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State Liability without the Liability of State

Constitutional Problems related to Individual Professional Liability of Estonian Notaries, Bailiffs and Sworn Translators

In Estonia, notaries, bailiffs and sworn translators are independent public authorities who are individually liable for any damage occurring due to their fault when performing their official duties.

The obligation to protect the rights of individuals and the principle of lawful exercise of state authority are the central elements of a state based on the rule of law. The state liability law must implement those principles and give them practical significance. If a public servant has acted unlawfully, the state is required to compensate the injured person for the damage caused by the act. Just like public servants, notaries, bailiffs and sworn translators perform public law functions, but the state is not liable for the damage caused by them. However, a natural person is often not able to perform the obligation to compensate for damage solely with his or her assets. It was said in the past that where nothing can be taken, the emperor has lost his right. In a state based on the rule of law, an injured person cannot be satisfied by knowing that his or her right to compensation has proven valid only on paper. The right to compensation for damage is applicable in Estonia as a fundamental right and such a right must be secured by all public authorities. The peculiarities of an administrative body should not affect the rights of the injured person.

In order to ensure the protection of the rights of individuals, the obligation to enter into a compulsory professional indemnity insurance contract has been imposed on notaries and bailiffs in Estonia; however, the indemnity insurance contracts of neither official suffice to cover the entire professional liability. The requirement for insurance contracts imposed on sworn translators was abolished recently — hence, they are only liable with their personal assets.

Although the number of liability cases is increasing, there is so far no information about any of the injured persons not receiving compensation.^{*1} It is still a matter of time before some injured person incurs damage

¹ The number of professional liability cases is not known precisely but several disputes concerning the liability of notaries have reached the Supreme Court during the past years. See Civil Chamber of the Supreme Court decision 3-2-1-77-01. – Riigi Teataja (State Gazette) III 2001, 22, 240; Civil Chamber of the Supreme Court decision 3-2-1-81-02. – Riigi Teataja (State Gazette) III 2002, 20, 238; Civil Chamber of the Supreme Court decision 3-2-1-129-02. – Riigi Teataja (State Gazette) III 2002, 35, 386; Civil Chamber of the Supreme Court decision 3-2-1-125-03. – Riigi Teataja (State Gazette) III 2004, 1, 9; Civil Chamber of the Supreme Court ruling 3-2-1-149-03. – Riigi Teataja (State Gazette) III 2004, 4, 43; Civil Chamber of the Supreme Court decision 3-2-1-74-04. – Riigi Teataja (State Gazette) III 2004, 19, 221; Special Panel of the Supreme Court decision 3-2-4-1-05. – Riigi Teataja (State Gazette) III 2005, 15, 145 (in Estonian).

not covered by the insurance contract and that the independent public authority is unable to compensate for. Such instances would be unacceptable in a state based on the rule of law and would deliver a very heavy blow to the reliability of the entire office in the eyes of public.

This article will examine whether, and on what conditions, the state may substitute its liability for the liability of a public authority that is a natural person and to what extent it is actually justified in the case of notaries, bailiffs and sworn translators. The article will draw attention towards the inadequacies of the mechanisms ensuring the liability of these independent public authorities and make proposals for improving the current regulation. Similar questions arise in the administrative law of all countries where a natural person is liable for the damage caused in the course of performance of administrative duties instead of the state.

1. Legal status of notaries, bailiffs and sworn translators

The first natural persons serving as a public authority, who were subjected to individual professional liability, were notaries. The Notaries Act (NA) entered into force in 1993² and its new version in 2002.³ Before that, notaries had been public servants. The duties of bailiffs were also performed by the officials of the enforcement departments of the county and city courts before the establishment of the Bailiffs Act (BA) in 2001.⁴ The office of sworn translators appeared in Estonia in 2002, when the Sworn Translators Act (STA) entered into force.⁵ Due to the small size of Estonia, the number of people holding these offices is rather limited. As of 1 June 2006, there were 86 notaries⁶, 50 bailiffs⁷ and 23 sworn translators in Estonia.⁸ Naturally, this does not undermine in any way the most important function of these offices in organising the legal relationships between individuals.

The legal status of notaries, bailiffs and sworn translators is very similar in Estonia. They are self-employed public authorities who perform public law functions imposed on them personally and in their own name, remaining impartial to the participants in the official acts, and subject to an extensive duty to maintain confidentiality. Notaries, bailiffs and also sworn translators are independent of other state authorities when performing their official acts.⁹ They are not public servants remunerated by the state, but instead charge fees in the amount and according to the procedure prescribed by law. The amount retained by the independent public authority after the deductions from the amount received for fees and the expenditure made on the performance of official duties as well as taxes constitutes professional revenue.¹⁰ Notaries and bailiffs must have higher education in law, while any academic degree suffices for sworn translators. To assume office, each candidate must pass an examination which is preceded by preparatory service for notaries and bailiffs.

In order to ensure the correct and high-level performance of official duties, the law also provides for several interference mechanisms on the part of the state. All three authorities are subject to the state supervision exercised by the Minister of Justice in issues related to the organisation of their duties. The Minister of Justice is also competent to carry out disciplinary proceedings. Besides that, the law imposes restrictions on holding office, which are most extensive regarding notaries and most lenient regarding sworn translators.¹¹

² The text of the Notaries Act of 1993 is available in English at http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=notariaadiseadus&nups.x=0&nups.y=0 (31.05.2006).

³ The text of the Notaries Act of 2002 is available in English at http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=notariaadiseadus&nups.x=0&nups.y=0 (31.05.2006).

⁴ The text of the Bailiffs Act is available in English at www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=kohtut%E4ituri+seadus&nups.x=0&nups.y=0 (31.05.2006).

⁵ The text of the Sworn Translators Act is available in English at www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=vandet%F5lgi+seadus&nups.x=0&nups.y=0 (31.05.2006).

⁶ List on notaries. Available at www.notar.ee/260 (31.05.2006) (in Estonian).

⁷ Whereas the number of notaries has continually increased, that of bailiffs has decreased. For various reasons, as many as 42 bailiffs have been released from office over five years. The list of bailiffs is available at www.just.ee/4263 and the list of bailiffs released from office at www.just.ee/4265 (31.05.2006).

⁸ List of sworn translators. Available at www.just.ee/10489 (31.05.2006).

⁹ See for details E. Andresen. Status and Role of Notary in Legal System of Estonia. – 10th Anniversary of the Estonian Chamber of Notaries. Tallinn 2003, pp. 53–62.

¹⁰ A separate Notary Fees Act applies to notaries (available at www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=notari+tasu+seadus&nups.x=0&nups.y=0) (31.05.2006), for bailiff fees see BA §§ 21–29, for sworn translator fees STA § 8.

¹¹ For example, a notary shall not engage in enterprise or be a trustee in bankruptcy, or a member of the management or supervisory board of a company (NA § 12 (2)). A bailiff, however, may act as a trustee in bankruptcy, if he or she has passed the relevant examination (§ 5 (1) 3)) and a sworn translator may engage in enterprise or perform salaried work if such activity involves frequent use of foreign language (STA § 9 (1)).

2. Person responsible in Estonian state liability law

As notaries, bailiffs and sworn translators carry out public law functions when performing official acts, there are public relations between them and the participants in official acts. The compensation for damage caused in public relationships is governed by state liability law; hence, the professional liability of notaries, bailiffs and sworn translators forms part of state liability law. It would consequently be erroneous to consider the liability of these public authorities as civil liability.

In Estonia, the restoration of the rights violated in the course of performance of public law functions, and compensation for damage, is governed by the State Liability Act (SLA) that entered into force as an Act of general application in 2002.^{*12} Estonian state liability law applies the model of direct state liability, according to which the unlawful act of public servant or any other natural person performing a public law function is attributed to the state or another public authority that had assigned the duty to the natural person. As a rule, a public servant or other natural person is not liable to the injured person (SLA § 12 (1) and (2)). Even if damage is caused by a public authority who is a natural person or private law legal person, the state or other public law legal person who authorised the private law person to perform public duties is generally liable for the damage (SLA § 12 (3)). The state may file a claim of recourse against the public servant or the private law person after compensating the injured person for the damage (SLA § 19 (1)). A claim of recourse may be filed against a natural person, only if damage occurred due to his or her fault (SLA § 19 (3)).

Such regulation is, above all, aimed at protecting the rights and interests of the injured person. State resources allow for satisfying even the largest claims for which private law persons may not have sufficient means. The model of direct state liability also gives the injured person an opportunity to request that the state take much more wide-ranging measures, if this could be demanded from private law persons whose competence is limited.

Nevertheless, § 12 (3) of the SLA provides for a possibility that in cases prescribed by law, the state need not be liable for damage caused by a independent public authority who is a private law person. Such authorities include notaries, bailiffs and sworn translators. All three authorities are liable first of all according to the provisions of the Act governing their official activities, while the State Liability Act is applied additionally. When the claims for compensation for damage caused by notaries, bailiffs or sworn translators were previously examined by the administrative court^{*13}, then as of 2006, such disputes in public law are, as an exception, settled by way of proceedings of action in county courts.^{*14}

3. Main differences in the liability of notaries, bailiffs and sworn translators compared to the liability of public servants

As it was said, notaries, bailiffs and sworn translators are — unlike public servants^{*15} — personally liable for the damage caused as the result of a breach of their official duties. All three Acts prescribe that the state is not liable for the damage caused by notaries, bailiffs or sworn translators (NA § 14 (4), BA § 6 (2) and STA § 10 (2)).

The liability of these three independent public authorities also differs from the regulation prescribed by the SLA in the fact that notaries, bailiffs and sworn translators are liable only for damage occurring due to the fault when performing their official duties (NA § 14 (1), BA § 6 (1) and STA § 10 (1)). The SLA, however, provides that the liability of the state to the injured person depends on the fault of the public authority only upon compensation for loss of income and non-proprietary damage (SLA § 13 (2) and § 9 (1)). Thus, according to the SLA, the fault is not a precondition for liability in the claim for compensation of direct proprietary liability.

¹² The text of the State Liability Act is in English available at www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=riigivastutuse&nups.x=0&nups.y=0 (31.05.2006). See an overview of Estonian state liability law E. Andresen. The Claim for Elimination of Unlawful Consequences and the Claim for Compensation for Damage under Estonian State Liability Law. – *Juridica International* 2005 (X), pp. 169–170.

¹³ In practice, such claims were often filed with civil courts. See Civil Chamber of the Supreme Court ruling 3-2-1-149-03 (Note 1), paragraph 13 and Special Panel of the Supreme Court decision 3-2-4-1-05 (Note 1), paragraph 9.

¹⁴ See NA § 14 (1), BA § 6 (3) and STA § 10 (2¹).

¹⁵ The term ‘public servant’ includes here all other natural persons acting on behalf of the state or local government.

The third important difference concerns only the liability of notaries. Namely, NA § 14 (2) prescribes the principle of subsidiary liability of notaries, according to which a notary shall be liable for damage occurring due to his or her fault only to the extent which remains uncompensated by other persons who also caused the damage. Consequently, in the cases in which the injured person can demand compensation for damage also from other persons, not only the notary but the administration as a whole is released from liability. Such a clause precluding the liability of the public authority is not contained in the SLA, BA or STA.

4. Why are notaries, bailiffs and sworn translators personally liable?

The personal liability of these officials may be put down to arguments related to both history and the course of their development. For example, Estonian notaries were personally liable also before the Second World War, but the suretyship obligation had been established to secure the claim.^{*16} In the course of reforming the notaries' offices after restoring Estonia's independence, the national notaries' offices were replaced by those adhering to the model of Latin notaries' offices^{*17}, one of the common characteristics of which is also the personal liability of a notary.^{*18} The office of a notary also served as an example when developing the offices of bailiffs and sworn translators^{*19} and in draft legislative acts, the personal liability of all three public authorities has been explained as being characteristic to so-called liberal professions. However, it is questionable whether it is correct to call the profession of a notary a liberal profession at all.^{*20}

The principle of personal liability of notaries, bailiffs and sworn translators is to a significant degree related to the other principles shaping these offices, above all to the principles of the independence of such authorities and their remuneration.

All the three officials are subject to the principle of independence which, serving as one of the most important characteristics of these offices, grants notaries and bailiffs the right to interpret and implement law — to sworn translators the right to decide on the translation issues related to the performance of his or her official acts — according to their best judgment.^{*21} If those public authorities were bound by the instructions of the governmental executive power when performing the official acts and the executive power decided about the correctness of the official acts, these public authorities would no longer be liable to the persons related to their official acts but the state. However, if the state were liable for the damage caused by notaries, bailiffs and sworn translators, this would damage their independence as the governmental executive power would have a chance to decide about the lawfulness of their professional activity. In such case, it would be impos-

¹⁶ J. Hargi, A. Harujõe, G. Savisaar, M. Saar. Eesti notariaat 1918–1998 (Estonian notaries' offices 1918–1998). – Konverents "Notari rollist tänapäeva ühiskonnas" (Conference "Role of notaries in contemporary society"). Valik ettekandeid ja artikleid. Eesti Vabariigi Notarite Koda (Selection of Articles. Republic of Estonia Chamber of Notaries). 1999, pp. 92–97 (in Estonian). For the English summary of the organisation of notaries' offices in Estonia in 1918–1944, see www.notar.ee/852 (31.05.2006).

¹⁷ The Estonian Chamber of Notaries is a member of the International Union of Latin Notaries (U.I.N.L., *Union Internationale du Notariat Latin*), uniting Latin notaries in the world and the Council of the Notariats of the European Union (CNUE, *Conseil des Notariats de L'Union Européenne*) that represents the interests of Latin notaries of the European Union member states.

¹⁸ For instance, the personal liability of notaries has been established in Austria, France, in a large part of Germany and Switzerland.

¹⁹ See Chapter 3 of the draft Bailiffs Act. Available at web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003673930&login=proov&password=&system=ems&server=ragne11 (31.05.2006) (in Estonian). The Sworn Translators Act only governs the issues differing from those of the office of a notary. In other parts, sworn translators are subject to Acts concerning notaries' offices (STA § 1 (2)).

²⁰ The notion 'representative of a liberal profession' is used for denoting these officials also in legislative acts but it should be rather avoided to use this ambiguous term in legal texts. Although the term *freiberuflicher Notar* is very common in literature, it only serves to signal that a notary is not a public servant and the activities of a notary can be compared to liberal professions only to the extent that the income earned by a notary belongs to him or her after the costs and taxes have been paid. H. Schippel. Stellung und Aufgabe der Notare. – K. Seybold (Begr.), H. Schippel (Hrsg.). Bundesnotarordnung: Dienstordnung für Notare; allgemeine Richtlinien für die Berufsausübung der Notare. Kommentar. 6. Aufl. München 1995, § 1, paragraph 14 (p. 50). Several other authors are also of the opinion that a notary cannot be considered as a representative of a liberal profession. See, e.g. W. Baumann. Das Amt des Notars – Seine öffentlichen und sozialen Funktionen. – Mitteilungen der Rheinischen Notarkammer, January/February 1996, p. 6; B. Stürer. Notare als Solidargemeinschaft. – DVBl. 1989, p. 1141; P. Lichtenberger. Gesellschaftliche Funktion und Stellung des Notars heute und morgen. – Festschrift 125 Jahre bayerisches Notariat. Bayerische Notariatsverein e.V. (Hrsg.). München: 1987, p. 117; H. Hoffmann. Die Verstaatlichung von Berufen. Deutsches Verwaltungsblatt 1964, p. 457.

²¹ The importance of the principle of independence of notaries has been also emphasised in the decisions of the Administrative Law Chamber of the Supreme Court. See Administrative Law Chamber of the Supreme Court decision 3-3-1-35-00, paragraph 1. – Riigi Teataja (State Gazette) III 2000, 21, 234; Administrative Law Chamber of the Supreme Court decision 3-3-1-70-04, paragraphs 10–13. – Riigi Teataja (State Gazette) III 2004, 36, 369 and Administrative Law Chamber of the Supreme Court decision 3-3-1-24-06, paragraph 21. – Riigi Teataja (State Gazette) III 2006, 14, 135 (in Estonian).

sible to exclude cases in which the independent public authority does not admit to damaging his or her official duty but the executive power satisfies the claim for damage and files a recourse action against the official.

The personal liability of an official is also related to the arrangement of his or her remuneration. Notaries, bailiffs and sworn translators do not receive a salary from the state but charge fees for their official acts to the extent and according to the procedure prescribed by law. The income that remains after deducting the expenditure made for performing the official acts belongs to the independent public authority. The fee also covers the risk arising from potential liability. If the beneficiary did not have to bear the risks related to earning the income, lower income would be justified. If the authorities could retain the income accompanying the professional activity but should not be liable for violating their duties, it would be unjust and in conflict with public interests. Thus, the substitution of the personal liability of notaries, bailiffs and sworn translators for state liability would also introduce changes to the remuneration of those authorities.^{*22}

Still, the regulation of the personal liability of those officials cannot be justified merely by the above arguments. The personal liability of a public authority must be above all acceptable in constitutional terms and in compliance with the requirements arising from the European Community law.

5. Constitutional requirements for personal liability of officials

Pursuant to the Constitution of the Republic of Estonia, the state authority must act lawfully (§ 3 (1) of the Constitution) and all state bodies must guarantee the protection of people's rights and freedoms (§ 14 of the Constitution). If the state is unable to meet those requirements, the state as based on the rule of law is obliged to ensure compensation for the damage caused by the unlawful activities of the state authority. The right to compensation for damage is a fundamental right in Estonian legal order (§ 25 of the Constitution).^{*23} The Constitution does not regulate this right exhaustively and does not preclude the provision of limitations of the liability and factors excluding the liability by law. However, the provisions in conjunction with each other imply that the liability for the lawful performance of public law functions lies above all with the state. Exceptions to the state liability are permitted only in exceptional cases and on the bases provided by law. In addition, the making of an exception must be substantively justified.^{*24}

Delegation of the state authority can only be permitted when the public authority created by the state is able to protect the rights of individuals at least to the same extent as the state. The Administrative Cooperation Act that entered into force in 2003 and specified the conditions of and procedure for authorising natural and legal persons to independently perform administrative duties prescribes as one condition that a legal person or a natural person may be granted the authority to perform an administrative duty if the grant of authority to perform the administrative duty will not harm the rights of persons in respect of whom the administrative duty is to be performed.^{*25} The main objective of state liability is to ensure the protection of the rights of an injured person. An injured person must have an opportunity to file the claim for compensation for damage against the person who is capable of satisfying the claim.^{*26} Exclusion of state liability may not jeopardise the exercise of the fundamental right provided in § 25 of the Constitution. It would be the case if the possibilities of a person who has suffered damage as a result of the acts of a public authority who is a natural person to obtain compensation for damage from this public authority are less secured than they would be if the state were liable for the same damage.^{*27} Hence, the personal liability of the official is acceptable in terms of constitutional law only if the liability of the state is substituted for a comparable liability system that is capable of offering protection equivalent to that of the state.^{*28}

Pursuant to § 12 (3) of the SLA, the state, as a rule, remains liable to citizens upon authorisation of a natural person or private law legal person to perform public duties by the state unless otherwise provided by a

²² The same conclusion was also reached when processing the German draft State Liability Act, in which it was considered to substitute the personal liability of notaries for the state liability but the idea was abandoned in the interests of retaining the principles of office. See S. Zimmermann. *Erstes Gesetz zur Änderung der Bundesnotarordnung und Staatshaftungsgesetz*. – DNotZ 1982, p. 13.

²³ E. Andresen (Note 12), p. 169.

²⁴ F. Ossenbühl. *Staatshaftungsrecht*. 5. Aufl. München 1998, pp. 50–51.

²⁵ Subsection 5 (1) 3) of the Administrative Cooperation Act. An English text of the Act is available at www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=halduskoost%F6%F6+seadus&nups.x=0&nups.y=0 (31.05.2006).

²⁶ H.-J. Papier. Article 34. – T. Maunz, G. Dürig. *Grundgesetz. Kommentar*. München 1998, § 34, paragraph 12; K. A. Bettermann, F. L. Neumann, U. Scheuner. *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte*. Berlin 1972, p. 831.

²⁷ A. Schäfer, H. J. Bonk. *Staatshaftungsgesetz*. München 1982, § 16, paragraph 34.

²⁸ B. Stüer (Note 20), p. 1142.

specific law. The principles of professional law of notaries, bailiffs and sworn translators and their mutual relations discussed above may be considered sufficient substantive reasons justifying exceptional regulation.²⁹ To what extent the system of personal liability of these officials is able to offer the injured person protection equivalent to that of the state needs yet to be clarified below.³⁰

6. European Community requirements for the personal liability of official

An official need not violate only the national official duty but also European law, which may entail a claim for compensation for damage filed on the basis of European law. This may happen, for example, when the official makes a mistake in an area harmonised by European law. However, when the activities of an official who is a natural person are in conflict with the European Community law, a question arises whether the member state should be liable for the mistake of the official or the national legislator may provide that the official is personally liable for causing the damage.

It is common to refer only to the liability of the member state. Conflicting opinions concerning this issue prevailed for a long time in the federal republics of Germany and Austria where the same question primarily arises in relation to the independent liability of the federal states (*Bundesländer*).³¹ The European Court of Justice answered the question in the judgment *Konle v. Austria* dated 1999, adopting the position that the member state may determine by its legislation what public authority is liable to the injured person.³² In this and in the subsequent judgment *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*³³, the European Court of Justice still additionally emphasised that the ultimate liability rested with the member state. Namely, the member state is obliged to ensure that it is possible for the person to obtain compensation for the damage caused by violating European Community law. This obligation is imposed on the member state regardless of which public authority is liable for the violation and regardless of which public authority should compensate for the damage pursuant to the law of the member state. The member state may not release itself from the liability, relying on the liability between public authorities as determined on the basis of national law or on the division of the state authority. Neither can the member state protect itself by arguing that the public authority causing the damage did not have the necessary competence, knowledge, means or resources.³⁴

Starting from its first judgments concerning the liability of the member states, the Court of Justice has also stressed that the national substantive and procedural law provisions relating to compensation for damage may not lead to a situation in which it is excessively difficult or downright impossible for the injured person to obtain compensation in practice.³⁵ Neither may the prerequisites for a claim for compensation for damage arising from the EC law be less favourable or discriminating, compared to the prerequisites for a national claim for compensation for damage.³⁶ The member states may thus decide on the division of state authority and the liability between public authorities independently, but only on condition that national law ensures efficient protection of the rights granted to individuals by the EC legal order and the exercise of those rights is not more difficult than the use of similar rights deriving from national law.³⁷

Although the federal state (*Bundesland*) was the person liable in the case *Konle v. Austria* and a public legal person in the case *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, the Court of Justice reassured in the latter judgment that any public authority separate from the state could serve as the person liable.³⁸

²⁹ See H.-J. Papier. Article 34 (Note 26), § 34, paragraph 279, who finds that the personal liability of notaries is justified by their independence, the fact that the injured person is not obliged to use the services of a particular notary but may choose a notary suitable for him or her as well as by the obligation of indemnity insurance that covers the risks related to the office to the required extent.

³⁰ See Chapter 7 of the article.

³¹ See for references to sources J. Gundel. Die Bestimmung des richtigen Anspruchsgegners der Staatshaftung für Verstöße gegen Gemeinschaftsrecht. – DVBl. 2001, p. 96, footnotes 7–8.

³² See case C-302/97, *Konle v. Austria*. – ECR 1999, p. I-3099, paragraph 62; see also A. Lengauer's comment on the case *Konle v. Austria*. – CMLR 2000 (37), pp. 181–190.

³³ Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*. – ECR 2000, p. I-05123, paragraph 27 et seq.

³⁴ *Ibid.*, paragraph 28.

³⁵ Joined cases C-6/90 and C-9/90, *Francovich and Others v. Italian Republic*. – ECR 1990, p. I-5357, paragraph 43; joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and the Queen v Secretary of State for Transport, ex parte Factortame and Others*. – ECR 1996, p. I-1029, paragraph 90.

³⁶ *Ibid.*

³⁷ Case C-302/97 (Note 32), paragraph 63.

³⁸ Case C-424/97 (Note 33), paragraph 31.

Consequently, the Estonian legislator may independently determine a public authority that is liable to the injured person for violation of European Community law³⁹ and also a public authority who is a natural person may serve as such a person. However, the state must develop regulatory provisions that enable the injured person to obtain compensation.

The Court of Justice has also expressed its opinion concerning the amount of compensation. In the judgment concerning *Von Colson v. Land Nordrhein-Westfalen* dated 1984, which is better known as the request made by the Court of Justice to member state courts to interpret national acts in compliance with the European law acts, the Court also emphasised that national courts had to ensure the protection of the rights granted to individuals by EC directives and the compensation had to have a deterrent effect. To that end, the compensation must be proportional to the damage caused and not limited to purely nominal compensation.⁴⁰

Hence, the national legislator does not have to guarantee for the injured person only legal mechanisms for obtaining compensation but the compensation ordered by the court must also be proportional to the damage caused to the injured person. If the member state fails to comply with these obligations phrased by the Court of Justice, the liability of the member state may be considered. Also in the case *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, the Court of Justice retained in the operative part of the judgment a reference to the liability of the member state:

Community law does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law.

7. Mechanisms to ensure liability of notaries, bailiffs and sworn translators in current law

It will be examined below to what extent the current regulation of the personal liability of notaries, bailiffs and sworn translators can guarantee to the injured person the right to receive compensation.

7.1. Conclusion of professional indemnity insurance contract: compulsory for notaries and voluntary for Chamber of Notaries

According to § 15 of the NA, each notary is required to enter into a professional indemnity insurance contract to compensate for the damage caused due to the fault.⁴¹ The existence of a indemnity insurance contract is a precondition for assuming the office of a notary (NA § 10 (2)) and its continuing validity while the office is held is monitored both by the Minister of Justice within the framework of national supervision (NA § 5 (3)) and the internal audit committee appointed by the Board of the Chamber of Notaries (§ 24 (2) of the statutes of the Chamber of Notaries). The Act does not specify the sanction imposed for the absence of the indemnity insurance contract; however, as the existence of the contract is a precondition for assuming the office, its absence should serve as a cause for removal from office.⁴²

It suffices to take a quick look at NA § 15 to notice that the indemnity insurance contract of a notary need not cover all the damage that may be caused to the injured person by violation of the official duties of the notary. Although § 15 (1) 2) prescribes the condition that the insurance contract of a notary shall fully cover the liability arising from § 14, the next clause sets the maximum amount of insurance indemnities payable during an insurance year, which is at least three million kroons (NA § 15 (1) 3)). The minimum amount of insurance coverage for one insured event shall be at least one million kroons (NA § 15 (1) 3)). Further to that, NA § 15 (2) establishes that the notary need not insure liability for intentional violation of official duties. In practice, however, it is not possible for the notary to insure himself or herself against intentional

³⁹ For example, according to the case law of the Court of Justice, German *Bundesgerichtshof* has assumed the position that the federal power, being obliged to ensure compensation for damage resulting from the violation of the EC law, is liable to the injured person in a state liability claim arising from the EC law on the national level only when the same arises from GG § 34 (1). BGH, Urteil vom 2.12.2004, III ZR 358/03. – DVBl. 2005, pp. 371–373.

⁴⁰ Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*. – ECR 1984, p. 1891, paragraph 28.

⁴¹ Laws on notary, bailiff and sworn translators use in Estonian the term ‘professional insurance contract’ and in English the term ‘professional liability insurance contract’, the Law of Obligations Act the term ‘liability insurance contract’.

⁴² NA § 17 (2) 4) sees as one of the reasons for removing a notary from his or her office, the appearance of other circumstances which make it impossible for a person to practise as a notary.

violation of official duties because according to § 452 (1) of the Law of Obligations Act, an insurer shall be released from the performance obligation if the policyholder, the insured person or the beneficiary intentionally caused the occurrence of the insured event. Any agreement which derogates therefrom is void. Hence, the notary cannot perform the obligation arising from § 15 (1) 2) and protect himself or herself fully against the liability arising from § 14. A situation in which the injured person can use insurance cover in the case of the negligent violation of notary's duties but not in the case of intentional violation cannot be substantially justified.

The risks not managed by the compulsory indemnity insurance contract entered into by the notary should be borne either by the Chamber of Notaries or the state. The legislator has been very clear in NA § 14 (4) that the state shall not be liable for damage caused by a notary. It also appeared above that the introduction of the liability of the state would significantly change the underlying foundations of the professional law of notaries.⁴³ At the same time, the legislator has not imposed the obligation to enter into an additional indemnity insurance contract to ensure notary's liability on the Chamber of Notaries either. According to the wording of NA § 15 (3), the Chamber of Notaries only 'may enter' into additional insurance contracts to secure the compensation for damage caused by a notary.

We must still ask whether the Chamber of Notaries should — regardless of the fact that the current law only provides for competence, not for obligation — nevertheless enter into an additional insurance contract based on other provisions and spirit of the Act.

One of the main tasks of the Chamber of Notaries is to stand for the good reputation of the office of the notary. Thus, NA § 44 (1) 1) sets out as the objective of the Chamber of Notaries to monitor that notaries execute their professional activities in a conscientious and correct manner, comply with professional ethics and act in a dignified manner. For example, in 1969, when the federal Notaries Act (*Bundesnotarordnung*) of Germany — unlike the amendments introduced in 1982⁴⁴ — did not stipulate yet the obligation of the Chamber of Notaries to enter into an insurance contract, the German *Bundesgerichtshof* assumed the position that the task of the Chamber of Notaries to monitor the conduct of notaries and the reputation of the office of a notary also encompassed the obligation of the Chamber of Notaries to see that compensation is secured for the damage caused by a notary.⁴⁵ It should be emphasised here that just like the state and notaries, the Chamber of Notaries is also, on the basis of § 14 of the Constitution, obliged to protect the rights and freedoms of individuals. Hence, as to the tasks of the Chamber of Notaries, we cannot speak about the need to protect the reputation of the office of a notary but, above all, the obligation to protect the rights of individuals.

The Chamber of Notaries can naturally act only within the framework provided by the state. The legislator need not regulate all the issues that relate to holding the office of a notary but it must make decisions on the most important principles affecting the office of a notary. The state must see to the operation of the notaries' offices as a system. This includes the obligation of the state to ensure that the protection of the rights of individuals is not undermined as a result of delegation of state authority. In the remaining part, the Chamber of Notaries as a public corporation can act pursuant to the guidelines given by the state based on the principles of self-government. The Chamber of Notaries is guided in its activities by law and its statute.⁴⁶ In addition to the areas listed in the NA, the statute of the Chamber of Notaries governs other issues falling within the sphere of competence of the Chamber of Notaries' (NA § 43 (3)). The current statute does not concern the topic of indemnity insurance. As the entry into additional indemnity insurance would affect the amount of the obligatory payments made by notaries to the Chamber of Notaries, only a meeting of the Chamber of Notaries could decide on the issue of entry into an indemnity insurance contract due to the requirements contained in the statute.⁴⁷ The Chamber of Notaries thus has no procedural impediment to conclude an additional insurance contract. A problem occurs, however, when notaries do not agree to the increase of compulsory payments and vote against the entry into indemnity insurance contract. As this is not solely an internal issue of the office of notaries, but above all a constitutional problem concerning the protection of the rights of individuals, the legislator cannot leave it for the Chamber of Notaries to decide but must resolve this as an issue relating to the protection of the fundamental rights of individuals by law.

⁴³ See Chapter 4 of the article.

⁴⁴ Erstes Gesetz zur Änderung der Bundesnotarordnung vom 7.8.1981. — BGBl. 1981 I, p. 803.

⁴⁵ BGH, DNotZ 1969, 637; Allgemeinen Richtlinien der Bundesnotarkammer für die Berufsausübung der Notare, § 11. — DNotZ 1963, p. 130.

⁴⁶ Statute of the Chamber of Notaries. Approved by Minister of Justice regulation No. 44 of 4.06.2003. — Riigi Teataja Lisa (Appendix to the State Gazette) 2003, 71, 1030. The statute is adopted by a meeting of all the notaries of the Chamber of Notaries and the statute is approved by the Minister of Justice.

⁴⁷ Subsection 7 (2) 5) of the statute of the Chamber of Notaries. Yet on the basis of § 7 (1) of the statute, a meeting of the Chamber of Notaries may include in its agenda and decide on any issue falling within the sphere of competence of the Chamber of Notaries.

7.2. Obligation of bailiffs to enter into professional indemnity insurance contract

The BA also imposes on bailiffs the obligation to enter into professional indemnity insurance contracts, the performance of which shall be monitored by the Minister of Justice (BA § 31 (1) 4)). Unlike the NA, the existence of a indemnity insurance contract is not a precondition for assuming the office of a bailiff and its absence does not serve as grounds for removal from office either.^{*48}

The indemnity insurance contract for a bailiff must cover the damage occurring due to the fault when performing the official duties, with the condition that the minimum amount of insurance coverage for an insured event is at least one million kroons, and the maximum amount of insurance indemnities paid during an insurance year is at least one million kroons. Bailiffs need not insure liability for intentional breach of official duties (BA § 7 (1) 3)). Unlike insurance of notaries' liability, BA § 7 (1) 4) provides for the possibility of bailiff's own liability on the condition that excess for one insured event shall not exceed 10,000 kroons.

Bailiffs do not have a self-governed professional organisation. Decisions on the arrangements relating to the office of bailiffs are made by the plenary assembly of bailiffs comprising all bailiffs, which is not a person with legal capacity.^{*49} As a consequence, there is no person who could enter into an additional professional indemnity insurance contract to secure the liability of bailiffs. As § 452 (1) of the Law of Obligations Act inhibits insurance of liability arising from intentionally caused damage, the bailiffs are liable for that only with their personal assets. The same applies to claims exceeding the insurance cover.

7.3. Personal liability of sworn translators without professional indemnity insurance contract

Until February 2006, sworn translators were also subject to the requirement for obligatory indemnity insurance, pursuant to which sworn translators had to enter into liability insurance contracts covering all of their liability; yet the required minimum amount of insurance coverage for one insured event was not less than 100,000 kroons and the maximum amount of insurance indemnities payable during an insurance year was not less than 500,000 kroons (§ 10 (3) 2) and 3) of the earlier STA). The existence of a indemnity insurance contract was a precondition for assuming the office of a sworn translator (§ 1 (2) 1) of the earlier STA and NA § 10 (2)) and its continuing validity while holding the office was monitored by the Minister of Justice within the framework of state supervision (STA § 1 (2) 1) and NA § 5 (3)).

To date, the requirement for indemnity insurance has been abandoned. The Ministry of Justice explained the amendment, stating that the income of sworn translators was not comparable to the income of notaries and bailiffs, that is why the requirement for entry into professional liability insurance contracts was too burdensome for sworn translators and did not spark interest in holding that office.^{*50} The explanatory memorandum to the draft Act unfortunately arrives at an erroneous conclusion that as the intentional violation of official duties cannot be insured, the abolition of the requirement for obligatory indemnity insurance theoretically only endangers the individuals to whom a sworn translator has caused damage by violation of his or her official duties as a result of negligence, and only when the sworn translator lacks means to compensate for the damage caused.^{*51} As already emphasised above, the injured person may not be deprived of compensation in any cases in which the official must be held liable.

⁴⁸ BA § 16 (1) 5) grants the right to remove a bailiff from office if removal from office is imposed on a bailiff as a disciplinary penalty. According to BA § 39 (1) 1), a bailiff may be removed from office for an intentionally committed serious disciplinary offence, for an offence committed while a disciplinary penalty has not expired or is not cancelled, or for an indecent act which renders it impossible for the person to act as a bailiff.

⁴⁹ According to the explanatory memorandum of the Act, the foundation of the Chamber of Bailiffs as a public legal person was not supported because the number of bailiffs was too small for that. See Chapter 3, § 4 of the explanatory memorandum to the draft Bailiffs Act, Code of Enforcement Procedure and State Fees Act Amendment Act. Available at web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=023530008&login=proov&password=&system=ems&server=ragne11 (31.05.2006) (in Estonian).

⁵⁰ See clause 3.9.2 of the Marital Property Register Act, Bailiffs Act, Law of Maritime Property Act and other Acts Amendment Act. Available at web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=053210006&login=proov&password=&system=ems&server=ragne11 (31.05.2006) (in Estonian).

⁵¹ *Ibid.*

8. Possibilities of improving the system of personal liability of independent public officials

There are undoubtedly several practical reasons for such a clearly poor situation. One of such circumstances may be the shortage of suitable insurers. Intentional violation of official duties gives rise to a legal impediment in the form of § 452 (1) of the Law of Obligations Act. However, these arguments do not alleviate the constitutional problem. The amount of income of the independent public official or the difficulties of the state in finding those officials are not relevant for the person suffering damage as a consequence of violation of official duties. The problems of insufficient supply of insurers offering favourable conditions and the failure of insurers to insure the damage caused by intentional violation of official duties do not limit to any extent the fundamental right of a person to compensation for damage. Therefore, we must find a solution that takes account of the problems evident in practice but would afford the injured person protection equivalent to state liability, unlike in the present situation.

The suggestions presented below do not represent ready-made solutions. Rather, they are aimed at creating a discussion to find suitable measures for ensuring the required liability of each official. The ultimate solutions depend on the actual acuteness of the situation and the options available. Unfortunately, neither the public nor the author of the article are aware of the number of claims filed against these three officials during their practice to date and to what extent they have been satisfied, nor are they aware of the amount of an average income of such officials. Starting from 2006, the information concerning claims should be communicated to the Ministry of Justice.^{*52}

8.1. Expansion of obligation to enter into professional indemnity insurance contracts

Subsection 452 (1) of the Law of Obligations Act does not enable an independent public official to insure the liability arising from the intentional violation of his or her official duties.^{*53} Hence, it is not possible to cover by indemnity insurance contracts of notaries and bailiffs the whole of the liability risk arising from their office. As regards notaries, the Chamber of Notaries could insure the liability related to the intentional violation of notaries' official duties. In such a case, the insured person would not be a notary but the injured person (§ 463 of the Law of Obligations Act). For example, in Germany, the Chambers of Notaries are also required by law to enter into so-called fidelity insurance contracts (*Vertrauensschadenversicherungsverträge*), the object of which is insurance of the intentional violations of the official duties of notaries.^{*54} The Chamber of Notaries is regarded as a policyholder and the injured person as an insured person^{*55} and there are no problems with provisions similar to the German Insurance Contracts Act.^{*56}

The conclusion of the indemnity insurance contract provided for in NA § 15 (3) should be made obligatory for the Chamber of Notaries. The Act should also specify the more precise objective of such a contract. An indemnity insurance contract to be concluded by the Chamber of Notaries should not copy in vain the insurance contract to be entered into by the notary but must protect the injured persons against risks not covered by the insurance contract of a notary. In addition to the cases of intentional violation of the official duties of a notary, the indemnity insurance contract to be concluded by the Chamber of Notaries should offer the injured person protection also when the amount of damage exceeds the maximum amount prescribed for insurance indemnities in the insurance contract of the notary.

Thus, in order to secure the liability of a notary, an obligatory two-pillar liability insurance system should be created in which the indemnity insurance contract to be concluded by the notary serves as one pillar and the indemnity insurance contract to be entered into by the Chamber of Notaries serves as another pillar.

⁵² On the basis of the amendment that entered into force in February 2006, notaries and bailiffs must inform the Ministry of Justice about any circumstances that may give rise to the obligation to compensate for damage, as well as about the submission of a claim for compensation for damage and about payment of indemnity to the injured person (NA § 15 (4) and BA § 7 (4)). A sworn translator must inform the Ministry of Justice about the commencement of judicial proceedings related to the alleged violation of his or her official duties (STA § 10 (3)).

⁵³ Subsection 452 (1) of the Law of Obligations Act: "An insurer shall be released from the performance obligation if the policyholder, the insured person or the beneficiary intentionally caused the occurrence of the insured event. Any agreement which derogates therefrom is void."

⁵⁴ Clause 3 of subsection 67 (2) of the German Federal Notaries Act (*Bundesnotarordnung*, BNotO).

⁵⁵ H. Weingärtner, H. Schöttler. *Dienstordnung für Notare*. Kommentar. 6. Aufl. 1993, paragraph 559a; S. Zimmermann. *Erstes Gesetz zur Änderung der Bundesnotarordnung und Staatshaftungsgesetz*. 2. Teil. – DNotZ 1982, p. 94; L.-C. Wolff. *Notarhaftung: Die sogenannte Vertrauensschadenversicherung und der Vertrauensschadensfonds der Notarkammern*. – VersR 1993, p. 275.

⁵⁶ Cf. §§ 61 and 79 of the German Insurance Contracts Act (*Versicherungsvertragsgesetz*, VVG).

8.2. Other possible measures

The situation is more complicated when it comes to bailiffs and sworn translators. The number of these officials is smaller compared to notaries. As they are new institutions founded only a couple of years ago, they are also less stable. Bailiffs and sworn translators do not have representative organisations for entering into indemnity insurance contracts and only officials themselves personally can enter into insurance contracts. Such contracts do not cover the liability arising from intentional violations or the damage exceeding the rates prescribed by personal indemnity insurance contracts.

The limited number of those independent public officials and the absence of the public law person uniting them render the identification of supplementary measures difficult. In the case of a public law corporation it would be feasible to establish an indemnity insurance foundation by that legal person, into which the officials would make mandatory payments that would be used solely for paying indemnities. The objective of the foundation could be to compensate the injured persons above all for the damage caused by the intentional act of an official and ensure credibility in the eyes of public. This would cover an important risk that is not included in the personal insurance contract of officials. For example, in Germany, a so-called fidelity insurance foundation (*Vertrauensschadensfond*) has been founded by the Federal Chamber of Notaries (*Bundesnotarkammer*) to secure the liability of notaries.⁵⁷ As the number of both bailiffs and sworn translators is small in Estonia, payments into the foundation would probably prove disproportionately burdensome for each individual official. If the obligation to enter into the insurance contract proved economically too burdensome for sworn translators, they would be unable to establish the insurance foundation even if they wished to do that very much.

However, it must be re-emphasised that the state cannot disregard such problems. Even if the officials cannot insure the damage caused by them either for legal or economic reasons, the state continues to have the obligation to protect the fundamental rights of persons. In such cases, the state must assume the obligations that the independent public officials cannot or are unable to perform. One option would be to substitute the personal liability of those officials for the state liability. The introduction of only one such change would affect the entire model of those professional laws and would inhibit the implementation of other principles of the office — above all, the mandatory independence of the official. This would, *inter alia*, raise the question of whether the present procedure for remuneration of officials would remain justified. A more lenient measure would be the assumption by the state of the obligation to enter into indemnity insurance contracts of bailiffs in part and the obligation to enter into indemnity insurance contracts of sworn translators in part or in full. Here we could also consider insurance of the insured risk of the injured person as a third party. If the state takes the role of a policy holder, this may also bring about infringement of the principle of independence of the official; however, no principle of holding the office can be absolute and the need to protect the fundamental rights of individuals would definitely justify the imposition of limitations on that principle. It should be possible to prevent by legislation the state from achieving other goals through the insurance relationship and from unjustified interference with the official duties.

9. Conclusions

Above all, the state must be liable to the injured person for the damage caused by unlawful performance of public duties. Although the Constitution of Estonia and the law of the European Communities enable the state to appoint other public authorities to be liable to the injured person, the state retains the right to ensure that it is possible for the injured person to exercise the right to be compensated for damage.

Estonian notaries, bailiffs and sworn translators are personally liable for the damage caused by violation of their official duties. However, the liability insurance contracts of notaries and bailiffs do not cover the risks associated with these offices as much as required, whereas sworn translators lack mechanisms for securing personal liability altogether. Such a legislative situation does not grant the persons who have relations with

⁵⁷ The objective of the foundation is to ensure that it is possible for the injured person to receive a fair compensation ultimately after the indemnities payable by the insurer have been paid. For instance, if the notary violated his or her official duty out of negligence, the injured person may first be indemnified in the maximum amount determined by the indemnity insurance contract of the notary and if this does not cover the damage caused, the injured person will also receive indemnity on the basis of the indemnity insurance contract to be entered into by the Chamber of Notaries. However, when the official duties of the notary are violated intentionally, the injured person can receive the indemnity only on the basis of the indemnity insurance contract of the Chamber of Notaries, which may not cover all of the damage. Therefore, the objective of the foundation is to provide for additional means to compensate for the damage caused by the intentional act of the notary. B. Stüer (Note 20), p. 1142. When responding to the objections made by the notaries, the German Federal Constitutional Court assumed the position that the obligatory participation in such a foundation was in compliance with the Constitution. See BVerfG, Urteil vom 21.4.1983. – DNotZ 1983, pp. 502–503; the same conclusion has been reached also in literature. See B. Stüer (Note 20), p. 1141 et seq.

such officials enough security and do not allow for the protection of the rights of individuals. Hence, the constitutional requirements for the personal liability of the relevant independent public officials are not met in law and the legislator should fill the gaps found in the liability system of these officials. If the state releases itself from the liability when delegating state authority, yet fails to secure the liability of public officials, the state may find itself being liable on new grounds.^{*58}

The enhancement of the system of personal liability of notaries, bailiffs and sworn translators is not only an important issue for the state but for the officials themselves. The mechanisms managing the risks related to the office also provide a sense of security to the officials that they have been protected against their mistakes. This also serves to protect the reputation of the offices as some unfortunate case may bring about distrust for all independent public officials. An alternative to the enhancement of the personal liability of those officials would be substitution of such liability for state liability but this may give rise to the need to change the entire organisation of the office.

⁵⁸ This may concern compensation for damage caused by the failure to issue legislation of general application. According to § 14 (1) of the SLA, a person may claim compensation for damage caused by legislation of general application or the failure to issue it, only if damage was caused by the sufficiently serious violation of the duties of the public authority, the provision serving as the basis for the obligation violated is directly applicable, and the person belongs to the group of individuals suffering special loss as a consequence of the legislation of general application or the failure to issue it.