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# Evaluation of the Constitutionality of Good-Faith Acquisition

The purpose of this article is to provide an evaluation addressing the specific grounds on which the constitutionality of the good-faith acquisition of things ought to be assessed. Since the regulation of the protection of property in the Estonian Constitution and the regulation of the good-faith acquisition of things in Estonia constitute solutions that are rather typical within the legal tradition of Continental Europe, the topic can be viewed in the context of a broader legal discussion, wherein Estonia can be considered only one of many possible examples.

Three groups of countries may be distinguished in Continental Europe in terms of the acceptability of the good-faith acquisition of a movable. The first group of countries (e.g., Spain and Portugal) relies on a notion stemming from Roman law, under which the initial owner may reclaim a movable from a possessor in good faith, as a rule. The unambiguousness of such regulation is, however, countered by countries' differences in the provisions of prescription, exceptions in the case of certain public methods of sale, etc.\*<sup>1</sup>

In other jurisdictions (such as Italy and formerly Sweden), the possibility of good-faith acquisition is recognised both when the initial owner has voluntarily delivered a thing from his possession and in the case of the owner being dispossessed of a thing against his will.\*<sup>2</sup>

Modern Estonia belongs to an intermediate group of countries that allow the owner to reclaim a thing from a possessor in good faith if it was removed from the owner's possession against said owner's will.\*<sup>3</sup> With discrepancies in details, this group includes Germany, Austria, France, and Switzerland, among others.\*<sup>4</sup>

The possibility and probability of the good-faith acquisition of immovables depend on which legal meaning is attributed to an incorrect entry in the land register by the legal system.

An entry in the register can be accorded negative disclosure effect, which allows a person in good faith to deny a legally existing circumstance that is not evident from the land register, as well as positive disclosure effect, which deems an incorrect entry to be correct for the benefit of a person in good faith. Negative disclosure effect has been more widespread in various legal systems than positive disclosure effect. Positive disclosure effect in various forms is, in addition to Germany, inherent also to the systems of Austria,

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<sup>1</sup> E. Karner. *Gutgläubiger Mobiliärerwerb. Zum Spannungsverhältnis von Bestandschutz und Verkehrsinteressen*. Springer-Verlag 2006, pp. 12–16.

<sup>2</sup> *Ibid.*, pp. 16–17.

<sup>3</sup> *Asjaõigusseadus (Law of Property Act)*, §95. – RT I 1993, 39, 590; RT I, 29.6.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

<sup>4</sup> Karner (see Note 1), p. 19.

Switzerland, Spain, Finland, and Sweden, for instance.<sup>\*5</sup> Positive disclosure effect also involves risks, owing to which an owner may irreversibly lose ownership of his property because of the emergence of incorrect entries in the case of the immovable being acquired in good faith.

In Estonia, an entry in the land register has been accorded negative disclosure effect, which stems from paragraph 2 of §56<sup>1</sup> of the Law of Property Act, as well as positive disclosure effect, which is secured by paragraph 1 of the same section.

## 1. Significance of the topic for a transitional society

The regulation of the good-faith acquisition of both movables and immovables has prompted serious debate in Estonian legal thought, which will be covered below. The possibility of the good-faith acquisition of things is not alien as such to the Estonian Germanic private-law tradition; such regulation was known in the autonomous Baltic provinces belonging to the Russian empire as well as the law in effect in independent Estonia prior to World War II. In the 1940s, the Soviet Union repeatedly occupying Estonia established its law here. The Soviet Union, unlike some of its satellites, never allowed even limited non-state ownership of land. Accordingly, regulation similar to regulations based on the idea of the protection of legal transactions (*Verkehrsschutz*) can be found mainly in the provisions on the good-faith acquisition of a movable alone. If usually the regulation of good-faith acquisition is justified by the idea of the protection of legal transactions, according to which market players need to be encouraged to enter into transactions in order to purchase things, then people having lived in territory under the supervision of the Soviet Union, who were suffering from a deficiency of basic commodities, required no special encouragement to purchase inexpensive movables. Whereas during an occupation lasting half a century the regulation of good-faith acquisition had only marginal meaning for Estonia, it is understandable that recognition of the consequences of the regulation may be shocking and the constitutionality of the situation subject to doubt, especially for people having lost their property.

The regulation of the good-faith acquisition of movables induced a number of debates in Estonia in the 1990s owing to the fact that in Estonia provisions pertaining to movables were applied also to those houses and flats that had not yet been entered in the land register.<sup>\*6</sup> This means that in such disputes the point had to do with much higher values than common movables usually involve. The regulation of the good-faith acquisition of movables was more seriously criticised by Tambet Toomela in Estonian legal literature.<sup>\*7</sup>

In works of a significant scientific standard, the regulation of good-faith acquisition has been accepted as such.<sup>\*8</sup> More widespread debate on the risks of positive disclosure effect was initiated in the general media in 1998 by an influential lawyer, later Chancellor of Justice Indrek Teder<sup>\*9</sup>, who highlighted the injustice created when the owner is deprived of a movable because of an incorrect entry, yet he did not specify in further detail which alternative with respect to the legal meaning of the land register he supported. His approach represents the widespread notions of the land register as archaic and exceptional, and he intimates also the possibility of the unconstitutionality thereof.

The problem raised by Teder was amplified publicly after the 1999 transfer, with a letter of authorisation prepared on the basis of a counterfeit passport, of a valuable house in the medieval heart of Tallinn belonging to the successors of a noble Baltic German family and its later transfer to persons allegedly in good faith. Discussion of a need to amend the law subsided after the registered immovable was restored to the initial owner by the alleged acquirer in good faith under trial in a criminal proceeding. The reason for

<sup>5</sup> V. Kõve. *Varaliste tehingute süsteem Eestis (System of Property Transactions in Estonia)*. Doctoral thesis. Tartu 2009, p. 197. Available at <http://dspace.utlib.ee/dspace/bitstream/handle/10062/8251/k%F5vevillu.pdf?sequence=1> (most recently accessed on 14.4.2012) (in Estonian).

<sup>6</sup> *Asjaõigusseaduse rakendamise seadus (Law of Property Act Implementation Act)*, §13. – RT I 1993, 72, 1021; RT I, 29.6.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

<sup>7</sup> T. Toomela. *Vallasasjade heauskse omandamise regulatsioon: muudatused ja probleemid (Regulating the Good-faith Acquisition of Movables: Changes and Problems)*. – *Juridica* 2004/8, pp. 530–539 (in Estonian).

<sup>8</sup> Kõve (see Note 5), p. 206.

<sup>9</sup> I. Teder. *Kuidas omastada Toompea lossi (How to Embezzle Toompea Castle)*. – *Eesti Päevaleht*, 11.5.1998. Available at <http://www.epl.ee/news/arvamus/kuidas-omastada-toompea-lossi.d?id=50755491> (most recently accessed on 14.4.2012) (in Estonian).

the waning of this discussion too was probably failure by the participants therein to offer clear alternatives, which would have allowed speaking about a solution that addresses law for the land register that is suitable for today's situation.

## 2. The Constitutional framework of good-faith acquisition

Estonian Constitutional tradition is also related to the German legal tradition, which is emphasised less here than in the realm of private-law traditions. In Estonia, the third Constitution, in effect at present, was established in 1992.<sup>\*10</sup> It was preceded by the constitutions of 1920 and of 1938. After the Constitutional Assembly completed the draft of the current Constitution, its chairman, Tõnu Anton, emphasised that the models in preparation of the draft were the earlier Estonian constitutions and the experience obtained through their enactment. According to him, no constitution of any other country could have been regarded as a model, but those of Germany, Hungary, Austria, Sweden, Finland, and Iceland were analysed in more detail during the work.<sup>\*11</sup>

When one is evaluating the constitutionality of the good-faith acquisition of things, central meaning is found in §32 of the Estonian Constitution, the illogic of whose structure<sup>\*12</sup> has been repeatedly pointed out.<sup>\*13</sup> One has to concur with Maruste's conclusion that sentence 1 of paragraph 1 of §32 ought to be followed by what is stipulated in paragraph 2, which constitutes a logical special provision related to the general principle of the inviolability of property mentioned in paragraph 1. In the Estonian Constitution of 1938, the sentence flow was more logical, while at the same time the current form might be influenced by the fact that several constitutions of foreign countries that the Constitutional Assembly used in its work do not explicitly regulate restriction on ownership and therefore their regulation of expropriation immediately follows the principle of the inviolability of property.<sup>\*14</sup> Thus, in the Constitution in effect, sentence 1 of paragraph 1 and paragraph 2 of §32, composing the regulation of the contents of ownership and general restrictions, could be logically grouped together. Another, differentiating, domain, a considerably more specific one, is the regulation of the alienation of property without the consent of the owner, which consists of sentences 2 and 3 of paragraph 2. In evaluation of the constitutionality of the regulation of the good-faith acquisition of a thing, paragraphs 3 and 4 of the section dealing with a restriction on the acquisition of some classes of property by some categories of persons and issues of the right of succession do not have to be considered, as a rule.

Even though §32 of the Constitution uses the notion of 'property' in a meaning differing from the terminology of property law, considering it to include different types of proprietary rights, much as the Convention for the Protection of Human Rights does in the interpretation of the practice of the Court of Human Rights<sup>\*15</sup>, it no doubt also involves tangible property. The Constitution protects property that one has acquired<sup>\*16</sup>, yet it fails to distinguish between cases of its acquisition for a fee and that without a charge—this is indirectly confirmed by, among other things, the provision on the protection of the right of succession included in the same section, which, obviously, does not assume paid performance by the successor.

<sup>10</sup> Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia). – RT I 1992, 26, 349; RT I, 27.4.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

<sup>11</sup> Vastab Põhiseaduse Assamblee juhataja Tõnu Anton (Interview with Chairman of the Constitutional Assembly Tõnu Anton). – Eesti Jurist 1992/2, p. 120 (in Estonian).

<sup>12</sup> R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and Protection of Fundamental Rights and Freedoms). Juura 2004, p. 475 (in Estonian).

<sup>13</sup> K. Ikkonen. Omandipõhiõigus ja selle piirid (The Basic Right of Ownership and Its Limits). – Juridica 2006/1, p. 60 (in Estonian).

<sup>14</sup> See, e.g., Article 72 (1) of the Constitution of Iceland, available at <http://www.government.is/constitution/> (most recently accessed on 14.4.2012), or Article 15 of the Constitution of Finland, available at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf> (most recently accessed on 14.4.2012).

<sup>15</sup> E.-J. Truuväli *et al.* (eds). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia, Commented Edition), 2nd edition. Juura 2008, §32 (comments 2.1–2.2) (in Estonian); K. Kullerkupp. National Report on the Transfer of Movables in Estonia. – W. Faber, B. Lurger (eds). National Reports on the Transfer of Movables in Europe. Sellier European Law Publishers 2008, p. 236.

<sup>16</sup> See §32 (comment 2.4) in the first work referred to in Note 15.

Therefore, more insufficient or deficient Constitutional protection of the good-faith acquisition of a thing cannot be automatically deduced from the fact that the acquirer in good faith need not have paid for the thing. Whereas one of the central objectives of the protection of property is considered to be the protection of a free market,<sup>\*17</sup> it will also assume, to an extent, a neutral attitude of the state toward the circumstances of the emergence of the property.

Whereas the Constitutional protection of property involves, in addition to the notion of tangible property, also any other substantial tangible positions, including claims under private law, it will also then involve claims for acquisition. It does not matter whether the claim stems from a synallagmatic contract or a transaction charge. Even though the Constitution does not protect the hope or opportunity of persons to acquire property<sup>\*18</sup>, it protects claims for the acquisition of property, inclusive of things. As it is in the case of property, the ownership of a claim of a specific entitled person is protected.

If the state is obliged to lay down rules pursuant to which property is to be protected<sup>\*19</sup>, it will also include a need to establish more specific regulation pertaining to property. The legislator has to determine the nature of property (in terms of the Constitution, not only in terms of property law) in its various forms in a sufficient manner, as well as to establish regulation for the emergence and extinguishing of property. Such regulation has to balance the objectives stipulated in sentences 1 and 3 of paragraph 2 of §32 of the Constitution on securing of the rights of ownership, use, and disposal of property for the owner and to avoid the use of property against the public interest. When making these choices, one has to proceed from the principle of proportionality. One has to deem logical in itself the position that the possibilities of restriction of ownership that are stipulated in sentence 2 of paragraph 2 may not lead to actual expropriation, wherein the owner is fully deprived of the object of ownership.<sup>\*20</sup> Alongside this, one is to analyse whether acquisition in good faith for the purposes of the Constitution is alienation without the consent of the owner or a restriction on ownership.

### 3. Acquisition in good faith as alienation without the consent of the owner

The regulation of the good-faith acquisition of a movable or an immovable favours the interests of the acquirer over those of the former owner, as a rule. Where in the case of good-faith acquisition the right of ownership of the former owner is extinguished in full, it may be reasonable to deem this to involve alienation of property without the consent of the owner for the purposes of sentence 2 of paragraph 1.

The alienation<sup>\*21</sup> of property without the consent of the owner is associated primarily with the notion of expropriation<sup>\*22</sup> for the purposes of the Constitution.<sup>\*23</sup> In addition to cases referred to as expropriation in law, which involves primarily the dispossession of lots for specific purposes stemming from the public interest<sup>\*24</sup>, in the legal theory the literature deems the confiscation of property due to the commission of an offence to fall under the concept of expropriation.<sup>\*25</sup> Also the Chancellor of Justice has, in an opinion submitted to the Supreme Court, considered confiscation to be the alienation of property without the consent of the owner for the purposes of the Constitution in Constitutional review court procedure.<sup>\*26</sup> The Supreme

<sup>17</sup> Supreme Court Constitutional Review Chamber decision of 30.4.2004, 3-4-1-3-04, paragraph 24 (in Estonian).

<sup>18</sup> Truuväli *et al.* (see Note 15), §32 (comment 2.3).

<sup>19</sup> *Ibid.*, §32 (comment 3).

<sup>20</sup> See the work of Ikkonen (Note 13), p. 64.

<sup>21</sup> The English translation of the Constitution uses, in sentences 2 and 3 of paragraph 1 of §32, the somewhat interpretation-dependent term 'expropriation', rather than 'alienation'.

<sup>22</sup> Truuväli *et al.* (see Note 15), §32 (comments 4.1–4.4).

<sup>23</sup> Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne (Final Report of the Constitutional Expert Committee of the Republic of Estonia). Available at <http://www.just.ee/10725> (most recently accessed on 14.4.2012) (in Estonian).

<sup>24</sup> Kinnisasja sundvõõrandamise seadus (Immovables Expropriation Act). – RT I 1995, 30, 380; 2010, 38, 231 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

<sup>25</sup> Maruste (see Note 12), p. 479.

<sup>26</sup> Õiguskantsleri arvamused põhiseaduslikkuse järelevalve kohtumenetluses (Opinion of the Chancellor of Justice in Constitutional Review Court Procedure), 19.2.2008, No. 9-2/080133/00800836, paragraph 39 (in Estonian).

Court, on the other hand, in its somewhat unclear statement in the same court case, has considered confiscation to be a restriction on property for the purposes of paragraph 2 of §32.<sup>\*27</sup>

The classification of compulsory auctions taking place in enforcement procedure in the context of the Estonian Constitution is also debatable. For some reason, Maruste has referred to the compulsory auction of movable property as only the alienation of property without the consent of the owner for the purposes of the Constitution<sup>\*28</sup>, which in essence should not be different from analogous procedure applied for immovables. In the prevailing opinion in German jurisprudence, sale in compulsory execution is not deemed to fall within the scope of the notion of expropriation for the purposes of the Constitution.<sup>\*29</sup> Ikkonen has strongly reasoned in favour of deeming compulsory auction to be alienation without the consent of the owner for the purposes of the Constitution, rather than a restriction on ownership, in a contrast to the prevailing opinion of German jurisprudence.<sup>\*30</sup> The central reasoning applied by Ikkonen is linguistic; it lies in emphasising that the German Constitution<sup>\*31</sup> uses the narrowly delimited concept of *Enteignung* when speaking about expropriation<sup>\*32</sup>, and this term denotes primarily action by a public authority in dispossession of a specific object on account of public interest. According to her, the formulation ‘alienation of property without the consent of the owner’ used in the Estonian Constitution is fundamentally broader and the earlier identification thereof primarily with expropriation is erroneous. On the basis of such logic, the extinguishing of the ownership of the former owner upon the good-faith acquisition of things could also be considered to belong to the scope of application of the same paragraph of the Constitution. However, one may cast doubt on the linguistic reasoning of Ikkonen, as the Estonian language lacks a general-language term that might be compared to the German *Enteignung*. In the Estonian Constitution, attempts have been made to avoid specific technical language; at times, preservation of archaic images characteristic of the previous forms of the Constitution have been preferred, in order for the new Constitution also to emphasise the idea of the continuity of the state. This may be why expropriation is not denoted by a single, shorter term rather than a longer phrase. Also, one has to consider important the fact that the Constitution of 1920 and the Constitution of 1938 used phrases similar to ‘alienation of property without the consent of the owner’ in analogous provisions.<sup>\*33</sup> One cannot deduce from such usage of language any specific desire to move away in any special way from German-influenced regulation. Obviously, it takes more to evaluate the meaning of a notion than to evaluate the intent of the designers of the draft Constitution; in any case, it was impossible to predict the future influence of the regulation of all property in the market economy of a just-recovering society of the early 1990s.

Cases of good-faith acquisition are distinguishable from application of the common concept of expropriation by the fact that here the dispossession does not take place via action by the state; instead, it depends on action by a private person. At the same time, regulation established by the legislator, as a result of which property is extinguished, can be considered to be definitive upon the arrival of the consequence.<sup>\*34</sup>

To be in accordance with the Constitution, the alienation of property without the consent of the owner assumes that the alienation takes place ‘in cases and pursuant to procedure provided by law’. The regulation of good-faith acquisition is distinguished from the expropriation of an immovable in the public interest or the confiscation of property owing to an offence by the fact that the state will establish the terms and conditions of the extinguishing of ownership abstractly, not knowing the specific person whose right of ownership is extinguished in the case in question. Also, the person acquiring the thing as a result of its decision will be indefinable for the state. It is impossible for the legislator to evaluate the relevance of its decision-making criteria in a single case; it can do so only on the basis of specific larger groups of cases. Therefore, it could be stated that alienation of property without consent was decided upon by the state as early as in 1993,

<sup>27</sup> Supreme Court of Estonia *en banc* decision of 16.5.2008, 3-1-1-88-07, paragraphs 41 and 43 (in Estonian).

<sup>28</sup> Maruste (see Note 12), p. 479.

<sup>29</sup> H.-J. Papier. Kommentierung zum Art. 14. – T. Maunz, G. Dürig. Grundgesetz Kommentar. Band II. Verlag C. H. Beck 2010 (July), p. 327; O. Depenheuer. Kommentierung zum Art. 14. – H. Mangoldt, F. Klein, C. Starck. Kommentar zum Grundgesetz. Band 1. Verlag Franz Vahlen 2010, p. 1484.

<sup>30</sup> Ikkonen (see Note 13), pp. 66–70.

<sup>31</sup> Basic Law for the Federal Republic of Germany, §14 (3). Available at <http://www.iuscomp.org/gla/statutes/GG.htm#14>.

<sup>32</sup> Ikkonen (see Note 13), p. 60.

<sup>33</sup> Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia 1920), §24. – RT 1920, 113/114 (in Estonian); Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia 1938), §26. – RT 1937, 71, 590 (in Estonian).

<sup>34</sup> D. Neundörfer. Die Bedeutung des Vertrauens bei den Gutgläubensvorschriften. Peter Lang 1998, p. 253.

through adoption of the Law of Property Act or amendment to the regulations on good-faith acquisition at a later time, but in the case of such interpretation one should assert that the alienation was induced by ‘the law’ rather than ‘in cases and pursuant to procedure provided by law’. Therefore, in the case of good-faith acquisition, alienation could be considered to be occurring in cases and pursuant to procedure provided by law, if one proceeds from the fact that the alienation is still being performed by a person not entitled thereto in the law, rather than occurring through adoption of a law by the state.

When considering the extinguishing of property due to good-faith acquisition as alienation of the property without the consent of the owner—in accordance with the Constitution—one ought to evaluate whether such alienation takes place in the public interest. Even though in a single case of good-faith acquisition there are few beneficiaries (usually one) in comparison to the expropriation of an immovable for road construction, there are still no grounds to deny the presence of public interest. The protection of legal transactions is aimed at protection of an economic order based on private property, the beneficiaries of which can be deemed to consist of society as a whole. Section 31 of the Constitution, which prescribes the freedom of business, refers to the recognition of the market-economy bases of society too. If one assumes that good-faith acquisition really promotes the protection of legal transactions that support the persistence and development of such an economic order, then it will correspond to that definition of the public interest pursuant to which the object of the public interest is indivisible among the members of society.<sup>\*35</sup>

It is more complicated to assume a position in relation to the fair and immediate compensation required by sentence 2 of paragraph 1 of §32. In interpretations that includes compulsory auction or the confiscation of property due to an offence as alienation without the consent of the owner, fair and immediate compensation too can be interpreted broadly. Thus exemption from debt has been considered to be fair and immediate compensation obtained by the former owner in the case of compulsory sale, as has exemption from a public-law duty in the case of confiscation of a punishable nature.<sup>\*36</sup> In the case of good-faith acquisition, there is no compensation secured efficiently for the former owner as would correspond to the value of the thing. He may be entitled to file claims for damage against a person, yet the efficiency of such a claim is questionable in every way. He cannot file a claim against a person having acquired his movable or immovable in good faith. Of course, one can say from a theory-based perspective that where there is still a claim against the non-entitled transferor, the acquirer in good faith has not totally lost his property. As the Constitution sets no limits to the notion of property as tangible property, the person has retained the property in the form of a certain tangible position or, in the specific case considered here, of a claim. Such a train of thought should still be considered to be merely an academic exercise, rather than a purposeful interpretation of the Constitution. The objective of a Constitutional provision that still addresses expropriation executed immediately by the state in public interests is securing of compensation that has actual value, which does not have a substitute in a claim against a person who is not precisely identified, whose whereabouts are unknown, or who is insolvent, for instance. In the case of good-faith acquisition, no practical grounds for interpreting the notion of fair compensation as broadly as has been done at times in the case of compulsory sale or confiscation of a punishable nature can be found.

Sentence 3 of paragraph 1 of §32 of the Constitution gives a person whose property was alienated without his consent the right to contest in court the alienation, or the compensation or the amount thereof. Maruste states that this regulation in itself is pointless, since paragraph 1 of §15 of the Constitution still ensures the right to court proceedings for everyone whose rights or freedoms have been violated.<sup>\*37</sup> The reasons for the emphasis on the right to address a court in the case of the alienation of property against the will of the owner are historical—similar reference can be found in the Estonian Constitution of 1938, as well as in the German Constitution. This sentence allows us to understand that the Constitution has focused primarily on common expropriation. Debate over the necessity of expropriation and the amount of compensation is logically possible. One can find that also in the case of good-faith acquisition it is possible to contest the matter of whether the terms and conditions for the extinguishing of ownership were met or how substantial a claim for the compensation of damage directed at a person having unjustifiably transferred a thing ought to be, but this surely was not the initial objective behind the provision. The above-mentioned

<sup>35</sup> K. Ikkonen. *Sundmüügi põhiseaduslikkus (Constitutionality of Compulsory Sale)*. Master's thesis. Tartu 2005, p. 78. Available at <http://dspace.utlib.ee/dspace/bitstream/handle/10062/660/ikkonen.pdf?sequence=5> (most recently accessed on 14.4.2012) (in Estonian).

<sup>36</sup> See the work cited in Note 26, paragraph 46.

<sup>37</sup> Maruste (see Note 12), p. 481.

sentence in the Constitution demonstrates, in addition to the linguistic reasoning described above, that at the time of preparation of the Constitution, alienation of property without the consent of the owner was understood primarily in terms of expropriation.

Therefore, the extinguishing of ownership in the course of good-faith acquisition cannot be deemed to be in conformity with the regulation of the Constitution pertaining to the alienation of property without the consent of the owner. Any other features required pursuant to the Constitution can be deemed to be present with greater or less doubt, but, in its essence, the regulation of good-faith acquisition fails to meet the requirement of fair and immediate compensation.

## 4. Good-faith acquisition as a restriction on ownership

Another option is to regard good-faith acquisition as a restriction on ownership, which has to be subject to the requirement of proportionality in the first place, being suitable, required, and moderate for reaching of a certain objective. The latter is first and foremost among these criteria; one has to evaluate whether the objective achievable by the means in question is in reasonable relation with the legal rights under infringement.

When good-faith acquisition is deemed to be a restriction on ownership, a linguistic obstruction arises, as the former owner loses his property in full. When sentence 1 of paragraph 2 of §32 of the Constitution speaks about the right to dispose of one's property, the obstruction of disposal by the owner rather than, in his place, the disposal of a thing should be considered to be the restriction on this right in the first place. Placing the extinguishing of the good-faith acquisition of ownership under a restriction of ownership, however, is better suited to the more abstract formulation of paragraph 2 of §32, as specific difficulties that would arise in dealing with good-faith acquisition without the consent of the owner in the absence of dispossession of his property are lacking. Such a seemingly opportunistic approach is supported by a genetic argument. Property is not a notion devoid of context, but the Estonian Constitution has brought it into use with a generally formed meaning. It is safe to declare that the regulation of good-faith acquisition has traditionally existed side by side with the notion of property and no explicit desire to amend this approach was expressed in the adoption of the Constitution. From the point of view of formal logic, it could be stated that the extinguishing of ownership in the course of good-faith acquisition is integral to the notion and content of property and therefore there are no grounds to treat it as a restriction on ownership. Similarly, German legal theory represents a position according to which the treatment of property in the Constitution can be formed on the basis of institutes of private law developed earlier, which were transposed to the Constitution as they stood.<sup>38</sup> Such an approach would leave the regulation of good-faith acquisition fully in a space free of control, which cannot be deemed to be the idea behind the Constitution. However, the extinguishing of ownership upon good-faith acquisition can be considered to be a restriction inherent to the legal tradition, which no obvious attempt has been made to amend through adoption of the Constitution. In evaluation of the constitutionality of the regulation of every possible good-faith acquisition, the assessment of the proportionality thereof will be reduced primarily to the value of the protection of legal transactions of good-faith acquisition. In principle, the profitability of specific regulations for economic turnover in general has to be verifiable. One must be able to determine how specific regulation can encourage market players to conclude acquisition transactions.

Surely the legislator must have certain boundaries when designing good-faith acquisition. It is hard to declare uniformly whether Constitutional choices should also involve full abolition of the good-faith acquisition of movables and immovables. In essence, it would be impossible to withdraw fully from the protection of the acquirer in good faith, even though it obviously need not be formally protected by means of the institutes of law in effect. Practical alternatives to good-faith acquisition could certainly be the shortening of the prescription period and giving of greater advantage to a possessor in good faith who has not become the owner of the relevant thing.<sup>39</sup> In principle, the Estonian legislator could make a choice from among all solutions existing in Continental Europe and not face any difficulties worth mentioning, so long as the details of the regulation resolve the issues of the protection of good faith in a satisfactory manner. Of

<sup>38</sup> J. Hager. *Verkehrsschutz durch redlichen Erwerb*. C. H. Beck 1990, pp. 11–12.

<sup>39</sup> *Ibid.*, p. 81.

course, every more substantial amendment would require considering the principle of legitimate expectations, which would not allow changing the proprietary positions rapidly.

A choice substantially preferring one party with a competitive interest to another will have to be justifiable, of course, from the standpoint of proportionality and from that of equal treatment. As a fundamental practical issue of the choices of the legislator, this context has highlighted a need for different treatment of acquirers in good faith, depending on whether they have contributed materially when acquiring a thing. In German theory of Constitutional law, the choice that would not allow the initial owner to reclaim a thing if the acquirer in good faith has received it at no cost has been considered to be illicit for the legislator, owing to the requirement of proportionality.<sup>\*40</sup> Placing free good-faith acquisition in a less favourable situation is also inherent to Estonian legal thought, yet no distinct position has been assumed such that the basis for it would stem from the Constitution. The Law of Obligations Act adopted in 2001 does not amend the terms and conditions for the good-faith acquisition of movables or immovables stemming from the Law of Property Act, but §1040 thereof provides a specific claim against unjustified enrichment in favour of the former owner of a thing, which will allow reclaiming both a movable and an immovable from a person that has acquired it via free disposal.<sup>\*41</sup> An explanatory note on the draft points out the grounds that in the case of free disposal the 'good faith of the acquirer is not as worthy of protection as the lost property of the former owner is'<sup>\*42</sup>, but it fails to assume a position on whether the choice of the legislator is restricted by the Constitution here.

In the case of immovables, the Supreme Court has in its practice limited the possibility of good-faith acquisition provided for by the Law of Property Act, finding that 'first- and second-order intestate successors cannot rely also on the good-faith acquisition of the real right in immovable property pursuant to a free transaction. There are no reasonable grounds for said persons being more protected when acquiring following a free transaction than in the case of succession'.<sup>\*43</sup> In this judgement, the Supreme Court has not explicitly pointed out its decision-making space stemming from the Constitution, as the case did not involve Constitutional review court procedure, but, taking into account its legal-political essence, one can sense the perception of certain Constitutional boundaries.

## 5. Conclusions

Estonian private-law regulation protects good-faith acquisition with largely the same reasoning applied in the general Continental European legal tradition (especially in its Germanic variation). The Estonian Constitution, which was worked out immediately after the extinguishing of an imposed Communist way of life, protects the market-economy grounds of society at times more emphatically than do its Western European counterparts. Estonian practical experience in the application of law, on the other hand, has made Estonian jurisprudence answer anew to the questions related to good-faith acquisition that other countries consider done away with. A peculiarity of the transition period in the field of good-faith acquisition was surely the possibility of the good-faith acquisition of immovables of buildings pursuant to the regulation of immovables, which raised suspicions as to the relevance of the regulation of good-faith acquisition as such but did not entail the amendment or fundamental re-evaluation thereof in court practice. Risks related to the function of the positive disclosure effect of the land register have also led Estonian legal scholars to deal with the topic in a more profound manner, yet without abandoning solutions that have become traditional. The intensively presented position in Estonian legal literature that the alienation of property without the consent of the owner has to be treated considerably more broadly than is done in the common handling of expropriation for the purposes of the Constitution can be deemed to be the starting point for discussion that has yet to reach a conclusion. It is clear that the Constitution protects persons from the arbitrary dispossession of property more broadly than only in cases that laws inferior to the Constitution call expropriation,

<sup>40</sup> *Ibid.*, p. 83.

<sup>41</sup> *Võlaõigusseadus* (Law of Obligations Act). – RT I 2001, 81, 487; RT I, 8.7.2011, 6 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

<sup>42</sup> *Võlaõigusseaduse eelnõu seletuskiri* (Explanatory Note to the Draft Law of Obligations Act). Available at [http://www.riigikogu.ee/?op=emsplain&content\\_type=text/html&page=mgetdoc&itemid=991610001](http://www.riigikogu.ee/?op=emsplain&content_type=text/html&page=mgetdoc&itemid=991610001) (most recently accessed on 14.4.2012) (in Estonian).

<sup>43</sup> Supreme Court Civil Chamber decision of 20.11.2003, 3-2-1-128-03, paragraph 21 (in Estonian).

but the juxtaposition of compulsory auction with expropriation in a Constitutional framework, for example, is a matter of some doubt. Extending the above-mentioned treatment to the regulation of good-faith acquisition would constitute a distinct departure from the intention that served as a basis for the preparation of the Constitution and would not allow reasonably following the requirement of fair and immediate compensation that is set forth by the Constitution. In the present stage of development of legal practice and the court practice related to the debate, it seems teleologically motivated to maintain the position that the extinguishing of ownership in the course of good-faith acquisition constitutes a restriction on ownership for the purposes of paragraph 2 of §32 of the Estonian Constitution. Surely this position cannot resolve all specific issues related to the constitutionality of the regulation of good-faith acquisition. Rather, it will demand continuous analysis among various issues, of which the central place on the current stage is held by the regulation of the good-faith acquisition of things in the case of free disposal.