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Justice Laws of 1889 — a Step in Estonia's Constitutional Development

1. Introduction

Considering Estonia's history and history recording traditions, it may be understood why the history of written constitutions of Estonia, or to be more exact, records of the related history, usually start with the birth of the Constitution of 1920.

The written history of Estonian law indicates that the acts preceding the constitutions have been referred to only in a few cases. Moreover, the prevailing understanding of these writings is that the principles of the rule of law and the first legal provisions characteristic of a state governed by the rule of law reached the Estonian legislation only when the country became independent and republican constitutions were drawn up after World War I.

This article attempts to give insight into the meaning of the 1889 reform for Estonia's constitutional development, focusing on the implementation of various rule of law principles and provisions in the Estonian legislation before 1917. It should be admitted that those principles and provisions were not implemented fully or without hindrances; the 1889 reform is thus not claimed to have created a state governed by the rule of law in one area of the empire. The article mainly focuses on the procedural codes and the laws regulating courts administration at the time. They are viewed in conjunction because of the historically close intertwining of procedural law and the courts administration.*¹

¹ G. Dahlmans. Frankreich. – Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. Bd. 3. Das 19. Jahrhundert. Zweiter Teilband. Gesetzgebung zum Allgemeinen Privatrecht und zum Verfahrensrecht. H. Coing (Hrsg.). München 1982, p. 2489.

2. Public nature of judicial power

The public nature of the administration of justice is taken for granted today and does not usually deserve much attention. However, in the historic view, the state monopoly of justice is a fairly young phenomenon; until the beginning of the 19th century it was common in Europe that the administration of justice (especially in civil matters) was largely non-public or even private.^{*2} The central power had to share the judicial power with many other subjects.

Estonia is no exception, although already in the 1630s a large-scale judicial reform was carried out here (mainly in South Estonia), led by J. Skytte, in which course a (Swedish) state court system was established, topped by the creation of the highest court in Tartu.^{*3} The reform also established state control over non-public courts.^{*4} In later history, fully public courts almost disappeared in Estonia and (Russian) state control over non-public courts weakened substantially. For example, in the Estonian province, the judges working outside of towns were not appointed by any state institution in the 19th century, and they were not remunerated by the state.^{*5}

2.1. Earlier research

Literature discussing the judicial system of the Baltic provinces in the 19th century and the judicial reform of 1889 generally states that the pre-reform courts were class courts. There is no detailed characterisation of the courts; even the public or non-public nature of the courts and the issue of patrimonial courts have not been given a closer view.^{*6} As regards the issue, or rather, silence on the issue of the public nature of the courts, both Baltic-German, Russian and Estonian researchers hold surprisingly similar opinions, but there is reason to believe that their opinions do not arise from the same grounds.

The former Baltic-German elite, especially the knighthood, for a long time tacitly relied on the premise that the 'Baltic Land State' (*Landesstaat*) was indeed a state and its institutions were state institutions. Classes, especially knighthoods, understood themselves to be the *Land*.^{*7} This opinion still prevailed in the 18th, but not in the 19th century.

The traditional way of thinking was still for a long time one of the leads in the Baltic-German approach to history, especially due to political and ideological factors. For example, the *Landtage* of the knighthood are time and again compared to a parliament and not a local council.^{*8} Today's German researcher J. Baberowski uses the term '*die baltische Eigenstaatlichkeit*' to characterise the situation at the time.^{*9} Relying on A. v. Tobien, G. v. Pistohlkors points out the lack of a state as such in Eastern and Central Europe before World War I. He claims that many (public and communal) functions were carried out by various class and patrimonial corporations.^{*10}

² W. Reinhard. *Geschichte der Staatsgewalt. Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart*. München 1999, pp. 291–306. Hereinafter the phrase 'non-public' is used as it also covers private administration of justice. Private and non-public justice are not further distinguished here from the legal and historical viewpoint.

³ E. Blumfeldt. *Gustav II Adolfs reformide ajastu. – Eesti ajalugu III. Roots ja Poola aeg (Gustaf II Adolf reform era. – History of Estonia III. Swedish and Polish periods)*. H. Kruus (chief ed.). Tartu 1940, pp. 152–153 (in Estonian).

⁴ A. Tering. *Über die Juristenausbildung der Mitglieder des Hofgerichts in Dorpat (Tartu) 1630–1710. – Tartu Ülikooli Toimetised. Vihik 868; Iz istorii juridicheskogo obrazovania v Estonii v XVII–XIX vv.* Tartu 1989, p. 28.

⁵ *Svod Mestnyh Zakononii Gubernii Ostzeiskih. Chast pervaya. Utchrezhdenia. Sankt-Peterburg 1845, §§ 848–853, 892–894, 921–926, 928, 966, 971.*

⁶ In his thorough monography 'Vallakohus Eestis 18. sajandi keskpaigast kuni 1866. aasta reformini' ('Parish courts in Estonia from mid-18th century to the 1866 reform') (Tallinn 1980), A. Traat does not use the term 'patrimonial court'. For example, in the division into periods of parish court history, he distinguishes between parish courts of the period of demise of serfdom and feudalism (mid-18th century to 1866) on one hand and those of the capitalist period (1866–1940) on the other hand. The only author whose approach suggests a distinction is J. Jegorov. See J. Jegorov. *Voprosy istorii gosudarstva i prava Estonskoi SSR do Oktyabrskoi revolyutsii. IV.* Tartu 1978, Contents. His textbook 'Istorija gosudarstva i prava Estonskoi SSR' (Tallinn 1981), however, lacks such distinction. According to F.G. v. Bunge, the patrimonial courts of landlords disappeared in Estonia and Livonia already as a result of the laws of 1802–1804. See F.G. v. Bunge. *Geschichte des Gerichtswesens und Gerichtsverfahrens in Liv-, Est- und Curland*. Reval 1874, p. 309.

⁷ J. v. Ungern-Sternberg. *750 aastat Eestimaa rüütelkonda (750 years of knighthood in Estonia)*. – *Akadeemia* 2002/10, pp. 2028–2029 (in Estonian).

⁸ *Ibid.*, pp. 2036–2038.

⁹ J. Baberowski. *Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914*. Frankfurt am Main 1996, p. 375.

¹⁰ G. v. Pistohlkors. *Die Ostseeprovinzen unter russischer Herrschaft (1710/95 – 1914)*. – *Deutsche Geschichte im Osten Europas. Baltische Länder*. G. v. Pistohlkors (Hrsg.). Berlin 1994, p. 363.

The leaders of the 1864 judicial reform in the Russian Empire viewed the existing courts as state courts and the 1864 Judicial Authorities Act did not specifically address this aspect. The problem of landlords' patrimonial justice was considered solved together with the elimination of serfdom under item 7 of the Manifest of 19 February 1861 and §§ 25–28 of the act.^{*11} Earlier Russian researchers have adopted the views of the Russian politicians of the time without critique; at least the historiography of the time does not question the issue of the public nature of the courts. According to the prevailing opinion, the courts acting in Russia before the 1864 judicial reform were class courts, but in any case they were state courts.^{*12} This position arises from the peculiarity of development of the Russian legal and judicial system, in which the state and the autocrat played a special role. According to F. Kaiser, **the central power** at the time of Katherine II **granted** the classes the opportunity and right to participate and represent their interests in the administration of justice. The state itself constantly empowered the voice of the aristocracy for various reasons; from 1831 the state allowed the aristocracy to elect the chairman of the provinces court of appeal.^{*13}

Unfortunately, this understanding like some other positions^{*14} has been transposed without further consideration also to the Baltic and Polish provinces of the empire, but as opposed to Russian society, the class corporations here were not a 'state venture'^{*15} without their own original traditions, including in the sphere of administration of justice. The classes and class institutions in the Baltic provinces were original, they were not created by the central power of the Russian empire. The administration of justice was also originally in the hands of the classes themselves and in these provinces, the central power rather attempted to subject to state control the administration of justice that belonged to and was executed by the classes. It should be reminded that apart from the magistrates that administered justice in the towns, the court members and officials of all levels in the Estonian province were elected by the knighthood and they did not require any approval by the representatives of state power to take office.^{*16}

The phrase 'class court' thus bears a different meaning in the Russian and Estonian legal historical writings.

As regards Marxist researchers, an inquiry into the public nature of the courts was prevented by the frameworks of historical-dialectic materialism, and the predefined use of the main categories of this theory — 'basis' and 'superstructure' in the narrow Soviet interpretation. The court belonged to the 'superstructure' of social, political and legal institutions. The court as a repressive punitive body that protected the interests of the governing exploitative class was an inseparable part of the superstructure, the most important part of which was the state. The court in turn came into being after people were divided into the exploited and the exploiters and after private property and statehood emerged.

According to F. Engels, during the primitive communal order (in the archaic legal culture) life ran: 'without soldiers, gendarmes or police; without nobles, kings, governors, prefects or judges; without prisons, without trials....'^{*17} According to J. Stalin: 'The state emerged by a division of society into hostile classes; it emerged to control the exploiting majority in the interests of the minority being exploited. The main instruments of exercising state power are the army, punitive bodies, intelligence service and prisons.'^{*18} From these arguments it was derived that 'Two parallel forms of state duress run in through the entire history of exploitative societies: all forms of administrative duress, of which the strongest is military suppression, on one hand, and the judicial form of state duress, on the other hand.'^{*19}

This opinion was not swayed throughout the Soviet-Marxist legal discourse. Based on the general views of historical-dialectic materialist and Soviet-Marxist legal theory, it was inappropriate in the Soviet legal discourse to question whether the court was actually a public function within the legal meaning of its time, in one stage of history of another.

¹¹ Reformy Aleksandra II. O. Tshistiakov, T. Novitskaya (Sost.). Moskva 1998, p. 25; Manifest 19. fevralya 1861 ob osvobodzhennii pomechtshchikh krestian iz krepostnoi zavisimosti. – Konets krepostnichestva v Rossi. V. Fjodorov (Sost.). Moskva 1994, p. 214; Obchtsee polozhenie o krestjanah, vyesdshikh iz krepostnoi zavisimosti. – Reformy Aleksandra II. O. Tshistiakov, T. Novitskaya (Sost.). Moskva 1998, pp. 43–44.

¹² If it was actually so, is another question.

¹³ F.B. Kaiser. Die russische Justizreform von 1864. Zur Geschichte der russischen Justiz von Katharina II bis 1917. Leiden 1972, p. 21.

¹⁴ For example, T. Karjahärm states that a bar association was established in the Baltic provinces in the course of the 1889 reform. – T. Karjahärm. Ida ja Lääne vahel. Eesti-Vene suhted 1850–1917 (Between east and west. Estonian–Russian relation 1850–1917). Tallinn 1998, p. 81 (in Estonian). In reality, attorneys-at-law had operated in these provinces for a length of time. The 1889 reform eliminated the former requirements for and the organisational structures of attorneys-at-law. – See K. Grau. Advokatuuri õigusajaloolise arengu põhihooni Eestis (Some of the main features of the legal historical development of the Bar Association). – Õigus 1939/8, pp. 357–373 (in Estonian); W. v Rüdiger. Aus dem letzten Kapitel deutsch-baltischer Geschichte in Lettland 1919–1945. Gern 1954, p. 52.

¹⁵ D. Geyer. Gesellschaft als staatliche Veranstaltung. – Jahrbücher für Geschichte Osteuropas. Neue Folge 1966/14, pp. 21–50.

¹⁶ Svod Mestnyh Uzakonenii Gubernii Ostzeiskih. Tshast pervaya. Utchrezhdenija. Sankt-Peterburg 1845, §§ 848–853, 892–894, 921–926.

¹⁷ F. Engels. Perekonna, eraomanduse ja riigi tekkimine (Emergence of family, private property and state). Tallinn 1946, p. 97 (in Estonian).

¹⁸ J. Stalin. Leninismi küsimusi (Leninist issues). Tallinn 1945, p. 530 (in Estonian).

¹⁹ S. Golunski, D. Karev. NSV Liidu kohtukorraldus. Õpperaamat juriidilistele koolidele (USSR courts administration. Textbook for law schools). Tallinn 1949, p. 13 (in Estonian).

Estonian researchers of different periods have tacitly accepted the positions of both Baltic-German and Russian Marxist and non-Marxist authors.

Following from the above, the public nature of justice has not been tackled by the studies of the 1889 judicial reform in Estonia. It is quite an ordinary argument that the German judicial system was replaced by the Russian system^{*20}, but neither the German nor Russian judicial system is a defined legal term. On the other hand, it has been stressed time and again that the courts of the Russian judicial system established by the 1889 reform were, with a few exceptions, non-class courts.^{*21} This is often accompanied by the argument that the maintenance of parish class courts was a most vivid remnant from the feudal system.^{*22}

2.2. Establishment of public judicial power

The fact that a principal change occurred in Estonia in 1889 — a transfer from non-public to public administration of justice — has not actually caught the attention of researchers. Such an approach is surprising for many reasons.

Firstly, the public nature of courts was one of the requirements of the Estonian nationalist movement. Items 7, 8 and 9 of the memorandum submitted to Alexander III by the envoys of Estonian societies on 19 June 1881 concerned the administration of the courts. It was requested in the memorandum that a 'new law on courts' be effected; it was separately pointed out that judges should be appointed by a 'minister of the courts'.^{*23} According to M. Päss, the memorandum stressed the main rights of state power in court administration issues and requested that the pre-emptive rights of the knighthood be abolished.^{*24} These requests were repeated in the petitions submitted during the review by the senator N. Manassein (1882–1883).^{*25}

Secondly, the abolishment of patrimonial courts and transfer to a public judicial system has been regarded as an essential element of the liberation of peasants from serfdom, which formally signifies the completion of the liberation of peasants.^{*26} The abolition of serfdom in turn is one of the problems most studied in the history of peasants both in the national and Soviet historiography.

Thirdly, the public nature of the administration of justice is a primary element of modern court administration under the rule of law, and the transfer to public administration of justice on all levels has a remarkable role in the European judicial history of the 18th–19th centuries. The requirement for public administration of justice was on an important place in the programmes of both French and German middle class–liberal movements and political parties, which saw it as a prerequisite to the equality of all citizens before law. Public administration of justice was also supported by the conservative government of many monarchist states, who saw in it a good opportunity to reduce the power of the classes and subordinate them more firmly to the central power of the state.

The first motive is noticeable in the abolition of patrimonial and seigniorial courts by Decision 4–5 of the French Constituent Assembly of 1789.^{*27} The same motive is also noticeable in the adoption of the Constitution by the German Frankfurt National Assembly in 1849. According to § 174 of the Constitution adopted by the National Assembly, state was the authority with judicial power.^{*28}

²⁰ T. Karjahärm (Note 14), p. 81 (in Estonian).

²¹ See e.g. Eesti Entsüklopeedia. (Estonian encyclopaedia). Vol. 11. Tallinn 2002, p. 287 (in Estonian); E. Hiio. Vallakohtute asutamise Eestimaa kubermangus (On the establishment of parish courts in the Estonian province). – Ajalooline Ajakiri 1998 (102) 3, p. 89 (in Estonian).

²² V. Kalnyn. Otscherki istorii gosudarstva i prava Latvii XI–XIX vekah. Epoha feodalizma i domonopolistitsheskogo kapitalizma. Riga 1980, pp. 167–168; J. Jegorov. Voprosy istorii ... (Note 6), p. 82; V. Peep. Pilguheit Eesti õiguse ja kohtute arengule (A Glance on the development of Estonian law and courts). – Kleio. Ajaloo Ajakiri 1995 (11) 5, p. 23 (in Estonian).

²³ Rahvusliku liikumise radikaalse suuna programm. Eesti seltside saadikute märgukiri Aleksander III-le ajalehes Sakala (19. juuni 1881). Eestirahva saadikute märgukiri. – Venestamine Eestis 1880–1917. Dokumente ja materjale (Programme of the radical branch of the nationalist movement. Memorandum by envoys of Estonian societies to Alexander III in the *Sakala* newspaper (19 June 1881). Memorandum by Estonian envoys. – Russianisation in Estonia 1880–1917. Documents and materials). T. Karjahärm (Comp.). Tallinn 1997, pp. 139–140 (in Estonian).

²⁴ M. Päss. Eestlaste petitsioonid ja kohtureform 1889. a (Petitions by Estonians and judicial reform of 1889). – Õigus 1939/5, p. 219 (in Estonian).

²⁵ *Ibid.*, pp. 220–223.

²⁶ M. Laur. Mõiste 'Bauernbefreiung' tänapäeva saksa ajalookirjanduses (The concept of 'Bauernbefreiung' in modern German history literature). – Kleio. Ajalooline Ajakiri. 1997 (21) 3, p. 41 (in Estonian).

²⁷ Rozhdenije frantsuzskoi burzhuaznoi politiko-pravovoi sistemy. (K 200-letiju Velikoi frantsuzskoi burzhuaznoi revoljutsii). A. Koroljov, K. Livantsev (Red.). Leningrad 1990, p. 12.

²⁸ Dokumente zur deutsche Verfassungsgeschichte. Bd. 1. Deutsche Verfassungsdokumente 1803–1850. E.R. Huber (Hrsg.). 3. Aufl. Stuttgart 1978, p. 394.

The second motive is noticeable for example in Germany, when the King of Württemberg liquidated patrimonial administration of justice by his rescript of 10 May 1809.^{*29} The king's order did not only eliminate the judicial power of clerical and secular estate owners (*Grundherr*) (i.e. patrimonial judicial power in the narrow meaning), but also the judicial power of imperial institutions (*Reichstift*), imperial knights (*Reichsritter*) and lords of the estate (*Standesherr*) who had lost their independence during mediatisation (patrimonial judicial power in the broad meaning).

In implementing the Russian judicial reform of 1864 in the inner Russian provinces, the educated and liberal circles of Russian society largely support the first motive, i.e. the equality of all citizens before law, although it is not associated with public administration of justice, but with class justice. Complying with the motive that inspired the liberal circles was not an aim for the Russian autocracy; its aim was to create a more efficient state by importing the latest achievements of Western (legal) science and statehood.^{*30}

In the 1889 judicial reform in the Baltic provinces, the second motive is more noticeable — the central government's wish to gain stronger control of the diverse population and territory by way of creating state courts.^{*31} Naturally, the Baltic-German elite sensed the central government's motive and saw the establishment of public administration of justice as the breaking of the former constitution and an element of Russianisation.^{*32}

These views were carried over to the later historiography of the judicial reform, which is why it has often been treated in the particular context of Russianisation.^{*33} Only in later historiography did the approach become more differentiated, seeing modernising elements besides Russianisation.^{*34}

Speaking about the public nature of the judicial power, it should be admitted that the administration of justice did not become fully public.

Clerical courts continued to exist side by side with public courts and they had extensive competence in family law and matrimonial law. The Orthodox and Lutheran churches operated in parallel in Estonia, but had different relations with the Russian state authority.

Secondly, the peasants' parish court remained, which has been generally assessed in a negative way as a remnant from the previous period.^{*35} A fact overlooked is that as opposed to the peasants' courts operating before the 1889 reform, the peasant courts that existed after the reform were integrated into the state court system. The state, i.e. the state court in the form of the local district court appointed the members of the parish court of their area, who were elected by the plenary in a secret ballot. The district court could choose not to appoint the parish court members only in the cases expressly and exhaustively listed in law, i.e. if the rules of the election procedure were violated or unsuitable candidates were elected.^{*36} The parish court's instance of appeal was the peasant court of second instance, whose chairman was also appointed by the state, i.e. the central state power represented by the Minister of Justice.^{*37} The cassation instance of the peasant courts was the district court, in which a representative of the prosecuting authority participated when reviewing the decisions of the peasant court of second instance by way of cassation proceedings. The district court had the function of general administration and supervision of the peasant courts in its area. The state laid down the competence of peasant courts in civil and criminal law by legislation, providing fairly exact procedural rules.

²⁹ S. Werthmann. Vom Ende der Patrimonialgerichtsbarkeit. Ein Beitrag zur deutschen Justizgeschichte des 19. Jahrhunderts. Frankfurt am Main 1995, pp. 49–53.

³⁰ J. Baberowski. Europa in Rußland: Justizreformen im ausgehenden Zarenreich am Beispiel der Geschworenengerichte 1864–1914. – Reformen im Rußland des 19. und 20. Jahrhunderts. D. Beyrau, I. Cicurov, M. Stolleis (Hrsg.). Frankfurt am Main 1996, p. 151.

³¹ E. Jansen. Aleksander III venestusreformid ja eesti avalikkus (Russianisation reforms of Alexander III and the Estonian public). – Acta Historica Tallinnensia 1999/3, p. 47 (in Estonian).

³² G. Pistolkohrs. Ritterschaftliche Reformpolitik zwischen Russifizierung und Revolution. Göttinger Bausteine zur Geschichtswissenschaft. Bd. 48. Göttingen 1978, pp. 22–23.

³³ A. Tobien. Die Livländische Ritterschaft in ihrem Verhältnis zum Zarismus und russischen Nationalismus. Bd. I. Riga 1925, Bd. II. Berlin 1930; M. Haltzel. Der Abbau der deutschen ständischen Selbstverwaltung in den Ostseeprovinzen Russlands. Ein Beitrag zur Geschichte der russischen Unifizierungspolitik 1855–1905. Marburg/Lahn 1977, p. 72.

³⁴ Deutsche Geschichte im Osten Europas. Baltische Länder. G. Pistolkohrs. Berlin 1994, p. 400; Russification in the Baltic Provinces and Finland, 1855–1914. E.C. Thaden (ed.). Princeton 1981, pp. 306–313. Of Estonian authors, see E. Jansen (Note 31), pp. 39–65.

³⁵ V. Kalnyn. Otsherki istorii gosudarstva i prava Latvii XI–XIX vekah. Epoha feodalizma i domonopolitistsheskogo kapitalizma. Riga 1980, pp. 167–168; J. Jegorov. Voprosy istorii... (Note 6), p. 82; V. Peep (Note 22), p. 23.

³⁶ Polnoe Sobranie Zakonov Rossiiskoi Imperii. Izdanie 3 (hereinafter PSZ-3) Nr. 6188. Polozhenije o preobrazovanii krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniakh. Tshast A. Volostnoi sudebnyi ustav, § 13.

³⁷ PSZ-3. Nr. 6188. Polozhenije o preobrazovanii krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniakh. Tshast A. Volostnoi sudebnyi ustav, § 30.

3. Separation of powers

Speaking about the principles characteristic to a state governed by the rule of law, the principle of separation of powers has an important role, being one of the primary elements of modern courts administration and one of the guarantees to the independence of the judicial power. In the historical context, this chiefly means freeing the executive power of the duties of administration of justice, which were transferred to independent judicial bodies.^{*38}

3.1. Concealment of the separation of powers

As opposed to the issue of the public nature of courts, the problem of separation of powers in the judicial reform has been clearly acknowledged. Considering the political situation in the autocratic Russia, it is not so much the separation of powers, but the resulting independence of the courts that is being talked about. No distinction has been made between the two levels of the courts' independence: the level of objective independence on the one hand and the level of personal independence on the other hand.

Section 1 of the Bases for the Court Reform, approved by Alexander II on 29 September 1862, expressly states that

‘Judicial power shall be separated from executive, administrative and legislative powers.’^{*39}

The next section of the Bases for the Court Reform, also repeated in § 1 of the Judicial Authorities Act of 1864, clearly states that judicial power is vested only in district courts, circuit courts, courts of appeal and the Supreme Court:

‘District court judges and assemblies thereof, circuit courts, courts of appeal and the Supreme Court as the highest court of annulment have judicial authority.’^{*40}

The principle of independence of the judicial power was also reflected in the Code of Civil Procedure (§§ 1, 2, 9, 10) and the Code of Criminal Procedure (§§ 1, 2, 3, 4, 5, 12, 13).

Section 1 of the Code of Civil Procedure stated:

‘Any civil law dispute shall be settled by the courts.’^{*41}

Section 1 of the Code of Criminal Procedure (Criminal Court Procedure Act) stated:

‘Nobody must be investigated by the courts for a crime or offence unless he has been brought to justice by the procedure set out in the rules of this Act.’^{*42}

The concealment of the problem of the separation of powers behind the wording of the independence of the courts was carried forward to the legal dogmatic literature of the Russian empire of that time.^{*43}

Remarkably, the Soviet Russian legal history literature continued the traditions of the 19th century legal writing, speaking about the independence of the courts, but avoiding the underlying theory of the separation of powers.^{*44} The independence of the courts is discussed in very narrow frames, understanding it only as

³⁸ E. Holthöfer. Ein deutscher Weg zu moderner und rechtsstaatlicher Gerichtsverfassung. Das Beispiel Württemberg. Veröffentlichungen der Kommission für Geschichtliche Landeskunde in Baden-Württemberg. Reihe B. Forschungen. Bd. 137. Stuttgart 1997, pp. 7–8.

³⁹ Sudebnye Ustavy 20. noyabrya 1864 goda s izlozheniem rasuzhdenii, na koikh oni osnovany. Vtoroe dopolnennoe izdanie. Ts. III. Ushrezhdenie sudebnyh ustanovlenii. Sankt-Peterburg 1867, p. XLII. This division differs from the usual division into three.

⁴⁰ Keisri Aleksandri Teise Kohtuseaduses ühes seadustega kohtuolu ja talurahva koosoleku kohtade uuendamise ja Balti kubermangudes ja Rahukohtumõistjatel pälepandavate nuhtluste seadusega (Courts Act of Tsar Alexander II with laws on updating court administration and peasant meeting places in the Baltic provinces and the law on punishments imposed by district judges). K. Tiisik, J. Truusman, T. Vares (Transl.). Eraväljaanne. Kohtukohtade seadlus. Väljaanne aastast 1883, kuhu 1886. a. jätku paragrahvid sisse on võetud ja 1887. a. jätku paragrahvid juurde lisatud (Private publication. Courts Act. Criminal Court Procedure Act 1883 Publication including the 1886 and 1887 continuation sections). Tallinn 1889, p. 3 (5) (in Estonian).

⁴¹ *Ibid.* Tsiviilkohtupidamise seadus. Väljaanne aastast 1883, kuhu 1886. a. jätku paragrahvid sisse on võetud ja 1887. a. jätku paragrahvid juurde lisatud (Civil Court Procedure Act 1883 publication including the 1886 and 1887 continuation sections). Tallinn 1889, p. 3 (53) (in Estonian).

⁴² *Ibid.* Kaelakohtupidamise seadus. Väljaanne aastast 1883, kuhu 1886. a. jätku paragrahvid sisse on võetud ja 1887. a. jätku paragrahvid juurde lisatud (Criminal Court Procedure Act 1883 publication including the 1886 and 1887 continuation sections). Tallinn 1889, p. 3 (160) (in Estonian).

⁴³ See e.g. J. Vaskovski. Kurs grazhdanskogo protsesssa. T. I. Subiekty i obiekty protsesssa, protsessualnyaotnoshenia i deistvia. Moskva 1913 (contents and index); A. Golmsten. Utshebnik russkogo grazhdanskogo sudoproizvodstva. 4. izd. Sankt-Peterburg 1907, pp. 28–33; I. Foinitski. Kurs ugovolnogo sudoproizvodstva. T. I. 4. izd. Sankt-Peterburg 1912, index.

⁴⁴ B. Vilenski. Sudebnaja reforma i kontreforma v Rossii. Saratov 1969, pp. 335–338.

independence from the executive power of the state. Following this narrow approach, it could be said that the courts of the Baltic provinces (especially the Estonian province) were sufficiently independence from the executive power of the Russian empire already before the reform, and took decisions that were indeed not approved by the empire (for example, the case of the Tallinn Mayor W. Greiffenhagen).⁴⁵ However, the question about the relation of the class courts of the time to the other class institutions has not been answered.

I believe that this is not an accidental phenomenon, but the approach of the Soviet legal history writing is rooted in the Marxist-Leninist legal theory. According to Soviet authors, already F. Engels assessed the theory of the separation of powers to be 'ridiculous', completely unfeasible, and a manifestation of mankind's fear of itself.⁴⁶ According to Soviet legal theory, 'the Soviet power was standing on the unity of the power of the workers from top to bottom'⁴⁷ The fullness of the power was centred around the councils, particularly the Supreme Council of the Soviet Union.⁴⁸ This opinion was not merely a theoretical point of view, but had a firm position in political programme documents.⁴⁹

3.2. Breaking the separation of powers in the empire

In line with the general focus of the Marxist historiography of the judicial reform on counter reforms rather than the reform itself, Soviet authors have paid most attention to breaking the independence of the judicial power on the institutional level. Two legislative acts are pointed out: the Emergency Situations Act of 14 August 1881 and the District Bailiffs Act of 12 July 1889.⁵⁰

The act of 14 August 1881, or to be more exact, the decision of the Committee of Ministers, codified and systematised the repressive acts of earlier years. This act has deserved quite different evaluations in non-Marxist historiography.⁵¹ The US researcher R. Pipes calls it the most important act between the 1861 manifest abolishing serfdom and the 1905 October Manifest, a constitution under which Russia was governed.⁵² This, however, is not an original view, as already V. Lenin called this Act the factual Russian Constitution and his assessment was used also in the Soviet historiography.⁵³

According to this act, an enhanced state of defence (*usilennaya ohrana*) could be declared by the Interior Minister or a governor general in his subordinate province. An emergency state of defence (*tshrezvytshainaya ohrana*) could be declared by the Interior Minister with the consent of the Committee of Ministers, subject to the tsar's approval.⁵⁴ In an enhanced state of defence, governors general, or in their absence, governors and town mayors could issue regulations and instructions to secure public order. Any violations of such regulations and instructions were handled by the aforementioned officials, who could impose a fine of up to 500 roubles or three months arrest. They could prohibit all public and private meetings and gatherings, close commercial and industrial undertakings, etc.

In an emergency state of defence, governors generals or deputy governors (*glavnonatshalstvujushchi*) separately appointed by the tsar had much greater powers. Besides other measures of securing order, they could

⁴⁵ M. Haltzel. Der Abbau der deutschen ständischen Selbstverwaltung in den Ostseeprovinzen Russland. Ein Beitrag zur Geschichte der russischen Unifizierungspolitik 1855–1905. Marburg, Lahn 1977, p. 85.

⁴⁶ S. Golunski, D. Karev. NSV Liidu kohtukorraldus. Õpperaamat juriidilistele koolidele (USSR courts administration. Textbook for law schools). Tallinn 1949, p. 19 (in Estonian). It is indeed a position of the Soviet legal theory, since F. Engels in this context speaks about the trinity of legislative power (*trijedinstvo zakonodatelnoi vlasti*), consisting in England of monarchist, aristocratic and democratic elements. See F. Engels. Polozhenie Anglii. Angliiskaya konstitutsia. – K. Marks, F. Engels. Sotshinenia. T. 2. Izd. 2. Moskva 1955, pp. 620–623.

⁴⁷ A. Vyshinski. Nõukogude riigiõigus. Õpperaamat juriidilistele instituutidele (Soviet constitutional law. Textbook for law institutes). Tartu 1941, p. 311 (in Estonian).

⁴⁸ *Ibid.*, p. 314.

⁴⁹ Item 5 of the Communist Party of the Soviet Union: 'Ensuring the working masses an incomparably broader opportunity than under bourgeois democracy and parliamentarism, to proceed with the election and removal of delegates in the easiest and best accessible way for workers and peasants, the Soviet power simultaneously destroys the dark sides of parliamentarism, especially the separation of legislative and executive powers, the separation of representative bodies from the masses, etc.' See A. Vyshinski (Note 47), p. 311.

⁵⁰ PSZ-3 Nr. 350 Polozhenie o merakh k ohraneniu gosudarstvennogo porjadka i obshtshestvennogo spokoistvia; it was later codified Svod Zakonov T. XIV Svod ustavov o preduprezhdenii i presetshenii prestuplenii § 1 primetshanije 2 pril. I Izd. 1890; PSZ-3 T. IX Nr. 6196, 6484.

⁵¹ J. Baberowski gives a positive assessment of this act, as it provides a legal frame for emergency situation and restricts the arbitrary action of local representatives of executive power. Thus, it has functions that increase and also restrict the powers of officials. – J. Baberowski (Note 9), pp. 704–705.

⁵² R. Pipes. Rossia pri starom rezhime. Moskva 1993, p. 398.

⁵³ A. Davidovits. Samoderzavie v epokhu imperializma. (Klassovaja sushtshnost i evolyutsiya absolyutizma v Rossii). Moskva 1975, p. 225.

⁵⁴ Earlier Estonian literature (until 1940) also uses the terms 'elevated' and 'extraordinary watch' (see K. Trakman. Kaitseseisukord (State of defence). – Õigus 1930/1, pp. 3–16 (in Estonian)). Later literature also makes use of the term 'enhanced vigilance' (see T. Karjahärm (Note 14), p. 122).

impose up to three months of imprisonment (including imprisonment in a fortress) or a fine of up to 3000 roubles by an administrative procedure. They could also remove any officials, including judges, from their offices.^{*55}

The District Bailiffs Act (or Acts, to be more exact) of 12 July 1889 eliminated the district courts elected in most European areas of Russia, replacing them by district bailiffs. The latter were judicial-administrative state authorities appointed by the Interior Minister. So, the separation of judicial and administrative powers was indeed waived in the case of minor civil and criminal matters.

According to B. Vilenski, those two acts annulled the independence of the judicial power.^{*56} The authors of the commentaries to the source publication of 1991 stress the importance of the Emergency Situations Act of 14 August 1881, which according to them abolished the exclusive right of the courts to impose punishments.^{*57} It has been tacitly presumed that these views also applied to the Baltic provinces as parts of the Russian empire, which were increasingly unified with the remaining areas of the empire.

3.3. ... and its maintenance in the Baltic provinces

This simplified approach, however, is misleading. At first, it should be made clear that one of the main goals of the empire-wide judicial reform besides modernising the administration of justice was to unify the legislation (at least some areas of it) on the whole territory of the empire^{*58}, but this was not achieved.

The act of 12 July 1889 was not implemented in the Baltic provinces; no judicial-administrative institutions were founded in these provinces. On the contrary, the act of 9 July 1889 on the Implementation of the Justice Reform in the Baltic Provinces helped the principle of separation of powers to a final victory, ensuring the independence of judicial power from executive power even on the lowest level of local class government.^{*59}

The Emergency Situations Act of 14 August 1881 was chiefly aimed against mass riots and criminal offences against the state; it was not applied in ordinary situations. The special attention of Marxist historiography to this act and its treatment as the normal situation is, on one hand, explained by the researchers' focus not on normal situations, but the revolutionary movement (*pro*: class struggle) and its countermeasures. Paradoxically, the tsarist government implemented the act of 14 August 1881 for the first time not to suppress revolutionary riots, but to suppress the anti-Semitic pogroms in Kiev and other Ukrainian towns (Konotop, Radom, Chernigov) in 1881.^{*60} On the other hand, the enhanced attention to this act is of course explained by the fact that the tsarist government constantly extended the emergency situation, which was originally declared for only three years, although not on the whole territory of the empire.^{*61} How far the constant extension was related to the scope of the revolutionary struggle or the institutional backwardness of Russia is another question.

Marxist researchers have overlooked the fact that the act of 14 August 1881 did not introduce many new rules; rather, it codified the provisions that already applied.^{*62} J. Baberowski even considers it to have restricted the arbitrary action of the local executive power.^{*63}

⁵⁵ Except for officials of the highest three classes.

⁵⁶ B. Vilenski. *Sudebnaya reforma i kontrreforma v Rossii*. Saratov 1969, p. 338.

⁵⁷ B. Vilenski. *Ustav ugolovnogo sudoproizvodstva. Kommentarii*. – *Sudebnaya reforma. Utsrezhdenie sudebnykh ustanovlenii. Ustav ugolovnogo sudoproizvodstva. Ustav o nakazaniyah, nalagayemykh mirovymi sudyami*. Otv. B. Vilenski (Red.). Rossiiskoje zakonodatelstvo X–XX vekov. O. Tshistiakov (Ob. Red.). T. 8. Moskva 1991, p. 252.

⁵⁸ It should be kept in mind in the case of the 1889 reform that unification was undertaken on various levels and in various areas. Firstly, the legislation of the Baltic provinces and the empire is unified. Secondly, the legislation of the Baltic provinces is unified, e.g. bankruptcy law and right of security contained in the BPL. Thirdly, unification was carried out on the level of the peasant laws of the Baltic provinces. An example is the penal law in the peasants' laws. Part IV of the Baltic Parish Courts Act 'Temporary Rules of Punishment Imposed by Parish Courts' extended the application of the maintained penal law provisions of the Peasants Act of Livonia to the area of application of the Peasant Acts of Estonia, Saaremaa and Curland. The new rules contained in the same act also applied on the territories of all the three provinces. – PSZ-3. Nr. 6188. *Polozhenije o preobrazovanii krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh*. Tshast A. *Volostnoi sudebnyi ustav*. Otd. IV. *Vremennye pravila o nakazaniyah, nalagayemykh volostnymi sudyami*.

⁵⁹ Earlier steps in this direction were taken in the Towns Act of 26 March 1877, which separated judicial and administrative powers on the town level. Former magistrates were maintained only as judicial bodies, town government passed on to the elected town councils and the town governments formed by them. The competence of peasants' class government and judicial bodies was delimited by the 1866 Rural Communities Act, known as the Parishes Act in Estonian literature.

⁶⁰ J. Baberowski. *Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914*. Frankfurt am Main 1996, p. 770.

⁶¹ For example, it was constantly in force in 1881–1905 in the provinces of St. Petersburg, Moscow, Kharkhov, Kiev, Volynia, Podolia, the towns of Rostov and Nikolayev and in the areas subject to the mayors of Odessa and Taganrog.

⁶² V. Gessen. *Iskljutshitelnoje polozhenije*. S.-Peterburg 1908, pp. 160–161; M. T. Ohrana. *Entsiklopeditsheski slovar*. Brokgauz-Efron. Tom XXII. S.-Peterburg 1897, pp. 508–509.

⁶³ J. Baberowski (Note 9), pp. 704–705.

Regarding Estonia, it should be added that an emergency situation in the form of a state of war (not an enhanced or emergency state of defence) was fully established on the Estonian territory only on 20 December 1905 and it was lifted on 15 September (26 August) 1908.⁶⁴ According to T. Karjahärm, an enhanced state of defence was thereafter established and it lasted until 4 September 1911, after which it was maintained only in Tallinn and Riga.⁶⁵ Thus, it may be said that neither of the acts that signify the breaking of the independence of the judicial power according to the Soviet Russian understanding was implemented in Estonia until 1908.

If we adopt the view that mere the adoption of the Emergency Situations Act of 14 August 1881 broke the independence of the courts, it should be concluded that there was no independence of the courts based on the separation of powers also in the Republic of Estonia from the beginning. This could be claimed on the grounds of Decision No. 32 of the Republic of Estonia Supreme Court of 1926, in which the court took the view that all three tsarist Russian state of emergency laws applied to Estonia. The Supreme Court claimed in the same decision that the Government of the Republic declared namely a state of war.⁶⁶ In fact, there was a state of war in certain areas of Estonia until 1940 practically without interruption.⁶⁷ Despite the above, even Marxist researchers who cannot be suspected of excessive sympathy for the Republic of Estonia have stated that there was no separation of powers in Estonia.

Coming back to the judicial reform in the Baltic provinces in 1889, it should be said that as opposed to the other areas of the Russian empire, the judicial reform did not begin but ended the process of separating the administration of justice from the executive power. It was the justice laws of 1889 that rendered judicial power independence from executive power also on the provincial level.

In the town level, judicial power was separated by the Town Act of 26 March 1877, which vested town government in elected town councils and the town governments formed by the councils. The former magistrates continued to operate only as judicial bodies. The competence of peasants' class government and judicial bodies was delimited by the 1866 Rural Communities Act, known as the Parishes Act in Estonian literature. Parish courts were re-established in Estonia under this act according to the instructions of the governor general of Estonia, Livonia and Courland of 18 October 1866.⁶⁸

Comparing the implementation of the 1864 judicial acts in the inner Russian provinces and their implementation in the Baltic provinces in 1889, it should be kept in mind that a considerably body of judicial practice had formed over the 25 years. The published decisions of the cassation departments of the Supreme Court are especially relevant, because according to the procedural codes of the time, all decisions and rulings duly published were mandatory not only for the court to which the matter was referred for a new hearing by way of cassation proceedings, but for all courts.⁶⁹ This position was arguable in the Russian legal literature, but the Supreme Court interpreted this rule in a very straightforward way on several occasions — the decisions were mandatory.⁷⁰ By 1889 the Supreme Court had taken many decisions protecting the independence of the courts.⁷¹ After the 1889 reform, these earlier decisions of the court of cassation were also mandatory for the newly established judicial bodies of the Baltic provinces. As regards the positions of the Supreme Court as the court of cassation, it should be taken into account that in the 1870s and 1880s it became the place of 'exile' for many liberal-minded senior officials of the reform period, including the authors of the judicial reform and their followers. The Supreme Court thus became a 'safe haven' for the more liberal representatives of legal thought in the 1870s–1880s.⁷²

⁶⁴ Eesti ajalugu. Kronoloogia (Estonian History. Chronology). S. Vahre (Koost.). Tallinn 1994, p. 124, 127; T. Karjahärm (Note 14), pp. 110, 122.

⁶⁵ T. Karjahärm (Note 14), p. 122.

⁶⁶ Otsus nr. 32. Administratiivosakond. 21. septembril/1. oktoobril 1926. a. Vene-Balti Laevaehituse ja Mehaanika A/S voliniku vann. adv. Otto Strandmann'i kaebus siseministri määruse peale 29. jaanuarist 1926. a. a/s varanduse sekvestri alla võtmise pärast (Decision No. 32. Administrative department. Complaint of 21 September/1 October 1926 by Attorney-at-Law Otto Strandmann, representative of Vene-Balti Laevaehituse ja Mehaanika A/S against the Interior Minister Regulation of 29 January 1926 on sequestration of property). – 1926. aasta Riigikohtu otsused (Supreme Court decisions of 1926). Riigi Teataja Lisa (State Gazette Supplement). Tallinn 1927, p. 52 (in Estonian). For details see K. Trakman (Note 54), p. 8.

⁶⁷ H. Kruus. Tallinn 30 aastat sõjaseisukorras (30 years of state of war in Tallinn). – Huvitav Žurnaal 1935 (summer), pp. 38–41 (in Estonian); RT 1934, 22, 156; 1938, 77, 701 (in Estonian).

⁶⁸ Pravila o sostave i predmetah vedomstva volostnyh sudov v Estljandskoi gubernii i porjadke deloproizvodstva v onyh. Prilozhenija, pp. 16–23.

⁶⁹ Ustav Grazhdanskogo Sudoproizvodstva (Izd. 1883) § 815; Ustav ugolovnogo Sudoproizvodstva (Izd. 1864) § 933.

⁷⁰ I. Foinitski. Kurs Ugolovnogo Sudoproizvodstva T. I 4. izd. Sankt-Peterburg 1912, pp. 177–182; Ustav Grazhdanskogo Sudoproizvodstva s sistematizirovannym sobraniejm zakonodatelnyh motivov ko vsem uzakonenijam i razjasnenii Pravitelstvujushtshego Senata i Ministerstva Justitsii. V. Gordon (Sost.). Izd. 6-e. S.-Peterburg 1914, pp. 628–629; J. Vaskovski. Kurs grazhdanskogo protsessu. Moskva 1913, p. 214; G. Shershenevitsh. Nauka grazhdanskogo prava v Rossii. Kazan 1893, pp. 235–236.

⁷¹ Reshenije 246. 1879 g. oktjabrja 10 dnja. Po prosheniju pov. zheny gvardii sht.-kapitana Jeleny Popovoi, kol. reg. Marka, ob otmene reshenija Aleksandrovskogo Mirovogo Sjezda. – Polnyi Svod Reshenii Grazhdanskogo Kassatsionnogo departamenenta Pravitelstvujushtshego Senata (natshinaja s 1866 goda). za 1879 g. Nr. 167–341. 2. Izd. Neoffitsalnoje. Jekaterinoslav 1912, pp. 766–767.

⁷² P. Liessem. Verwaltungsgerichtsbarkeit im späten Zarenreich. Der Dirigierende Senat und seine Entscheidungen zur russischen Selbstverwaltung (1864–1917). Frankfurt am Main 1996, pp. 124–125; J. Baberowski (Note 9), pp. 708–709.

4. Equality of citizens before the court

The equality of citizens before the court (*Gleichheit des Gerichtsstandes*) is an important principle of the rule of law. This is a principle whose establishment has usually been hidden behind the view of abolition of class courts in Estonian literature. After implementing the judicial reform, subjects of tsarist empire usually fell into the jurisdiction of the same courts and privileged jurisdiction was generally eliminated. Jurisdiction was defined not so much by a person's class status, but the value of the particular civil matter or the severity of the offence. For example, parish courts had jurisdiction over claims of up to 100 roubles, claims for restoration of violated possession within the parish limits if less than a year had passed from the beginning of the violation, etc.^{*73} District courts had jurisdiction over civil matters of up to 500 roubles and claims for the restoration of violated possession (BPL §§ 682–699).^{*74} Circuit courts had jurisdiction over all civil matters that did not fall within the competence of district courts.

This rule was not general, since various clerical court and parish courts as special peasant courts were maintained even in the Baltic provinces. Compared to the issue of the independence of the courts discussed earlier, a change of accents stands out in the historiography up to that time — while the negative and deviant is stressed with respect to the independence of the courts, the general rules are stressed when it comes to the equality of the citizens, leaving deviations without much attention.

How justified it is to stress the class nature of the Estonian peasant courts at the end of the 19th century similarly to the Russian peasant courts is another question. It may be said that according to the 1889 rules of the Baltic Parish Courts Act regulating the handling of civil matters provided that parish courts had jurisdiction over the mutual civil claims of peasants and 'other members of the local parish community' with a value not exceeding 100 roubles.^{*75} This provision clearly indicated that all members of the parish community need not be peasants and the parish court's jurisdiction need not be limited to peasants according to the legislator.^{*76}

Viewing the issues of class status and the equality of citizens in the legal history literature about the 1864 judicial reform, it may be said that the discussion is usually limited to parish courts (and the respective natives' courts) and clerical courts. It is usually not mentioned that a special court procedure applied to the members of the empire's governing dynasty.^{*77} For disobedience to the emperor, the tsar could, by his individual decision, deprive a person of his rights or prosecute him at the tsar's own discretion. This provision is similar e.g. to the laws of the Kingdom of Württemberg, according to which the members of the governing dynasty were subject in criminal matters only to an *ad hoc* family council, and in civil matters to the highest tribunal of the kingdom.^{*78}

Secondly, § 945 1) of the Code of Criminal Procedure provided that in certain cases, court decisions that had entered into force would be submitted to the tsar for a review prior to enforcement. This was necessary if noblemen, officials, clergymen or persons who had been granted awards that could be withdrawn only with the tsar's consent were subjected to punishments accompanied by the deprivation of all class rights and privileges or special rights and privileges. This provision was heatedly discussed during the drafting of the judicial reform laws, because the majority of the Imperial Senate saw it as the abandonment of the principles of equal administration of justice.^{*79}

The tsar, however, no longer decided the issue of guilt or innocence, but only the issue of the punishment. He could either approve it or alleviate it at his discretion, but the emperor could not increase the punishment.

⁷³ PSZ-3. Nr. 6188. Polozhenije o preobrazovanii krestjanskikh prisutstvennykh mest v Pribaltiiskikh gubernijah. Tshast A. Volostnoi sudebnyi ustav, § 7.

⁷⁴ PSZ-3. Nr. 6188. Polozhenije o preobrazovanii sudebnoi tshasti v Pribaltiiskikh gubernijah. Tshast A. O primenenii sudebnykh ustavov Imperatora Aleksandra II. III Po ustavu grazhdanskogo sudoproizvodstva, § 69.

⁷⁵ PSZ-3. Nr. 6188. Polozhenije o preobrazovanii krestjanskikh prisutstvennykh mest v Pribaltiiskikh gubernijah. Tshast A. Volostnoi sudebnyi ustav. Otd. II Pravila o proizvodstve grazhdanskih del, § 7.

⁷⁶ The openness of the membership of the parish community and a weakening of the narrow class nature of the parish community is already evident from earlier legislation. In the Estonian province, the peasants' private law provisions of the Peasants Act applied not only to the members of the peasant community, but all taxable persons and artisans who lived in the territory of the rural parish community. Section 1045 of the 1856 Estonian Peasants Act: 'The private law of Estonian peasants contains rule by which the private matters of persons of the peasant status are to be handled; these laws also apply to **other persons of taxable statuses** living within the borders of the community.'

⁷⁷ Svod Zakonov. T. I Tsh. I Svod Osnovnykh Gosudarstvennykh Zakonov. Izd. 1906. Osnovnye Gosudarstvennye Zakony, § 222.

⁷⁸ E. Holthöfer. Ein deutscher Weg zu moderner und rechtsstaatlicher Gerichtsverfassung. Das Beispiel Württemberg. Veröffentlichungen der Kommission für Geschichtliche Landeskunde in Baden-Württemberg. Reihe B. Forschungen. Bd. 137. Stuttgart 1997, p. 12.

⁷⁹ Sudebniye Ustavy 20. noyabria 1864 goda s izlozhenijem rasuzhdenii, na koikh oni osnovany. Vtoroje dopolnennoe izdanie. Tch. II. Ustav ugolovnogo sudoproizvodstva. Sankt-Peterburg 1867, pp. 342–343.

5. Summary

As we know, the formation of middle-class society and the respective legal system is a lengthy and not nearly linear process. There are often dead ends and back roads; even in the case of Europe one cannot make broad generalisations. However, since the 1789 French revolution at the latest, Europe adopted a view that a written constitution is one of the pillars of the legal system of a middle-class society.^{*80} This should give the citizens a catalogue of their fundamental rights and an exhaustive description of the public order, being also the guarantor of the prescribed public order and fundamental rights by virtue of its position on the top of the state legislation. Whether it has always been so is another question.

However, the function and meaning of the provisions of the constitution and some other law and their mutual relations have not always in the history of legal development corresponded to society's current understanding. It is irrelevant whether we speak about private law or public law provisions. In his discussion of the relations between the fundamental rights of a state governed by the rule of law and modern private law, D. Grimm has indicated that in a situation where there are no constitutions declaring and guaranteeing fundamental rights, private law may have the function of substituting for a constitution.^{*81} W. Schubert claims that in the Rhine provinces that became part of the monarchist Prussia after the end of Napoleon's wars, the French judicial laws and especially the law on courts administration (*Gerichtsverfassung*) that remained in force in these provinces were substituting for a constitution.^{*82}

Considering the nature and goal of the Baltic Private Law that entered into force in Estonia from 1 July 1865 — to perpetuate the law rooted in the Middle Ages by the force of a modern law^{*83} —, it may be claimed that the private law in force in Estonia at the end of the 19th century was not able to perform this function. The laws on which the 1889 judicial reform was based were one of the first legislative acts in Estonia's legal development where several principles of the rule of law (public administration of justice, separation of powers, formal equality of citizens) were so extensively (of course of fully!) and complexly implemented. This allows to claim that the function of substituting for a constitution belonged to the procedural codes on which the 1889 judicial reform was based, together with the Courts Administration Act. The judicial laws were able to perform their substituting role in the legal historical development of the Estonian constitution all the more successfully since as opposed to many other areas of the Russian empire, no state of emergency was declared in the Baltic provinces before the revolutionary events of 1905.

⁸⁰ H. Hattenhauer. *Europäische Rechtsgeschichte*, 3. Auf. Heidelberg 1999, p. 530.

⁸¹ D. Grimm. *Recht und Staat der bürgerlichen Gesellschaft*. Frankfurt 1987, pp. 192–212.

⁸² W. Schubert. *Die deutsche Gerichtsverfassung (1869–1877). Entstehung und Quellen*. Frankfurt am Main 1981, p. 25.

⁸³ M. Luts. *Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus (Incidental and patriotic: the provincial legal science of F.G. v. Bunge)*. Tartu 2000, p. 149 (in Estonian).