international organisations shall be provided by special law (International Communication Act).

Many member states of the European Union have amended their constitutions in order to specify more precisely their relations with the European Union and avoid any conflicts in the future.

In case of Estonia, this can logically take place before accession. After succession this would merely mean following a formality, which does not exclude renewal/amendment of the Constitution in the future, while being member of the EU, if this should become necessary due to a change of level of integration of the European Union.

The Constitution may be amended as follows:

- Using specifically the concept of the European Union or talking about international law in general. The latter is excluded by the peculiarity of the European Union and its legal order as well as the danger that otherwise we could delegate a portion of our sovereignty also to some other organisation or union in the future, without specifying its name and essence in particular.
- Amending specifically all the sections that may cause any conflicts. This would unnecessarily make the situation complicated and also psychologically hard to accept for the people, without making use of the opportunity to interpret the Constitution proceeding from cumulative effect of its provisions.^{*52}

⁵⁰ The list is definitely not exhaustive.

⁵¹ Pursuant to the Roman Statute (see art. 25) adopted on 17 July 1998 at the UN diplomatic conference of the International Criminal Court, the International Criminal Court has jurisdiction over natural persons. Available at: <http://untreaty.un.org/ENGLISH/notpubl/notpubl.asp> (2.04.2001).

⁵² For instance A. Albi recommends (Note 7, p. 164) the changing of the concept of statehood with the assumption that the first sentence of section 1 of the Constitution will be amended. As the author herself also points out, this, however, would be difficult to implement in practice.

- Confining oneself only to a laconic wording that enables Estonia's accession to the European Union. Such amendment will not be sufficient, considering the peculiarity of the European Union and the need for specification on a constitutional level of the roles of Estonian state institutions at dealing with European Union issues.
- Applying very specific methods — establishing superiority of European law by the Constitution. This is a proposal of some foreign experts, which anyway is too extreme an approach and unreasonably encumbering for the Constitution.
- Confining oneself only to single provisions dealing with the European Union and excluding therewith any conflicts through cumulative effect of different provisions of the Constitution (highly welcome), and amending both section 1 and section 123 of the Constitution.^{*53}
- Amending only section 1 of the Constitution.^{*54}
- Amending only section 123 of the Constitution.
- Bringing a new chapter covering the European Union into the Constitution.^{*55}
- There also has been put forward such a position according to which a so-called third constitutional act covering the European Union should be adopted through a referendum. Such an option has been derived from the fact that at present the Estonian Constitution consists of two acts — the Constitution and the Implementation of the Constitution Act. The latter may be treated as a constitutional act because some of its provisions are not implementation provisions in their character, but will always remain valid.^{*56} This option would surely need further consideration, but at a first glance, if amendment of the Constitution turns out to be necessary, doing this through amendment of the Constitution itself still seems psychologically more acceptable, as this would correspond better to the principle of legal clarity and would definitely grant stronger legitimacy also in the eyes of the people than adoption of a constitutional act supplementing the Constitution.

The Irish Constitution provides an extremely laconic option for constitutional amendment, according to which Ireland shall join the European Union in accordance with its Accession Agreement. Such construction has also been used by France at its accession to the International Criminal Court.^{*57} On the other hand, another extreme is reflected in radical proposals for amendment presented by some foreign experts to provide, for instance, the superiority of European law in the Estonian Constitution, and to take the European law explicitly away from under norm review of internal courts.^{*58} I personally find that this kind of amendment of the Constitution would be an exaggeration; the member states accept the principle of superiority of European law tacitly, as an unwritten principle.

The Committee of Expert Legal Review of the Constitution of the Republic of Estonia prefers to confine itself only to single provisions dealing with the European Union, excluding conflicts through cumulative effect in different provisions of the Constitution and taking the so-called European article 23 of the German Constitution as the example. According to the Committee's position, it would be necessary to bring a third paragraph into section 1 of the Constitution, pursuant to which Estonia may join the European Union on the grounds of a referendum on the conditions prescribed by section 123' of the Constitution. It has been proposed to supplement Chapter IX of the Constitution "Foreign Relations and International Treaties" with section 123' of the following wording:

"Estonia may delegate authorities of state power arising from the Constitution to bodies of the European Union on the principle of reciprocity and equality for their joint implementation by the member states of the European Union to the extent necessary for application of treaties serving as the foundation of the Union, and on the condition that this does not contradict the foundational principles and tasks of Estonian statehood provided by the Preamble of the Constitution.

⁵³ Position of the Expert Legal Review Committee of the Constitution.

⁵⁴ Position of A. Albi.

⁵⁵ The author of this article proposes the two latter options.

⁵⁶ Position of Ü. Madis at the 4 December 2000 round table of the Ministry of Justice on the EU law "On the need for amendment of the Constitution of the Republic of Estonia in relation with Estonia's accession to the European Union".

⁵⁷ See the Irish Constitution of 1 July 1937 and its amendments to article 29 on foreign relations dating back to the years 1972, 1992 and 1998. Available at: <http://www.irlgov.ie/taoiseach/publication/constitution/english/contents.htm> (2.04.2001), and article 53-2 of the French Constitution. Available at: <http://www.conseil-constitutionnel.fr/textes/const.rtf> (2.04.2001).

⁵⁸ McKenna & Co. Commission of the European Communities Directorate-General for External Economic Relations, Operational Service PHARE Proposals Paper Brussels and London to the Ministry of Justice and the Ministry of Economics of the Republic of Estonia. Approximation of Legislation: Constitutional Amendments, September 1996.

The Government of the Republic shall inform the *Riigikogu* as early and extensively as possible about issues concerning the European Union and take account of positions of the *Riigikogu* at participation in preparation of legislation of the European Union. A more specific order shall be established by law upon membership of the Republic of Estonia.”

Albi proposes to bind proposals which overlap in their essence for amendment into a new third paragraph of section 1 and holds the position that references found in constitutions of the member states to guaranteeing democracy and human rights, subsidiarity, *etc.* within the European Union should also be considered in order to eliminate the parallel dominating the consciousness of the people between the European Union and the Soviet Union.^{*59}

In my opinion, the main problem of this topic does not lie in the first section of the Constitution and the impossibility of alienation of sovereignty. The amendment/rewording of this section may be necessary in relation to cultural and historical traditions, the importance of the concept and essence of sovereignty for the Estonian people. This matters a lot from the political aspect in the first place, while preserving at the same time a balance in the Constitution between the first chapter and consequent sections.

Amendment of the Constitution turns out to be much more important when proceeding from the fact that the Constitution of the Republic of Estonia absolutely lacks a generally formulated provision that would allow for implementation of state competencies on an international level by international organisations, and thus also to delegate implementation of certain sovereign authorities of state power to the European Union. Obviously, there has not been an urgent need for this so far. The relationship between the Government and the Parliament at formulating Estonian positions concerning the EU would also need constitutional regulation in such a way as this has been proposed by the Expert Legal Review Committee of the Constitution in the wording of the new second paragraph of section 123. Similar wording may also be found in article 23 of the German Constitution and in articles 88–4 of the French Constitution. This is just the way via which the people may be involved through the members of the *Riigikogu* in the decision-making process of the EU in addition to elections to the European Parliament.

Relying on the above, I hold the position that supplementation of the Constitution will be necessary. However, I deliberately use the term supplementation at this point, and not amendment. From the point of view of stability of the Constitution I cannot see any need for changing the provisions of the Constitution that could maybe cause conflict when Estonia belongs to the European Union. It should be attempted to adapt these provisions as much as possible to the circumstances of the European Union. Rather the existing Constitution should be supplemented in such a way that it could be interpreted as proceeding from the cumulative effect principle in a European-integration-friendly manner. The alteration must not be profound; on the contrary, the more insignificant supplementation legitimises accession to the European Union, the better from the viewpoint of stability of the Constitution and also the people’s attitude towards the European Union. Indeed, the politicians’ fear that amendment of the Constitution as such in relation with accession to the European Union would frighten the people and cause unfounded confrontation is justified to some extent.

I therefore think that the addition of section 123’ to the Constitution and interpretation of section 1 in the light of the former would probably be sufficient. In my opinion, duplicating of two sections should be avoided and issues concerning the European Union should be provided by one single section, but not by section 1 (as proposed by Albi) but by section 123’. Albi rightly emphasises that covering the European Union in Chapter IX of the Constitution that deals with foreign relations and foreign treaties is underlining the international character of the European Union, whereas the Union itself is not an international organisation any more in the classical sense of the term. I therefore feel that supplementation of an entirely separate chapter to the Constitution dealing with the European Union and European Community could be considered. This would avoid overestimating the importance of the European Union in the first chapter of the Constitution dealing with Estonian statehood and favour a vision of European integration as a means and not an end, but avoid also a too superficial attitude towards the European Union. In such a chapter, there also would be space for opening Estonia’s vision of the European Union and its compliance with the principle of democracy and other attitudes.

Success of the proposals presented in this article will depend to a great extent on how it would be best to carry out the supplementation of the Constitution in terms of procedure.

⁵⁹ A. Albi (Note 7), p. 164.

4.2. Procedure of supplementation of the Constitution and referendum on the issue of accession to the European Union

Amendment of the Constitution of the Republic of Estonia has been regulated by Chapter XV of the Constitution. Pursuant to it the right to initiate an amendment rests only with not less than one-fifth of the membership of the *Riigikogu* (21 members) and with the President of the Republic (section 161). Amendment of the Constitution cannot be initiated through a referendum. An act amending the Constitution may be passed only either via referendum or by two successive compositions of the *Riigikogu*, or as a matter of urgency, by the *Riigikogu* upon four-fifths majority of the vote (section 163). But even while an amendment may be adopted by the people, this would be possible only if the *Riigikogu* prior decides to subject the amendment to a referendum. Thus the making of a decision upon carrying through a referendum is a parliamentary monopoly.

Chapters I (General Provisions, where the proposal for amendment of the Constitutional Expert Review Committee concerning the third paragraph of section 1 should be included) and XV (Amendment of the Constitution) may be amended upon the initiative from the President or one-fifth of the membership of the *Riigikogu* only via referendum. Therefore a portion of amendments concerning the European Union proposed by the Expert Review Committee could enter into force in one way or another only after the affirmative result of a referendum.

However, a three-fifths majority of the membership of the *Riigikogu* will be required to subject a bill for amendment of the Constitution to a referendum. A bill to amend the Constitution shall be debated for three readings in the *Riigikogu*, in which the interval between the first and second readings shall be not less than three months, and the interval between the second and third readings shall be not less than one month. The manner in which the Constitution is to be amended shall be decided at the third reading (sections 163, 164). The referendum will take place three months after the *Riigikogu*'s decision to subject the amendment to a referendum at the earliest. Thus, in the fastest case, an amendment will take seven months from its presentation to the first reading.

Amendment of the Constitution by two successive memberships of the *Riigikogu* has been regulated by section 165 of the Constitution.

An amendment to the Constitution regarding the same issue shall not be initiated within one year after the rejection of a corresponding bill by a referendum or by the *Riigikogu* (section 168).

In terms of procedure, supplementations to the Constitution in relation with Estonia's accession to the European Union:

- may be included into the Constitution together with other amendments

or

- the supplementations concerning accession to the European Union may be separated from other amendments and included independently.

The finding of the right solution hereby depends to a great extent on what kind of positions dominate concerning the rest of proposals for amendment of the Expert Legal Review Committee of the Constitution. If consensus is achieved on such an issue as, for instance, direct election of the President, the supplementations related to the European Union may also be included together with this amendment. If, however, issues concerning internal policy do not find a unanimous approach amongst political parties, it will be desirable for avoiding the slowing down of the European integration process to separate the supplementations related to accession to the European Union from other amendments.

Given that there is no common position amongst political forces at the moment on the need for amendment of the Constitution and there is consensus only on the issue that a referendum should be carried out on the question of accession to the European Union⁶⁰, I would now consider issues related to conducting a referendum and the procedure of accession to the European Union more generally.

Pursuant to the valid Constitution, issues regarding the budget, taxation, financial obligations of the state, ratification and denunciation of international treaties, the declaration or termination of a state of emergency, or national defence shall not be submitted to a referendum (section 106). Thus there are mainly three circumstances at the present moment arguing against subjecting the issue of accession to the European Union to a referendum as quickly as possible:

⁶⁰ The Chair of the Constitutional Committee of the *Riigikogu* at the 4 December 2000 round table organised by the Ministry of Justice on the EU law "On the need for amendment of the Constitution of the Republic of Estonia in relation with Estonia's accession to the European Union".

- 1) at the moment there is no agreement on accession to the European Union, as Estonia is still holding accession negotiations,
- 2) even if there were an accession agreement, it would not be possible in accordance with section 106 of the Constitution of the Republic of Estonia to submit the issue of ratification of the international treaty — and this is what accession agreement actually is — to a referendum, and
- 3) at ensuring the legitimacy of the accession process, it should be aimed for as short as possible a time interval between the receiving of consent for accession from the people and the accession itself.^{*61} Otherwise, if meanwhile the European Union itself for instance turns into a federation, the consent given by the people for accession to a union of states does not correspond to reality any more.

There is of course one option to amend section 106 of the Constitution in such a way that international treaties could be submitted to a referendum. However, the Expert Legal Review Committee of the Constitution has put forward a different, less risky option, according to which, instead of amending section 106 of the Constitution, the Constitution should first be amended by adding a third paragraph to section 1 of the Constitution as a result of a referendum, so that Estonia would be allowed to join the European Union only on the grounds of a referendum, and then, just before accession, to perform a referendum on the accession.

From my point of view, such a construction is questionable from two aspects — first, in this case a possible conflict would emerge between section 106 and the third paragraph of section 1 of the Constitution, as pursuant to the first it will be impossible to submit an international treaty and therewith also an issue of accession to an international organisation to a referendum, but the third paragraph of section 1 would make a referendum possible or even obligatory in case of the European Union as an exception. Second, according to such a construction, two referendums should be conducted — first for amendment of the Constitution, and then for accession to the European Union. As it is known, however, organising a referendum requires very thorough preparation, timing, and also certain expenses, and therefore duplication of a referendum in its essence on one and the same issue should be avoided.

The Expert Review Committee's proposal could still be interpreted and modified in such a manner that the people would not vote on the issue of entering into a treaty of accession to the European Union, but adopt (or renounce the adoption) of an act of amendment of the Constitution which would make the entering into the accession treaty possible in case of an affirmative result. In such case the wording of the third paragraph of section 1 should be left out of the set of amendment proposals, and the people would vote on section 123', *i.e.* the referendum would decide whether to amend the Constitution in such a way that it would enable Estonia's accession to the European Union.

At this point I would dare to propose a third option: namely, to use section 105 of the Constitution granting the *Riigikogu* the right to submit a bill or other national issue to a referendum as the legal basis for a referendum. Joining the European Union could definitely be classified as a national issue. And only then, if the people have approved the accession to the European Union, to amend the Constitution of the Republic of Estonia accordingly (by adding section 123' or a separate chapter dealing with the European Union) in order to fix the accession legitimately also in the Constitution. However, amendment of Chapter IX of the Constitution or adding a new chapter coming after it does not automatically presume subjection of the amendment to the Constitution to a referendum. Through such a solution, neither automatic amendment of the Estonian Constitution in case of any future changes within the European Union nor conducting of a referendum under any circumstances on these matters would be definitely determined. If the European Union changes, it should be weighed separately depending on each particular case whether these changes are foundational enough as to presume a referendum and/or amendment of the Constitution.

A referendum on the issue of accession to the European Union should be, however, as it has been mentioned already, thoroughly prepared. It implies legal, political, as well as psychological prepa-

⁶¹ Contrary to A. Albi who holds the position that the referendum should take place as soon as possible in order to legitimise the ongoing process of European integration, I am of the opinion, as I have given my arguments for sufficient legitimisation of the process of European integration above, that now the main emphasis should be focused on thorough preparation for the referendum preceding the accession and its timing. Besides it is strange that Albi at the 30 March 2001 presentation of her collection "The Process of Estonia's Integration into the Western Economic System — International Legal Issues" at the Faculty of Law of the University of Tartu stuck to the position that we should be very cautious with our conducting of a referendum, if this would be carried through at all, while in her article (Note 6) she dared to doubt even about the legitimacy of the European integration. In this case, though, the accession to the European Union should be legitimised via a referendum even more.

rations and analyses. The timing of the referendum is also important. All the more that although the Constitution allows for organising a referendum and a Referendum Act has been adopted in Estonia^{*62}, no referendums have taken place after the adoption of the Constitution. At a round table of the Prime Minister and representatives of the parties represented in the *Riigikogu* on the topic of the EU that took place on 16 March 2001, the politicians achieved a principal agreement that a referendum for the joining of Estonia with the European Union should be organised before the conclusion of the accession agreement. Besides the conclusion was drawn that the right period for organising the referendum would be the time when Estonia has completed its accession negotiations and the accession conditions are precisely known. Estonia expects to complete its negotiations early in 2002. Local elections will take place in the fall of the same year. Still, according to preliminary data, the politicians are not willing to connect the organising of the referendum with the elections, but are planning to carry the referendum through entirely independently.^{*63}

Pursuant to the Constitution and the Referendum Act, the result of a referendum is mandatory for the state institutions.^{*64} But the relevant provisions of the Constitution and the Referendum Act are relatively difficult to comprehend and may be interpreted in multiple ways — all the more that there is no experience.^{*65}

If the people approve the accession, the position on the agreement of the Constitutional Review Chamber of the Supreme Court could theoretically also be asked upon the President's or Legal Chancellor's initiative before the entering into force of the accession agreement.^{*66}

In addition to Estonia, the European Parliament and all the member states should also approve the accession agreement according to their internal rules of procedure.

I personally do not share the opinion of the Expert Legal Review Committee of the Constitution stating that the Estonian courts (the Supreme Court in the first place) would be able in the future to perform review (constitutional review) over legal acts passed by the institutions of the European Union. Review over validity of legal acts of the institutions of the EU can be performed exclusively by the European Court of Justice. It is assumed that the secondary law of the EU, if this is in compliance with the primary law of the EU, to which Estonia as a member state has given its legal consent, is also in compliance with the constitution of a member state. The Estonian Supreme Court will be able, however, in the future to perform review over treaties amending those treaties constituting the foundation for the European Union before their ratification by Estonia, deciding upon the compliance of these treaties with the Constitution of the Republic of Estonia.

Conclusions

Finally the following conclusions may be drawn:

- (1) The process preceding accession is legitimate and it cannot be equalised with accession itself.
- (2) The Constitution can be interpreted in a dynamic manner. Still, it is not sufficient for Estonia's accession to the European Union. If we violate our own Constitution, we will make a substantial mistake that will cause mistrust amongst the people towards the Constitution and the constitutional order/institutions.
- (3) Supplementation, and not amendment, of the Constitution will be possible in multiple ways. Legally the wording of section 1 of the Constitution does not hinder Estonia from joining the European Union; culturally and politically the adding of an aspect of the European Union into this section could be considered. Nevertheless, the supplementation of the Constitution in its Chapter on foreign relations with a separate section dealing with

⁶² Rahvahääletuse seadus (Referendum Act) – Riigi Teataja (The State Gazette) I 1994, 41, 659 (in Estonian).

⁶³ See Baltic News Service. Erakonnad jõudsid euroreferendumi suhtes kokkuleppele (The parties attained an agreement upon a European referendum). – Eesti Päevaleht, 17 March 2001 (in Estonian).

⁶⁴ Section 105 of the Constitution of the Republic of Estonia; section 39 of the Referendum Act.

⁶⁵ See J. Frowein. Report on Possible Amendments to the Constitution of Estonia of 1992. SIGMA Panel Review of the Estonian Constitution. September 1997, p. 10.

⁶⁶ Subsection 6 (1) of the Constitutional Review Proceedings Act.

the European Union or even with a new chapter on the European Union will definitely be necessary.

- (4) Before the supplementation of the Constitution a referendum should be performed in order to clarify what exactly is the opinion of the people on accession to the European Union — both the organising of the referendum and the supplementation of the Constitution should be very thoroughly prepared for, both legally and psychologically.

Status of International Law in the Estonian Legal System under the 1992 Constitution

The dispute between monists and dualists about the domestic status of international law has continued over a century and is still in progress. Today, the shield of sovereignty of states is still too strong for the states to unconditionally accept the rules of international law as a part of domestic law, especially so that the domestic legal acts in conflict with the rules of international law are repealed or at least repealable. However, no state is able to escape the recognition of the impact of international law on domestic law. Disregarding the assault of European Community law, the impact may be detected, above all, in the area of the protection of human rights. Also countries having a so-called dualist approach have transported the European Convention on Human Rights (ECHR) to their domestic law and courts apply this instrument directly.*¹

The jurists who are accustomed to a practical approach have therefore abandoned their legaltheoretical discussions and search for the differences and common ground between international and domestic law. They claim that these two legal systems do not overlap, except when the state decides to transpose the rules of international law into the sphere of domestic law.*² If the state does not recognise the rules of international law as a part of domestic law and does not apply them, or if it recognises them but applies them incorrectly, the state bears international responsibility for the consequential breach of its international obligation entailed thereby.

Thus, the methods of transporting particular sources of international law to domestic law (adoption, incorporation, transformation) are brought into focus and the consequences of using one or another

¹ See, e.g., on Denmark – Act No. 285 of 29 April 1992 and explanations: B. K. Olsen. *Incorporation and Implementation of Human Rights in Denmark*. – *International Human Rights Norms in the Nordic and Baltic Countries*. Ed. by M. Scheinin. The Hague: Martinus Nijhoff Publishers, 1996, pp. 227–232 and 248–249; Sweden – Law on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1994:1219) and explanations: G. Melander. *Ibid.*, pp. 295–300 and 305; and the United Kingdom — 1998 Human Rights Act. Available at: <http://www.hmso.gov.uk/acts/acts1998/19980042.htm>.

² See Oppenheim's *International Law*. 9th ed. Ed. by Sir R. Jennings and Sir A. Watts. Vol. I. London/New York: Longman, 1996, pp. 54, sections 18 and 82–85, section 21; K. J. Partsch. *International law and municipal law*. – *Encyclopedia of Public International Law*. R. Bernhardt (ed.). 1995, Vol. II, p. 1186; see also M. Schweitzer. *Staatsrecht III. Staatsrecht, Völkerrecht, Europarecht*. 7. neubearb. Aufl. Heidelberg: Müller, 2000, p. 141, paragraph No. 418; R. Geiger. *Grundgesetz und Völkerrecht: die Bezüge des Staatsrechts zum Völkerrecht und Europarecht*. 2nd, revised ed. Munich: Beck, 1994, pp. 158–159; G. Fitzmaurice – cited in: D. J. Harris. *Cases and Materials on International Law*. 4th ed. London: Sweet & Maxwell, 1991, pp. 69–72.

method are examined instead.^{*4} Strictly speaking, it is a dualist approach — a state itself decides on the choice of the method and the implementation thereof. Nevertheless, some methods transport the rules of international law to domestic law more immediately than others and therefore they could be classified (though in a modified manner) as monist or dualist.

The purpose of this article is firstly to describe briefly the content of each method and the nuances of the impact of international law transported to domestic law thereby, and secondly to evaluate the position of international law arising from the applicable Constitution in the Estonian legal system.

1. Rule of recognition and techniques of transporting international law to domestic law

1.1. Main concepts

Before describing each method, let us introduce the notion of the rule of recognition into discussion.^{*5} A rule of recognition is a written or unwritten rule in the order of the state due to which international law binding on the state becomes a part of its legal order. If the rule of recognition exists, the state may be deemed to be monist with regard to the sources of international law covered by the rule of recognition; if the rule does not exist, the approach of the state is dualist.

The following terms have been used in different meanings in literature to describe the methods of transporting international law to domestic law. In this article, the following meaning has been given to these methods.

Transformation is a method characteristic of the dualist approach as a result of which the rules of international law are transported to domestic law by means of a domestic transforming act. The transforming act need not be the enforcement act of a treaty. The transforming act may serve to amend, specify or supplement the wording of the treaty or any other written source of international law. The transformation method has been divided into general transformation and special transformation. In the latter case, each international law instrument (*e.g.* an agreement or a decision of an international organisation) is transported to domestic law separately; in the former case, all the rules of some source of international law (*e.g.* rules of general international law), including the rules to be to be created in the future, are deemed to have been transported to domestic law.^{*6} In special transformation, the transforming rule is contained in the transforming act.

As a result of **adoption**, the rules of some source of international law are, similarly to general transformation, automatically transported to the sphere of domestic law.^{*7} Adoption is a monist technique whereas the adopting rule serves as a rule of recognition. Adoption is, as a rule, applied to general international law the rules of which (with certain exceptions) are binding on the state irrespective of its consent.

Another monist method is **incorporation** which, unlike adoption, requires means and presumes an act on the part of the state, as a result of the performance of which the rules of the source of international law become a part of domestic law.^{*8} An enforcement act of a treaty is the best example. Unlike in special transformation, the incorporating rule (being the rule of recognition) and the incorporating act are usually separated from each other. The incorporating act that is, as a rule, the enforcement act of the treaty, transports the treaty to domestic law by virtue of an incorporating rule.

⁴ See, *e.g.*, R. Geiger (Note 2), pp. 159–160. One of the most up-to-date comparative analyses of treaties is: Expression of consent by states to be bound by a treaty. Analytical report and country reports. Secretariat memorandum prepared by the Directorate General of Legal Affairs (CAHDI (2001) 3). Strasbourg: Council of Europe, 2001 (particularly pp. 74–84).

⁵ Here one should not draw parallels with Hart's secondary rule validating the law (H. L. A. Hart. *The Concept of Law*. 2nd edition. Oxford: Clarendon Press, 1997, pp. 100 *ff.*).

⁶ See also M. Schweitzer (Note 2), p. 145, paragraph No. 430–431.

⁷ See also *ibid.*, pp. 141–142, paragraph No. 420–421.

⁸ Similar to this is the German implementation theory (*Vollzugslehre*), where a domestic act approving the rule is also regarded as an order to apply the rule in domestic law. – See M. Schweitzer (Note 2), p. 143, paragraph No. 423.

1.2. Impact of rule of recognition

Monist approach differs from the dualist one mainly by the fact that international law remains the basis for the validity of the rule of international law transported to domestic law.^{*9} Therefore, in the case of monist approach, it is extremely important to examine the following: (a) changes in validity of the international law rule — suspension of the treaty and expiry thereof, creation of a rule prevailing over the treaty or customary rule under the principle of *lex superior*, *lex posterior* or *lex specialis*; (b) changes in the content of the international law rule irrespective of whether they are approved by the state or not (the latter is possible for example in the case of a simplified procedure of amendment or upon the alteration of the general customary rule), and (c) restrictions on validity of such rules (above all, reservations to the treaties). All these changes occur in international and domestic law in synchrony. The domestic body implementing laws has to take account of the circumstances pertaining to international law. In the case of monist approach, the implementor also has to proceed from the international and legal interpretation of the applied rule of international law.

Dualists have claimed that their doctrine relieves most of these concerns experienced by the implementor (and also the subjects) of law — the task of the executive power is to ensure (together with the legislator, if necessary) that domestic law is in compliance with the international obligations of the state. The implementors continue to apply the rules of international law until the transforming acts are valid and in the manner prescribed by the transforming acts. In order to interpret a rule of international law, easily available domestic sources of interpretation are used.^{*10}

Dualist approach appears simple and attractive at first glance only. If the basis of validity of a rule of international law is domestic, the asynchronous validity of the transformed rule or the domestic validity application thereof which ignores international interpretation may entail a violation of international law, or oblige the state to observe a rule that is no longer restricting its activities internationally. Hence, the proponents of mitigated dualism prefer the view that primary (regulating) rules of international law are transformed to domestic law together with the rules determining their validity and other secondary (ancillary) rules.^{*11} Thus, the domestic implementor of law is not exempted from the obligation to observe international and legal validity and interpretation of the transformed rule of international law and adhere thereto.

Consequently, the distinction between revised monism and dualism is largely dependent on what branch of power has the largest share in monitoring the validity of the rules of international law and the compliance of the rules of domestic law therewith and in clarification of the content of the rules of international law transported to domestic law: in monism the primary care rests with courts, in dualism — with the executive. Perhaps the establishment and strengthening of judicial control over the activities of the administrative power (incl. state bodies responsible for international relations) has also contributed to the increase in the domestic impact of international law. Domestic judges and other implementors of law need thus be prepared to assess the validity of international law on the domestic level whereas the validity of the rule depends on the international validity thereof.

1.3. Form of rule of recognition and bases for identification

The rule of recognition may be worded as a rule determining the domestic validity or status of international law (Lithuania, France) and as a conflict of laws rule (Estonia) or a combination thereof (Germany, Russia).^{*12} Problems arise in connection with identification of the rule of recognition. The

⁹ For the consequences of monist techniques see A. Verdross, B. Simma. *Universelles Völkerrecht. Theorie und Praxis*. 3., new, fully revised ed. Berlin: Duncker & Humblot, 1984, p. 546, section 858; K. J. Partsch (Note 2), p. 1192.

¹⁰ See K. J. Partsch (Note 2), pp. 1191–1192.

¹¹ See A. Verdross, B. Simma (Note 8), pp. 545–546, section 858; M. Schweitzer (Note 2), pp. 145–146, paragraph No. 432–435.

¹² Article 138 (3) of the Lithuanian 1992 Constitution (“International agreements which are ratified by the Parliament of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania.”); article 55 of the French 1958 Constitution (“*Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie.*”); article 25 of the German 1949 Constitution (“*Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes.*”); article 15 (4) of the Russian Federation 1993 Constitution (“The generally recognised principles and norms of international law and international treaties of the Russian Federation are a constituent part of its legal system. If an international treaty of the Russian Federation stipulates rules other than those stipulated by the law, the rules of the international treaty apply.”). For the relevant provision of the Estonian Constitution, see the text below.

pursuit of sovereignty of states is also evident in the fact that an obvious rule of recognition is not deemed to be one, and the transformation method is preferred. An identical rule in constitution may be interpreted as a rule of recognition or it may not.^{*13} The choice of one or another interpretation thus characterises the political willingness of the state to effectively implement international law.

The clearest answer about the approach of a state is provided by the practice of that state at domestic implementation of international law. Here also careful attention is required since we notice that the distinction between the impacts of the techniques described above is not very significant. Implementation consists in, for example:^{*14}

- application of the rules of international law to the relationships between private individuals or private individuals and the state (direct application) — if the international validity of the rule is adhered to upon application (*i.e.* synchrony is accepted), the international interpretation of the rule is examined, and no reference is made to the transforming act as the domestic basis of the rule, *etc.*, such approach may be considered monist;
- exercise of supervision over the conformity of any domestic rules with the rules of international law — if courts (above all, the constitutional court) exercise supervision over such conformity, such approach is monist;
- issue of secondary legislation on the basis of the rules of international law — an approach where the enforcement or ratification instrument of a rule of international law (*e.g.* the enforcement law or a law approving the enforcement of a treaty) rather than the rule itself is referred to as the basis upon the issue of a regulation may be considered dualist;
- use of rules of international law as ancillary means for interpreting domestic legislation.

In addition thereto, the manner of enforcing rules of international law helps to clarify the status of international law (this is valid, first and foremost, with regard to treaties). If the above-mentioned methods of implementation do not operate without special mention of their domestic validity or applicability in the enforcement law of the treaty (Finland, Italy) or without the adoption of a separate law or any other legal act to validate them (United Kingdom), it is indicative of the dualist approach of the state.^{*15} Hence, to distinguish between incorporation and transformation, it is extremely important to first examine by what domestic legal acts of what bodies the state enforces or ratifies treaties. It is essential to answer this question also in order to determine the domestic status of an enforced treaty, which is outside the scope of this article.

Further, we will examine how “simple” or “complicated” the life of judges in Estonia has been rendered — whether any rules of international law are introduced into the legal system of Estonia, and if they are, on what basis they are valid. Due to the limited volume of the article only the domestic validity of the rules of international law is examined. The status of these rules in the hierarchy of domestic legislation and the conditions for their direct applicability are excluded. As the approach of the state to various types of sources of international law differs, the position of treaties and custom and other sources is discussed separately.

2. Validity of international law in the Estonian legal system

2.1. Treaties

2.1.1. Enforcement of treaties

In Estonia, treaties are prepared by the Ministry of Foreign Affairs or other institutions concerned in co-operation with the Ministry of Foreign Affairs. Draft treaties are approved by the Government of the Republic by adopting an order (individual instrument). Any less-important agreements are

¹³ See *e.g.* M. Schweitzer (Note 2), p. 144, paragraph No. 428. Article 25 of the German Constitution has been considered both an incorporating rule and a general transformation rule — see R. Geiger (Note 2), pp. 165–166. Germany has no such clear rule of recognition with regard to treaties (interpreted according to subsection 59 (2) of their Constitution); it is still unclear whether special transformation or incorporation is used for transporting treaties to German law — see M. Schweitzer (Note 2), pp. 152–153, paragraph No. 446–448.

¹⁴ See A. Verdross, B. Simma (Note 8), p. 550, section 864.

¹⁵ See Expression ... (Note 3), pp. 78–79.

enforced by the Government of the Republic (intergovernmental agreements).^{*16} The above-mentioned order serves as the enforcement act for bilateral and plurilateral (closed) treaties. Although rare in practice, some multilateral treaties are enforced by the government by its regulation (general instrument). Both orders and regulations are enacted according to the same procedure as other government instruments.

Although unusual in international practice, the enforcement acts of the more important treaties are adopted by the *Riigikogu* (Estonian Parliament). Section 121 of the Constitution lists five cases when a treaty is enforced by the *Riigikogu*:

- if the treaty alters state borders;
- if implementation of the treaty requires the passage, amendment or repeal of Estonian laws;
- if the treaty provides that the Republic of Estonia joins international organisations or unions;
- if the Republic of Estonia assumes military or financial obligations by the treaty;
- if the treaty itself prescribes ratification.

Although the Constitution and Foreign Relations Act do not specify the instrument by which the *Riigikogu* should enforce treaties, the enforcement is carried out by an act that is processed according to the same procedure as the other acts.

In Estonian constitutional law, a distinction is made between constitutional and simple laws. The former are the laws specified in subsection 104 (2) of the Constitution, for the passing of which a majority of the membership of the *Riigikogu*, i.e. over 51 votes is required. The list contains, *inter alia*, “laws pertaining to foreign and domestic borrowing, and to financial obligations of the state”. The question of the number of votes needed for the enforcement law of the *Riigikogu* became particularly burning in relation to the ratification of the WTO Agreement or Marrakesh Agreement in the *Riigikogu* on 29 September 1999. The *Riigikogu* adopted the ratification law by 48 votes given in favour. The opposition claimed that at least 51 votes should have been given in favour to pass the law as the Agreement clearly provides for the making of a contribution to the Working Capital Fund and the payment of the membership fee. The Legal Chancellor to whom some members of the parliament made an inquiry has not given an adequate answer concerning the constitutionality of such act.

Enforcement acts are laconic, usually providing merely “To ratify the appended /.../ treaty”, or “To accede to the appended /.../ treaty.” A state agency competent to perform the contractual acts is appointed in the following section of the act if necessary. Reservations to or interpretative declarations of the treaty are also contained in the following sections of the enforcement act. Thus, enforcement acts serve as individual instruments from the substantive aspect and from the constitutional aspect, the *Riigikogu* could also enforce treaties by decisions.

In accordance with the generally applicable procedure, the enforcement acts shall be proclaimed by the President of the Republic (section 107 of the Constitution). The President has the right of suspensive veto. The President may finally refuse to proclaim an enforcement act when he or she finds that the law is unconstitutional while in such case the issue is automatically passed to the Supreme Court for adjudication. On the international arena, instruments of ratification of treaties that require ratification are exchanged or, in the case of multilateral treaties, deposited with the depositary. The country is usually represented by the head of state. In Estonia, the Constitution also provides that the President of the Republic shall sign instruments of ratification (subsection 78 (6) of the Constitution), although this act has been rendered to merely “affixing a rubber seal”. The President of the Republic has, due to his or her limited powers, no right to decide on the purposefulness of the enforcement of the treaty (however, as indicated above, the President may intervene in the enactment of the enforcement law to a certain extent).

2.1.2. Domestic validity of treaties

In order to ascertain the domestic validity of treaties, a rule of recognition has to be found in the constitutional order of Estonia. The Constitution provides for two relevant rules. Subsection 3 (1) of the Constitution reads; “/.../ Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system”, and subsection 123 (2) provides; “If laws or other

¹⁶ See clause 5) of subsection 7 (1) of the Estonian 1993 Foreign Relations Act (*Välissuhtlemiseseadus*) (Riigi Teataja (The State Gazette) I 1993, 72/73, 1020; last amendment 1997, 73, 1200) (in Estonian). In respect of such term, a distinction must be made between parties to the agreement and the bodies enforcing the agreement — in the Estonian practice, the Government of the Republic has also enforced international conventions that are not identified as intergovernmental agreements.

legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the rules of the international treaty shall apply.”

The first one of the quoted rules has been related to international customary law in other states and we will examine it in detail below. Subsection 123 (2) of the Constitution, however, refers to treaties directly. It has been claimed that a contradiction may arise only between the rules that belong to the same legal system, due to which the rule evidences the monist approach of Estonia.^{*17} Nevertheless, the contradiction may be firstly interpreted not as a formal conflict between two rules but as a substantive contradiction. Secondly, the rule does not regulate the applicability of treaties if the contradiction does not exist and if the relevant rule is not found in domestic law. Hence, in order to clarify the meaning of subsection 123 (2) of the Constitution, we have to resort to the implementation practice of treaties.

As a rule, no secondary legislation has been issued on the basis of treaties enforced by the *Riigikogu*. Such practice would anyway be restricted by subsections 87 (6) and 94 (2) of the Constitution. Those provisions allow to issue regulations only on the basis of legal acts issued by the parliament. The lack of such practice is also justified with the principle of legal certainty of domestic subjects. The rule concerned with the delegation of authority, arising from international law, may easily disappear independently of the domestic acts, compromising thereby the legal foundation of the implementing provision. At the same time, the issue of regulations on the basis of the enforcement laws of treaties would be indicative of a dualist approach as in such case, the domestic law may be considered as the basis of the validity of the treaty. Such practice has also not been applied.

In several European states (e.g. Bulgaria, Slovenia, Poland), constitutional courts are competent to repeal domestic legislation that are in conflict with the rules of international law binding on the state.^{*18} Sections 15 and 152 of the Estonian Constitution enable the courts not to apply or appeal any law or other legislation that is in conflict with the Constitution. The legislation does not refer to the opportunity of courts to refuse to apply or repeal any domestic legal act due to its conflict with a rule of international law. Nevertheless, the Constitutional Court of Estonia (the Constitutional Review Chamber of the Supreme Court) has repeatedly detected conflicts between domestic legislation and treaties binding on Estonia.^{*19} Although it is apparent from the examples that the Supreme Court has applied a provision of the Constitution in parallel with the rule of a treaty, not all references to the treaties (or any other rules of international law) in the judgements have carried merely the meaning of *obiter dictum*. This demonstrates that the Supreme Court still (although to a limited extent) exercises supervision over conformity between domestic legal acts and treaties binding on Estonia, and implements thereby the rules of international law in the legal order of Estonia.

During the eight years of operation of the Supreme Court since the restoration of Estonia's independence, the Court has repeatedly referred to the rules of international law. As a court of cassation, the Supreme Court does not generally implement law directly (except in the case of procedural law rules), but examines the correctness of the interpretation of substantive law. The majority of the judgements of the Supreme Court that make use of international law state that the interpretation of domestic law is supported by some international law rule; under particular circumstances, such use could be regarded as interpretation assistance.^{*20} A rule of international law is certainly interpreted when the court states that it is not applicable to the particular case.^{*21} The frequently criticised apprehension of international law manifests itself also in the practice of the

¹⁷ T. Sillaste. *Rahvusvaheliste inimõigusnormide rakendatavusest Eestis* (On Applicability of International Human Rights Norms in Estonia). – *Juridica*, 1993, nr. 1, lk. 13 (in Estonian).

¹⁸ See article 149 clause iv of the Bulgarian 1991 Constitution; article 160 of the Slovenian 1991 Constitution; article 188 (2) and (3) of the Polish 1997 Constitution.

¹⁹ See, for instance, 10.05.1996 decision in Case No. 3-4-1-1-96 (Riigi Teataja (The State Gazette) I 1996, 35, 737) (in Estonian), where the provisions of the 1989 Convention on the Rights of the Child were applied in parallel with those of the Estonian Constitution; 27.05.1998 decision in Case No. 3-4-1-4-98 (Riigi Teataja (The State Gazette) I 1998, 49, 752) (in Estonian), where ILO Convention No. 108 was interpreted and possibly applied; 05.03.2001 decision in Case No. 3-4-1-2-01 (Riigi Teataja (The State Gazette) III 2001, 7, 75) (in Estonian), where article 8 of the ECHR was applied.

²⁰ See, for instance, 26.08.1997 decision in Case No. 3-1-1-80-97 (“*Tammer Case*”) (Riigi Teataja (The State Gazette) III 1997, 28, 285) (in Estonian). The majority of the references to treaties in the opinion section of the Supreme Court's judgements are to the ECHR (some 50 cases, though not all of them are just interpretation assistance).

²¹ See e.g. 4.03.1999 decision in Case No. 3-2-1-29-99 (Riigi Teataja (The State Gazette) III 1999, 9, 99) (in Estonian); 18.05.2000 decision in Case No. 3-3-1-11-00 (“*Ushakova Case*”) (Riigi Teataja (The State Gazette) III 2000, 14, 149) (in Estonian).

Supreme Court — if the domestic basis for satisfying an appeal in cassation has been adequate, references to the rule of international law made by the appellant in cassation have simply been ignored in the opinion section of the judgement.^{*22} (However, examples of different kind can be found too, where the appeal is dismissed and no attention has been paid to the complainant's references to international law.^{*23}) Nevertheless, there are several judgements indicating that only a treaty has been implemented.^{*24} As the enforcement acts of the treaties applied contain no references to the validity and applicability of the treaties on domestic level, while the Supreme Court has not established an order of validity issued by the legislator or executive as a condition for their applicability, it shows the direct domestic impact of such treaties.

In addition to implementation practice, the enforcement practice — the enforcement law of the treaty, the wording thereof, references to the time of entry into force of the law in the rules regulating the enforcement of the treaties, *etc.* — also evidences monist approach. As said already, the enforcement acts — laws adopted by the *Riigikogu* — make no reference to the validity or applicability of the treaty on the domestic level. Although it has been claimed by some scholars that any treaties ratified by the *Riigikogu* enter into force in domestic law on the tenth day after the publication of the enforcement law (*i.e.* according to the general procedure for the entry into force of legislation)^{*25}, it is not supported by the implementation practice or the majority of the authors.^{*26} Thus, treaty rules transfer into domestic law only as of the moment when the treaty enters into force internationally in respect of the state (and are excluded therefrom automatically upon the expiry or termination of the treaty; change automatically upon the amendment of the treaty, *etc.*).

Consequently, on the basis of the wording of subsection 123 (2) of the Constitution and the enforcement and implementation practice of treaties, we may claim that Estonia's approach to treaties (at least those enforced by the *Riigikogu*) is monist.^{*27} The enforcement laws of treaties also serve as the incorporation acts thereof, as a result of which and by virtue of the rule of recognition found in subsection 123 (2) of the Constitution, the treaties transfer to the legal system of Estonia to be valid without altering their basis for validity.

The above discussion applied only to a part of the international agreements of Estonia. Subsection 123 (2) of the Constitution does not govern the domestic validity of the intergovernmental agreements. If we take into account the constitutional approach to ratifiable treaties and the fact that some of the purest examples of direct applicability concern the intergovernmental agreements^{*28}, we may presume that an unwritten rule of recognition exists in the legal order of Estonia, under which the agreements enforced by the Government of the Republic transfer to the domestic law of Estonia.

²² See, for instance, 22.04.1998 decision in Case No. 3-2-1-51-98 ("*H. Tähemaa v. T. Taavel*") (Riigi Teataja (The State Gazette) III 1998, 15, 168) (in Estonian); 18.06.1998 in Case No. 3-2-1-78-98 ("*M. Sarv-Kaasik and R. Kaasik v. A. Reedik and the State*") (Riigi Teataja (The State Gazette) III 1998, 23, 233) (in Estonian); 22.06.1999 in Case No. 3-3-1-27-99 ("*Lahtikov Case*") (Riigi Teataja (The State Gazette) III 1999, 22, 208) (in Estonian); and 29.05.2000 decision in Case No. 3-1-1-62-00 ("*J. Mishin, L. Kashnova, E. Shur and H. Truusa Case*") (Riigi Teataja (The State Gazette) III 2000, 17, 183) (in Estonian).

²³ See 30.10.1998 decision in Case No. 3-3-1-33-98 ("*Bozhko Case*") (Riigi Teataja (The State Gazette) III 1998, 29, 294) (in Estonian).

²⁴ See 23.10.1997 decision in Case No. 3-2-1-117-97 ("*A. Einseln v. Security Police*") (Riigi Teataja (The State Gazette) III 1997, 31/32, 333) (in Estonian); 23.12.1997 decision in Case No. 3-2-1-138-97 ("*L. Karamoesheva v. O. Pavlov*") (Riigi Teataja (The State Gazette) III 1998, 4, 40) (in Estonian); 26.03.1998 decision in Case No. 3-2-1-38-98 ("*AOZT Eesti Ärikeskus v. AS Rapla Veod*") (Riigi Teataja (The State Gazette) III 1998, 11, 121) (in Estonian).

²⁵ See R. Maruste. Põhiseadus ja selle järelevalve (Constitution and its Review). Tallinn: Õigusteabe AS Juura, 1997, p. 118 (in Estonian).

²⁶ See, for instance, P. Roosma. Rahvusvahelise ja siseriikliku õiguse vahekorra Eestis (On the Relation Between International and Domestic Law in Estonia). – Konstitutsioonikohtud põhiõiguste ja vabaduste kaitsel. Tartu: Riigikohus, 1997, p. 40 (in Estonian); A. Albi. Rahvusvaheliste lepingute iserealiseeruv olemus ja otsekohaldatavus (Self-executing Nature and Direct Applicability of International Treaties). – Juridica, 1998, No. 1, p. 39 (in Estonian); Final Report of the Expert Commission for the Estonian Constitution: section 123, subsection 2.2. Available at: <http://www.just.ee/index.php3?cath=1606> (in Estonian) (1).

²⁷ J. Pöld, for example, has expressed a similar opinion: Põhiseaduslikkuse järelevalve menetluse algatamine halduskohtus (Initiation of review of Constitutionality in Administrative Court). – Kohtuniku käsiraamat. Tartu: Sihtasutus Eesti Õiguskeskus, 1998, p. 10 (in Estonian); see also R. Maruste (Note 24), pp. 117–124 (especially p. 123); K. Merusk, R. Narits. Eesti Konstitutsiooniõigusest (Estonian Constitutional Law). Tallinn: Õigusteabe AS Juura, 1998, pp. 26–32 (in Estonian). L. Madise has had a different opinion: Rahvusvahelise õiguse käsitlest 1992. aasta Eesti põhiseaduses (International Law in the Estonian 1992 Constitution). – Juridica, 1998, No. 7, pp. 366–368 (in Estonian).

²⁸ See Case No. 3-2-1-38-98 referred to in Note 23; similar are 8.05.1997 decision in Case No. 3-2-1-60-97 ("*AS Rutsan v. AS Vikta*, II round") (Riigi Teataja (The State Gazette) III 1997, 18/19, 186) (in Estonian); 20.06.1996 decision in Case No. 3-2-1-85-96 ("*AS Rutsan v. AS Vikta*") (Riigi Teataja (The State Gazette) III 1996, 22, 296) (in Estonian) and 10.04.1996 decision in Case No. 3-2-1-54-96 ("*AS Assotrans v. AS Sampo and A. Hallasoo*") (Riigi Teataja (The State Gazette) III 1996, 14, 199) (in Estonian), in which the Convention on the Contract for International Carriage by Road (CMR) was applied which was enforced by the Government of the Republic regulation No. 61 of 9.03.1993 (Riigi Teataja (The State Gazette) II 1993, 9, 8).

2.2. International custom and other sources

Although treaties have become the most widespread source of international law to date, international custom, general principles of law and any binding resolutions of international organisations have not lost their importance — this also applies to domestic subjects.^{*29}

2.2.1. International custom and general principles of law

The above-quoted subsection 3 (1) of the Constitution refers to the general principles and rules of international law which are, according to that provision, an inseparable part of the Estonian legal system.^{*30} This gives rise to two questions:

- what sources of international law are implied by the phrase “generally recognised principles and rules of international law”, and
- what does “an inseparable part of the Estonian legal system” mean?

Starting from the second question, we may conclude, referring back to the definition provided at the beginning of the article, that subsection 3 (1) of the Constitution is an adoption rule that automatically transports generally recognised rules of international law (whatever they mean) to the Estonian legal system.^{*31} The Supreme Court has referred to this provision in its decisions and applied the rules of international law transported to the Estonian legal system under that provision. Thus, the Criminal Chamber of the Supreme Court stated in its decision of 23.05.1995: “in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, being, pursuant to section 3 of the Constitution of the Republic of Estonia, an inseparable part of the Estonian legal system, shall everyone charged with a criminal offence be presumed innocent until proved guilty according to law (article 6 (2))” and charges dropped to the extent not substantiated.^{*32}

This leads us to the first question. If we take into account that the ECHR as a treaty became binding on the Republic of Estonia from 16.04.1996, the Supreme Court had to apply the rule of presumption of innocence in the case quoted above as a rule of international customary law — as it has been codified in the ECHR (and several other instruments before and thereafter). Indeed, subsection 3 (1) of the Constitution has been considered a provision by which the rules of international customary law are adopted into Estonian law.^{*33} Yet many questions remain unanswered. The former Estonian Constitutions and the constitutions of Austria and FRG referred to do not distinguish between the “rules” and “principles” of international law.^{*34} Hence, does the adoption rule include, in addition to custom, other sources of international law, *e.g.* the general principles of law recognised by civilised nations to which a reference has been made in article 38 (1) (c) of the ICJ Statute, or universal multilateral conventions to which most of the countries in the world have acceded? Another question is related to the phrase “generally recognised”. Unlike in the Weimar Constitution, it is no longer found in the applicable constitution of FRG. Does this serve as a condition restricting the rules of international customary law?

²⁹ Besides the last one, article 38 (1) of the Statute of the ICJ also refers to the sources listed — nearly everyone dealing with the domestic position of international law has referred to that rule. For the domestic impact of international custom in general, see the recent comparative study: S. Stirling-Zanda. *L’application judiciaire du droit international coutumier. Étude comparée de la pratique européenne*. Zürich: Schulthess, 2000, pp. 115–135.

³⁰ The earlier Estonian Constitutions also contained similar provisions: subsection 4 (1) of the 1920 Constitution provided: “/.../ Generally recognised prescriptions (*määrused*) of international law shall be valid in Estonia as an inseparable part of her legal order.”; subsection 4 (2) of the 1937 Constitution reads: “Generally recognised prescriptions (*eeskirjad*) of international law shall be valid in Estonia as an inseparable part of her legal order.” It is rather obvious that these rules have been derived from the Weimar State 1919 Constitution article 4 that states: “*Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts*”, and from article 9 (1) of the 1920 Austrian Federal Constitution: “*Die allgemein anerkannten Regeln des Völkerrechts gelten als Bestandteil des Bundesrechts*.”

³¹ K. Merusk, R. Narits, for example, are of the same opinion (Note 26), p. 29; H.-J. Uibopuu. *Eesti põhiseadus, rahvusvahelised suhted ja rahvusvaheline õigus* (Estonian Constitution, International Relations and International Law). – *Juridica*, 1998, No. 4, p. 192 (in Estonian). For the interpretation of a similar rule in the FRG constitution (section 25), see R. Streinz. – *Sachs, Grundgesetz*. 2nd ed., article 25, paragraph No. 38; R. Geiger (Note 2), pp. 165–166. For Austria, see, *e.g.* F. Ermacora. – *Österreichisches Handbuch des Völkerrechts*. Hrsg. von H. Neuhold *et al.* Wien: Manzsche Verlags- und Universitätsbuchhandlung, 1991, p. 118, paragraph No. 578.

³² Case No. III-1/1-34/95 (“*Torop’s Case*”) (Riigi Teataja (The State Gazette) III 1995, 7, 83) (in Estonian).

³³ See H.-J. Uibopuu (Note 30), p. 192; K. Merusk, R. Narits (Note 26), pp. 28–9; L. Madise (Note 26), p. 366. For the FRG, see R. Streinz (Note 30), article 25, paragraph No. 38; R. Geiger (Note 2), pp. 165–166. For Austria, see, *e.g.* F. Ermacora (Note 30), p. 118, paragraph No. 578; see also A. Verdross, B. Simma (Note 8), pp. 542–543, sections 853–854.

³⁴ However, a distinction is made in the Portugal 1976 Constitution (article 8 (1)) and the Russian Federation 1993 Constitution (article 15 (4)).

The prevailing opinion seems to be that subsection 3 (1) of the Constitution covers both the customary law rules and the principles of law.^{*35} When referring to the principles of “international law”, the modifier has been subject to criticism since several general principles used in international law originate from the domestic legal orders.^{*36} This is also implied in article 38 (1) (c) of the Statutes of ICJ. It would be incorrect, however, to furnish the phrase only with the rule found in the Statutes of ICJ as international law also makes use of general principles that are characteristic of solely international law.^{*37} Insofar as these principles arise from international law or through international law, placing them under the adoption rule of the Constitution should not entail any problems.

In German law, the treaties subject to approval by law are excluded from the scope of application of article 25 of their Constitution as their status in domestic law is regulated by a special provision (article 59 (2)).^{*38} This leads to the peculiar conclusion that intergovernmental agreements could fall within the scope of article 25 provided that the other conditions have been met. The Constitution of Estonia also contains a separate rule of recognition for certain treaties. One could claim that the treaties to which Estonia has not acceded but which could contain “generally recognised rules of international law” due to their significance and numerous body of acceded parties serve as an inseparable part of the Estonian legal system. In reality, however, such treaties rather represent international customs (or create one themselves), and if Estonia has not clearly rejected such custom (e.g. by declaring its refusal to enforce the treaty), we could speak about the binding nature of the rules of that treaty as generally recognised customary rules and there is no need to extend the scope of application of subsection 3 (1) of the Constitution to include treaties that are not binding on Estonia as such. Neither does subsection 3 (1) of the Constitution extend to the intergovernmental agreements binding on Estonia, even if they contained “generally recognised rules of international law”, as these agreements are valid, due to the tacit rule of recognition, as a part of domestic law. In the last case, another question arises with regard to the hierarchical status of the rules of such treaties in the Estonian domestic law, compared to the status that they would have if they were deemed to be adopted under subsection 3 (1) of the Constitution, but this discussion no longer falls within the framework of the current topic.

Hence, subsection 3 (1) of the Constitution at least includes:

- generally recognised rules of international customary law;
- generally recognised principles of international law itself, and
- general principles of law originating from domestic law but widely applicable in international relations.^{*39}

Generally, international customary rule is such as to become binding, due to its validity in many states, also on the states that have not rejected the customary rule at the time of its evolvement (*i.e.* that are not persistent objectors). The existence of particular or regional and even bilateral custom is not precluded and ICJ recognised them “as evidence of a general practice accepted as law”.^{*40} On the one hand, one thing is clear: the modifier “generally recognised” does not presume that the Republic of Estonia itself has recognised the rule *expressis verbis*.^{*41} On the other hand, if Estonia

^{*35} See, for example, K. Merusk, R. Narits (Note 26), pp. 28–29; L. Madise (Note 26), pp. 364–365; H.-J. Uibopuu (Note 30), p. 191. U. Lõhmus seems to be of the same opinion. *Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana* (Generally Recognised Principles of International Law as Part of the Estonian Legal System). – *Juridica*, 1999, No. 9, p. 425 ff. (in Estonian). H.-J. Uibopuu has alternatively proposed that the expressions “generally recognised rules” and “generally recognised principles” refer to two ingredients of international conventional law (Note 30, pp. 190–191).

^{*36} See R. Maruste (Note 24), pp. 85–86.

^{*37} See H. Mosler. – *Encyclopedia of Public International Law*. Vol. II. R. Bernhardt (ed.), 1995, pp. 522–524, enumerating in this connection, for instance, principles of sovereign immunity of states, prohibition of genocide, equidistance method in delimitation of sea boundaries, Martens’ Clause etc.

^{*38} See R. Geiger (Note 2), p. 164.

^{*39} See U. Lõhmus (Note 34), p. 426.

^{*40} See A. Verdross, B. Simma (Note 8), pp. 359–361.

^{*41} See J. Uluots’ introductory speech about the 1937 Constitution in the National Assembly (*Rahvuskogu*) – cited in: H.-J. Uibopuu (Note 30), p. 189. An earlier opposing opinion was based on the Weimar interpretation, see: A. Piip. *Rahvusvaheline õigus* (International law). Tartu, 1936, p. 33–34 (in Estonian). See also the interpretation of the Bonn Constitution: R. Streinz (Note 30), article 25, paragraph No. 25. The change in the German constitutional law has been explained by the elimination of the word “recognised” (*anerkannten*) from the Bonn Constitution, see R. Geiger (Note 2), pp. 164–165. It could also be pointed out that in customary law, *opinio iuris* is often expressed by tacit consent and the consent of the state concerning the binding nature of the rule of customary law is often simply presumed, see I. Brownlie. *Principles of Public International Law*. 5th ed. Oxford: Oxford University Press, 1998, p. 7.

has acted as a persistent objector, such rule of customary law cannot be regarded as binding on Estonia in international law and thus it cannot transfer to the Estonian domestic law.^{*42}

The German practice indicates that the general rules of international law are those which have been recognised by all the states in the world or the majority thereof, while the latter is not estimated by the number of states involved but also by their “weight”.^{*43} The same principle should be observed when developing the Estonian approach — although all the states in the world need not be related to the custom (moreover, it would be difficult to ascertain that), a certain number of states exceeding the critical limit is required. Or *vice versa* — if a particular number of weighty states have objected to the binding nature of the evolving custom, it cannot be considered “a generally recognised rule”. The *opinio iuris* expressed by the countries belonging to the European legal culture area could be more meaningful for Estonia than that of those countries of some more distant area. In addition to the above-mentioned case, the Supreme Court has interpreted the rules of customary law upon adjudicating a crime against humanity, for instance.^{*44} The Criminal Chamber of the Supreme Court used charters of different international tribunals (Nurnberg and Yugoslavia) and other instruments when explaining the difference between crime against humanity and the crime of genocide. The differentiation was essential for sentencing a special agent of the Soviet intelligence service (NKVD) for killing members of the Estonian resistance movement in 1945–1946.

2.2.2. Binding decisions of international organisations

There are decisions of some international organisations that are adopted by a majority, not consensus, and that are binding on all the member states of the organisation. The most important of them are undoubtedly the decisions of the UN Security Council^{*45}, but also decisions of the Ministerial Conference of the WTO^{*46}, not to mention the decisions of the bodies of the European Community. Such decisions derive their legal force from treaties to which the member states of an organisation have acceded by ordinary procedure. Therefore, the decisions have been referred to as derived treaty law (*abgeleitete Vertragsrecht*).^{*47}

Estonia joins international organisations on the basis of treaties enforced by the *Riigikogu* (subsection 121 (3)). The Constitution of Estonia does not provide for the domestic status of the resolutions of international organisations.^{*48}

There is one case when the Republic of Estonia transformed a UN Security Council resolution into domestic law — by Government of the Republic regulation No. 298 of 23.08.1994, Estonia established sanctions against the Republic of Haiti on the basis of Security Council resolution No. 917 of 06.05.1994.^{*49} The regulation assigned to the particular agencies of Estonia the tasks corresponding to the content of the resolution, but it also extended to private persons — *e.g.* the financial resources (if any) of the Haitian officers and other officials in all Estonian credit institutions were frozen by the regulation. The regulation was repealed on 03.11.1994 by regulation No. 412, which, in turn, relied on Security Council resolution No. 944 of 29.09.1994^{*50}. As it appears, a significant temporal dissonance occurred both upon the enforcement of the sanctions on the domestic level and the termination thereof, as compared to their validity on the international level.

There is no information about the direct transposition of the Security Council resolutions into the Estonian domestic law. The later practice concerning the imposition of sanctions has been based on the approval of the European Union Common Foreign and Security Policy — thus, for example, by

⁴² See R. Streinz (Note 30), article 25, paragraph No. 25.

⁴³ *Ibid.*, paragraph No. 24. It should be taken into account that “generally recognised” has replaced “general” in the applicable German Constitution.

⁴⁴ Decision of 21 March 2000 in Case No. 3-1-1-31-00 (“*Paulov’s Case*”) Riigi Teataja (The State Gazette). — III 2000, 11, 118 (in Estonian).

⁴⁵ See article 25 of the Charter of the United Nations.

⁴⁶ Article IX (1) of the Marrakesh Agreement Establishing the World Trade Organisation.

⁴⁷ See also M. Schweitzer (Note 2), p. 88, paragraph No. 268.

⁴⁸ Neither do the constitutions of other countries. Article 93 of the Netherlands 1983 Constitution is an exception (“Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.”) as well as the provisions concerning the resolutions of the bodies of the Community included in the constitutions of some other European Union member states (*e.g.* article 8 (3) of the Portugal 1976 Constitution).

⁴⁹ Riigi Teataja (The State Gazette) I 1994, 61, 1021 (in Estonian). The text of Resolution S/RES/917 (1994) is available at: <http://www.un.org/Docs/scres/1994/9420793e.htm> ().

⁵⁰ The text of the Security Council Resolution S/RES/944 (1994) is available at: <http://www.un.org/Docs/scres/1994/9438017e.htm> (19.07.2001).

approving European Union common position No. 1999/206/CFSP of 15.03.1999 and the common positions extending and amending it, the arms embargo imposed on Ethiopia and Eritrea by UN Security Council resolution No. 1298 of 17.05.2000 has been recognised.^{*51} The domestic impact of such recognition is another question. The approved common positions comprise non-binding European Union law^{*52}, including positions that need not directly arise from the UN regulations. Hence, the relevant orders of the Government of Estonia cannot be regarded as the incorporation acts of the underlying Security Council resolutions. Yet it may be regarded (with reservations) as an act incorporating international soft law and thereto also establishing thereof as a recognised set of legal provisions.

As Estonia has, by approving treaties that serve as the basis for the binding nature of the resolutions adopted by international organisations, also agreed to the mechanisms for issuing secondary legislation, arising therefrom, they could be considered as adopted into the Estonian domestic law as from the moment that they became internationally binding on Estonia. Such decisions have been indirectly legitimised by the legislator. In practice at least the Supreme Court has not yet discussed the domestic applicability of the binding resolutions of international organisations.

The validity of the binding resolutions of international organisations on the domestic level does not determine their applicability. The purpose of the UN Security Council instruments presented as an example was to restrict the behaviour of the domestic subjects of all states, *i.e.* impose indirect obligations on domestic subjects. Although the rules of international law valid on the domestic level should be presumed to be directly applicable, it is the self-executing nature of the rules imposed on private individuals that is questionable.^{*53}

To sum up the above discussion, we may state that treaties binding on Estonia, generally recognised rules of international customary law binding on Estonia, general principles of international law itself or law used thereby and the resolutions of international organisations binding on Estonia are all valid as a part of the Estonian domestic law. The basis of their validity is international and legal, *i.e.* Estonia follows the modified monist doctrine. However, the domestic validity of international law does not provide a clear answer to the status of such rules (and principles) in the hierarchy of rules or to their direct applicability.

⁵¹ Clause 1 of Government of the Republic order No. 822-k of 18.10.2000 (Riigi Teataja (The State Gazette) II 2000, 24, 151) (in Estonian). For the text of the common position (1999/206/CFSP) see http://europa.eu.int/eur-lex/en/lif/dat/1999/en_499X0206.html (1.04.2001); for the text of the Security Council Resolution S/RES/1298 (2000) see <http://www.un.org/Docs/scres/2000/res1298e.pdf> ().

⁵² See, *e.g.*, T. Kerikmäe, *Euroopa Liit ja õigus* (European Union and Law). Tallinn: Õiguskirjastus, 2000, pp. 31–33 (in Estonian).

⁵³ This applies primarily with regard to the legal certainty of the domestic subjects — they must have an opportunity to foresee the impact of the directly applicable binding rule. This presumes completeness and clarity of the rule. See, for example, judgement of the European Court of Human Rights in *the Groppera Radio and Others v. Switzerland* case of 28.03.1990 (Series A, No. 173, sections 65–68), where the Court accepted a radio regulation adopted by the International Telecommunications Union and applied by Swiss authorities against the applicants as an accessible legal ground with foreseeable influence on radio operators for restricting international broadcasts.