https://doi.org/10.12697/JI.2017.26.00

Dear reader,

In looking at the collection of papers in this volume, an impression of a certain eclecticism cannot be avoided. We have articles on public international law, European human-rights law, legal history, and various aspects of Estonian law, but also, for example, issues in Ukrainian law are dealt with. Moreover, while most of the articles are in English, some key papers are in German, which in times gone by was the *lingua franca* of the Baltic intellectual universe.

Although the substantive themes of this edition of *Juridica International* are inevitably varied, it seems to me nevertheless that the diverse legal domains and questions all are connected with the expectations that we as lawyers and citizens have for law – be it international, regional, or domestic.

Christian Tomuschat's programmatic article on the current state and future of public international law is connected with a festive event that we celebrated at our university on 1 December 2016, when Professor Tomuschat received an honorary doctorate from the University of Tartu. In this capacity, he has joined the ranks of other distinguished individuals who have become honorary doctors in the field of law here: Boris Meissner (1996), Heinrich Mark (1998), Peter Schlechtriem and Thomas Wilhelmsson (2002), Wilfried Schlüter (2003), Tarja Halonen (2004), Christian von Bar (2007), Werner Krawietz (2008), Erik Nerep (2011), and Joachim Rückert (2014).

The question of international law's future is inevitably linked to the expectations we hold for that law. Professor Tomuschat demonstrates how international law became universal and how this has influenced expectations of it. Of course, the higher the expectations are, the easier it is to fall short of them. When the case load of the European Court of Human Rights became too heavy on occasion, some people said that the Court had become a victim of its own success. In this issue, Judge Julia Laffranque reflects on ethical foundations of, and expectations for, European human-rights law and its interpretations.

Legal history, in turn, reminds us that the issue of expectations of law is an age-old one. Ideas from natural law have lived in an uneasy relationship with pure legal positivism. Especially in dictatorships, law does not correspond to ethical standards characteristic of democracies. In some cases, law has even become a tool of outright repression. The Radbruch Formula, known from the history of legal debate in Germany, has not lost its topicality.

What are the expectations for national law? We usually expect best practices and legal models – to the extent that these can be established – to be followed. We expect legal certainty and a certain rationality and logic behind the law. Yet law can be likened to Estonia's capital city, Tallinn, which according to an ancient legend will never be 'ready': it can never be complete. Expectations for law are particularly high in countries in transition, such as Ukraine. The University of Tartu (formerly Dorpat) had important links to universities in Ukraine already in the 19th century, and now we keep our fingers crossed that Ukraine will be able to pursue its own strong statehood based on democratic values.

What are the expectations for legal scholarship? Since the readers of legal writings are educated in jurisprudence, we all expect to become more enlightened, to find clarification for things that we were not aware of or that we knew less about. If this volume of *Juridica International* succeeds with that in its readers' eyes, it has done well enough.

Lauri Mälksoo
Professor of International Law

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https://doi.org/10.12697/JI.2017.26.01

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Die Zukunft des Völkerrechts

I. Vorbemerkung

Das Völkerrecht unserer Tage hat einen hohen Entwicklungsstand erreicht. Als Netz normativer Leitaussagen verbindet es nicht nur die Staaten des Erdballs miteinander, sondern hat seinen Geltungsanspruch gleichzeitig stark über den ursprünglichen Adressatenkreis hinaus ausgeweitet. Völkerrechtliche Regeln richten sich auch an internationale Organisationen, statten Einzelpersonen mit Rechten aus oder erlegen ihnen Pflichten auf und dringen teilweise auch in die Privatrechtsordnung ein. Auch inhaltlich hat das Völkerrecht seit der Gründung der Vereinten Nationen eine neue Qualität gewonnen. War es zunächst den historischen Zufälligkeiten folgend ohne systematischen Bauplan über Jahrhunderte hinweg bruchstückhaft gewachsen, hat es seit dem Jahre 1945 Leitprinzipien gewonnen, die fundamentalen menschlichen Bedürfnissen Rechnung tragen. Frieden und Menschenrechte sind mit der UN-Charta (im Folgenden: Charta) ins Zentrum der völkerrechtlichen Ordnung gerückt.

Viele der rechtlichen Konzepte und Institutionen der Gegenwart lassen sich als unmittelbare Ableitungen aus diesen Grunddaten des internationalen Systems ableiten. Kriegs- und Interventionsverbot dienen unmittelbar der Sicherung des Friedens, das Selbstbestimmungsrecht erlaubt es jedem Volke, seine eigenen Zielvorstellungen in friedlicher Weise zu verwirklichen, und die Menschenrechte sollen nicht nur jeder menschlichen Person ein Leben in Würde und Sicherheit gewährleisten, sondern gleichzeitig auch sicherstellen, dass nicht innerstaatliche Auseinandersetzungen gewaltsam auf die internationale Ebene durchschlagen. Insgesamt hat das Völkerrecht in hohem Maße Wertvorstellungen aufgenommen, die von den Völkern der Welt weithin geteilt werden. Eine Grundsatzkritik an der bestehenden völkerrechtlichen Ordnung wird nur noch von vereinzelten Kreisen geäußert. Vor allem ein der Geschichte geschuldeter struktureller Mangel ist mittlerweile behoben worden.[*1] Nachdem der Prozess der Dekolonisierung seinen Abschluss gefunden hat, haben die früheren Kolonialvölker sich mit großer Hingabe an dem Prozess der Sichtung und Überprüfung des Völkerrechts beteiligt und auf diese Weise seine früheren Einseitigkeiten beseitigt.[*2]

So ist mittlerweile ein Normengerüst entstanden, das trotz seiner Auffächerung in viele Spezialdisziplinen als eine geschlossene systematische Einheit betrachtet werden darf. Über viele Jahre hinweg hat das Gerede über die Fragmentierung des Völkerrechts die literarischen Debatten beherrscht[*3] – doch prinzipiell

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1 Die von den Anhängern der Third World Approaches to International Law (TWAIL) geäußerte Kritik, vgl. etwa B.S. Chimni, 'Critical Theory of Economic Law: a Third World Approach to International Law (TWAIL) Perspective'; in: John Linarelli (ed.), Research Handbook on Global Justice and International Economic Law (Cheltenham, UK: Edward Elgar, 2013) 251-273), hat sich mittlerweile überlebt und wird nur noch ideologisch gestützt.

2 Eines der Vehikel dieses tiefgreifenden Wandels ist bis zum heutigen Tage die UN-Völkerrechtskommission (International Law Commission, ILC), ein Unterorgan der UN-Generalversammlung (GV).

3 S. dazu den Bericht der Studiengruppe der Völkerrechtskommission, Yearbook of the International Law Commission 2006, Vol. II Part Two, UN-Dok. A/CN.4/SER.A/2006/Add.1 (Part 2), 176.

zu Unrecht.[*4] Es ist selbstverständlich, dass sich zu eigenständigen Themenkomplexen besondere Regeln ausbilden müssen. Sowohl das Seerecht wie das Umweltrecht oder auch das Investitionsschutzrecht brauchen jeweils sachangepasste Rechtsregime, die jeweils aus den spezifischen Eigenheiten der Materie entwickelt werden müssen. Zusammengehalten werden aber diese unterschiedlichen Rechtsregime durch die allgemeinen Rechtsfiguren des Völkerrechts, vor allem durch die genannten Leitprinzipien, die der internationalen Ordnung ein festes Rahmenwerk verleihen. Was das materielle Recht angeht, lassen sich kaum noch irgendwelche Lücken grundlegender Art feststellen, auch wenn das Rechtsgebäude nach Maßgabe der tatsächlichen Entwicklungen immer wieder überprüft und nachgebessert werden muss.

Ergänzend sei sogleich festgestellt, dass das klassische zwischenstaatliche Recht nicht das Ganze der grenzüberschreitenden Regelungen ausmacht. Nichtstaatliche Akteure haben vielfach Machtpositionen errungen, die faktisch denen kleinerer Länder kaum nachstehen. Zunehmend muss sich vor allem das humanitäre Recht mit den Gewalttaten von ideologiegeprägten Extremistengruppen im innerstaatlichen Raum auseinandersetzen. Auch das Privatrecht hat sich über die Jahrzehnte hinweg vor allem seit dem Ende des Zweiten Weltkrieges weitgehend internationalisiert. In Ausübung der allgemeinen Freiheitsrechte haben Einzelmenschen und Unternehmen ein Netz von transnationalen Beziehungen gespannt, das sich neben dem zwischenstaatlichen Völkerrecht mächtig entfaltet. Die Staaten sind demgemäß in den internationalen Beziehungen nicht mehr die einzigen bedeutsamen Akteure. Ihre Monopolstellung, wenn es sie jemals gegeben hat, haben sie jedenfalls verloren. Gegenüber dieser Parallelwelt obliegt es den Mitgliedern der internationalen Staatengemeinschaft, die Belange des öffentlichen Wohls beständig und konsequent zur Geltung zu bringen.

Insgesamt darf man der mittlerweile entstandenen normativen Ordnung der Welt einen bemerkenswerten Perfektionsgrad bescheinigen. In der theoretischen Diskussion hat dieser Befund zur These von der Konstitutionalisierung des Völkerrechts geführt.[*5] Beim Blick auf die Realitäten der heutigen Weltpolitik ist man indes von einem Zustand der Zufriedenheit weit entfernt. Die Leitprinzipien des Völkerrechts werden zwar in den Vereinten Nationen von breiten Mehrheiten fast einhellig immer wieder beschworen,[*6] werden aber im Alltag nicht nur gelegentlich mit Füßen getreten. Beispiele lassen sich in jeder Ausgabe einer Tageszeitung finden. Die Kriege im Südsudan wie in Syrien, der Zerfall Libyens wie auch die von außen unterstützten gewaltsamen separatistischen Bewegungen im Osten der Ukraine mögen als Beispiel dienen, hinter denen sich unendliches menschliches Leid verbirgt. Nach wie vor ist die Sklaverei nicht ausgerottet, und Millionen von Frauen werden zur Zwangsprostitution missbraucht, auch und gerade in den jedenfalls technologisch fortgeschrittenen westlichen Staaten. Diese kurze exemplarische Liste ließe sich fast beliebig verlängern.

Hat das Völkerrecht seine Steuerungskraft verloren? Es bedarf keiner langen Begründung für die Aussage, dass kein Rechtssystem perfekt ist. Es soll ja gerade die soziale Wirklichkeit disziplinieren, so dass Abweichungen und Unvollkommenheiten geradezu systemimmanent vorausgesetzt sind. Letzten Endes aber sollte sich die normative Ordnung durchsetzen. Bleiben Verletzungshandlungen generell und ständig folgenlos, so bricht irgendwann das Konzept einer Rechtsordnung zusammen. Was ursprünglich Recht genannt wurde, zerfällt zu bloßer politischer Rhetorik. In einem rechtlosen Zustand gibt es nicht nur Verlierer, sondern auch Gewinner. Es sind durchweg die mächtigen Staaten, die ihren Nutzen aus einer Lage ziehen, wo die Regelhaftigkeit als Relikt der Vergangenheit in die Ecke gestellt wird. Demgegenüber haben vor allem die kleineren und mittleren Staaten ein lebhaftes Interesse an einem Umgang, der auf festen Regeln beruht, wo vor allem das Prinzip der souveränen Gleichheit hochgehalten wird.

Versucht werden soll zunächst, durch einen kursorischen Rückblick auf die jüngere Geschichte herauszufinden, wie sich auf dem Gebiete des Völkerrechts Faktizität und Normativität zueinander verhalten, um auf diese Weise in Erfahrung zu bringen, wo die Gründe für eine Schwäche des Völkerrechts liegen können. Daran anschließend soll eine spezifische Untersuchung der gegenwärtigen Rechtslage aufzeigen, mit welchen besonderen Schwierigkeiten man sich bei einer solchen Analyse in der Gegenwart auseinanderzusetzen hat. Lässt sich der Traum von einer großen Friedensordnung verwirklichen?

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4 Vgl. etwa Christian Tomuschat, 'International Law as a Coherent System: Unity or Fragmentation?', in: Mahnoush H. Arsanjani et al. (eds.), *Looking to the Future. Essays on International Law in Honor of W. Michael Reisman* (Leiden and Boston: Martinus Nijhoff, 2011) 323, 354.

5 Vgl. etwa Anne Peters, 'Konstitutionalismus als globale Errungenschaft', in: Jost Delbrück et al. (eds.), *Aus Kiel in die Welt* (Berlin: Duncker & Humblot, 2014) 127-138.

6 Vgl. insbesondere die Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, GV-Resolution 67/1, 24 September 2012.

II. Das Völkerrecht als grenzüberschreitendes Ordnungssystem – Historischer Rückblick

1) Das europäische Völkerrecht

Üblicherweise wird als Zeitpunkt für das moderne Völkerrecht der Friedensschluss von Münster und Osnabrück des Jahres 1648 angesetzt.[*7] Alternativ oder gleichzeitig wird auch Hugo Grotius als Vater der neuzeitlichen Völkerrechtsordnung genannt.[*8] Offensichtlich ist dies eine typische westliche Sichtweise. Über Jahrhunderte entwickelte sich das Normengerüst, das wir heute Völkerrecht nennen, im gegenseitigen Verkehr der christlichen europäischen Staaten untereinander. Vor allem durch die Forschungen des japanischen Autors *Onuma Yasuaki* wissen wir heute, dass es auch in Ostasien Regeln für den Verkehr zwischen den Völkern gab, die einen hohen Grad von Komplexität erreichten.[*9] Auch das Verhältnis der europäischen zu den arabischen Staaten war teilweise durch rechtliche Regeln geprägt und verengte sich nicht ausschließlich auf Kampf und Gewalt. Aber die europäischen Staaten bewahrten sich doch stets einen Vorsprung nicht nur durch ihre Eroberungspolitik in anderen Weltteilen, sondern auch durch eine gesteigerte Kommunikationsfähigkeit, die es ihnen erlaubte, die von ihnen geübte Praxis zu konzeptualisieren und als ein allgemein verbindliches Rechtssystem darzustellen. Damit war ein Monopolanspruch erhoben, der allerdings nicht nur auf Arroganz beruhte, sondern seine Ursachen auch in schlichter Unkenntnis hatte. Wenig oder gar nichts wussten die kleineren und mittleren europäischen Staaten von der Praxis der Herrschaftsgebilde in Afrika und Asien, und die Autoren der völkerrechtlichen Traktate waren als Schreibstubengelehrte meist von der Praxis noch weiter entfernt als die den Regierungen als Berater zur Seite stehenden Juristen. Rührend ist es zu lesen, wenn in den Lehrbüchern des Völkerrechts vom Anfang des 19. Jahrhunderts die existierenden Staaten einzeln aufgezählt werden, angefangen vom (alten) Deutschen Reich, Frankreich und Spanien[*10] bis hin zur Republik San Marino.[*11] Der hier zur Schau getragene Provinzialismus war kein Anzeichen dominanter Selbstsicherheit, sondern erwuchs eher einem Gebot weiser Selbstbeschränkung, da über diesen begrenzten territorialen Kreis hinaus die eigene Lebenserfahrung nicht reichte und demgemäß auch keine Aussagen über die dabei geübte Praxis gemacht werden konnten.

Erste entscheidende Schritte hin zu einer weltumspannenden Ordnung machte das Völkerrecht europäischer Prägung erst, als im Jahre 1856 die Türkei zu den „Vorteilen" dieses Rechtssystems „zugelassen" wurde.[*12] An der Gründung des Völkerbundes im Jahre 1920 waren ursprünglich 32 Staaten beteiligt, unter ihnen 4 asiatische, 2 afrikanische (Liberia, Südafrika) und 9 Staaten aus Lateinamerika. Immer noch standen aber weite Teile Asiens und Afrikas unter Kolonialherrschaft. Im Wesentlichen war der Völkerbund von den europäischen Hauptmächten dominiert, insofern die außereuropäischen Staaten noch in einer Minderheitsposition verblieben. Erst die Charta der Vereinten Nationen setzte mit ihrer Proklamation des Selbstbestimmungsrechts der Völker dieser Differenzierung ein Ende, wenn sie zunächst auch nicht den Mut hatte, die Kolonialherrschaft für überwunden zu erklären. In Art. 73, der „Erklärung über Hoheitsgebiete ohne Selbstregierung", wurde die Verpflichtung übernommen, die „Selbstregierung" der betroffenen Völker zu entwickeln. Der Anerkennung eines Rechts auf souveräne Unabhängigkeit kam diese Erklärung nicht gleich. Die Kolonialmächte Frankreich und Großbritannien wollten nach eigenem Ermessen die Art und Weise wie auch die Geschwindigkeit des Emanzipationsprozesses bestimmen. Es bedurfte erst der Erklärung der UN-Generalversammlung vom 14. Dezember 1960 über „Colonial Countries and Peoples",[*13] um der Unabhängigkeitsbewegung zu schnellerer Gangart zu verhelfen. Mit der Anerkennung Südafrikas als eines vom System der Apartheid befreiten demokratischen Mitgliedstaats im Jahre 1994 war dann die

7 Vgl. etwa Wolfgang Preiser, Stichwort ‚History of the Law of Nations, Ancient Times to 1648', in: *Encyclopedia of Public International Law*, Vol. II (Amsterdam et al.: Elsevier, 1995) 722, 745.

8 Vgl. etwa George Frédéric de Martens, *Précis du droit des gens moderne de l'Europe* (Göttingen, 1801) 17; Arthur Nussbaum, *Geschichte des Völkerrechts* (München / Berlin : C.H. Beck, 1960) 126; Preiser (Fn. 7) 744.

9 Onuma Yasuaki, *A Transcivilizational Perspective on International Law* (Leiden and Boston: Martinus Nijhoff, 2010).

10 Vgl. Martens (Fn. 8) 46.

11 Vgl. Johann Ludwig Klüber, *Europäisches Völkerrecht*, Bd. 1 (Stuttgart: Cotta, 1821) 60.

12 Pariser Frieden über die Beendigung des Krimkrieges, 30.3.1856, abgedruckt bei: Wilhelm G. Grewe, Fontes Historiae Gentium, Band 3/1 (Berlin / New York: Walter de Gruyter, 1992) 19, Art. 7.

13 GV-Resolution 1514 (XV).

Kolonialepoche im Wesentlichen abgeschlossen.[*14] Es bleibt nur noch als Kernproblem die Durchsetzung des Selbstbestimmungsrechts des palästinensischen Volkes durch die Gründung eines souveränen Staates Palästina unter Wahrung der israelischen Sicherheitsinteressen.

Erst von diesem Zeitpunkt an konnte der Gedanke reifen, dass das Völkerrecht eine umfassende Weltordnung für alle Völker der Welt bilden sollte. Die kolonialen Großmächte mochten auch zuvor die rechtliche Möglichkeit gehabt haben, Bindungen für alle Völker unter ihrer Jurisdiktion herzustellen. Aber echte Legitimität konnten solche Rechtsbindungen im Zeichen des aufkommenden und von der UN-Charta auch implizit anerkannten demokratischen Prinzips nicht mehr entfalten. Eine verbindliche Weltordnung muss von den Menschen aller Völker getragen werden. Die Ausübung hoheitlicher Gewalt setzt nach heute allgemein anerkannten Grundsätzen voraus, dass die Gewaltunterworfenen an der Konstituierung und Ausübung solcher Gewalt beteiligt sind. Demokratische Mitbestimmung der Bürger ist kein Luxus, sondern eine notwendige Vorbedingung für legitime Herrschaft.

2) Vom europäischen zum weltumspannenden Völkerrecht

Damit sind heute alle konzeptionellen Voraussetzungen erfüllt, um jedenfalls den Versuch zu unternehmen, ein Herrschaftssystem mit weltweitem Geltungsanspruch zu errichten, welches die angestrebten Menschheitsziele, wie sie in der UN-Charta angelegt sind, zu verwirklichen. Leicht ist zu erkennen, dass in früheren Jahrhunderten auch bei dem feierlichen Abschluss multilateraler Verträge die Vertragsparteien nicht den Ehrgeiz haben konnten, eine umfassende Friedensordnung zu schaffen, auch wenn die Einleitungsartikel manchmal hehre Ziele verkündeten. So verlangt jeweils Art. 1 der westfälischen Friedensverträge von Münster und Osnabrück von 1648 die Herstellung eines christlichen allgemeinen und immerwährenden Friedens sowie wahre und aufrichtige Freundschaft (Pax Christiana, universalis et perpetua veraque et sincera amicitia),[*15] doch konnte es zu der damaligen Zeit nicht gelingen, auch gleichzeitig feste institutionelle Grundlagen für die Sicherstellung dieser Ziele zu schaffen. Eine allgemeine Amnestieklausel (jeweils Art. 2) sollte die Spannungsursachen der Vergangenheit entschärfen und opferte dabei den Gedanken perfekter Gerechtigkeit dem praktischen Bedürfnis, den Boden für ein künftiges friedliches Zusammenleben zu bereiten. Alle „mit Worten, Schriften oder Taten zugefügten Beleidigungen, Gewalttaten, feindselige Handlungen“ sollten “gänzlich gegeneinander aufgehoben … und immerwährendem Vergessen anheimgegeben” sein. In den Artikeln 5, 6 und 7 des Friedens von Osnabrück wurden weitreichende Bestimmungen zur Friedenssicherung getroffen. Einseitige Gewaltanwendung war verboten, und die Vertragspartner wurden sogar aufgefordert, im Falle eines Friedensbruches dem Verletzten militärische Hilfe zu leisten.[*16] Bei alldem handelte es sich um Appelle an die Vertragspartner, ganz sicher von den besten Absichten getragen, aber eben doch ohne feste institutionelle Gewährleistung dieser Gebote, auch wenn sie als Reichsgrundgesetze verankert werden sollten. Immerhin war damit im Herzen von Europa ein Friedensbündnis entstanden, das seine Kraft vor allem der Erinnerung an die Schrecken des soeben beendeten Konfliktes verdankte. Insgesamt besaß der Westfälische Frieden Modellcharakter für den ausgewogenen Ausgleich nach einem mörderischen Konflikt. Es gab keine trennscharfe Scheidung zwischen Siegern und Besiegten. Verfestigt wurde nur der Einfluss Frankreichs und Schwedens auf die innerdeutschen Verhältnisse. Als Parteien der Verträge konnten sie als Garantiemächte jederzeit angerufen werden.

Mehr als 150 Jahre später besiegelte der Wiener Frieden von 1815 nach dem Ende der napoleonischen Aggressionen erneut einen Friedenszustand, der von allen Beteiligten nach langen Jahren militärischer Auseinandersetzungen herbeigesehnt wurde.[*17] Dieser Friedensschluss war von äußerster Nüchternheit und Prägnanz. Die Vertragsparteien verzichteten auf weitreichende Versprechungen, das Herzstück des Wiener Friedens bildeten territoriale Verfügungen, die für die gesamte weitere Dauer des 19. Jahrhunderts bestimmend blieben. Auf die Erarbeitung großartiger Pläne für die Zukunft wurde verzichtet. Lediglich der Vertrag

[14] Vgl. die Rede von Präsident Mandela am 3. Oktober 1994 vor der Generalversammlung der Vereinten Nationen, http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS204&txtstr=united%20nations.

[15] Abgedruckt bei Wilhelm G. Grewe, Fontes Historiae Iuris Gentium, Bd. 2 (Berlin / New York: Walter de Gruyter, 1988) 183 und 188.

[16] Dieses Instrumentarium war freilich nie zur Anwendung gekommen, vgl. Nussbaum (Fn. 8) 130.

[17] Wiener Kongress-Akte, abgedruckt bei Grewe (Fn. 12) 3.

zwischen den vier Großmächten Österreich, Großbritannien, Preußen und Russland, dem Frankreich später beitrat („Heilige Allianz"),[*18] verkündete Frieden als überragendes Ziel, verwob dieses aber aufs Engste mit der Aufrechterhaltung der monarchischen Legitimität und institutionalisierte damit eine Scheidung zwischen den Großmächten auf der einen und den Mittelmächten und Kleinstaaten auf der anderen Seite.[*19]

Das 19. Jahrhundert war insgesamt ein Zeitalter der Nationalstaaten. Sie nahmen als souveräne Einzelakteure die Führungsrolle in internationalen Angelegenheiten für sich in Anspruch, wobei in Deutschland der neu gegründete Deutsche Bund der eigenstaatlichen Entscheidungsfreiheit mit Preußen und Österreich als Führungsmächten nur leichte Fesseln anlegte. Das Völkerrecht war nach wie vor inhaltlich eng begrenzt. Zu seinen Schwerpunkten gehörten territoriale Fragen, das Kriegsrecht sowie vor allem diplomatische und konsularische Beziehungen. Hier stand durchweg die Bilateralität der Rechtsbeziehungen im Vordergrund, wo Rechtstreue durch das Prinzip der Gegenseitigkeit erzwungen wurde. Allerdings entstanden auf technischem Gebiet erste Verwaltungsunionen. Die Schwäche des Völkerrechts war gleichzeitig seine Stärke. Die Staaten wurden nicht durch schwer zu erfüllende Anforderungen überlastet. Ihre Innenpolitik konnten sie fast zur Gänze in eigener Zuständigkeit ohne von außen kommende Vorgaben bestimmen. Einen Höhepunkt der mit großem Einsatz betriebenen Kolonialpolitik war die im Jahre 1885 beschlossene Generalakte der Kongo-Konferenz, die Afrika als ein bloßes Beuteobjekt behandelte.[*20]

Nach dem Ende des I. Weltkriegs sollten der Versailler Vertrag mit Deutschland[*21] und die übrigen Pariser Vorortverträge[*22] mit den anderen besiegten Feindmächten die Grundlage für dauerhaften Frieden und Sicherheit in Europa legen. Diese Verträge selbst beschränkten sich durchweg auf die Ziehung neuer Grenzlinien, während die Neuordnung Europas und der Welt von der Satzung des Völkerbundes ausgehen sollte, die einen Bestandteil des Versailler Vertrages bildete.[*23] Hier erhob sich die Präambel zu ehrgeizigen Formulierungen, dass es „zur Förderung der Zusammenarbeit unter den Nationen und zur Gewährleistung des internationalen Friedens und der internationalen Sicherheit" wesentlich sei, bestimmte grundlegende Verpflichtungen zu erfüllen, insbesondere „nicht zum Kriege zu schreiten". In Art. 10 wurde dieses Gebot, die territoriale Unversehrtheit und die politische Unabhängigkeit aller Bundesmitglieder zu achten, ausdrücklich als Rechtsverpflichtung statuiert und im Anschluss daran eine Gewährleistung durch den Rat des Völkerbundes ausgesprochen (Art. 11). Bekanntlich ist dieses Ordnungsmodell gescheitert. Es ist Sache der Historiker, ein Urteil darüber abzugeben, welche Gründe für den Misserfolg maßgebend waren. Unter den Gründen lassen sich freilich mehrere klar benennen. Grundlegend waren der Mangel an übereinstimmenden Wertvorstellungen, vor allem nach dem Auftreten der Sowjetunion auf der weltpolitischen Bühne, dann die Diskriminierung des Deutschen Reiches, dem anfänglich ein gleichberechtigter Status verwehrt wurde, ferner die Abwesenheit der USA, deren Senat sich davor scheute, durch eine Ratifizierung der Satzung die USA in die Stellung einer der hauptverantwortlichen Mächte für den Frieden in der Welt zu erheben. Deutlich ist zu erkennen, dass die Mitglieder des Völkerbundes seinerzeit weit davon entfernt waren, eine gemeinsame Konzeption für eine kohärente Weltpolitik zu entwickeln. Im Laufe der wenigen Jahre der Existenz des Völkerbundes zerfiel der ursprüngliche schwache Konsens im Übrigen immer weiter. Im Jahre 1931 drangen japanische Truppenverbände in die Mandschurei ein, 1935 überfiel Italien das Mitgliedsland Abessinien, ohne dass das vorhandene Sanktionspotential den Rechtsbruch verhindern konnte. Eine weitere Schwächung des Völkerbundes wurde durch den Austritt des nationalsozialistischen Deutschen Reiches aus der Organisation im Jahre 1933 bewirkt. So war der Völkerbund auch nicht in der Lage, in den Jahren 1939 und 1940 der Aggression der Sowjetunion gegen Finnland und die baltischen Staaten entgegenzutreten. Auch der spanische Bürgerkrieg lief völlig ohne Beteiligung des Völkerbundes ab, da Spanien kein Mitglied der Weltorganisation geworden war. Im Rückblick erscheint als Hauptmangel des Völkerbundes, dass er den Ausbruch des II. Weltkrieges nicht verhindern konnte.

Trotz dieser Fehlschläge – und gerade wegen dieser Fehlschläge – ließen sich die Siegermächte des II. Weltkrieges nicht davon abschrecken, noch vor dem Ende des Kampfgeschehens Pläne für die Schaffung einer neuen Weltorganisation zu entwerfen. Die UN-Charta wurde in San Francisco am 26. Juni 1945 zu

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18 Vom 20.11.1815, *ibid.*, 100.

19 Dazu Hermann Mosler, *Die Großmachtstellung im Völkerrecht* (Heidelberg: Lambert Schneider, 1949).

20 Vom 26.2.1885, abgedruckt bei Wilhelm G. Grewe, Fontes Historiae Juris Gentium, Band 3/1 (Berlin / New York: Walter de Gruyter, 1992) 297.

21 Abgedruckt bei Grewe, *ibid.*, Band 3/2 (1992) 683.

22 Verträge von St. Germain (Österreich), Neuilly (Bulgarien), Trianon (Ungarn), Sèvres (Türkei), *ibid.*, 701-718.

23 *Ibid.*, 810.

einer Zeit angenommen, als der Krieg mit Japan noch nicht beendet war. Hellsichtig erkannte man, dass in der Tat das Kriegsverbot der Völkerbunds-Satzung beibehalten und verstärkt werden müsse und dass es vor allem erforderlich sei, ihm – in Gestalt des Sicherheitsrats – eine feste institutionelle Stütze zu geben. Die seitdem vergangenen mehr als 70 Jahre haben gezeigt, dass auch die UN-Charta nicht zu einer definitiven Lösung des Grundproblems der internationalen Staatengemeinschaft, der Gewaltanwendung in den internationalen Beziehungen, geführt hat. Vor allem ist der Sicherheitsrat vielfach nicht bereit, seine Verantwortung zu übernehmen, weil die ständigen Mitglieder ihr Vetorecht zu eigenständigen Machtspielen nutzen, die nicht den Zielen der internationalen Gemeinschaft nützen. Man darf also in der Gegenwart kein optimistisches Fazit ziehen. Trotz ihrer juristischen Perfektion hat es die UN-Charta nicht vermocht, jenen Zustand des friedlichen Ausgleichs herbeizuführen, den sich ihre Verfasser im Jahre des Neuanfangs 1945 erhofft hatten.

III. Hauptprobleme der Gegenwart

1) Die Moralisierung des Völkerrechts als Gewinn und Risikofaktor zugleich

Löst man sich von dem Zentralproblem Frieden und Sicherheit, so stößt man bei einer Querschnittsdiagnose auch auf andere Grundprobleme, welche die Diskrepanz zwischen Anspruch und Wirklichkeit in ein grelles Licht rücken. Es ist paradoxerweise die soeben schon beschriebene ethische Anreicherung des Völkerrechts, die an seine Leistungskraft rührt. Zu Recht hat man sich nach den Erfahrungen zweier Weltkriege der Aufgabe gestellt, dem Völkerrecht einen festen moralischen Boden einzuziehen und es nicht nur als technische Apparatur zu betrachten, die zur Verfolgung beliebiger Ziele eingesetzt werden kann. Das Gewaltverbot der Charta wurde mit den vier Genfer Abkommen aus dem Jahre 1949 in das *jus in bello* hinein grundlegend reformiert und gestärkt. Als weitere Kernelemente des neuen Völkerrechts der Epoche nach dem II. Weltkrieg können die Bestimmungen gelten, dass Verträge, die unter Zwangsanwendung zustande gekommen sind, nicht als rechtsgültig anerkannt werden (Art. 52 der Wiener Vertragsrechtskonvention, WVK) und dass jeder Verstoß gegen *jus cogens*, die Kernsubstanz des Völkerrechts, einen Vertrag nichtig macht (Art. 53 WVK). Niemals hat man sich indes der Illusion hingegeben, dass die Gewährleistung solcher rechtsethischer Standards ein Kinderspiel wäre. Wenn aber das Völkerrecht als Verkörperung einer gerechten Weltordnung seine Legitimität behalten sollte, so war der Schritt hinüber zu einer neuen Begründung trotz der damit verbundenen Risiken unausweichlich.

Richtig haben die Verfasser der UN-Charta sich nach den Erfahrungen mit dem nationalsozialistischen Deutschland vor allem auch der Frage gestellt, wie verhindert werden kann, dass aus Unruhe, Chaos und Gewaltsamkeit im Inneren eines Landes nachteilige Konsequenzen für den internationalen Frieden erwachsen. In Art. 1 Abs. 3 der Charta ist diese Abhängigkeit des internationalen Friedens von einem Zustand des Friedens im internen Raum der Staaten richtungweisend zum Ausdruck gebracht worden. Hiervon ist ein allgemeiner Anstoß ausgegangen, vom Völkerrecht aus auf das interne Leben der Völker Einfluss zu nehmen. Diese Kehrtwendung macht sowohl die Stärke wie auch die Schwäche des heutigen Völkerrechts aus. Seine Stärke ist, dass es sich als moralisch geschlossenes Gebilde darstellt und dabei die frühere ausschließliche Ausrichtung auf die zwischenstaatlichen Beziehungen abgelegt hat. Auf der anderen Seite hat es mit dem Vordringen in den innerstaatlichen Raum eine Aufgabe angepackt, für deren Bewältigung ihm durchweg nur unzureichende Handlungsmittel zur Verfügung stehen.

Wenn dem Völkerrecht im Zuge dieser Neuorientierung auch die Aufgabe zugewiesen wird, die materiellen Grundbedürfnisse des Menschen zu befriedigen, und eine fürsorgerische Sozialpolitik zu betreiben, so greift es damit tief in die Entscheidungsfreiheit der Staaten ein. Im Grunde manifestiert sich hier eine völlige Abkehr vom Völkerrecht klassischer Prägung, für das die Trennung von Innen und Außen zu den Grundpfeilern des systematischen Verständnisses gehörte. In seiner einflussreichen Schrift „Völkerrecht und Landesrecht“ hat im Jahre 1899 *Heinrich Triepel* diese Scheidung dogmatisch untermauert.*[24] Für ihn waren Völkerrecht und innerstaatliches Recht dem Grundsatz nach unterschieden durch den Adressatenkreis und vor allem die normativen Inhalte. Insbesondere die Menschenrechte waren für ihn entsprechend

[24] Leipzig: Hirschfeld.

der damals vorherrschenden Konzeption kein denkbarer Gegenstand des Völkerrechts, und diese Konzeption hat bis in die neuere Zeit hinein ihren Niederschlag gefunden in Art. 2 Abs. 7 der UN-Charta, wonach es einen Bereich der inneren Angelegenheiten gibt, in den von den Organen der Vereinten Nationen nicht eingegriffen werden darf. Nach einer vor allem von den sozialistischen Staaten über Jahrzehnte mit großer Vehemenz vertretenen Auffassung gehörte die tatsächliche Praxis der Menschenrechte zu diesem geschützten Bereich, der auch durch das Interventionsverbot des allgemeinen zwischenstaatlichen Völkerrechts gegen Einflussnahme von außen[*25] rechtlich abgeriegelt sein sollte. Mit der Annahme der beiden Weltmenschenrechtspakte im Jahre 1966 und dem Beginn der Tätigkeit des Menschenrechtsauschusses zur Prüfung von Berichten der Staaten über ihre Praxis im Jahre 1977 hat dieses Theoriemodell seine Grundlagen eingebüßt. So haben die Menschenrechte die klassische Trennmauer zwischen Völkerrecht und innerstaatlichem Recht fast gänzlich niedergelegt. Das innere Leben des Staates ist rechtlich in den Status der Transparenz erhoben worden. Der Staat schuldet der internationalen Gemeinschaft Rechenschaft im Hinblick auf jede Maßnahme, die in irgendeiner Weise Menschenrechte berührt – und das betrifft nahezu das gesamte Staatshandeln. Gefordert wird im Grunde *good governance* als Rechtsgebot.

Aber die Schwierigkeiten, diesem Anspruch gerecht zu werden, sind enorm. Das Völkerrecht entwickelt sich gleichsam zum Legitimitätsmaßstab, der neben die von den Völkern in eigener demokratischer Verantwortung beschlossenen Legitimitätskriterien tritt. Dies muss deshalb jedenfalls langfristig zu Spannungen führen, weil die völkerrechtlichen Instrumente nicht nur erfreulich stabil und fest, sondern gleichzeitig auch beklagenswert starr sein können. In einem demokratischen Gemeinwesen gehört grundsätzlich auch die Überprüfung des gegebenen Normenbestandes zu den selbstverständlichen und jederzeit verfügbaren Optionen.[*26] Vor allem bei den menschenrechtlichen Schutzinstrumenten sind Veränderungen durchweg nur im Wege des breiten Konsenses denkbar, und die gefestigte richterliche Rechtsprechung einer internationalen Spruchinstanz lässt sich kaum aus den Angeln heben. Richter selbst haben die Neigung, ihre eigenen Judikate zu dogmatisieren und sie für sakrosankt zu halten.

2) Stabilisierende Elemente

Nicht zu übersehen sind andererseits die Signale, die dem Völkerrecht konstruktive Stabilität verleihen. In der heutigen Zeit lassen sich seine Schwächen und Stärken besser erkennen als etwa vor rund 100 Jahren in Paris nach dem Ende des I. Weltkrieges, als man noch in den klassischen Denkmustern der Zwischenstaatlichkeit verhaftet war.

Als wichtiger Pluspunkt ist zunächst die Tatsache zu vermerken, dass alle Staaten der Welt bereit sind, die Existenz des Völkerrechts und seine Geltungskraft anzuerkennen. Jedenfalls auf der politischen Ebene der Politiker und Diplomaten gibt es keine einzige Stimme, welche das Völkerrecht als Regulierungsinstrument für die internationalen Beziehungen grundsätzlich ablehnen würde.[*27] Dies gilt zunächst für das Handwerkszeug des völkerrechtlichen Vertrages, der von allen Regierungen als Handlungsmittel genutzt wird. Seine Nützlichkeit und Unersetzbarkeit ist so offensichtlich, dass es dazu keiner langen Diskussion bedarf – die auch nie geführt worden ist. Verträge sind ihrer Natur nach, da sie auf dem Konsens der Vertragsparteien aufbauen, Instrumente des friedlichen Ausgleichs. Nur wer – unter Beseitigung des Prinzips der souveränen Gleichheit – der Monopolherrschaft eines einzigen Landes das Wort reden wollte, könnte das autoritäre Diktat als Ersatz für den Vertrag anbieten. Was für den Vertrag selbst gilt, trifft auch für seine Anwendungsmodalitäten zu. Das Vertragsregime, wie es in der Wiener Vertragsrechtskonvention seinen Niederschlag gefunden hat, steht im Grundsatz unangefochten da, auch wenn über Details – fast zwangsläufig – gestritten wird. Damit hat das Völkerrecht feste handwerkliche Grundlagen, die ihm auch in Zukunft erhalten bleiben werden. Dies ist umso wichtiger, als ja die große Mehrzahl der völkerrechtlichen Verpflichtungen aus dem Abschluss völkerrechtlicher Verträge erwächst. Der völkerrechtliche Vertrag ist das Arbeitspferd der internationalen Beziehungen.

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25 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GV-Resolution 2625 (XXV), 24. Oktober 1970, Prinzip 3.

26 Dazu Isabelle Ley, *Opposition im Völkerrecht* (Heidelberg et al.: Springer, 2014) 201.

27 Die These von Jack L. Goldsmith und Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2010), dass die Staaten das Völkerrecht nur als eine Sammlung von unverbindlichen Strategieregeln betrachten würden, ist weit überspitzt.

Völkerrechtliche Verträge sind auch die Grundlage für die heute existierenden Internationalen Organisationen. Was dort niedergelegt ist, hat dank des im Vertragsrecht geltenden Konsensprinzips eine erhöhte Bestandsgarantie. Vor allem die Großmächte, die auf Grund der im Jahre 1945 herrschenden Machtlage für sich einen ständigen Sitz im UN-Sicherheitsrat erringen konnten, wären in einer offensichtlichen Zwangslage, wenn sie die Bindungskraft des Völkerrechts generell bestreiten wollten. Denn damit stellen sie unvermeidlich auch ihre eigene Machtstellung in der Weltorganisation in Frage. Diese Privilegierung stellt für sie ein kostbares Gut dar, das sie bei einer Revision der Charta in keinem Falle wieder in vollem Umfang erhalten würden, was vor allem für die europäischen Mittelmächte Frankreich und Vereinigtes Königreich gilt. Jedenfalls die ständigen Mitglieder des Sicherheitsrates darf man deswegen zu den unbeugsamen Befürwortern des Völkerrechts in seiner heutigen Gestalt rechnen.[*28]

Zu den Neuerungen mit einer jedenfalls auf lange Sicht erheblichen strukturellen Wirkung darf man wohl auch die Tatsache rechnen, dass mittlerweile der Grundsatz sich definitiv Bahn gebrochen hat, wonach jeglicher im Sinne des Völkerrechts rechtswidrige Akt die Verantwortlichkeit des handelnden Staates nach sich zieht. Die Erarbeitung der Vorschriften über „Responsibility of States for internationally wrongful acts“ durch die Völkerrechtskommission der Vereinten Nationen im Jahre 2001 und ihre Kenntnisnahme durch die Generalversammlung am 12. Dezember 2001[*29] ist überwiegend als ein bloß rechtstechnischer Vorgang verstanden worden. Gesagt wurde im Allgemeinen, dass es sich hier lediglich um die Kodifikation von ohnehin geltendem Gewohnheitsrecht handele.[*30] Schon dies ist zweifelhaft, da die Völkerrechtskommission zu einem beträchtlichen Anteil rechtschöpferisch gehandelt hat.[*31] Verschiedene Artikel des Regelentwurfs sind neu und lassen sich nur schwer auf eine bereits bestehende Rechtsquelle zurückführen. Jedenfalls aber ist der Entwurf ein Bekenntnis zu der Bindungskraft des Völkerrechts, wenn es dort in Artikel 1 heißt:

Every internationally wrongful act of a State entails the international responsibility of that State.

Es lässt sich gar nicht leugnen, dass dieser Satz eher aus dem Himmel der Theorie stammt statt aus der Schmiedewerkstatt der Praxis. Es tragen sich alltäglich Hunderte oder sogar Tausende von rechtswidrigen Handlungen zu, die keinerlei Weiterungen nach sich ziehen, vor allem weil der Geschädigte es nicht für angemessen hält, Wiedergutmachungsforderungen zu stellen. Dennoch hat die zitierte Aussage ihre Bedeutung, indem sie mit allgemeiner Billigung in der internationalen Gemeinschaft klarstellt, dass Völkerrecht eine spezifische Bindungskraft besitzt, deren Verletzung die in dem Entwurf näher umschriebenen Wirkungen nach sich zieht. Damit ist eine Antriebskraft für die Einhaltung völkerrechtlicher Verpflichtungen benannt, auf die sich jedes von einer Rechtsverletzung betroffene Völkerrechtssubjekt berufen kann. Das allgemeine Völkerrecht bildet also bei normativer Betrachtung eine der festesten Grundlagen für die Einhaltung des Völkerrechts insgesamt.

Ein hohes Maß an Effektivität darf man auch der Mehrzahl der eher unpolitischen technischen Regelungen des Völkerrechts attestieren. Die WTO hat sich zu einem Verhaltensmaßstab für den internationalen Handelsverkehr entwickelt, der durch die bestehenden Beschwerdemöglichkeiten wirksam abgestützt wird. Zu den positiven Aspekten gehören insgesamt die Arbeit der Sonderorganisationen der Vereinten Nationen sowie die weltweit funktionierenden Regime zum Schutz der Gemeingüter der Menschheit. Hier, wo es weniger um die Verteilung der erzeugter Güter geht als um die Sicherung der Lebenschancen der Menschheit insgesamt, müsste sich nach rationalen Maßstäben letzten Endes die Vernunft durchsetzen, welche Erhaltung und Schutz propagiert. Für das Rechtsregime der Weltmeere hat die Staatengemeinschaft in der Seerechtskonvention vom 10. Dezember 1982 eine sorgfältig austarierte Kompromisslösung gefunden, die gewiss nicht jede kontroverse Einzelheit geklärt hat, aber doch einen

[28] Zur ambivalenten Haltung Russlands s. Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford *University Press*, 2015). Eine Durchsicht des *Chinese Journal of International Law* ergibt, dass dort höchste Regierungsmitglieder sich durchweg für die Einhaltung des Völkerrechts in seiner heutigen Gestalt einsetzen, vgl. etwa Deming Huang, Yuan Kong und Hua Zhang, ‘Symposium on China’s Peaceful Development and International Law’, 5 *Chinese Journal of International Law* (2006) 261, 262.

[29] GV-Resolution 56/83, 12.12.2001.

[30] James Crawford, ‘State Responsibility’, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. IX (Oxford: Oxford University Press, 2012) 517, 532, nennt die Artikel des ILC-Entwurfs “part of the fabric of general international law”.

[31] Vgl. insbesondere die Regeln über Gegenmaßnahmen, dazu James Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002) 47-56.

Fundus bildet, der im Gesamtpaket als ein Muster für sorgfältige Abwägung aller vorhandenen Interessen gelten kann. Niemand kann dem Regime der Seerechtskonvention Einseitigkeit oder versteckte Parteinahme vorwerfen. Natürlich sind auch hier Anpassungen und Weiterentwicklungen notwendig. So war das immense Ausmaß der Meeresverschmutzung durch Eintrag von festen oder gasförmigen Abfällen während der Dauer der Seerechtskonferenz noch nicht mit ausreichender Schärfe erkannt worden. Hier bedarf es zusätzlicher Regelungen, die nicht leicht auf den Weg zu bringen sein werden. Aber es besteht Hoffnung, weil sich mittlerweile gut eingespielte Verhandlungsmechanismen herausgebildet haben. Einen weiteren Grund für Optimismus bildet das im Seerecht stark ausgebildete gerichtliche Streitbeilegungssystem, das einige Erfolge für sich verbuchen kann, das aber auch mit der chinesischen Weigerung, den Schiedsspruch zu den Rechtsverhältnissen im südchinesischen Meer[*32] zu respektieren, einen schweren Rückschlag erlitten hat.

Insgesamt darf man wohl davon ausgehen, dass bei der Verwaltung gemeinsamer Güter der Menschheit zu den bereits erzielten Erfolgen noch weitere hinzutreten werden. Offensichtlich haben sich die Staaten nicht der Einsicht verschlossen, dass ein Verbot von Stoffen, die zum Abbau der Ozonschicht führen, im Interesse aller liegt. Das zu diesem Zweck erarbeitete Protokoll von Montreal vom 16. September 1987 zählt heute nicht weniger als 197 Vertragsparteien. Im Vertrag von Paris vom 12. Dezember 2015[*33] haben sich die Parteien geeinigt, auf die Ziele des Klimaschutzes zumindest hinzuarbeiten, auch wenn die Verpflichtungen mit äußerster Flexibilität formuliert sind.

Betrachtet man das Panorama des Völkerrechts von einer höheren Warte aus, so sticht hervor, dass das moderne Völkerrecht über eine Vielzahl von Verfahren verfügt, in denen streitige Probleme geklärt werden können. Dies gilt für alle Lebensbereiche. Zwar ist die Einschaltung des Internationalen Gerichtshofs nach wie vor in das Ermessen der Streitpartien gestellt. Bei der Streiterledigung gehört der Gang nach Den Haag lediglich zu einer der möglichen Optionen. Indes bieten sich vor allem die internationalen Organisationen als Gesprächsforen an, wo die zuständigen Gremien zugleich wichtige Vermittlungsfunktionen ausüben können. Auf weltweiter Ebene steht es jedem Mitgliedstaat jederzeit frei, die Dienste des UN-Generalsekretärs oder sonstiger zuständiger Sonderorgane in Anspruch zu nehmen, wenn bilaterale Gespräche ihre Ergebnislosigkeit gezeigt haben. Sobald es um Probleme von Krieg und Frieden geht, kommt es heute fast automatisch zur Einschaltung des Sicherheitsrates und/oder seiner Mitglieder. Undenkbar wäre heute, dass Mächte in ähnlicher Weise unbewusst in einen kriegerischen Konflikt hineinschlittern, wie dies nach der Deutung des Oxforder Historikers Christopher Clark im Jahre 1914 geschehen ist,[*34] nicht zuletzt deswegen, weil die Regierungsführer der Großmächte keine institutionellen Kontakte zueinander besaßen und ihre Entscheidungen auf engster Wissensbasis ohne angemessene Beratung in einer Atmosphäre der Vereinzelung trafen. Vermittlungs- und Ausgleichsmechanismen werden heute nicht nur von den Vereinten Nationen, sondern in reicher Vielzahl auch auf regionaler Ebene angeboten, in Europa etwa im Rahmen des Europarates, der Europäischen Union und der OSZE.

Zu den klassischen Verfahren diplomatischer Prägung treten heute vielfach förmliche Verfahren gerichtlicher Art hinzu, die vor allem auf dem Gebiet der Menschenrechte einen ungeheuren Aufschwung genommen haben. Bekannt ist die Führungsrolle, die seit vielen Jahrzehnten der Europäische Menschenrechtsgerichtshof in Straßburg Zug um Zug aufgebaut hat, so dass er als Vorbild für den Interamerikanischen Menschenrechtsgerichtshof wie auch für den Afrikanischen Gerichtshof für Menschenrechte und die Rechte der Völker dient. Der Straßburger Gerichtshof, der im Jahre 2016 wieder eine Rekordzahl von Fällen erledigt hat,[*35] hat die Zuständigkeit, das gesamte Handeln aller 47 Vertragsparteien der Europäischen Menschenrechtskonvention zu kontrollieren. Bisher sind seine Entscheidungen meist anstandslos von den beklagten Staaten hingenommen worden, obwohl vielfach die Vollstreckung erst mit Hilfe zäher Bemühungen des Ministerkomitees nach langer Frist gesichert werden konnte. In jüngster Zeit hat sich überdies eine allgemeine Debatte über die Legitimation des Gerichtshofs zur Beurteilung von Problemlagen mit typischer nationaler Färbung entwickelt. In Großbritannien will man seine Rechtsprechung

[32] Award of 12 July 2016, PCA Case No. 2013-19, *Republic of the Philippines v. People's Republic of China*, http://www.pcacases.com/web/sendAttach/2086.

[33] Der Vertrag hat bereits 136 Parteien und ist am 4. November 2016 in Kraft getreten.

[34] Christopher Clark, *Die Schlafwandler* (München: Deutsche Verlagsanstalt, 2013).

[35] 38.505 Fälle, s. European Court of Human Rights, *Annual Report 2016*, 193.

zum Wahlrecht verurteilter Straftäter nicht hinnehmen,[*36] und Russland hat ihm erst jüngst den Fehdehandschuh hingeworden, indem zunächst der Russische Verfassungsgerichtshof in einer Grundsatzentscheidung festgestellt hat, dass Straßburger Entscheidungen gegen die russische Verfassung verstoßen könnten,[*37] und indem später dieses höchstrichterliche Dictum durch Gesetz abgesichert wurde.[*38] Im Falle des Urteils in der Yukos-Sache, wo der Gerichtshof wegen zahlreicher Unregelmäßigkeiten des Verfahrens eine Wiedergutmachungsleistung in Höhe von 1 Milliarde 866 Millionen Euro angeordnet hat,[*39] ist diese Bremsfunktion ohne Umschweife in Anspruch genommen worden.[*40] Hier zeigen sich Grenzen richterlicher Macht, wenn ein Land den Eindruck gewinnt, dass seine Verfassungsidentität beeinträchtigt worden sei. Auch das deutsche Bundesverfassungsgericht hat prinzipiell den Standpunkt bezogen, dass die Elemente der Verfassungsidentität eine Mauer bildeten, vor der das Völkerrecht Halt machen müsse.[*41] Unleugbar ist, dass das Völkerrecht seine Legitimation von den Staaten her bezieht, wo die Legitimität aller öffentlichen Gewalt ihren Ursprung hat.

Als Erfolg hat man bisher die Arbeit der internationalen Strafgerichte bewertet, die ja dazu bestimmt sind, der Wahrung der Kernsubstanz der völkerrechtlichen Ordnung durch strafrechtliche Sanktionen zu dienen. Vor allem die beiden vom Sicherheitsrat eingerichteten internationalen Strafgerichte für das ehemalige Jugoslawien (ICTY) und für Ruanda (ICTR) können in der Tat eine bemerkenswerte Bilanz vorweisen. Weniger günstig ist der Internationale Strafgerichtshof (ICC) zu beurteilen, der ja lediglich auf einem Vertrag beruht, den die Staaten zu ratifizieren frei sind. Keine der Großmächte China, Russland und USA hat sich der Jurisdiktion des ICC unterworfen. Aus Afrika ist die Kritik lautstark geäußert worden, dass sich der ICC im Grunde nur auf Afrika konzentriere und deswegen seine Unparteilichkeit eingebüßt habe. In der Tat hat mittlerweile ein Land (Burundi) seine Ratifikation des Römischen Statuts schon wieder widerrufen, und Südafrika steckt insoweit noch in einem Abwägungsprozess. Eine internationale Strafgerichtsbarkeit kann auf Dauer nur funktionieren, wenn gleiches Recht für alle gilt. Die Zukunftsaussichten des IStGH bleiben daher im Dunkel schwankender Prognosen höchst unsicher.

Als Erfolgsmodell lässt sich der europäische Integrationsprozess bewerten, der seit dem Inkrafttreten des Vertrages über die Europäische Gemeinschaft für Kohle und Stahl im Jahre 1952 bis zum heutigen Tage friedliche Beziehungen unter den Mitgliedstaaten hat gewährleisten können. Obwohl in anderen Weltregionen die heutige Europäische Union sich bisher nicht als wirkmächtiges Vorbild hat durchsetzen können, und obwohl der bevorstehende Austritt des Vereinigten Königreichs die Attraktivität des europäischen Zusammengehens empfindlich schwächen wird, bleibt dieser Solidarverbund eine große Hoffnung echter genossenschaftlicher Zusammenarbeit ohne strukturelle Vorherrschaft einzelner Mitgliedsländer. Fast unvermeidlich wird man sich außerhalb Europas bei ähnlichen Planungen an der europäischen Vorreiterrolle orientieren müssen.

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36 Ausgangspunkt war der Fall *Hirst v. United Kingdom (No. 2)*, Beschwerde Nr. 74025/01, 6.10.2005. Bestätigung der Rechtsprechung Hirst in *Greens and M.T. v. United KIngdom*, Beschwerde Nr. 60041/08, 23.11.2010, und *Firth and Others v. United Kingdom*, Beschwerde Nr. 47784/09, 12.8.2014. See also the judgment of the Russian Constitutional Court of 19 April 2016, Nr. 12-P/2016, on the judgment of the European Court of Human Rights in *Anchugov and Gladkov*.

37 Russischer Verfassungsgerichtshof, 14.7.2015, teilweise wiedergegeben bei Matthias Hartwig, 'Vom Dialog zum Disput? Verfassungsrecht vs. Europäische Menschenrechtskonvention – Der Fall der Russländischen Föderation', 44 *Europäische Grundrechte-Zeitschrift* (2017) 1, 5.

38 Gesetz vom 14.12.2015, *ibid.*, 8. S. dazu die negative Stellungnahme der Venedig-Kommission des Europarats, Nr. 832/2015, 13.6.2016, Dok. CDL-AD(2016)016.

39 *Yukos v. Russian Federation*, Beschwerde Nr. 14902/04, 31.7.2014.

40 Mit Urteil vom 19.1.2017 hat der Russische Verfassungsgerichtshof entschieden, dass das Urteil in Russland nicht vollstreckbar sei: https://acerislaw.com/de/european-court-human-right/.

41 Vgl. insbesondere das Urteil *Görgülü* des Bundesverfassungsgerichts, 14.10.2004, BVerfGE 111, 307, 319. Das Urteil des italienischen Verfassungsgerichtshofs Nr. 238 vom 22.10.2014, das dem Spruch des Internationalen Gerichtshofs in der Sache *Deutschland gegen Italien*, Urteil vom 3.2.2012, ICJ Reports 2012, 99, die Verbindlichkeit in Italien verweigerte, muss eher als zufallsbedingter Unfall bezeichnet werden.

3) Risikobereiche

Kritische Aspekte enthüllt, wie im Vorstehenden schon angedeutet, der Blick auf andere Materien des Völkerrechts, wo die effektive Durchsetzung seiner Normen ständig in Frage steht. Hier müssen zunächst die Menschenrechte genannt werden, vor allem in ihrer Ausweitung auf die Rechte der „zweiten" und „dritten" Generation.

Die klassischen bürgerlichen Rechte gehören seit mehr als zweihundert Jahren zum Kernbestand der westlichen Demokratien, angefangen mit der französischen Déclaration des droits de l'homme et du citoyen und der amerikanischen Bill of Rights, seit der europäischen Renaissance der Jahre 1945 und 1989 in ganz Europa. Alle diese Rechte – Recht auf Leben, auf Freiheit, Meinungsfreiheit, Schutz vor körperlicher Misshandlung – gehörten zunächst zum innerstaatlichen Verfassungsrecht, ehe sie über die Europäische Menschenrechtskonvention, den Internationalen Pakt über bürgerliche und politische Rechte wie auch die anderen regionalen Menschenrechtsinstrumente in das Völkerrecht hineinwuchsen. Im Umgang mit diesen Rechten liegt ein breites Erfahrungsmaterial vor. Durch die Beschwerde zum Straßburger Gerichtshof ist in weitem Umfang sichergestellt, dass aus bloßen papierenen Versprechungen echte Schutzpositionen tatsächlicher Art werden. Aber der juristische Perfektionismus ist heute ersichtlich nicht mehr in der Lage, in Mitgliedsländern, in denen starke strukturelle Defizite herrschen, eine entscheidende Wende zum Besseren herbeizuführen. In Russland wie auch in der Türkei sind *de facto* die demokratischen Freiheitsrechte abgeschafft. Oppositioneller Widerspruch wird als strafbarer Landesverrat oder Terrorismus abqualifiziert. Die Straßburger Maschine läuft noch, immer noch werden Einzelfälle entschieden, und vielfach leisten die Behörden tatsächlich die den Beschwerdeführern zuerkannten Schadensbeträge. Aber das System ist ins Herz getroffen worden, wenn jeder, der von seinem Recht der Meinungsfreiheit Gebrauch macht, unverzüglich mit strafgerichtlicher Verfolgung rechnen muss. Die Schranke der nationalen Identität wird offensichtlich missbraucht, wenn sie zur Abwehr und Unterdrückung elementarer demokratischer Freiheiten benutzt wird.

Noch größere Schwierigkeiten bereitet eine Beurteilung der Effektivität der wirtschaftlichen, sozialen und kulturellen Rechte, die heute in allen Systemen, die überhaupt einen Menschenrechtsschutz kennen, hinsichtlich ihres materiellen Werts auf die gleiche Stufe wie die klassischen Freiheitsrechte gestellt werden. Es ist gleichsam ein Dogma der Menschenrechtsbewegung geworden, dass keine Unterscheidung zwischen den verschiedenen Gruppen von Rechten getroffen werden dürfe. Die Generalversammlung hat sich wiederholt dezidiert in diesem Sinne geäußert,[*42] und Widerspruch macht sich rar.

In einem politisch-moralischen Sinne haben diejenigen, die sich für die Gleichstellung der beiden Fallgruppen einsetzen, völlig Recht. Nahrung, Kleidung, Wohnung und Gesundheit gehören zu den Grundbedürfnissen des Menschen. Sie sind für ihn ebenso wichtig wie die elementaren Freiheitsrechte, ja geradezu existenzentscheidend.[*43] Nur ist nicht zu verkennen, dass das Völkerrecht mit seiner Forderung, diese Grundbedürfnisse zu sichern, den Staaten eine Last aufbürdet, der sie häufig gar nicht gerecht werden können, auch wenn sie sich dazu durch förmlichen Vertragsschluss bereit erklärt haben.

Hier gelangt man an einen der neuralgischen Punkte des heutigen Völkerrechts. Das Netz der multilateralen Verträge ist eindrucksvoll. Der Mitgliederbestand umfasst gelegentlich sogar mehr als die 193 Staaten, die Mitglieder der Vereinten Nationen sind. Aber die formale Vertragsmitgliedschaft und die effektive Leistungskraft fallen vielfach weit auseinander. Regierungen sind bereit, Vertragsbindungen zu übernehmen, zu deren Erfüllung sie nicht in der Lage sind oder die sie gar nicht zu erfüllen beabsichtigen. Damit ist die gesamte Logik des völkerrechtlichen Vertrages in Frage gestellt, die davon ausgeht, dass jede Vertragsbindung auf einen staatlichen Akteur zurückzuführen ist, der die Verantwortung für die Durchführung der eingegangenen Verpflichtungen übernimmt.

Speziell im Hinblick auf soziale und wirtschaftliche Rechte kommt hinzu, dass der Erfüllungsdruck der Gegenseitigkeit nicht zum Zuge kommen kann. Diese Rechte begründen Verpflichtungen des Staates gegenüber seinen eigenen Bürgern. Hier braucht es nach dem Grundsatz der Subsidiarität primär innerstaatlich wirksame Durchsetzungsmechanismen, die traditionsgemäß für die klassischen Freiheitsrechte vorhanden sind, aber im Hinblick auf die Rechte der zweiten Generation nur bruchstückhaft existieren. Auch internationale Beschwerdeverfahren bringen durchweg kaum Abhilfe, weil der Schwerpunkt nicht

[42] Vgl. insbesondere den 2005 World Summit Outcome, GV-Resolution 60/1, 16.9.2005, para. 121.

[43] Dazu Christian Tomuschat, *Human Rights – Between Idealism and Realism*, 3. Aufl. (Oxford: Oxford University Press, 2014) 4.

auf dem Unrecht im Einzelfall liegt, sondern von einer defizitären Gesamtlage herrührt. Dies haben sowohl das allgemeine Publikum wie auch die verantwortlichen Regierungen durchweg verstanden. So hat das Beschwerdeverfahren nach dem Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte, dessen Einführung durch das Fakultativprotokoll zum Pakt im Jahre 2008 lebhaft begrüßt worden war, bisher nur 22 Ratifikationen erhalten. In der Tat ist nicht ersichtlich, inwiefern etwa eine hohe Arbeitslosigkeit in einem Lande eine spezifische Rechtsverletzung einem Arbeitsuchenden gegenüber bedeuten könnte. Hier sind zupackende Berichtsprüfungsverfahren, welche die tieferen Gründe für die Notlage zu erforschen suchen, das bessere Gegenmittel. Aber die Schlussfolgerungen des Kontrollgremiums, des Ausschusses für wirtschaftliche, soziale und kulturelle Rechte, bleiben im Status der bloßen Empfehlung stecken und werden von den Regierungen meist nur mit mildem Interesse zur Kenntnis genommen. Auch im Verfahren des Universal Periodic Review, dem sich alle Mitgliedstaaten der Vereinten Nationen stellen,[*44] spielen die Rechte der zweiten Generation meist nur eine zweitrangige Rolle, weil sich alle zur Überprüfung berufenen Mitgliedstaaten der Weltorganisation darüber einig sind, dass es ja grundsätzlich im Interesse jeder Regierung liegt, die Angehörigen des eigenen Volkes angemessen mit sozialen Dienstleistungen zu versorgen – ausgenommen die Fälle, wo eine korrupte Führungselite das eigene Volks nur als Objekt der Ausbeutung sieht. Man geht also davon aus, dass allein schon der Druck von unten die Regierung zwingt, ihren wirtschaftlichen und sozialen Verpflichtungen nachzukommen.

Nicht gelöst ist schließlich das Migrationsproblem. Hier stehen auf der einen Seite staatliche Souveränität, die das Recht zur Entscheidung über Einreise und Aufenthalt fremder Staatsangehöriger für sich in Anspruch nimmt, und das wenig konturierte Prinzip der internationalen Solidarität einander gegenüber. Ein individuelles Recht auf Asyl kennt das Völkerrecht nicht, nur die vage Aussage in Art. 14 der Allgemeinen Erklärung der Menschenrechte, dass jeder Mensch das Recht habe, „in anderen Ländern vor Verfolgung Asyl zu suchen und zu genießen". Staatszerfall und Überbevölkerung als Fluchtursachen lassen sich vom Völkerrecht her nur in bescheidenem Umfang bekämpfen. Die internationale Gemeinschaft hat bisher weder die Kraft noch die Handlungsmittel, um einem Versagen bei der Ausübung des nationalen Selbstbestimmungsrechts, das wesentlich Selbstverantwortung für das eigene Schicksal heißt, entgegenzusteuern.[*45]

IV. Schlussbemerkungen

Zum Schluss sei der Blick nochmals auf das Grundproblem von Krieg und Frieden gelenkt. Das Völkerrecht hat hier seine optimale Form gefunden mit dem allgemeinen Gewaltverbot und der Einschränkung der legalen Gewaltanwendung auf den Fall der Selbstverteidigung und die Ermächtigung durch den Sicherheitsrat. Nicht ausgeführt zu werden braucht, dass diese grobmaschigen Regeln im Detail zu vielfältigen Auseinandersetzungen im Detail geführt haben. Aber im Grundsatz haben sie sich bewährt, auch wenn ihre Anwendung durch den Sicherheitsrat schwere strukturelle Mängel aufweist. Diese institutionelle Seite verlangt nach Verbesserung, ohne dass man sich der Täuschung hingeben sollte, dass vom normativen Standpunkt aus ein Patentrezept gefunden werden könnte. Das Völkerrecht lässt sich nicht in die Wissenschaft von den internationalen Beziehungen umwandeln. An eine Abschaffung des Vetorechts ist in der Gegenwart nicht ernsthaft zu denken. Keine der ständigen Ratsmächte ist bereit, an ihre privilegierte Stellung rühren zu lassen. Wünschenswert ist indes eine bessere Abstimmung zwischen Sicherheitsrat und Generalversammlung, damit der Gemeinwille der internationalen Gemeinschaft besser zur Geltung kommt. Weitergehende Ratschläge können vom Boden des Rechts aus nicht gemacht werden. Es liegt auf der Hand, dass internationale Spannungsursachen möglichst frühzeitig in geeigneten Verfahren ausgeräumt werden sollten. Aber menschliche Machtgier und Irrationalität lassen sich durch das Recht nicht in Fesseln legen.

Allerdings darf man auch darauf setzen, dass die in der Charta selbst und in den Menschenrechtspakten verankerten Gemeinwohlvorstellungen durch dauernde Bekräftigung von Seiten der verantwortlichen Amtsträger eine die Wirklichkeit prägende Kraft entfalten werden. Diese Hoffnung erscheint schon

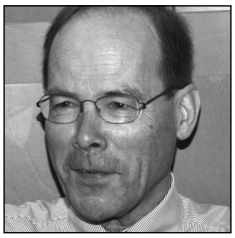
[44] GV-Resolution 60/251, 15.3.2006.

[45] Vgl. die Erklärung über territoriales Asyl, GV-Resolution 2312(XXII), 14.12.1967 sowie die vor kurzem verabschiedete New Yorker Erklärung über Flüchtlinge und Migranten, GV-Resolution 71/1, 19.9.2016.

allein deswegen nicht abwegig, weil ja ganz offensichtlich die Menschheit vor Entwicklungen steht, die ihre Existenz bedrohen können. Sie wird sich zunehmend als eine Notgemeinschaft begreifen müssen, die ihre Zukunft nur durch solidarisches Zusammenstehen sichern kann. Vor allem die prosperierenden Staaten des Westens – und auch diejenigen des Nahen Ostens – werden noch weit stärkere Opfer als bisher erbringen müssen, um die Armutskluft zwischen einem industriell entwickelten Norden und einem jedenfalls technologisch rückständigen Süden zu schließen. Der Gefahr eines aus der Verzweiflung der Not erwachsenden Krieges sollte man ernsthaft ins Auge blicken, um solche zerstörerischen Entwicklungen abzuwenden. Frieden bleibt eine konkrete Utopie, nicht ein inhaltsleerer Wunschtraum.*[46] Aber damit sind die Grenzen des Völkerrechts eindeutig überschritten. Es gehört zu den Aufgaben der Politik und kann nicht von der Rechtswissenschaft geleistet werden, solche Herausforderungen zu bewältigen und die Zukunft aktiv zu gestalten.

[46] Zum Gedanken der konkreten Utopie vgl. Karl Mannheim, *Ideologie und Utopie*, 9. Aufl. (Frankfurt: Vittorio Klostermann, 2015) 169-184. Auch Ernst Bloch hat in seinem Werk immer wieder die Notwendigkeit einer „konkreten" Utopie betont, vgl. etwa: 'Widerstand und Friede', in: *Politische Messungen, Pestzeit, Vormärz* [Werke, Gesamtausgabe, Bd. 11] (Frankfurt/Main: Suhrkamp, 1970) 375, 457.

https://doi.org/10.12697/JI.2017.26.02



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Legal Methodology in the German Dictatorships

1. Introduction

As is well known, two dictatorships arose and held sway in Germany in the years between 1933 and 1990. The first was the National Socialist (hereinafter 'NS') 'Third Reich', which ended in 1945. The second was the German Democratic Republic (GDR) of 1945 or 1949[*1] to 1990: With the end of World War II, Germany was divided into two states. While a parliamentary democracy (the Federal Republic of Germany) developed in the western one, the GDR arose in the eastern portion as a satellite state of the Soviet Union. In the end, in 1990, the two German states were reunited (more precisely, the socialist GDR was integrated into the democratic Federal Republic). In this lecture[*2] – which refers to my book *Rechtswissenschaft in Diktaturen*[*3], published in June 2016 as a follow-up to my 2012 work on the history of legal methodology[*4] – I would like to compare the legal methodology of the NS state and the GDR. Therefore, this discussion, as my German book does, contains a twofold comparison, looking backwards to the empire and the Weimar Republic and 'sideways' from one dictatorship to the other. Especially in the field of politics and history, comparisons of dictatorships are nothing new. To give an example, I would like to mention Hannah Arendt's magnificent book *The Origins of Totalitarianism* (1951). Specific comparison of legal methods across different dictatorships nevertheless did not yet exist.

However, several objections might be raised against a comparison of the NS and GDR states. One might discuss whether both systems really were dictatorships. In the NS case, there are no doubts about that. The entire state was a single person, the 'leader' Adolf Hitler, who combined the supreme legislative, executive, and judicial powers in a single body. Things are more complicated with regard to the GDR. There did not exist a certain person acting as a dictator, only a particular outstanding party, the United Socialist Party ('Sozialistische Einheitspartei') of the GDR. However, there are no reasons not to classify it as a dictator. Firstly, it dominated the state by dint of holding all the power. That stemmed from the fact that government officials held crucial positions in the system while being party leaders at the same time. Furthermore, there was a constantly guaranteed parliamentary majority for that party as well. Secondly, in line with Marxist-Leninist theory, the party was the 'head' of the ruling 'working class', as the arrangement was expressed in

1 1949 was the year of the first GDR Constitution ('Verfassung der Deutschen Demokratischen Republik vom 7. Oktober 1949').

2 This article is based on a presentation made at the Autonomy of Law: Dictatorships Compared workshop in Tartu on 15 October 2016 and edited by Marju Luts-Sootak, with support from the Estonian Research Council (grant IUT20-50).

3 Jan Schröder. *Rechtswissenschaft in Diktaturen. Die juristische Methodenlehre im NS-Staat und in der DDR*. Munich 2016.

4 Jan Schröder. *Recht als Wissenschaft. Geschichte der juristischen Methodenlehre in der Neuzeit*. 2nd edition. Munich 2012.

the Constitution of 1968[*5]. The Socialist Party embodied the state power[*6]; separation of powers definitely did not exist in the GDR.

A completely different and heavily discussed question in Germany is whether the injustice of the Nazi era and the GDR government can really be 'compared' to each other. It can certainly be determined that the state crimes in the Nazi state had a dimension additional to those in the GDR. However, this is not the subject of my comparison. The task is not to evaluate crimes but to apply a scientific approach to concretely expressed real-world theories.

A second and very difficult preliminary question rears its head too, however: to what extent can one ever compare certain figures of the legal methodology? Legal comparison does not mean comparing the concepts – i.e., looking for equal-sounding terms in certain systems that one would like to compare. Rather, one has to consider the function: which tools does a given legal system use to resolve a specific problem?[*7] Let us consider an example: the question of what powers legal representatives of minors hold in English law makes no sense. The answer would be this: 'None, as there are no permanent legal representatives of a minor in English law.' However, the problem that minors are not able to perform actions that are valid in terms of law is also known in English law. This would be the correct question: 'Who can act for a minor in English law, and what powers are given to him?' With regard to the comparison of methodological figures, there definitely exist similar pitfalls. However, I think that the problems are smaller in addressing two linguistically and historically related legal systems, such as those of the two German dictatorships. Therefore, I assume that linguistically equal methodological figures have not just the same expression but also the same function.

2. Concepts and sources of law

The concept of law found in the NS state and the GDR differs in a significant way from the preceding and the following periods. In the German Empire and the Weimar Republic, a voluntarist concept of law had prevailed. Law was the will of the community[*8], expressed as statute in the constitutional procedure or otherwise as customary law. The law reflected no particular ideology, or 'Weltanschauung'; instead, it was open to different values. That aspect of law was quite different in the dictatorships. On one hand, the law was will, intent as well – in this case, the intent of the dictator (the 'leader' or the party). On the other hand, it should have specific contents that reflect the official ideology. In a contrast to 'bourgeois theory', there was not merely **one** principle, that of will, the intention of the legislator; there were **two** elements – the intent of the dictator and the official ideology. This antinomy or contradiction between voluntaristic (authoritarian in this case) and ideological principles is the key to the legal methodology of the German dictatorships.

That tension can be seen already in the concept of law and the sources of law. In the NS state, the law was defined as 'ethnic order', 'order of life of the national community', rooted in the 'folkish sense of justice', in the 'racial soul'[*9]. This is an ideological definition. However, if we look to the law as statute, we find an authoritarian definition, because the statute is called the 'plan and will of the leader'[*10] or simply the

5 See 'Verfassung der Deutschen Demokratischen Republik vom 6. April 1968 in der Fassung des Gesetzes zur Ergänzung und Änderung der Verfassung der Deutsche Demokratischen Republik vom 7. Oktober 1974', whose Article I states: 'Die Deutsche Demokratische Republik ist ein sozialistischer Staat deutscher Nation. Sie ist die politische Organisation der Werktätigen in Stadt und Land, die gemeinsam unter Führung der Arbeiterklasse und ihrer marxistisch-leninistischen Partei den Sozialismus verwirklichen.'

6 See, for example, Karl-Heinz Schöneburg, Richard Stüber. Führende Rolle der Arbeiterklasse und sozialistischer Staat. – *Staat und Recht* 18 (1969), pp. 666–686, especially 'Die Partei ist die "Seele", das "Zentrum", der Kern der sozialistischen Staatsmacht' (p. 680), and further quotations offered by J. Schröder. *Diktaturen* (see Note 3), p. 61 *ff*.

7 Konrad Zweigert, Hein Kötz. *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*. 3rd edition. Tübingen, Germany, 1996, p. 33 *ff*.

8 See, for example, Karl Binding. *Handbuch des Strafrechts*, Vol. 1. Leipzig, Germany, 1885, p. 197: 'erklärter Gemeinwille', and, still in the German Federal Republic, Ludwig Enneccerus, Hans Carl Nipperdey. *Allgemeiner Teil des Bürgerlichen Rechts*, 15th Edition, Half-Vol. 1. Tübingen, Germany, 1959, p. 210 *f*.: 'die auf dem Willen einer Gemeinschaft beruhende, unabhängig vom Willen des Einzelnen (211) verbindliche Ordnung äußeren menschlichen Zusammenlebens durch Gebote und Gewährungen'. Further quotations are provided by J. Schröder. *Recht* (see Note 4), pp. 281–283.

9 For example, Heinrich Lange. Nationalsozialismus und bürgerliches Recht. – Hans Frank (ed.). *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*. Munich 1935, pp. 933–956 (935): 'Lebensordnung der Volksgemeinschaft'. Further quotations are provided by J. Schröder. *Diktaturen* (see Note 3), p. 5 *ff*.

10 Carl Schmitt. Die Rechtswissenschaft im Führerstaat. – *Zeitschrift der Akademie für Deutsches Recht* 2 (1935), pp. 433–440 (439). Further quotations are provided by J. Schröder (*ibid.*), pp. 7–9.

'leader's order' (*Führerbefehl*). Clearly, there is antinomy here. The order of the leader does not necessarily coincide with the real folkish sense of justice. The correspondence is created by the fiction that the leader is the supreme interpreter of ethnic volition, 'managing director of the people's spirit'[*11]. The same tension or antinomy can be found in the GDR. In a system following Karl Marx, the law is the will of the ruling class (representing the voluntaristic element) while, on the other hand, it has a certain content, which is given by the 'material conditions' of the class (expressing the ideological element)[*12]. The material base ('Basis') determines the legal superstructure ('Überbau'). In **real socialism**, the voluntaristic element is the will of the working class, ultimately their party, and the ideological element arises no longer from the material base (*Basis*), which may have to be formed via revolutionary means by the superstructure (*Überbau*) – see Stalin[*13] – but from the socialist 'objective laws of development' of the society. This is how, in one example, Leipzig's Professor Traute Schönrath defined the socialist law in 1962[*14]: it is 'the uniform will formed by the working class and its allies on the basis of the decisions of the party by means of the socialist state' – that is, the authoritarian element – 'to realise the objective laws of the given stage consciously' in the substantive, ideological element. Here antinomy arises again: it may be that the will of the party and the 'objective laws' do not coincide. But, again, they assist with a fiction – namely, that the party always scientifically recognises the objective social laws and the necessary conclusions[*15].

Having understood this interaction or contradiction between the authoritarian and the ideological principle, one can discern its effects in the legal methodology anywhere. With regard to the doctrine of legal sources, it was the **authoritarian** principle that dominated in both dictatorships. I will mention only three particularly striking correspondences.

2.1. Customary law

Before 1933, German lawyers had recognised a customary law. At least according to the private-law literature, it did not require any approval by the legislator and could even abolish (derogate from) statutory law, in line with the *lex posterior derogat legi priori* principle[*16].

In the Nazi state and the GDR, all of that no longer applied. Indeed, the Nazi jurists seem at first glance to have held customary law in high esteem. According to the 'folkish' legal theory, the people are creator of the law while the state, as it has been put, is 'only a midwife, not the mother'[*17]. But if we look more closely, a different picture emerges. No Nazi jurist believed that a customary law could override statutory law[*18]. The will of the leadership always was given priority. The dominance of law expressed as statutes is even more evident in the GDR context[*19]. For the most part, the jurists spoke not of customary law but of customs. There are reasons for this point of view. In the European legal tradition, customary law requires not only constant exercise but also legal conviction on the part of the people. However, such autonomous legal conviction could not exist under socialism. A 'legal consciousness' (*Rechtsbewußtsein*) does not arise spontaneously in people; it develops only in the 'conscious part of the proletariat' – i.e., in the party[*20]. Only the party carries the 'scientifically' developed legal consciousness to the working class and to the people.

11 Walter Schönfeld. Zur geschichtlichen und weltanschaulichen Grundlegung des Rechts. – *Deutsche Rechtswissenschaft* 4 (1939), pp. 201–221 (215).

12 Karl Marx, Friedrich Engels. Manifest der kommunistischen Partei (1848). Karl Marx, Friedrich Engels. *Werke*. Berlin 1956–1990, 4, pp. 462–492 (477): '... wie euer Recht nur der zum Gesetz erhobene Wille eurer Klasse ist, ein Wille, dessen Inhalt gegeben ist, in den materiellen Lebensbedingungen eurer Klasse'.

13 Josef Stalin. *Marxismus und Fragen der Sprachwissenschaft* (1950) (edited by H.P. Gente). Munich 1968, p. 21 *ff*. (24).

14 Traute Schönrath. Das sozialistische Recht - Instrument des einheitlichen bewußten Handelns der Gesellschaft unter Führung der Partei der Arbeiterklasse. – *Staat und Recht* 11 (1962), pp. 1776–1779 (1777). Further definitions are provided by J. Schröder. *Diktaturen* (see Note 3), p. 67.

15 Institut für Theorie des Staates und des Rechts der Akademie der Wissenschaften der DDR (eds). *Marxistisch-leninistische Staats- und Rechtstheorie. Lehrbuch*. 3rd edition. Berlin 1980, p. 502: The decisions of the party are 'Ausdruck höchster Bewußtheit und Wissenschaftlichkeit'. See also J. Schröder (*ibid.*), p. 68 *f*.

16 See J. Schröder. *Recht* (see Note 4), p. 297 *ff*.

17 J. von Staudinger. *Kommentar zum Bürgerlichen Gesetzbuch und dem Einführungsgesetze*, Vol. I: 'Allgemeiner Teil', 10th edition. Munich, Berlin, & Leipzig, Germany, 1936, specifically, the introduction's Section VI, no. 46, p. 26.

18 See J. Schröder. *Diktaturen* (see Note 3), p. 10 *f*.

19 The following is according to J. Schröder (*ibid.*), pp. 71–73.

20 *Staats- und Rechtstheorie* (see Note 15), p. 468.

Therefore, customary law has no chance of evolving in socialism. The party and the leaders of the state can 'sanction' a form of constant exercise and elevate it to the status of statutory law[*21]; however, autonomous customary law does not exist.

2.2. Judicial review of statutes (the court's right of inspection)

Jurists in the Weimar Republic had claimed that a court may examine whether a statute corresponds to the Constitution or not. The Supreme Court (*Reichsgericht*) often exercised this right. However, in the legal literature, this issue remained controversial until the end of the Weimar Republic[*22].

In both German dictatorships, a judicial right of inspection of statutes nevertheless was strictly rejected. In the Nazi state, the Weimar Constitution was held to be no longer valid. Unless particular norms were still in place, they certainly had no priority over ordinary statutes. But even apart from that, the Nazi jurists vehemently denied a power of intervention by judges in the statutes of the leaders: 'The leader can interpret the folkish legal conviction better than the judge.'[*23] In the GDR, the same figure can be seen[*24]. Lenin had characterised the judge's judicial review as a typical manifestation of a bourgeois society of exploitation. The bourgeoisie wanted to eliminate legality in order to serve the interests of monopoly capitalism more easily. Only the parliament of the GDR ('Volkskammer'), dominated by the party, could decide whether a given statute violated the Constitution[*25]; that action could not legitimately be performed by a court, not even the highest of courts.

2.3. Judge-made law?

Since about 1900, German lawyers had maintained the conclusion that there are gaps in the law that cannot be filled by the legal system itself (by analogy). The result is a theory of judge-made law. Hence, the judge should close the gaps by free decision, even on the basis of his own personal value judgements ('Eigenwertung'). Hence, the judge's decision is regarded as a source of law in the individual case at issue. Whether it also has the effect of a prejudice remains controversial indeed, but in any case the decision can grow into customary law and thereby become a source of law[*26].

The lawyers in the German dictatorships did not follow this theory of judge-made law. Accordingly, in the NS state, the term 'judge-made law' was seen very rarely. The lawyers especially rejected the idea that a judge could enforce his own value preferences. As far as he ever can decide freely, his decision should be based on Nazi ideology[*27]. A much more in-depth discussion developed in the GDR[*28], but there too the lawyers did not accept 'case law'. Only in the final years of that dictatorship, 1985–1990, did the idea arise that the judicial decision issued is at least a source of law for the relevant individual case[*29]. Just as strongly as in the NS state, personal evaluation by the judge was rejected. Again, if the judge is free to decide, then he should do so on the basis of the socialist ideology and not through his personal sense of justice[*30]. In addi-

21 *Ibid.*, p. 405 *f.*

22 See Christoph Gusy. *Richterliches Prüfungsrecht. Eine verfassungsgeschichtliche Untersuchung*. Berlin 1985; J. Schröder. *Recht* (see Note 4), p. 322 *ff.*

23 Hans Franzen. *Gesetz und Richter*. Hamburg, Germany, 1935, p. 27 *ff.* See also J. Schröder. *Diktaturen* (see Note 3), p. 13 *ff.*

24 For example, *Staatsrecht der DDR*, a textbook edited by Akademie für Staats- und Rechtswissenschaft der DDR. Berlin 1977, pp. 336, 381. Further quotations are provided by J. Schröder (*ibid.*), p. 78.

25 DDR-Verfassung 1968, Art. 89 III 2.

26 Cf. J. Schröder. *Recht* (see Note 4), pp. 305 *ff.*, 376 *ff.*

27 Georg Dahm et al. Leitsätze über Stellung und Aufgaben des Richters. – *Deutsche Rechtswissenschaft* 1 (1936) p. 123 *ff.* (123): 'Es ist nicht seine [sc. the judge's] Aufgabe, einer über der Volksgemeinschaft stehenden Rechtsordnung zur Anwendung zu verhelfen oder "allgemeine Wertvorstellungen" durchsetzen; vielmehr hat er die konkrete völkische Gemeinschaftsordnung zu wahren.' Cf. J. Schröder. *Diktaturen* (see Note 3), pp. 11, 36 *ff.*

28 See J. Schröder (*ibid.*), pp. 73–76, 98.

29 For example, Detlef Joseph. Buchbesprechung. – *Staat und Recht* 35 (1986), pp. 508–510, specifically p. 510.

30 The judge had to decide *parteilich* – in accordance with socialist ideology: Günther Lehmann, Hans Weber. Theoretische Grundfragen der sozialistischen Rechtspflege. – *Neue Justiz* 1969, pp. 606–615 (608): 'Die Parteilichkeit ist Grundlage und Garantie der richterlichen Unabhängigkeit, weil sie dem Richter die Möglichkeit gibt, auf der Basis der objektiven Gesetzmäßigkeiten und der revolutionären Praxis zu entscheiden und ihn vor Spontaneität und damit vor Willkür und Ungesetzlichkeit bewahrt.'

tion, judgements can never evolve to become customary law, because – as we have seen – an autonomous customary law did not exist in East Germany. Only the legislator could elevate a permanent judicial practice to statutory law.

In summary, we can see striking similarities between the dictatorial theories and, at the same time, significant differences from 'bourgeois theory'. In dictatorships, the authoritarian principle is quite prevalent. The dictator (whether 'leader' or party) holds a legislative monopoly that is strictly maintained. The ideological principle is not required here. Yet its implementation will not be harmed, according to the fiction that the dictator always recognises the ideologically correct solution, either through visionary talent (such as that of the NS 'leader') or by application of 'scientific' insight (as with that of the party). Only in situations wherein the dictator is unable to act himself (e.g., in the judicial realm) does the ideological principle play a certain role.

3. Interpretation of the law

3.1. The purpose of interpretation of the law

For this reason, the ideological principle gains much greater importance in the interpretation of the law. To discuss this, I shall start again with a review of the German Empire and the Weimar Republic. Interpretation theory before 1933 had an ideologically neutral alignment relative to either the intention of the legislator (subjective-historical theory) or the occasion's prevailing values (objective theory)[*31]. This controversy between objective and subjective theory continued in the dictatorships as tension between the authoritarian principle, following the will of the dictator, and the ideological principle, applying the official ideology. However clear the divide was before 1933, it was ultimately dissolved in the dictatorships through elevation of the ideological principle.

National Socialism

In National Socialism, there was swift ascendancy of the principle that laws should be interpreted in accordance with the 'National Socialist ideology'[*32]. The opposing 'subjective-historical' theory (in the dictatorships, the authoritarian principle) had only a few followers[*33]. At first glance, this is surprising: why was the will of the dictator unimportant? One reason is that the NS state was tied up not only with Nazi statutes but also with numerous old norms, which remained valid, such as those enshrined in the German civil code (BGB) and the Criminal Code (StGB). Here, no will of the dictator was evident if he had not commented on the old law, and the intention of the old legislator did not need to be honoured. The Nazis were interested particularly in interpreting the old statutes in light of their own ideology. The other reason is that even Nazi laws could become obsolete or were formulated deficiently. Also, there was an interest in adapting the National Socialist ideology in this case if it was not clearly in opposition to the will of the dictator.

Some examples may be illustrative:

1) Before 1933, German tax law accorded a privileged position to services and institutions that were 'of public utility' or 'charitable' in nature. From that year forward, however, the courts denied such tax benefits when they could be applied in favour of Jewish taxpayers. The tax law came to be interpreted restrictively. Hence, expenses for Jewish sports clubs and children's sanatoriums were no longer 'of public utility' or 'charitable', because they were preferential to 'foreign race nationals'

[31] See J. Schröder. *Recht* (see Note 4), p. 345 *ff*.

[32] Steueranpassungsgesetz (16 October 1934), Section 1, 'Die Steuergesetze sind nach nationalsozialistischer Weltanschauung auszulegen'. This was regarded as a principle valid for the interpretation of any law. See, for example, Sächsisches Oberverwaltungsgericht. – *Juristische Wochenschrift* 1935, p. 886 ('allgemeiner Rechtsgrundsatz'); Georg Dahm et al. Leitsätze (see Note 27), p. 123 ('Grundlage der Auslegung aller Rechtsquellen ist die nationalsozialistische Weltanschauung'). See Bernd Rüthers. *Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*. 7th edition (1968). Tübingen, Germany, 2012, p. 183 *ff*.; Bernd Mertens. *Rechtsetzung im Nationalsozialismus*. Tübingen, Germany, 2009, pp. 96, 104 *ff*.; J. Schröder. *Diktaturen* (see Note 3), p. 18 *ff*.

[33] Chief among these was Philipp Heck. *Rechtserneuerung und juristische Methodenlehre*. Tübingen, Germany, 1936. Cf. J. Schröder (*ibid*.), p. 30 *ff*.

and not the German national community[*34]. The racial ideology of the Nazi regime here leads to an ideologically based interpretation of the law, which has nothing to do with the original intention of the legislator.

2) In consequence of the Reichstag Fire Decree of 28 February 1933, the Gestapo could impose so-called protective custody (*Schutzhaft*) 'to repel Communist seditious violence'. The Nazi courts extended this rule such that it applied not only to Communists but in respect of any other persons whom the state somehow deemed undesired[*35]. After this, attacks by said parties were interpreted as 'communist in the broadest sense', in the words of the Berlin Regional Court (*Landgericht*)[*36].
3) Passed on 14 July 1933, the Law for the Prevention of Genetically Diseased Offspring allowed the sterilisation of alcoholics and certain other persons with a hereditary defect. This statute was extended by the courts in favour of the so-called eugenic health of the German people: if a woman with a hereditary illness was pregnant, not only sterilisation but also abortion could now be performed[*37]. In 1935, the Nazis issued a corresponding statute[*38].

The GDR

In an analogous manner, the jurists of the GDR interpreted the law in accordance with the ideology and not with reference to the historical intention of the legislator. It was stated that the interpretation should be 'partially' socialist[*39], and sometimes scholars opined that the will of the legislator is likewise relevant. However, that will was not conceived of in a historical sense; instead, the framework was to be 'dialectical' in the sense of the development of the law and society. This has to be regarded as 'evolutionary', not 'static'[*40]. Therefore, the actual intention of the legislature is irrelevant; there is only an ideological and 'partial' interpretation. So, while in the NS state a minority still preferred the subjective-historical interpretation, it disappeared completely in the GDR. There is free rein in interpretation on the basis of the current ideological requirements.

Again, I shall offer a few examples:

1) The German Civil Code of 1896 remained valid in the GDR until 1975. Its Section 932 contains terms for *bona fide* acquisition of movables. The acquirer becomes the owner if he believes the seller's ownership to be valid. Only stolen or lost things are exempted. What is to be done under socialism, however, when a state-owned (*volkseigen*) thing is at issue? The GDR's lawyers refused to apply the BGB in this case. It was impossible for a private citizen to acquire a state-owned movable in good faith. Thus §932 became restricted: it could not apply to public property. Otherwise, the 'planned development of our economy' could be disturbed, according to the Supreme Court of the GDR[*41].
2) In cases of renting out flats, the courts protected the tenant against the (generally private) owner, because the tenant was supposed to be the socially weaker party. According to the Civil Code's Section 112, Chapter III, the tenant has to be compensated at the end of the term of rental for any improvements made to the flat. However, the courts went further, extending this rule: if the flat is defective, the tenant may demand compensation earlier[*42].

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34 Reichsfinanzhof (7. Januar 1936). – *Juristische Wochenschrift* 1936, pp. 2264–2266 (2265); Reichsfinanzhof (10. Dezember 1936). – *Juristische Wochenschrift* 1937, p. 276.

35 See Gerhard Werle. *Justiz-Strafrecht und politische Verbrechensbekämpfung im Dritten Reich*. Berlin etc. 1989, p. 66 *ff*.; Lothar Gruchmann. *Justiz im Dritten Reich. Anpassung und Unterwerfung in der Ära Gürtner*. 3rd edition. Munich 2001, p. 535 *ff*.

36 Following L. Gruchmann (*ibid*.), p. 540.

37 Erbgesundheitsgericht Hamburg (16. März 1934). – *Juristische Wochenschrift* 1935, pp. 215–218 (217); Erbgesundheitsobergericht Bamberg (21. Dezember 1934). – *Juristische Wochenschrift* 1935, p. 1427.

38 Änderungsgesetz zum Erbgesundheitsgesetz, 26 June 1935, Section 10 a.

39 *Staats- und Rechtstheorie* (see Note 15), p. 580; Hilde Benjamin. *Neue Justiz* 1958, p. 437: 'dialektische Einheit von strikter Einhaltung der Gesetze und Parteilichkeit ihrer Anwendung'. More quotations are provided by J. Schröder. *Diktaturen* (see Note 3), p. 82 *ff*.

40 Imre Szabó. *Die theoretischen Fragen der Auslegung der Rechtsnorm*. (East) Berlin 1963, p. 9 *ff*.

41 Oberstes Gericht der DDR (8. Oktober 1957). – *Neue Justiz* 1957, pp. 776–778 (777). In the modern literature, this decision is commented on by, for example, Hans-Peter Haferkamp. Begründungsverhalten des Reichsgerichts zwischen 1933 und 1945 in Zivilsachen verglichen mit Entscheidungen des obersten Gerichts der DDR vor 1958. – Rainer Schröder (ed.). *Zivilrechtskultur der DDR*, Vol. 2. Berlin 2000, pp. 15–50 (especially p. 46 *ff*.); J. Schröder. *Diktaturen* (see Note 3), p. 92 *ff*.

42 Bezirksgericht Leipzig (11. Mai 1978). – *Neue Justiz* 1978, p. 506 *f*.; Oberstes Gericht der DDR (11. Mai 1979). – *Neue Justiz* 1979, p. 374 *ff*.

3) A Supreme Court decision on the law applying to an agricultural-production co-operative (*Landwirtschaftliche Produktionsgenossenschaft*, or LPG) has become well known. The LPGs represented compulsory forced association of farmers. They became agricultural collectives. Under the provisions of the relevant statute, a member could leave the collective before the end of the harvest only if the General Assembly agreed to this. However, according to the Supreme Court, the General Assembly could also contest exit **after** the harvest is complete. In general, a member could leave the co-operative for 'socially justifiable reasons' only*[43]. That is – again for ideological reasons – almost an interpretation *contra legem*.

3.2. The tools of statutory interpretation

I cannot go into detail here on the complex doctrine on tools or 'elements' of interpretation, which has been in constant flux over the centuries. I just want to point to one significant divergence of the dictatorial theory from the preceding 'bourgeois theory'. The 'bourgeois' voluntarist legal theory in 1900 particularly stressed the purpose of the legislator*[44]. Going a step further, Philipp Heck developed the notion of the 'jurisprudence of interests', which involved enquiry into the interests that formed the basis for a statute and evaluation of them*[45]. These are questions of a relativistic theory of law, which, rather than recognise absolute and immutable values, purposes, and interests, assumes pluralism and the constant change of purposes and interests. And, of course, these interests are not only those of the society but also of the individual.

Things were completely different in the dictatorships. Hardly a word was so hated there as 'pluralism'. There was no majority of relevant interests, only one – either, in the NS state, the 'folkish' or, in the GDR, a socialist interest. Of course, that is a collective interest, not an individual-level one. The Nazi lawyers launched a violent attack on the jurisprudence of interests as espousing relativism and positivism*[46]. In the GDR, jurists declared that under socialism there can be no conflict of interests, because the 'antagonistic contradiction between the interests of the individual and the interests of society' had been 'overcome'*[47]. What benefits society also benefits the individual. I return to an example from earlier: if a private citizen cannot acquire public property in good faith, that still benefits him, 'because the protection of public property always serves the interests of single citizens too'*[48]. Hence, the jurisprudence of interests should not be developed further but negated*[49]. The different and changing purposes and interests are not tools of interpretation. Herein, the interpretation theories of the German dictatorships correspond to each other, while differing from those in 'bourgeois theory'.

3.3. Gaps and their filling

Allow me to make a few comments about the gaps. One problem is the very concept of a gap. The lawyers of the early 20th century had recognised that ascertaining the existence of a 'gap' is a value judgement. That is a discovery largely due to Ernst Zitelmann (1903)*[50]. For example, the German Criminal Code of 1871 punished only the theft of physical objects. Is there a gap demonstrated by not punishing the theft of electrical energy? A gap in the sense that a judge cannot make a decision does not exist. He could also argue *e contrario* and acquit the electricity thief. A gap exists only if we judge this kind of 'theft' to be punishable.

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43 Oberstes Gericht der DDR (13. August 1963). – *Neue Justiz* 1963, pp. 571–575 (574).

44 See J. Schröder. *Recht* (see Note 4), p. 365 *ff*.

45 See Jan Schröder. Interessenjurisprudenz. – Albrecht Cordes et al. (eds). *Handwörterbuch zur deutschen Rechtsgeschichte*. 2nd edition, Vol. II. Berlin 2012, cols 1267–1269.

46 For example, Karl Larenz. *Über Gegenstand und Methode des völkischen Rechtsdenkens*. Berlin 1938, p. 37; Roland Freisler. *Nationalsozialistisches Recht und Rechtsdenken*. Berlin 1938, p. 40. Modern analysis is provided by B. Rüthers. *Unbegrenzte Auslegung* (see Note 32), p. 270 *ff*.

47 Gerhard Haney, Helmut Oberländer. Sozialistische Staatlichkeit ohne Rechtsbewußtsein? – *Staat und Recht* 19 (1970), pp. 80–93 (91).

48 Oberstes Gericht (see Note 41), p. 777 *ff*.

49 Karl-Heinz Schöneburg. Staats- und Rechtstheorie der Arbeiterklasse in der antifaschistisch -demokratischen Umwälzung 1945 bis 1949. – *Staat und Recht* 28 (1979), pp. 814–825 (822).

50 Ernst Zitelmann. *Lücken im Recht*. Leipzig, Germany, 1903.

This is not self-evident but, as noted above, a value judgement. What are its foundations? That is controversial under the 'bourgeois' legal theory: According to the subjective and historical interpretation theory, this depends on the intention of the legislator. According to the objective theory, it depends on the social values prevailing at the time[*51].

In the German dictatorships, one can see the same principles as in the theory of the tools of interpretation. The subjective-historical point of view does not matter; only the current values are relevant. This is, again, in line with the official ideology. The NS ideology assumes the presence of a gap if 'the folkish consciousness is requiring a norm that is not contained in the statute'[*52]. According to the GDR lawyers, a gap exists when rules are missing that 'are absolutely necessary for the development of social relations'[*53]. While in the 'bourgeois' conception the gap is found to exist on the basis of the plan of the legislator or the current values, in the NS state it arises in light of the nationalist ideology and in socialism in connection with the needs of the socialist society.

The corresponding 'bourgeois' view on filling in the gaps was that they should be addressed either by analogy or via creative judgement. These two methods came to be discussed in the dictatorships too, but with different emphasis. Although analogy was indeed recognised as necessary, suspicion was maintained in connection with it. The judge's decision should be, as we already have seen, based not on the judge's own values but only on the official ideology of the dictatorship[*54].

One could say the following in summary: The two dictatorships show a clear difference from 'bourgeois theory': There is no 'subjective-historical' interpretation, or at least its supporters were (as in the NS context) quite clearly in the minority. The dictatorships were in mutual agreement that the interpretation has to realise the current values and that these stem from the official ideology. The ideological principle was dominant, while the authoritarian principle's influence was negligible.

4. Jurisprudence

'Jurisprudence' refers here to the doctrine of the applicable law, the conceptual and systematic treatment of legal material. In Germany, we call it 'Rechtsdogmatik' (legal doctrine) in a contrast to philosophy of law, history of law, sociology of law, etc. Little interest in this dogmatic processing of the law was expressed in the dictatorships. Especially in the GDR, there were demands that the current law not be handled in its own right and be dealt with only in its relationship to the social basis[*55]. Nevertheless, not only in the NS state but also in the GDR there were statements on conceptual and systematic workings. Again, these resemble each other and diverge from 'bourgeois theory' significantly.

Considering the **conceptualisation**, we can, following Ernst Cassirer[*56], distinguish between substantial and functional ones. With the former, one asks about the essence of an object, while the functional is an attempt to conceive of law only in relation to its specific purpose. German jurisprudence has long dealt with both substantial and essential concepts, particularly in the natural-law theory of the early modern period and then in the scholarship of the historical school of law. But voluntaristic theory after 1900 abandoned the essential-class concepts. The specific purpose of a norm was deemed crucial for its correct understanding, and the concepts were seen as having to be formed in accordance therewith. The jurists of the day no longer believed that one essence obtains at all times. Even if there were such an essence, it was not deemed to play a role for conceptualisation purposes. In contrast, only the functional context was decisive. An example can be seen with the concept of causality. The substantial or essential concept might stress each *sine qua non* as the cause. This term, however, was found to be overly broad in the civil-law context, so jurists limited

51 Cf. J. Schröder. *Recht* (see Note 4), p. 380 *ff.*

52 K. Larenz. *Gegenstand* (see Note 46), p. 16. See also Heinz Hildebrandt. *Rechtsfindung im neuen deutschen Staate*. Berlin & Leipzig, Germany, 1935, p. 76.

53 Gregor Gysi. *Zur Vervollkommnung des sozialistischen Rechts im Rechtsverwirklichungsprozeß* (doctoral dissertation (A). Humboldt-Universität Berlin 1975, p. 99 *ff.*; W.W. Lasarew. *Die Lücken im Recht und die Wege zu ihrer Beseitigung* (in Russian). Moscow 1974, p. 7 (cited by Gysi, on p. 100).

54 Cf. J. Schröder. *Diktaturen* (see Note 3), pp. 33–35, 95–97 (on analogy), and pp. 35–37, 97 *ff.* (on the judge's judgement).

55 Cf. J. Schröder (*ibid.*), pp. 101–104.

56 Ernst Cassirer. *Substanzbegriff und Funktionsbegriff. Untersuchungen über die Grundfragen der Erkenntniskritik*. Berlin 1910.

it in accordance with the functions of civil liability in line with so-called adequate causation[*57]. The lawyers in the dictatorships, in turn, rejected such a purely functional or relativistic conceptualisation[*58]. Both in the NS[*59] and in the GDR[*60], it was necessary to form concepts in accordance with the nature or essence of the object. Rooted in their ideology, a belief was held in the dictatorships that they could be secure in their knowledge, which laid bare to them the essence, the substance of a concept. It is instructive yet again how the concept of causality was applied. Unlike 'bourgeois theory', Marxist-Leninist theory included an assertion that there is only one correct concept of causality, that held by Karl Marx. For him, causality was 'the direct connection between two processes' only[*61]. The lawyers in the GDR soon came to perceive that this concept of direct causality was not suitable in practice. They had to approve an indirect causality, a causal chain, too[*62]. Nevertheless, they stuck with the Marxist concept, simply changing it 'dialectically' for the specific case dealt with[*63]. Thus the conceptualisation is determined by the ideological principle entirely.

An almost insurmountable problem in the dictatorships was the **system formation**. The traditional systems of jurisprudence are identified as axiomatic and classificatory systems. The axiomatic ones presuppose a law that can be derived from a few fundamental principles. Natural lawyers took such systems to be possible. After the 19th century, however, German jurists not longer sought an axiomatic system of law. A classificatory system, in contrast, is less demanding; it requires only the ever further subdivision of a central concept into narrower terms, such as the division of law into public and private law and so forth. Such systems can be found even in the 'bourgeois' jurisprudence of the 20th century. However, to create such systems, one needs relatively formal, general concepts. Those were roundly rejected in the dictatorial ideologies. It is my opinion that this is why all attempts to create systems in the dictatorships ultimately failed. They all were disorganised and merely reordered, piece by piece, what had existed in the legal fields already covered. For example, the groupings in the NS state were the following: party, state, family, farm, labour[*64]. In the GDR, the areas of law were constitutional law, administrative law, financial law, land law, civil law, etc.[*65] In these 'systems', one can see already that the first requirement for a true system is not met. Namely, they are missing an independent organising principle. The system formation – at least according to traditional standards – probably failed because of the ideological setting.

I hope to have shown that, on one hand, the methodological statements made are similar between the two German dictatorships and that, secondly, they deviate considerably from those of 'bourgeois' legal theory. Accordingly, this discussion has revealed a clear profile of a dictatorial-ideological method characteristic of the German dictatorships of the 20th century. I have to leave unanswered the question of whether this is found also in other dictatorships.

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57 See J. Schröder. *Recht* (see Note 4), pp. 403–406 (403 *ff.*).

58 See J. Schröder. *Diktaturen* (see Note 3), pp. 45 *ff.*, 104 *ff.*

59 Karl Michaelis. Wandlungen des deutschen Rechtsdenkens seit dem Eindringen des fremden Rechts. – Karl Larenz (ed.). *Grundfragen der neuen Rechtswissenschaft*. Berlin 1935, pp. 9–61 (60 *f.*); Karl Larenz. Zur Logik des konkreten Begriffs. Eine Voruntersuchung zur Rechtsphilosophie. – *Deutsche Rechtswissenschaft* 5 (1940), pp. 279–299 (298); Wolfgang Siebert. BGB.-System und völkische Ordnung. – *Deutsche Rechtswissenschaft* 1 (1936), pp. 204–262 (209).

60 Gerhard Haney, Ingo Wagner. *Grundlagen der Theorie des sozialistischen Staates und Rechts*. 2nd edition, Part II. Institut für Theorie des Staates und des Rechts, Karl-Marx-Universität Leipzig 1969, p. 1; D.A. Kerimow. Grundfragen der Methodologie zur Erforschung staatlicher und rechtlicher Erscheinungen. – *Staat und Recht* 6 (1957), pp. 868–883 (869, 878 *ff.*).

61 Herbert Hörz. Zur Anwendung der marxistischen Kausalitätsauffassung in der Praxis. – *Neue Justiz* 1966, pp. 137–143 (139).

62 Oberstes Gericht der DDR (24. Februar 1967). – *Neue Justiz* 1967, pp. 288–290.

63 Cf. J. Schröder. *Diktaturen* (see Note 3), p. 108 *f.*

64 W. Siebert. BGB.-System (see Note 59), p. 245. Cf. J. Schröder (*ibid.*), p. 53 *ff.*

65 The scientific system has to correspond to the actual system of legislation: Hans Dietrich Moschütz. Zu den Kriterien des Aufbaus des Systems des sozialistischen Rechts. – *Staat und Recht* 26 (1977), pp. 273–277 (275); Michael Benjamin. Zur Entwicklung des Systems der Staats- und Rechtswissenschaft der DDR. – *Staat und Recht* 26 (1977), pp. 740–750 (740); Karl A. Mollnau. Strukturelle Optimierung des sozialistischen Rechts als Komponente seiner Effektivität - Thesen nebst einigen empirisch-analytischen Anlagen. – Karl A. Mollnau (ed.). *Struktur- und Systemgestaltung des sozialistischen Rechts und ihr Einfluß auf dessen Effektivität. Materialien des V. Berliner Rechtstheoretischen Symposiums*. (East) Berlin 1984, pp. 18–52 (40 *ff.*). Cf. J. Schröder (*ibid.*), pp. 110–113.

https://doi.org/10.12697/JI.2017.26.03

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Das im Generalgouvernement in den Jahren 1939–1945 angewandte materielle Strafrecht

Nach der Beendigung der Kriegshandlungen im Oktober 1939 hat Deutschland eine Teilung der besetzten Territorien des polnischen Staates vorgenommen. Die nördlichen und östlichen Gebiete (u. a. Großpolen, Oberschlesien, Ostpommern) wurden dem Dritten Reich einverleibt. Aus den übrig gebliebenen Gebieten (Kleinpolen, Masowien, Lubliner Region) wurde am 26.10.1939 das Generalgouvernement für die besetzten polnischen Gebiete (hier weiterhin: GG) gebildet. Am 31.07.1940 wurde seine Bezeichnung in das Generalgouvernement geändert. Dieses wurde in vier Distrikte eingeteilt: Warschau, Radom, Lublin und Krakau. Nach dem deutschen Überfall auf die Sowjetunion im Jahre 1941 wurde das GG um das fünfte Distrikt Galizien vergrößert. Das Territorium des GG umfasste 96.000 und ab 1941 145.000 Quadratkilometer. Die gesamte Okkupationsdauer hindurch war Krakau die Hauptstadt des GG, wo der Generalgouverneur Hans Frank in der Wawelburg seinen Sitz hatte.[*1]

Das Generalgouvernement war ein Gebilde von einer unklaren strukturell-rechtlichen Position. Das Schwanken und die Unklarheit sind wahrscheinlich auf die sich verändernden politischen Konzeptionen in den Regierungskreisen des Dritten Reichs zum weiteren Schicksal dieser Gebiete zurückzuführen, die im großen Maße durch die Situation an den Fronten des II. Weltkrieges beeinflusst wurden. Es gibt keine Zweifel, dass das GG tatsächlich der Hoheit des Deutschen Reichs untergeordnet war. Als ein übergeordnetes Ziel der auf diesem Gebiet verwirklichten gesetzgeberischen Gewalt des Okkupanten galt, die Interessen des Reichs zu schützen.[*2]

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1 W. Witkowski, Die Verwaltungsgeschichte in Polen 1764-1989, Warschau 2007, S. 384; Ł. Kozera, M. Wojtasik, Administrative Übersicht über die deutsche Besetzung des Generalgouvernements (Kommentar und Quellentexte), Chełm 2008, S. 4, 9-11; D. Schenk, Hans Frank, Biografie des Generalgouverneurs, Krakau 2009, S. 147, 151; K. Grünberg, B. Otręba, Hans Frank in der Wawelburg, Włocławek 2001, S. 43-45, 47-50; M. Winstone, Generalgouvernement. Ein dunkles Herz Europas unter Hitler, Posen 2015, S. 70-71.

2 Zu den wichtigsten Akten, welche die Fragen der Staatsform neben der Propagandaproklamation von Hans Frank regelten, gehörten: die erste Verordnung über den Verwaltungswiederaufbau der besetzten polnischen Gebiete, die Verordnung über die Sicherheit und Ordnung im Generalgouvernement. Das Verordnungsblatt für die besetzten polnischen Gebiete, S. 1-5 (die vier ersten Nummern wurden in Warschau gedruckt, die nächsten erschienen schon in Krakau). A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit im Generalgouvernement 1939-1945. Organisation und Funktionieren, Lublin 2008, S. 358.

Das Strafrecht soll auf dem Gebiet des GG während des II. Weltkrieges als ein Begriff behandelt werden, der einen vielfältigen Charakter hatte. Im Laufe von kaum einigen Jahren funktionierten auf diesen Territorien mehrere diverse Rechtsordnungen im Bereich des materiellen Strafrechts nebeneinander. Der Besatzer hat sich hier für eine ungewöhnliche Lösung entschieden. Es wurde ein dualistisches Rechtssystem geschaffen. Das Recht des Reichs und die von den deutschen Behörden des GG gesetzten Vorschriften galten als eine Rechtsform und als die andere das in Kraft gelassene polnische Recht, soweit es zu den Interessen der Besatzer nicht im Widerspruch stand. Das Recht der Republik Polen aus den Jahren 1918-1939 war für alle Bürger des polnischen Staats trotz der Okkupation weiterhin geltend und wurde gleichzeitig auch vom sog. Polnischen Untergrundstaat anerkannt. Ergänzend soll hierbei bemerkt werden, dass dieses Recht um die Regelungen erweitert wurde, welche die besonderen Besatzungsverhältnisse berücksichtigen sollten. Bemerkenswert ist gleichfalls, dass sich diese unterschiedlichen Rechtsordnungen häufig überlappt und teilweise sogar miteinander gedeckt haben. Es soll allerdings nicht vergessen werden, dass sie die Rechtssysteme von zwei verfeindeten Staaten waren, die sich deutlich bereits vor dem Kriegsausbruch voneinander unterschieden. Im Laufe der Kriegshandlungen und der Okkupation sollten diese Systeme ganz und gar andersartige Ziele verwirklichen. Am nachdrücklichsten kam es gerade im Bereich des Strafrechts zum Ausdruck, in dem dieselbe Tat von den Justizorganen des einen Staates verfolgt, vom Standpunkt des anderen aber als ein rechtmäßiges oder sogar erwünschtes Verhalten behandelt werden konnte.[*3]

Der vorliegende Beitrag hat es zum Ziel zu unterstreichen, dass die vom deutschen Okkupanten gegenüber polnischen Bürgern auf dem Gebiet des Generalgouvernements in den Jahren 1939-1945 angewandte Politik der Repressionen und Extermination sich nicht nur auf die Handlungen verschiedener Polizeistrukturen und die Errichtung vom Hitlerdeutschland der Konzentrations- und Vernichtungslager beschränkte. Meines Erachtens wurde auch die Gesetzgebung im Bereich des materiellen Strafrechts zur Methode, die Politik der Repressionen und Extermination vom Okkupanten in die Tat umzusetzen.

Es scheint, dass diese Problematik wegen einer Vielfalt von Regelungen im Bereich des in den vom Dritten Reich besetzten einzelnen Gebieten geltenden materiellen Strafrechts die Staatsform- und Rechtshistoriker in verschiedenen europäischen Staaten interessieren kann.

Aufgrund des Hitler-Erlasses vom 12.10.1939 (in Kraft getreten am 26.10.) gestaltete sich eine dualistische Rechtsform im GG. Die Rechtsordnung aus der Vorkriegszeit wurde im Prinzip aufrechterhalten, jedoch unter dem Vorrang des deutschen Rechts vor der polnischen Gesetzgebung. Im GG sollten diese polnischen Rechtsvorschriften gelten, die sich in keinem Widerspruch zur Verwaltungsübernahme vom Deutschen Reich befanden.[*4] In der Praxis hat es sich erwiesen, dass sogar die Funktionäre des Besatzungsapparats sehr viele Zweifel in Bezug auf die Geltungskraft des polnischen Rechts hegten. Diesbezügliche Aufklärung sollte in die Zuständigkeit der Gesetzgebungsabteilung (nachher Gesetzgebungsamt) als eines Organs der Zentralverwaltung des GG fallen.[*5]

Im Bereich des uns hier interessierenden materiellen Strafrechts wurden manche konkreten Vorschriften des polnischen Rechts durch die im GG eingeführten Rechtsakten aufgehoben. Beispielsweise wurde es *expressis verbis* in der „Zollstrafverordnung" vom 24.04.1940 ausgedrückt. „Die widersprechenden Vorschriften des ehemaligen polnischen Steuerstrafrechts vom 3.11.1936 und der ehemaligen polnischen Gesetze über die Zoll-, Verbrauchssteuer- und Monopolgebührenerhebung treten gleichzeitig außer Kraft".[*6] In der Praxis waren im Geltungsbereich des Strafrechts der II. Republik Polen die Okkupationsrealien entscheidend. Jede Strafsache wurde an die deutsche Staatsanwaltschaft verwiesen, von der sie an das Ressort der deutschen Gerichtsbarkeit oder an die offizielle polnische Justiz weitergeleitet wurde. Die Besatzer hielten das eingeschränkte System der polnischen Gerichtsbarkeit aufrecht. Seit dem Anschluss des Distrikts Galizien im Jahre 1943 wurde die amtliche Bezeichnung: nicht-deutsche Gerichtsbarkeit

3 A. Wrzyszcz, Das materielle Recht auf den polnischen Gebieten während des 2. Weltkrieges [in:] *System Prawa Karnego* (Strafrechtssystem), Band 2, *Źródła prawa karnego* (Strafrechtsquellen). Herausgegeben von T. Bojarski, Warschau 2011, S. 161-162. Fragmente dieser Publikation werden nachstehend im vorliegenden Artikel ausgewertet.

4 A. Weh, Das Recht des Generalgouvernements in sachlicher Anordnung mit Erläuterungen und ausführlichem Verzeichnis (dritte Auflage), Krakau 1941, A 100, Der Erlass des Führers und Kanzlers des Deutschen Reichs über die Verwaltung der besetzten polnischen Gebiete vom 12.10.1939 (nachstehend: A 100), § 4.

5 A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit..., S. 344, 354-357.

6 A. Weh, Das Recht des Generalgouvernements..., G 390. Die Verordnung über Strafrecht und Strafverfahren für Ver-brauchssteuer-, Zoll- und Monopolzuwiderhandlungen (Zollstrafverordnung) vom 24.04.1940, § 33, Abs. 3.

gebraucht. Im Rahmen dieses Systems funktionierten die Stadt-, Bezirks- und Appellationsgerichte, die unter Anwendung des polnischen Vorkriegsrechts ihre Urteile fällten.*[7]

Die Normativakten der Zentralorgane des Dritten Reichs

Die dominierende Rechtsordnung im GG war das deutsche Recht. Als Rechtsgrundlage für die deutsche Okkupationsgerichtsbarkeit im GG galt der oben genannte Erlass Hitlers vom 12.10.1939. Der Paragraph 5 dieses Erlasses bestimmte nämlich, dass auf den besetzten polnischen Gebieten neue Rechtsvorschriften in Form von Verordnungen vom Ministerrat für die Reichsverteidigung, dem Bevollmächtigten für den Vierjahresplan und dem Generalgouverneur eingeführt werden sollten.*[8] Vom Ministerrat für die Reichsverteidigung wurden lediglich einige Verordnungen erlassen, die sich auf die Gebiete des GG bezogen (darunter auch die Normativakten, welche das materielle Strafrecht regelten, z. B. die Passstrafverordnung vom 27. Mai 1942, RGBl I, S. 348-350). Der Bevollmächtigte für den Vierjahresplan erließ nur eine auf dem Gebiet des GG geltende Verordnung. Es soll nicht vergessen werden, dass weiterhin der Kanzler des Deutschen Reichs der wichtigste Gesetzgeber blieb und im Laufe der folgenden Jahre seine Normativakten in großer Menge erschienen. Während der Okkupation wurden für GG auch solche Normativakten in Kraft gesetzt, die von sonstigen Zentralorganen des Dritten Reichs wie Innenminister, Justizminister, Arbeitsminister, Finanzminister, Rüstungsminister, Hauptbevollmächtigter für die Verwaltungsangelegenheiten des Reichs und Hauptbevollmächtigter für Arbeit erlassen wurden. Aufgrund einer Sondervollmacht von Hitler erschien eine vom Reichsminister und Chef der Reichskanzlei, Chef des Oberkommandos der Wehrmacht und Leiter der Parteikanzlei unterzeichnete Verordnung. Im Jahre 1942 erschienen ziemlich viele Bekanntmachungen des Verkehrsreichsministers, die das Distrikt Galizien betrafen. Die von den Zentralorganen des Deutschen Reichs für das Generalgouvernement erlassenen Normativakten beinhalteten öfters eine nachdrückliche Bestimmung betreffend die Geltungskraft auf dem Gebiet des GG und am häufigsten wurden sie parallel in Deutschland und im GG publiziert. Sie wurden im Reichsgesetzblatt beziehungsweise in anderen amtlichen Massenmedien in Deutschland (z. B. im Reichsarbeitsblatt) sowie im Verordnungsblatt für das Generalgouvernement veröffentlicht (darunter auch die Normativakten, welche das materielle Strafrecht regelten, z. B. die Verordnung über die Ausübung der Dienststrafgewalt in den neuen Gebieten vom 3. Januar 1943, RGBl I, S. 1-2). Zusammenfassend lässt sich sagen, dass die Gesetzgebung der deutschen Zentralorgane gegenüber dem GG jedoch nicht allzu reichlich war und keinen Charakter von einer komplexen, geregelten Konzeption der Rechtssetzung trug. Es soll eher konstatiert werden, dass es Übergangshandlungen waren, die man auf das Gebot der Stunde zurückführen kann. Eindeutig intensiver und komplexer war die gesetzgeberische Tätigkeit der Behörden des GG.*[9]

Die Normativakten der Organe des Generalgouvernements

Von den durch den Generalgouverneur erlassenen Normativakten sollen Proklamationen, Dekrete und vor allem die am häufigsten angewandten Verordnungen genannt werden. Die Proklamationen hatten einen politisch-propagandistischen Charakter, die Dekrete bezogen sich vor allem auf Staatssystemfragen, wobei die Verordnungen Gesetze ersetzten und das System des geltenden Rechts schaffen sollten (der

[7] A. Wrzyszcz, Zur Organisation der polnischen Okkupationsgerichtsbarkeit im Generalgouvernement in den Jahren 1939-1945, *Zeszyty Majdanka* (Majdanek-Hefte), Bd. XIV, 1992, S. 114-117. Siehe auch die Memoiren des Richters Remigiusz Moszyński aus der Zeit der deutschen Okkupation in Polen in den Jahren 1939-1945, Tagebuch 1939-1945. Der Krieg und die Okkupation in Lublin in den Augen der Erwachsenen und Kinder, Bearbeitung und Vorwort vom Priester E. Walawander, Wissenschaftliche Gesellschaft der KUL, Lublin 2014.

[8] A. Weh, Das Recht des Generalgouvernements..., A 100, § 5; Reichsgesetzblatt 1939 I, S. 2077-2078; F. W. Adami, Die Gesetzgebungsarbeit im Generalgouvernement. Ein Überblick über die bisher geleistete Aufbauarbeit – „Deutsches Recht" 1940, S. 604.

[9] A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit..., S. 346-349.

Generalgouverneur erließ viele Verordnungen, welche die Vorschriften des materiellen Strafrechts beinhalteten. Ich analysiere sie im Nachfolgenden im vorliegenden Beitrag). Bereits seit Beginn der Existenz des GG musste Frank eine starke Position der Polizeibehörden respektieren, das sich auch auf den Bereich der Rechtssetzung beziehen sollte. Im Paket der Rechtsakten vom 26.10.1939 fand sich die Verordnung des Generalgouverneurs, die dem höheren Befehlshaber der SS und der Polizei im GG das Recht einräumte, Verordnungen zu erlassen. Es wurde zwar betont, dass in Angelegenheiten vom grundsätzlichen Belang der höhere Befehlshaber der SS und der Polizei die Einwilligung von Frank erhalten sollte, dagegen durfte er die sonstigen, für die Ordnungshaltung und Sicherheit erforderlichen Verordnungen ganz selbstständig erlassen. Die Polizeiverordnungen, die auf dem Gebiet des ganzen Generalgouvernements gelten sollten, wurden im Verordnungsblatt veröffentlicht. Bei Verordnungen mit der territorial beschränkten Zuständigkeit wurden andere Bekanntmachungsweisen zugelassen.[*10] Die Rolle eines amtlichen Mediums erfüllte das „Verordnungsblatt des Generalgouverneurs für die besetzten polnischen Gebiete", das seit dem 31.10.1939 parallel im GG und im Reich herausgegeben wurde. Am 1. September 1940 wurde dieser Name in „Verordnungsblatt für den Generalgouverneur" geändert.

Zu den wichtigsten Verordnungen, welche die Strafvorschriften enthielten, gehörten die Verordnungen zur Bekämpfung von Gewalttaten vom 31.10.1939, Verordnung über die Sondergerichte vom 15.10.1939, Verordnung über die polnische Gerichtsbarkeit vom 19.02.1940, Verordnung über die deutsche Gerichtsbarkeit vom 19.02.1940,[*11] Verordnung über den Waffenbesitz im Generalgouvernement vom 26.11.1941 und die zweite Verordnung zur Bekämpfung von Gewalttaten im Generalgouvernement vom 26.11.1941, ebenso die Verordnung zur Bekämpfung von Angriffen gegen das deutsche Aufbauwerk vom 2.10.1943.[*12] Es soll hier unterstrichen werden, dass sich in zahlreichen sonstigen Normativakten als „Strafvorschriften" betitelte Fragmente befanden.

Das Nebeneinander der deutschen und polnischen Gerichtsbarkeit

Das im Generalgouvernement geltende deutsche Recht unterschied sich deutlich vom Rechtssystem des nationalsozialistischen Dritten Reichs. In der Literatur wurde hervorgehoben, dass das Reichsrecht nicht automatisch im GG in Kraft trat.[*13] Die vorstehend erörterten formellen Grundlagen der Rechtssetzung scheinen, diese These zu bekräftigen. Es soll dennoch nicht vergessen werden, dass als ein glaubwürdiger Test der Wirksamkeit eines Rechtssystems nur die Analyse seiner praktischen Anwendung von den Staatsorganen und vor allem von den Gerichten dienen kann. Im GG waren es einerseits die deutsche Gerichtsbarkeit und daneben die nach dem Recht der II. Republik Polen erkennende polnische bzw. nicht-deutsche Gerichtsbarkeit. In der die deutsche Gerichtsbarkeit einführenden Verordnung wurde eindeutig betont, dass sowohl im Bereich der Straf- als auch der Zivilgerichtsbarkeit die Vorschriften des deutschen materiellen sowie des Verfahrensrechts anzuwenden sind. Nach der Bearbeitung der Akten von mehreren Gerichten habe ich festgestellt, dass in der deutschen Gerichtsbarkeit im GG ohne keinerlei Zweifel eine folgende Rangordnung der verschiedenen Rechtsmassen galt: 1. das im GG gesetzte Recht, 2. das Recht des Deutschen Reichs, 3. die für die als GG anderen von den Deutschen besetzten Gebiete eingeführten Akten.[*14]

Im GG wurden die von der deutschen Staatsanwaltschaft vorgenommenen Verteilungskriterien der Strafsachen zwischen die deutsche und die polnische (nicht-deutsche) Gerichtsbarkeit durch nicht veröffentlichte Rundschreiben des Justizressorts des GG geregelt. In der Praxis wurden die ernsten Strafsachen von der deutschen Gerichtsbarkeit behandelt. Der polnischen Jurisdiktion unterlagen vor allem die geringfügigen Straftaten, die ohne Anwendung von Waffen oder sonstigen gefährlichen Werkzeugen begangen

10 Ebenda, S. 350.

11 A. Weh, Das Recht des Generalgouvernements ..., C 105, Die Verordnung über die Sondergerichte im Generalgouvernement vom 15.11.1939, C 120, Die Verordnung über die deutsche Gerichtsbarkeit im Generalgouvernement vom 19.02.1940, C 150, Die Verordnung über die polnische Gerichtsbarkeit im Generalgouvernement vom 19.02.1940, (nachstehend C 150); C 305, Die Verordnung zur Bekämpfung von Gewalttaten im Generalgouvernement vom 31.10.1939 (nachstehend C 305).

12 Das Verordnungsblatt für das Generalgouvernement (nachstehend VbGG), 1941, S. 662-663, S. 663-664, 1943, S. 589-590.

13 K. M. Pospieszalski, Das nationalsozialistische „Okkupationsrecht" in Polen, Teil II, Generalgouvernement, Auswahl von Urkunden und Versuch einer Synthese, Posen 1958; S. 37.

14 A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit..., S. 382.

wurden, also Schlägereien, Fälschungen u. dgl.[*15] Diese Gerichte fällten ihre Urteile aufgrund des Strafrechts der II. Republik Polen (vor allem das Strafgesetzbuch von 1932).

Wie oben erwähnt, wurde von der deutschen Gerichtsbarkeit das deutsche Recht unter Berücksichtigung der von Nazis in dieser Beziehung durchgesetzten Änderungen sowie der bereits während des Kriegs eingeführten Vorschriften angewandt.[*16] Auf dem Gebiet des GG galt hingegen die Verordnung vom 4.12.1941 über die Strafgerichtsbarkeit für die Polen und Juden auf den einverleibten Ostgebieten nicht.[*17]

Die Verschärfung des Strafrechts im GG

Durch die speziell für das GG errichtete Gesetzgebung wurden neue Lösungen betreffend die Institution der Straftat eingeführt. Ähnlich wie im Dritten Reich wurde der Grundsatz *lex retro non agit* nicht respektiert, die Gesetze konnten auch gegen das Rückwirkungsverbot angewandt werden.

Um die Rechtsmäßigkeit der Entscheidungen der polnischen Gerichte zu kontrollieren, wurde die Institution des sog. Nachprüfungsrechts eingeführt. Die Ankündigung einer solchen Form der Kontrolle fand sich bereits in der Verordnung über den Aufbau der Rechtspflege vom 26.10.1939 und genau präzisiert wurde sie in der Verordnung über die polnische Gerichtsbarkeit vom 19.02.1940. Die Nachprüfung eines Urteils wurde vom Leiter der Justizabteilung im gegebenen Distrikt beim deutschen Obergericht innerhalb von 6 Monaten ab dessen Rechtskraft beantragt. Als Voraussetzung galt ein Verstoß gegen das öffentliche Interesse. Das deutsche Obergericht konnte die Entscheidung genehmigen oder sie aufheben. Beim letztgenannten Fall sprach es das Urteil selbst oder verwies die Sache an die deutsche Gerichtsbarkeit, und wenn es eine Zivilsache war, erhielt sie das deutsche Gericht, bei einer Strafsache war es das Sondergericht.

Charakteristisch für die Strafrechtslage im GG war die Tatsache, dass das Nachprüfungsrecht rückwirkend in Kraft treten konnte. Sämtliche Urteile der polnischen Gerichte, die nach dem 31. Juli 1938 rechtskräftig wurden, konnten überprüft werden. Von diesem für die Polen sowieso ungünstigen Grundsatz wurde noch eine weitgehende Ausnahme gemacht. Bei besonders relevanten Fällen, wenn die Entscheidung das Interesse der deutschen Nation verletzte, konnte die Entscheidung überprüft werden ohne jegliche Rücksicht auf die Zeit, die seit Datum seiner Rechtskraft verflossen war. Den Entschluss über die Nachprüfung der Entscheidung konnte in derartiger Situation vom Leiter des Justizressorts im GG gefasst werden.[*18]

Ein fundamentaler Normativakt aus dem Bereich des materiellen Strafrechts war die Verordnung zur Bekämpfung von Gewalttaten vom 31.10.1939. Bereits zu Beginn des Bestehens des GG wurde ein Katalog von Sachverhalten abgesondert, die für die Interessensicherung des Besatzers am wesentlichsten waren. Zu ihnen wurden gezählt:

- Gewalttaten gegen das Reich und gegen die deutschen Behörden im GG;
- vorsätzliche Beschädigung von Einrichtungen der deutschen Behörden und ihren Arbeitseinrichtungen oder Einrichtungen der Gemeinnützigkeit;
- Aufforderung oder Ermunterung zum Ungehorsam gegenüber Verordnungen oder Anordnungen der deutschen Behörden;
- Gewalttaten gegen die Deutschen wegen ihrer Zugehörigkeit zur deutschen Nation;
- vorsätzliche Brandstiftung von Vermögen der Deutschen".

15 J. Mazurkiewicz, L. Policha, Die Geschichte der Lubliner Gerichtsbarkeit in den Jahren 1915-1944, Typoskript am Lehrstuhl für Staats- und Rechtsgeschichte der UMCS Lublin, S. 46-49; J. Szarycz, Richter und Gerichte in Polen in den Jahren 1918-1988, Justizministerium, Institut für Untersuchung des Gerichtsrechts, Warschau 1988, S. 33-37; Z. Mańkowski, Zwischen der Weichsel und dem Bug, Studie zur Politik des Besatzers und Haltungen der Gesellschaft, Lublin 1982, S. 139-140; A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit..., S. 106.

16 Z. B. die Verordnung über die öffentlichen Schädiger vom 5.09.1939; die Verordnung über die außerordentlichen Maßnahmen im Bereich des Rundfunks vom 1.09.1939; die Verordnung über die Kriegswirtschaft vom 4.09.1939 u. a.; A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit..., S. 376-378.

17 Cz. Madajczyk, Die Politik des Dritten Reichs im besetzen Polen, Bd. II, Warschau 1970, S. 245-254; D. Majer, „Fremdvölkische" im Dritten Reich. Beitrag zur nationalsozialistischen Gesetzgebung und Rechtspraxis in der Verwaltung und Justiz unter besonderer Berücksichtigung der ins Reich und Generalgouvernement eingegliederten Gebiete, Warschau 1989, S. 328; A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit..., S. 384-386.

18 A. Weh, Das Recht des Generalgouvernements..., C 100, Die Verordnung über den Aufbau der Rechtspflege im Generalgouvernement vom 26.10.1939; §§ 3; C 150, 16-18; G. Moritz, Die Gerichtsbarkeit in besetzten Gebieten. Historische Entwicklung und völkerrechtliche Würdigung, Tübingen 1959, S. 79.

Die Verantwortung trugen ebenfalls die Gehilfen und Anstifter. Strafbar war auch der Versuch von diesen Taten, wobei der Begriff eines Versuchs weit konzipiert wurde. „Wer sich verabredet, eine Straftat zu begehen, wer zu diesem Zweck mit Anderen zu einer Einigung kommt, wer die Verübung einer Straftat anbietet oder ein solches Angebot annimmt". Die Strafbarkeit bezog sich auch auf Personen, die von der Begehungsabsicht der genannten Straftaten erfahren hatten und davon die Behörden beziehungsweise die gefährdete Person nicht in Kenntnis gesetzt haben.[*19]

Die Verordnung über den Waffenbesitz vom 12.09.1939, also noch aus der Zeit vor der Gründung des GG, sollte Personen betreffen, die Waffen, Munition, Handgranaten, Sprengstoffe oder sonstige Kriegsausrüstung besaßen. Die Vorschriften jener Verordnung wurden im GG gleichfalls aufrechterhalten und entsprechend erweitert: „Wer eine Nachricht über einen illegalen Waffenbesitz von einer anderen Person erhält und die Benachrichtigung der Behörden darüber unterlässt, unterliegt einer Strafe".[*20]

Während der Okkupation konnte die Übertragung der Lösungen im Bereich des materiellen Strafrechts des Dritten Reichs ins GG passieren. Die einfachste Methode waren die Verordnungen von Hitler, die sowohl im Reich wie auch im GG rechtskräftig wurden (sie wurden auch im Verordnungsblatt des Generalgouvernements veröffentlicht).[*21] Eine andere Art war die Gesetzgebung des Generalgouverneurs, welche die Rechtsänderungen in Deutschland berücksichtigte. Dies bezieht sich zum Beispiel auf die Einführung der aus dem III. Reich bekannten Konstruktion „eines Gewohnheitstäters". Die „so streng oder so viel mal verurteilten Verbrecher, dass sie als eine ständige Gefahr für die Allgemeinheit anzusehen sind", konnten von der polnischen (nicht-deutschen) Gerichtsbarkeit „zur Sicherung festgehalten" oder von den deutschen Sondergerichten sogar zum Tode verurteilt werden, wenn es aus Rücksicht auf „den Schutz der Allgemeinheit oder das Bedürfnis einer gerechten Vergeltung" gemacht wurde. In den Realien des GG bedeutete es die Möglichkeit, die fundamentalen Grundsätze der Gesetzmäßigkeit zu brechen, und auch auf diesem Grund die rechtskräftigen Urteile der polnischen Gerichte (sogar diese aus der Vorkriegszeit) anzufechten.[*22]

Ähnlich wie im Deutschen Reich wurde gegen Ende des Krieges die Verallgemeinerung der strafrechtlichen Verantwortlichkeit für sämtliche Überschreitungen der im GG geltenden Vorschriften eingeführt. Strafbar war aufgrund der Verordnung vom 2.10.1943 die Verletzung von Gesetzen, Verordnungen, Anordnungen und Verfügungen der Behörden mit der Absicht, „das deutsche Aufbauwerk im Generalgouvernement" zu erschweren oder es zu behindern. Dies galt ebenfalls für den Versuch; die Verantwortung trugen auch die Gehilfen und Anstifter.[*23]

Im Generalgouvernement wurden sogar einige hundert Normativakten (sie stellten *leges speziales* im Verhältnis zu dem polnischen und dem deutschen Strafgesetzbuch dar) erlassen, in denen die Handlungen für strafbare Taten erklärt wurden, die unter normalen Umständen außerhalb des Regelungsbereichs des Strafrechts bleiben. Eine weit ausgebaute Pönalisierung betraf solche Gebiete wie Kulturtätigkeit, Arbeit und Vereinsaktivität.[*24]

Die Definitionen der Sachverhalte wurden oft nach einem konstanten Muster geregelt. Eine Standardformel hatte folgenden Wortlaut: „Wer es unternimmt, den Vorschriften dieser Verordnung zuwiderzuhandeln, wird bestraft".[*25]

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19 A. Weh, Das Recht des Generalgouvernements..., C 305, § 1-9.

20 Ebenda, § 10; C 300, Die Verordnung des Oberbefehlshabers des Heeres über Waffenbesitz vom 12. September 1939, § 2-3. Die Vorschriften über Waffenbesitz wurden am 26.11.1941 nachpräzisiert (u. a. wurde die Verantwortung der Deutschen und der anderen GG-Einwohner differenziert, berücksichtigt wurde die Institution der tätigen Reue). VbGG, S. 662-663.

21 Die Verordnung zum Schutz der Sammlung von Wintersachen für die Front vom 23.12.1941, VbGG 1942, S. 9; Verordnung des Führers zum Schutze der Rüstungswirtschaft vom 21.03.1942, VbGG, S. 250. Die darin eingeschlossenen Sachverhalte führten die Strafbarkeit der gegen die Sammlung von Wintersachen für die Front gerichteten Handlungen sowie die Gefährdung von Interessen der Rüstungswirtschaft des Reichs ein. W. Wolter, Das aufgezwungene Strafrecht auf dem Gebiet des sog. Generalgouvernements vom nationalsozialistischen Angreifer [in:] Expertisen und Entscheidungen vor dem Obersten Volksgerichtshof, ausgewählt und zur Veröffentlichung vorbereitet von Cz. Pilichowski, Bd. II, Warschau 1979, S. 335, 339-340.

22 Die Verordnung zum Schutz gegen Schwer- und Gewohnheitsverbrecher vom 20.03.1942, VbGG, S. 143; W. Wolter, Das aufgezwungene Strafrecht..., S. 286-287.

23 Diese Verantwortung trugen die Deutschen, dagegen die Bürger der mit dem III. Reich allierten sowie der neutralen Staaten nicht. Im Vergleich mit dem Dritten Reich und den Bürgern der oben genannten Staaten war die strafrechtliche Verantwortlichkeit der Polen verschärft. Die Verordnung zur Bekämpfung von Angriffen gegen das deutsche Aufbauwerk im Generalgouvernement vom 2.10.1943, VbGG, S. 589-590.

24 W. Wolter, Das aufgezwungene Strafrecht..., S. 301-306.

25 Z. B. die Verordnung über die Beschlagnahme von Einrichtungen und Gegenständen der Mineralölwirtschaft vom 23.01.1940, VbGG, S. 21; Die Verordnung über die Beschlagnahme von privaten Vermögen vom 24.01.1940, VbGG, S. 23 und viele andere.

Darüber hinaus gab es noch eine bequeme Lösung, die darin bestand, dass Sachen aus dem Strafverwaltungsverfahren an das Strafverfahren verwiesen wurden. Am häufigsten wurde folgende Generalklausel angewandt: „a) Die Nichtbefolgung dieser Verordnung wird im Strafverwaltungsverfahren bestraft; b) wenn die Bestrafung im Rahmen dieses Verfahrens nicht ausreichend zu sein scheint, soll die Sache der deutschen klagenden Behörde überlassen werden (seit 1943 wurde der Name: deutsche Staatsanwaltschaft benutzt)“.[*26]

Die Differenzierung unter den Personenkreisen

Ein charakteristisches Merkmal des materiellen Strafrechts im GG, das jenes von anderen von dem Dritten Reich annektierten Gebieten unterschied, war nicht nur die Aufrechterhaltung des privilegierten Status der Deutschen, sondern auch die Differenzierung der rechtlichen Stellung der Polen und Juden. Seinen Ausdruck fand es in den bereits im Jahre 1939 erlassenen Normativakten. Die für die Juden erlassenen Vorschriften enthielten weiterreichende Gebote und Verbote und sahen deutlich schärfere Sanktionen für ihre Verletzungen vor. Als Beispiel können die Vorschriften über die Einführung der Arbeitspflicht für die polnische Bevölkerung des GG dienen. Für die Juden wurde an demselben Tag eine besondere Verordnung über die Einführung des Arbeitszwangs erlassen, die noch strengere Regelungen enthielt.[*27] Im legislativen Wege wurden die Juden der persönlichen Freiheit, des Eigentums, der Freiheit der Berufswahl, des Anspruchs auf die Bildung, der Freiheit der Wohnsitzwahl, der Bewegungsfreiheit, darin der Auslandsreise beraubt. Es wurde sogar das Verbot eingeführt, den Wohnort zu verlassen.[*28] Seit Mitte des Jahres 1941 wird die Zahl der ausschließlich für die jüdische Bevölkerung erlassenen Gesetzgebungsakten drastisch reduziert. Möglicherweise ist es auf die steigenden Kompetenzen von Himmler in Bezug auf die geplante Extermination der Juden zurückzuführen.[*29]

Das polnische Recht im Generalgouvernement

Von den Besatzern aufrechterhaltenes polnisches Recht erfuhr in Bezug auf das System der sich aus dem Strafgesetzbuch von 1932 ergebenden Strafen keine Veränderungen. Die Besatzer haben allerdings die Urteilsfindungsfreiheit der polnischen Richter beschränkt. Es wurden die bisherigen Kompetenzen der polnischen Gerichte beschränkt, weil sie von den Okkupationsbehörden des GG-Justizressorts als Berechtigungen vom Charakter des Gnadenrechts angesehen wurden. Die Behörden des Justizressorts haben erklärt, dass die polnischen Gerichte nicht mehr über das Recht verfügen, auf die Verurteilung zur Bewährung oder bedingte Haftentlassung zu erkennen, weil diese als Gnadenakte zu betrachten waren. Die außerordentliche Strafmilderung wurde jedoch anders behandelt, denn sie wurde als eine Institution betrachtet, die sich aufs Strafmaß und nicht auf das Gnadenrecht bezieht. Bei dem in manchen Fällen dem Gericht zustehenden Rücktrittsrecht von der Strafverhängung trotz des Schuldigsprechens haben sich die Besatzer das Entscheidungsrecht vorbehalten.[*30]

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26 W. Wolter, Das aufgezwungene Strafrecht..., S. 271.

27 A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit..., S. 365-367.

28 W. Uruszczak, Das Rechtserbe des 20. Jahrhunderts mit Augen eines Rechtshistorikers. Das fremde, eigene, rechtschaffene und das schändliche Recht {in:] Das Rechtserbe des 20. Jahrhunderts. Das Gedenkbuch aus Anlass des 150-jährigen Jubiläums der Gesellschaft von Jurahörern der Jagiellonen-Universität, Redaktionskomitee: A. Zoll, J. Stelmach, J. Halberda, *Kantor Wydawniczy* (Verlag) Zakamycze 2001, S. 92.

29 In den Jahren 1941-1942 waren die Polizeiverordnungen des SS- und Polizei-Oberbefehlshabers Krüger, der Himmler unterstellt war, von höchster Bedeutung. Sie regelten die Bildung von jüdischen Wohnvierteln in genannten Ortschaften in allen fünf Distrikten des GG. Die Polizeiverordnung über die Bildung von Judenwohnbezirken in den Distrikten Warschau und Lublin vom 28.10.1942, VbGG, S. 665-666 und die Verordnung über die Bildung von Judenwohnbezirken in den Distrikten Radom, Krakau und Galizien vom 10.11.1942, VbGG, S. 683-686.

30 A. Weh, Das Recht des Generalgouvernements..., C 150, § 3; A. Wrzyszcz, Die deutsche Okkupationsgerichtsbarkeit..., S. 207-208.

Das Sanktionensystem

Die im Dritten Reich innerhalb des Strafsystems vorgenommenen Änderungen waren selbstverständlich im Gerichtswesen des GG respektiert. In den im GG eingeführten Strafvorschriften wurde der folgende Katalog der Strafen in Anspruch genommen: Todesstrafe, schwere Gefängnisstrafe, Gefängnisstrafe, Geldstrafe, Strafe der Vermögensbeschlagnahme (sie konnte getrennt oder als Zusatzstrafe verhängt werden). Zu den Zusatzstrafen wurden folgende Strafen gezählt: ständiges oder zeitweise beschränktes Berufsverbot (es betraf die Ärzte), Zwangsarbeit im Walde. Es bestand ebenso die Möglichkeit, auf die Bußzahlung zugunsten des Geschädigten zu verurteilen. Den im Generalgouvernement erlassenen Gesetzgebungsakten lagen die deutschen Lösungen (unter anderem die im polnischen Strafgesetzbuch unbekannte Einteilung in Gefängnisstrafe und schwere Gefängnisstrafe) zugrunde, obwohl für das GG spezifische Tendenzen zu bemerken sind, die sich aus politischen Zwecken der Nazis ergaben, welche die maximale wirtschaftliche Ausbeutung der besetzten zentralpolnischen Gebiete und die Durchführung auf diesen Gebieten der intensivsten Ausrottung der jüdischen Bevölkerung bedeuteten.

Es soll hervorgehoben werden, dass die Behörden des Dritten Reichs ebenfalls die Konzeption der Ordnungshaltung auf dem Gebiet des GG nur mit Hilfe von polizeilichen Zwangsmaßnahmen erwogen hatten. Für die lokale Bevölkerung hätte dies die absolute Beraubung irgendeines Rechtssystems bedeutet. Vorwiegend aus wirtschaftlichen Gründen wurde diese Konzeption jedoch abgelehnt. Das GG sollte zum Objekt der Ausbeutung seitens des Reichs werden und im Zusammenhang damit wurde die Anwendung von ausschließlich Polizeimaßnahmen als unzulässig anerkannt, weil sie ein normales Funktionieren des wirtschaftlichen Lebens unmöglich gemacht hätten.*[31] Die Oberhand gewann die Ansicht, dass die Errichtung eines dualistischen Rechtssystems praktischer wird, das allerdings aufgrund der drastisch strengen Strafrechtsvorschriften Recht sprechen sollte. Die oben erwähnten und in der fundamentalen Verordnung zur Bekämpfung von Gewalttaten vom 31.10.1939 (§ 1-9) genannten Sachverhalte waren mit obligatorischer Todesstrafe bedroht.*[32] Vom Umfang einer drakonischen Pönalisierung im GG bezeugt die Tatsache, dass diese Strafe (obligatorisch, oder fakultativ) noch in beinahe 30 im Verordnungsblatt des Generalgouvernements veröffentlichen Normativakten vorgesehen war. In diesen Vorschriften wurden Sachverhalte geregelt, die sogar im Reich mit dem höchsten Strafmaß nicht bedroht waren.*[33] Vom wesentlichsten Belang war die oben erwähnte Verordnung zur Bekämpfung von Angriffen gegen das deutsche Aufbauwerk im Generalgouvernement vom 2.10.1943, durch welche die strafrechtliche Verantwortlichkeit für sämtliche Überschreitungen der im Generalgouvernement geltenden Vorschriften ausgedehnt und mit der Todesstrafe bedroht wurde. Das spektakulärste Beispiel betrifft die Verurteilung der Juden zum Tode, wenn sie in die Ghettos nicht übersiedelten oder deren Grenzen verließen. Mehr noch, mit Todesstrafe wurden alle bedroht, die ihnen Zuflucht gewährten, insbesondere wenn sie die Juden außerhalb der Ghettogrenzen unterbrachten, sie fütterten oder versteckten.*[34]

In keinem der besetzten Länder haben die Deutschen so repressive Vorschriften eingeführt. Die Wirtschaftsinteressen des Besatzers dienten hierbei als Grundlage der Pönalisierung jeglichen Widerstands gegen die Übernahme der Agrarprodukte von den GG-Behörden (und insbesondere der Sabotage von obligatorischen Agrarkontingenten). Die mit der Todesstrafe drohenden Verordnungen wurden im GG dreifach

[31] D. Majer, „Fremdvölkische"..., S. 318-319.

[32] A. Weh, Das Recht des Generalgouvernements..., C 305, § 1-9.

[33] Im Generalgouvernement war die Verletzung von folgenden Vorschriften mit der höchsten Strafe bedroht: Verordnungen über die Bekämpfung der Geschlechtskrankheiten vom 22.02.1940, A. Weh, Das Recht des Generalgouvernements..., B 520; Verordnungen zum Schutze des Waldes und Wildes vom 13.04.1940; A. Weh, Das Recht des Generalgouvernements..., B 670; Verordnungen über die Meldepflicht polnischer Offiziere vom 31.07.1940; A. Weh, Das Recht des Generalgouvernements..., A 316; Verordnungen über den Feuerschutz vom 22.04.1941, VbGG, S. 227; Verordnungen gegen den Missbrauch von Uniformen vom 9.05.1941, VbGG, S. 278; Verordnungen über den Luftschutz vom 22.04.1941, VbGG, S. 341; Anordnungen über die Einführung der Verdunkelung vom 26.06.1941, VbGG, S. 394; Verordnungen über Waffenbesitz vom 26.11.1941, VbGG, S. 662; Verordnungen des Führers zum Schutz der Sammlung von Wintersachen für die Front vom 23.12.1941, VbGG 1942, S. 9; Verordnungen zum Schutz gegen Schwer- und Gewohnheitsverbrecher vom 20.03.1942, VbGG 1942, S. 143; Verordnungen über die Arbeit mit lebendigen Krankheitserregern vom 13.01.1944, VbGG, S. 26; Polizeiverordnungen über die Nutzung von Personenwagen und Motorrädern in der Stadt Warschau vom 2.02.1944, VbGG, S. 45; Verordnungen über den Gifthandel vom 13.01.1944, VbGG, S. 72; Verordnungen über die Sprengstoffe vom 31.05.1944, VbGG, S. 194; Verordnungen zum Schutze der Befestigungseinrichtungen vom 3.09.1944, VbGG, S. 245 u. a.

[34] Die Polizeiverordnung über die Bildung von Judenwohnbezirken in den Distrikten Warschau und Lublin vom 28.10.1942, VbGG, S. 665-66, § 2-3 und die Polizeiverordnung über die Bildung von Judenwohnbezirken in den Distrikten Radom, Krakau und Galizien vom 10.11.1942, VbGG, S. 683-686, § 2-3.

(1942, 1943, 1944) wiederholt, wobei die strafbaren Sachverhalte im Verhältnis zum Muster vom 1942 in den nächsten Jahren bedeutend erweitert wurden. Verlängert wurde ebenfalls die Dauer des Ausnahmezustands für die Übernahme der Agrarprodukte. Im Jahr 1942 war dies für den Zeitraum vom 1.08. bis 30.11. bestimmt; für die Jahre 1943 und 1944 dagegen für denjenigen vom 15.07 bis 20.12.).*[35] Als Bestandteil einer maximalen materiellen Ausbeutung der Bevölkerung soll die sehr häufige Bedrohung mit der Geldstrafe in unbeschränkter Höhe (so in über 60 Normativakten) und verschiedenen Beschlagnahmearten (in über 30 Normativakten) genannt werden.*[36]

Es soll darauf hingewiesen werden, dass Himmler neben dem System des Strafrechts und dem Justizapparat im GG noch die ihm direkt untergeordneten Konzentrations- und Vernichtungslager zur Verfügung hatte. Die Deportation in die Lager gehörte nicht zum Katalog der im Strafrecht vorgesehenen Strafen, aber aus Sicht der Gefangenen konnte sie als eine der empfindlichsten Sanktionen angesehen werden.*[37]

Das Strafrecht des Polnischen Untergrundstaates

Auf dem Gebiet des Generalgouvernements galten und kamen die Vorschriften des Strafrechts zur Anwendung, die in der Zeit des Funktionierens des Polnischen Untergrundstaates (polnisch: *Polskie Państwo Podziemne*) eingeführt wurden. Es ist zu unterstreichen, dass die Bildung und die Tätigkeit des Polnischen Untergrundstaates während des II. Weltkrieges, meiner Meinung nach, ein absolut einmaliges Phänomen in den europäischen Realien der Jahre 1939-1945 war. In keinem der anderen Länder gelang es, einen so allumfassenden und geheimen Staatsapparat zu gestalten).*[38] Die Verschwörungsgerichte des Polnischen Untergrundstaates (sowohl Militär- wie auch ordentliche Gerichte) erkannten aufgrund der Vorschriften des in der Republik Polen noch vor dem Ausbruch des II. Weltkrieges geltenden materiellen Strafrechts. Sie wendeten jedoch auch neue Regelungen an, die von den Organen des Polnischen Staates in den Jahren 1939-1945 in Erwiderung der außerordentlichen Kriegs- und Okkupationsrealien eingeführt wurden. Aus Rücksicht auf die Tatsache, dass der Polnische Untergrundstaat nicht nur auf dem Gebiet des GG, sondern auch auf allen vom Dritten Reich annektierten polnischen Gebieten sowie auf den östlich der GG-Grenzen gelegenen Territorien funktionierte, soll diese Problematik in einer separaten Bearbeitung präsentiert werden.*[39]

[35] Die Verordnung zum Schutze der Ernteerfassung vom 11.07.1942, VbGG, S. 409, § 1, 2; Die Verordnung zum Schutze der Ernteerfassung und zur Ernährungssicherung im Wirtschaftsjahr 1943/1944 vom 14.07.1943, VbGG, S. 320, § 1, 2; Die Verordnung zum Schutze der Ernteerfassung und zur Ernährungssicherung im Wirtschaftsjahr 1944/1945 vom 13.07.1944, VbGG, S. 208, § 1, 2.

[36] A. Wrzyszcz, Das materielle Strafrecht..., S. 182.

[37] In der Strafgesetzgebung des Generalgouvernements kann man nur einige Beispiele finden, in denen enigmatische Formulierungen über die Übertragung der Kompetenzen den Polizeiorganen (Festnahme zwecks Sicherung) verwendet wurden. Die Verordnung zum Schutze gegen Schwer- und Gewohnheitsverbrecher vom 20.03.1942, VbGG, S. 143; (Anwendung der polizeilichen Sicherheitsmaßnahmen) Die Polizeiverordnung über die Bildung von Judenwohnbezirken in den Distrikten Warschau und Lublin vom 28.10.1942, VbGG, S. 665-666, § 3 und die Polizeiverordnung über die Bildung von Judenwohnbezirken in den Distrikten Radom, Krakau und Galizien vom 10.11.1942, VbGG, S. 683-686, § 3.

[38] Siehe z. B. S. Korboński, Der Polnische Untergrundstaat. Ein Führer durch den Untergrund aus den Jahren 1939-1945, Philadelphia, [ohne Datum der Ausgabe 1983?]; S. Salmonowicz, Der Polnische Untergrundstaat. Aus der Geschichte des bürgerlichen Kampfes, Warschau 1994; T. Strzembosz, Die Untergrundrepublik Polen. Die polnische Gesellschaft und der Untergrundstaat 1939-1945, Warschau 2000; G. Górski, Der Polnische Untergrundstaat 1939-1945, Thorn 1998 und sehr zahlreiche sonstige Bearbeitungen.

[39] A. Wrzyszcz, Das materielle Strafrecht..., S. 168-170, 177-178, 184.

https://doi.org/10.12697/JI.2017.26.04

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A Look at the European Court of Human Rights Case Law on Moral Issues and Academic Freedom

Introduction

Moral issues are present in very many aspects of life and are involved in choices we make. Ethics is a subject that leaves no one of us indifferent and is constantly topical. This is true also in times of economic crises, in dealing with issues of migration and refugees and in coping with the threat of terrorism.

In almost all cases brought before it, the European Court of Human Rights (ECtHR, the Court) in Strasbourg faces more or less morally oriented issues. There are hardly any problems of life that have not been dealt with in the ECtHR case-law. More than 800 million people from the 47 member states of the Council of Europe can potentially turn to the Court in Strasbourg for help. As of 31 March 2017 there were 87,850 applications pending before the European Court of Human Rights. Most applications currently are from Turkey (in the aftermath of the *coup d'état* attempt, as well as of the curfew situation in south-eastern Turkey), Ukraine, Hungary, Romania and Russia, but quite many also arrive from Italy, Georgia, Azerbaijan, Poland and Armenia.

The present article will concentrate only on a few aspects of the case law of the European Court of Human Rights related to moral and ethical issues and will not go into depth on the more comprehensive, philosophical and social dimensions of this phenomenon. Firstly, the different dimensions of ethics at the European Court of Human Rights in general will be analysed. Secondly, some central topics related to moral issues in the case law of the European Court of Human Rights will be examined, and thirdly, more precisely, some of the judgements of the ECtHR that have dealt with academic freedom will be touched upon. Finally, a few concluding observations will be provided.

[1] The article does not express any official opinions of the European Court of Human Rights and represents the author's personal views.

1. A few remarks about the different dimensions of ethics at the European Court of Human Rights

Ethics in the European Court of Human Rights can be considered to have at least three dimensions:

a. On one hand, the first dimension of ethics in the Court is the common ethical grounds and European values on which the ECtHR decisions are often based;
b. On the other hand, the second dimension of the ethics consists of some differences in ethical grounds in cases where no European consensus on a given issue seems to exist. Ethics may then be used as a valid reason for leaving the decision-making within the margin of appreciation of the member states of the Council of Europe;
c. And the third dimension of ethics in the Court is the independence, impartiality and internal ethics of the ECtHR and its judges. The European Court of Human Rights itself needs to be human and ethical in order to deal with important human rights issues.

1.1. Common ethical values in Europe

As to the first dimension, the common ethical grounds, then, it is clear that certain ethical grounds are inherent to human rights. The Court has the authority to apply and interpret one of the most important human rights protection instruments in the world: the European Convention on Human Rights (Convention) of 1950, which came into force in 1953. The core of the Convention and its protocols is the right to life and prohibition of torture. Also important are the prohibition of slavery and forced labour, right to liberty and security, right to respect for private and family life and right to education and free elections, as well as procedural rights to a fair trial, effective remedy and no punishment without law. Furthermore, the Convention and its protocols guarantee several freedoms, such as freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association. These human rights documents (the Convention and its protocols) also protect property and prohibit discrimination as well as abolish the death penalty. Some of these rights are absolute, such as prohibition of torture and inhuman and degrading treatment. Others may be restricted, but these restrictions are only allowed if they are prescribed by law, necessary in democratic society and proportionate.

It is true that life has changed a lot since the 1950s and the Court, as indeed the rest of the world, finds itself facing new issues of developments in society, bioethics and technologies (such as adoption of children by same-sex parents, artificial procreation, the right to euthanasia, freedom of speech on the Internet and many others). In several cases, domestic law lags behind reality and offers no answers to questions of this kind, so people come to the European Court of Human Rights in Strasbourg, where the judges will need to find answers. This is why the European Court of Human Rights has developed a doctrine of looking at the Convention as a living instrument and has interpreted the Convention in light of the modern society and its developments dynamically.[*2] For instance, the ECtHR has found that the right to private life also includes the protection of the environment.[*3] Along the same lines, the Court has created case law on protecting social rights that were not covered by the Convention.

And yet, according to the principle of subsidiarity[*4], it is first and foremost for the States of the Council of Europe themselves, including their domestic judiciaries, to guarantee the good protection of human rights. The Court only steps in if respect for human rights has not been achieved on national level.

1.2. Differences in ethical values in Europe

This brings us to the second dimension of ethics in the ECtHR. Here the question arises of whether the States may sometimes restrict the human rights in relying on their traditions, on ethical and/or moral grounds, or there is enough consensus in Europe on certain issues, such as, for example, same-sex marriages or

2 E.g., *Tyrer v. UK,* 25.04.1978, p. 31, Series A, no. 26, and *Christine Goodwin v. UK* [GC], no. 28957/95, p. 75, ECHR 2002-VI.

3 E.g., *Guerra and Others v. Italy,* nos. 116/1996/735/932, 19.2.1998.

4 *Belgian Linguistic* (merits), 23.07.1968, Series A, no. 6, p. 35, §10 *in fine*.

surrogate mothers. Where there is no consensus, ethics and sensitive moral issues can be one of the reasons to leave this question to be decided on national level, without taking a final pan-European position, provided that the national situation is not manifestly breaching human rights. However, if consensus exists, then this common trend can be used by the European Court of Human Rights in order to push through certain all-European ethical moral standards without it necessarily creating them itself. This technique avoids the Court being criticised for not having respected the identity of these States, because the States anyhow have a certain consensus on certain ethical issues.[*5] Nevertheless, it cannot avoid the fact that for some commentators the case-law of the Court may seem too conservative and for others again too liberal. It is important that the European Court of Human Rights avoid trying to please anybody; instead, it must remain faithful to the Convention standards.

1.3. Ethical values in the Court

This is why the third aspect of ethics in the Court is very vital: the ethics of decision-making within the European Court of Human Rights – the issues of conviction and emotions on one hand and responsibility and rationality on the other, finding the right balance between generalisation and deciding an individual case. One of the former judges of the ECtHR has said that the Court is like a jazz player; it improvises, but within the given limits.[*6] On 23 June 2008 the Plenary of the European Court of Human Rights adopted a resolution on judicial ethics, which stresses the importance of independence, impartiality, integrity, diligence and competence, as well as discretion of judges.[*7] The judges of the European Court of Human Rights are free to express their separate opinions if they do not agree with the majority judgement.

2. Some central topics related to moral issues in the case-law of the European Court of Human Rights

2.1. Human dignity and ethics

In order to develop the second part of this article, it is necessary to write a few words about human dignity, as this is closely connected with ethics.

Human dignity is, along with equality and liberty, a complicated, complex and vague concept, as pointed out by law professor Aharon Barak[*8], former president of the Supreme Court of Israel. The Convention does not mention *expressis verbis* human dignity, but it is included prominently in several later Council of Europe conventions, notably the Revised European Social Charter and the Convention on Human Rights and Biomedicine.

Interpretations of the former European Commission of Human Rights and the Court, particularly of Article 3 of the Convention, which prohibits torture and inhuman and degrading treatment and punishment, have drawn extensively on the concept of human dignity as a basis for the decisions.[*9] The first references to human dignity appeared in the decision of the European Human Rights Commission in the *East African Asians v. United Kingdom* case in the 1970s, where the racial discrimination the applicants were subjected to constituted an infringement of their human dignity, which in the particular circumstances of the case (citizens of the United Kingdom from its colonies and UK passport-holders of Asian origin were not admitted to the UK) amounted to degrading treatment.[*10] The first reference by the European Court of Human Rights to human dignity was in 1978 in a judgement in the case *Tyrer v. UK*,[*11] in which corporal

5 *Jan Christian Urban*, Freiheitsbeschränkungen aus Gründen von Ethik und Moral in Europa, Tectum: 2015, siehe auch: http://www.schleyer-stiftung.de/pdf/pdf_2012/leipzig_2012/Urban_Jan.pdf. S. (1.5.2017), S. 2.

6 *Anatoly Kovler* (Russia) during a judicial reflection meeting, 25.6.2012 (non-official records).

7 Available on the website of the Court: http://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf (1.5.2017).

8 *Aharon Barak*, Human dignity: constitutional value and constitutional right, Cambridge University Press, 2015. – DOI: https://doi.org/10.1017/CBO9781316106327.

9 *Christopher McCrudden*, Human Dignity and Judicial Interpretation of Human Rights, The European Journal of International Law (EIJL) (2008), Vol. 19, No. 4, pp. 655–724, on p. 683. – DOI: https://doi.org/10.1093/ejil/chn043.

10 *East African Asians v. United Kingdom*, 3 E.H.R.R. 76, 15.12.1973.

11 Cited above.

punishment, administered as part of a judicial sentence, birching (i.e., caning) the then 15-year-old applicant, who had to take down his trousers and underpants, was held to be contrary to the Convention and an assault on a person's dignity and physical integrity. Since then, dignity has been drawn on in the context of the right to a fair hearing, the right not to be punished in the absence of a legal prohibition, the prohibition of torture and the right to private life. The European Court of Human Rights now regards human dignity as underpinning all of the rights protected by the Convention.

2.2. Beginning of life and moral issues

Most of the central topics related to moral issues that the Court has to tackle are connected with the beginning and end of life. The cases involving reproductive rights before the ECtHR have dealt with access to a lawful abortion, embryo donation and scientific research, home birth, medically assisted procreation, precautionary measures to protect a newborn baby's health, prenatal medical tests, sterilisation operations and forced sterilisations, surrogacy and an unborn child's right to life.

In a case called *Vo v. France*, owing to a mix-up with another patient, with the same surname, the applicant's amniotic sack was punctured, making a therapeutic abortion necessary.*[12] She maintained that the unintentional killing of her child should have been classified as manslaughter. The Court held in 2004 that there had been no violation of the right to life. It found that it was not currently desirable or possible to rule on whether an unborn child was a person under protection of the European human rights convention. And there was no need for a criminal-law remedy; remedies already existed in allowing the applicant to prove medical negligence and to seek compensation.

In *A., B. and C. v. Ireland* the Court found in 2010 that Ireland had failed to implement the constitutional right to a legal abortion.*[13] There had therefore been a violation of the right to respect for private and family life with regard to one applicant whose cancer was in remission, because she was unable to establish her right to a legal abortion either through the courts or via the medical services available in Ireland. The Court noted the uncertainty surrounding the process of establishing whether a woman's pregnancy posed a risk to her life and that the threat of criminal prosecution had a 'significant chilling effect' both on doctors and on the women concerned.*[14]

Three years earlier, in *Evans v. United Kingdom* the ECtHR found that since the issue of when the right to life began came within the State's margin of appreciation, given the lack of European consensus, the embryos created by the applicant and her former partner did not have a right to life.*[15] The Court held that when the embryos were destroyed in accordance with national law because there was no longer consent of the applicant's former partner to use them, there had been no violation of the right to life.

However, in the case *Dickson v. United Kingdom*, later in the same year, 2007, the Court held that there had been a violation of the right to respect for private and family life as a fair balance had not been struck between the competing public and private interests.*[16] In this case, the applicant, who was a prisoner with a minimum 15-year sentence to serve for murder, was refused access in the UK to artificial insemination facilities to enable him to have a child with his wife, who had little chance of conceiving after his release. The European Court of Human Rights did not agree with UK authorities.

On the other hand, in *S.H. and Others v. Austria*, in 2011 the Court concluded that there had been no violation of the right to respect for private and family life in a case that concerned two Austrian couples wishing to conceive a child through IVF and ovum donation.*[17] The Court noted that, although there was a clear trend across Europe in favour of allowing gamete donation for *in vitro* fertilisation, the emerging consensus was still under development and was not based on settled legal principles. Austrian legislators had tried, among other things, to avoid the possibility that two women could claim to be the biological mother of the same child. They had approached carefully a controversial issue involving complex ethical questions. Besides, Austria had not banned individuals from going overseas for infertility treatment unavailable in Austria.

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12 *Vo v. France*, no. 53924/00 [GC], 8.7.2004.

13 *A., B. and C. v. Ireland,* no. 25579/05 [GC], 16.12.2010.

14 *A., B. and C. v. Ireland* (cited above), §254.

15 *Evans v. United Kingdom*, no. 6339/05 [GC], 10.4.2007.

16 *Dickson v. United Kingdom*, no. 44362/04 [GC], 4.12.2007.

17 *S.H. and Others v. Austria*, no. 57813/00 [GC], 3.11.2011.

More recently, in the cases *Mennesson and Others v. France* and *Labassee v. France*, in 2014, which involved the refusal to grant legal recognition in France to parent–child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment, the Court held that there had been no violation of the parents' right to respect for their family life,[*18] but that there had been a violation of the children's right to respect for their private life.

However, in *Paradiso and Campanelli v. Italy*, the Court, itself admitting that it dealt with an ethical issue, held, by eleven votes to six, that there had been no violation of Article 8 (on the right to respect for private and family life) of the European Convention on Human Rights.[*19] The case pertained to the placement in social-service care of a nine-month-old child who had been born in Russia under a gestational surrogacy contract, entered into with a Russian woman by an Italian couple who had no biological relationship with the child. The Court concentrated on surrogacy instead of the proportionality of the measure, which consisted of taking the baby away from the couple and giving the child to others for adoption.[*20] The Court observed that the facts of the case touch on ethically sensitive issues – adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood – in connection with which Member States enjoy a wide margin of appreciation.[*21]

Another Italian case, *Parrillo v. Italy* involved a ban under Italian law that prevented the applicant from donating to scientific research embryos obtained from an *in vitro* fertilisation that were not destined for a pregnancy.[*22] The Court, which was called upon for the first time to rule on this issue, held in August 2015 that the right to respect for private and family life set forth in the Convention was applicable in this case under its 'private life' aspect, as the embryos in question contained the applicant's genetic material and accordingly represented a constituent part of her identity. However, later, in *Paradiso and Campanelli*, the Court concluded that Italy was also to be given considerable room for manoeuvring (a 'wide margin of appreciation') in the field of embryo donations on this sensitive question, as confirmed by the lack of a European consensus and the international texts on this subject.

It is interesting that in another recent case, *Dubská and Krejzová v. The Czech Republic*, which involved home births and a legal ban on midwifes assisting in home delivery, the Court has, on the contrary, not found the issue at stake to be of a particular moral nature.[*23] The Court stated the following:

While the question of home birth does not as such raise acutely sensitive moral and ethical issues (see, by contrast, *A, B and C v. Ireland*, cited above), it can be said to touch upon an important public interest in the area of public health. Moreover, the responsibility of the State in this field necessarily implies a broader boundary for the State's power to lay down rules for the functioning of the health-care system, incorporating both State and private health-care institutions. In this context the Court notes that the present case involves a complex matter of health-care policy requiring an assessment by the national authorities of expert and scientific data concerning the risks of hospital and home births. In addition, general social and economic policy considerations come into play, including the allocation of financial means, since budgetary resources may need to be shifted from the general system of maternity hospitals to the provision of a framework for home births.[*24]

2.3. End of life and moral issues

As far as **the end of life** is concerned, in one of the first judgements of the Court on this subject, *Pretty v. United Kingdom*, the Court in 2002 held that there had been no violation of the right to life, finding that the right to life could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die.[*25]

18 *Mennesson and Others v. France,* no. 65192/11, 26.6.2014, *and Labassee v. France*, no. 65941/11, 26.6.2014.

19 *Paradiso and Campanelli v. Italy*, no. 25358/12 [GC], 24.1.2017; see e.g., §§ 182, 184, 194, 201, 203.

20 See also the joint dissenting opinion of judges *Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev* regarding the same judgement.

21 *Paradiso and Campanelli v. Italy* (cited above), §194.

22 *Parrillo v. Italy*, no. 46470/11 [GC], 27.8.2015.

23 *Dubská and Krejzová v. The Czech Republic*, nos. 28859/11 and 28473/12 [GC], 15.11.2016.

24 *Dubská and Krejzová v. The Czech Republic* (cited above), §182. See also, critical of the majority judgement, the dissenting opinion of judges *Sajo, Karakas, Nicolaou, Laffranque and Keller*.

25 *Pretty v. United Kingdom*, no. 2346/02, 29.4.2002.

In this case, the applicant was dying of motor neurone disease, a degenerative disease affecting the muscles for which there is no cure. Given that the final stages of the disease are distressing and undignified, she wished to be able to control how and when she died. Because of her disease, the applicant could not commit suicide alone and wanted her husband to help her. But, although it was not a crime in English law to commit suicide, assisting a suicide was.

In subsequent cases, the Court has noted that the Member States of the Council of Europe were far from having reached a consensus with regard to the right of an individual to choose how and when to end his life.*[26]

However, in 2012 the Court found in *Koch v. Germany* that Germany had violated a procedural aspect of the right to private and family life by refusal of its courts to examine the merits of the complaint of an applicant who wished to help his wife, who suffered a serious disease, to obtain a lethal dose of a drug in order to commit suicide at home in Germany.*[27]

In a recent judgement, in *Lambert and Others v. France* in June 2015, the Court held that there would not be a violation of the right to life in the event of implementation of the French *Conseil d'État* judgement that confirmed the lawfulness of the decision of a panel of medical doctors to discontinue the artificial nutrition and hydration of Vincent Lambert.*[28] Vincent Lambert had sustained a head injury in a road-traffic accident in 2008 and in a result of that became tetraplegic. The Court once more observed that there was no consensus among Member States in favour of permitting the withdrawal of life-sustaining treatment. In that sphere the States must be afforded a margin of appreciation. The Court was, further, keenly aware of the importance of the issues raised in the case, which pertained to extremely complex medical, legal and ethical matters. In the circumstances of the case, the Court reiterated that it was primarily for the domestic authorities to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the Convention, and to establish the patient's wishes. In said case, an in-depth examination of all aspects had been carefully conducted in France by the highest-ranking medical and ethical bodies.

As in many cases of this kind, the case was heard by the Grand Chamber and the Court was not unanimous, with dissenting opinions voiced.

In its decision in the case *Gard and Others v. the United Kingdom*[*29], the European Court of Human Rights on 27.6.2017, by a majority, endorsed in substance also the approach of the domestic courts and declared the application inadmissible by a final decision. Consequently, the Court also lifted the interim measure it had granted previously under Rule 39 of its Rules of Court. The case concerned Charlie Gard, a baby suffering from a rare and fatal genetic disease. In February 2017, the treating hospital sought a declaration from the domestic courts as to whether it would be lawful to withdraw artificial ventilation and provide Charlie with palliative care. Charlie's parents also asked the courts to consider whether it would be in the best interests of their son for him to undergo experimental treatment in the USA. The domestic courts in the United Kingdom concluded that it would be lawful for the hospital to withdraw life-sustaining treatment because it was likely that Charlie would suffer significant harm if his present suffering were prolonged without any realistic prospect of improvement and that the experimental therapy would be of no effective benefit. In the proceedings before the ECtHR, Charlie's parents argued – on their own behalf and that of their son – under Article 2 (on the right to life) that the hospital had blocked access to life-sustaining treatment (in the USA) for Charlie and under Article 5 (on the right to liberty and security) that, in consequence, he had been unlawfully deprived of his liberty. They further alleged under articles 6 (on the right to a fair trial) and 8 (on the right to respect for private and family life) that the domestic court decisions amounted to unfair and disproportionate interference with their parental rights. The Court bore in mind the considerable room for manoeuvring ('wide margin of appreciation') left to the authorities in the sphere related to access to experimental medication for the terminally ill and in cases raising sensitive moral and ethical issues, reiterating that it was not for the Court to substitute itself for the competent domestic authorities. From this perspective, the Court gave weight to the fact that a domestic legal framework – compatible with the Convention – was available for governing both access to experimental medication and withdrawal of life-sustaining treatment. Furthermore, the domestic court decisions had been meticulously argued, thorough and reviewed at three levels of jurisdiction with clear and extensive reasoning giving relevant and

[26] E.g., *Haas v. Switzerland,* no. 31322/07, 20.1.2011.

[27] *Koch v. Germany*, no. 497/09, 19.7.2012.

[28] *Lambert and Others v. France,* no. 46043/14 [GC], 5.6.2015.

[29] *Gard and Others v. the United Kingdom,* no. 39793/17, 27.6.2017.

sufficient support for the conclusions; the domestic courts had direct contact with all those concerned; it was appropriate for the hospital to approach the courts in the UK in the event of doubts as to the best decision to take; and, lastly, the domestic courts had concluded, on the basis of extensive, high-quality expert evidence, that it was most likely Charlie was being exposed to continued pain, suffering and distress and that undergoing experimental treatment with no prospects of success would offer no benefit, and continue to cause him significant harm.

In *Paposhvili v. Belgium*, the Court did, however, reach a Grand Chamber judgement unanimously[*30], in a case involving an order for Paposhvili's deportation to Georgia, issued together with a ban on re-entering Belgium. Unfortunately, the applicant died before the end of proceedings in the ECtHR. Nevertheless, the Court examined the case and held, unanimously, that there would have been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights if Paposhvili had been removed to Georgia without the Belgian authorities having assessed the risk faced by him in light of the information on his state of health and the existence of appropriate treatment in Georgia, and also a violation of Article 8 (right to respect for private and family life) if Paposhvili had been removed to Georgia without the Belgian authorities having assessed the impact of removal on the applicant's right to respect for his family life in view of his state of health.

These examples are just a drop of water in the sea of ethical problems examined by the Court in Strasbourg.

2.4. Other topics related to moral issues in the European Court of Human Rights case-law

The following topics can be mentioned as examples pointing to areas in which ethics and moral issues play an important role in front of the ECtHR:

Firstly, of course, the most serious human rights violations in general create moral problems: involvement of state authorities in killing and torturing people, tolerating torture and inhuman treatment, human trafficking, even slavery – problems that regrettably still exist in many European countries.

Then, another context for moral issues is the arbitrary deprivation of liberty in its own right, which can be combined with so many other factors, such as the victims being people who have participated in peaceful demonstrations or journalists who have been reporting on elections.

Next are the social, moral, family-rights and health issues, in which matters of poverty and human dignity are of importance. Can a pensioner in Russia who struggles to make ends meet with his/her retirement income apply to the Court for reason of suffering inhuman and degrading treatment? The Court has said yes but has not yet found a violation.[*31]

As for family matters, parental rights, the best interests of a child and children's rights, cases of child abduction are to be emphasised. Must the Latvian courts examine a psychological report about a child whose mother has brought her child back to her mother's land (Latvia) before sending the child back to her father in Australia, where the child was forbidden to speak Latvian to her mother? The Court has answered yes.[*32]

As far as the recognition of homosexual partnerships is concerned, this question was raised: Can Greece allow registered partnership for heterosexual couples but forbid it for homosexual couples? The Court has said no – homosexuals enjoy the same right to private life and family as others[*33] – but the Court has not yet made a pronouncement as far as same-sex marriages are concerned, finding that there is no European consensus on the matter. Discrimination based on HIV-positive status has also caused ethical questions: the Court has condemned countries where employers have discriminated against employees because of their HIV infection, such as Russia and Greece, which refused a residence permit solely on account of the applicant's HIV infection.[*34]

Let us consider two examples involving private life and ethical choices wherein the Court did not see a problem: on 8 October 2015, the European Court of Human Rights in the case *Macalin Moxamed Sed*

30 *Paposhvili v. Belgium*, no. 41738/10 [GC], 13.12.2016.

31 *Larioshina v. Russia* (dec.), no. 56869/00, 23.4.2002; *Budina v. Russia* (dec.), no. 45603/05, 18.6.2009.

32 *X v. Latvia*, no. 27853/09 [GC], 26.11.2013.

33 *Vallianatos and Others v. Greece*, nos. 29381/09 32684/09 [GC], 7.11.2013.

34 See e.g., *Kiyutin v. Russia*, no. 2700/10, 10.03.2011, and *I.B. v. Greece*, no. 552/103, 10.2013.

Dahir v. Switzerland unanimously declared the application inadmissible.*[35] The case involved a request by the applicant, a Somali and Swiss national, to change her surname on the grounds that the Swiss pronunciation of the name produced words with an offensive meaning in her mother tongue, Somali – namely, meanings such as 'rotten skin' and 'toilets'. The applicant had sought the possibility of using different spellings of her name but had been denied this in Switzerland. The European Court of Human Rights found, in assessing the possible breach of the applicant's private-life rights, the fact that the language in which offensive meaning was produced was Somali and not one of the national languages of the country where she lived, Switzerland, to be key. The applicant was therefore not comparable to persons whose names gain a ridiculous or humiliating meaning in a more common language such as the national languages of Switzerland.

In 2009 the Court dismissed an application of a family who argued that introducing an obligatory course in ethics in Berlin violated their freedom of religion. The Court confirmed that the purpose of the ethics course was independent from the cultural, ethical, religious or ideological background of the pupils; it dealt with general ethical issues; and it did not prevent the family from educating their children according to their convictions.*[36]

Further issues with moral aspects are related to religion, such as those of Crucifixes and headscarves in public schools or prohibition to wear a burka in public places. The Court has allowed Crucifix display in Italian public schools on ethical-religious-art-historical grounds.*[37] On the other hand, the Court has emphasised that applying the principle of 'living together' was a legitimate aim for the French law forbidding wearing a burka in public places in France, particularly as the State had a wide margin of appreciation as regards this general policy question on which there were significant differences of opinion.*[38]

Another set of examples is that related to the controversial rights of prisoners and prison conditions as well as the fight against and prevention of terrorism. The Court has been faced with applications from prisoners who suffer under degrading prison conditions and has ruled many times to urge Member States to improve their situation, calling, for example, on the UK to abandon its blanket ban on prisoners voting.*[39] The Court has also heard applicants who have been victims of terrorist attacks and helped them on their way to finding justice and proper investigation on national level.*[40] On the other hand, the Court has also ruled on the rights of terrorists or terrorism suspects, as in rendition cases.*[41] The delicate issue of terrorism prevention involves what measures to take and when. For example, what about general wire-tapping in connection with terrorism prevention?

A further very sensitive topic concerns refugees and migrants. The Court has pointed out the prohibition of inhuman and degrading treatment of asylum-seekers and warned States to examine individual applications and circumstances case by case.*[42]

Then there are conflicts of a political nature and armed conflicts that find their way to the Court, such as inter-state applications, between, for example, Cyprus and Turkey, Georgia and Russia or Ukraine and Russia.

Another bundle of problems is found in the economic power and violation of human rights by big private companies and other enterprises; often these issues are connected with ethics and also, for example, with protection of the environment (pollution by big companies causing health problems to their employees and people who live in the neighbourhood). States can also have obligations to avoid violation of the Convention by private persons and enterprises. Sometimes the property rights involve ethical dilemmas, especially in the framework of privatisation or nationalisation and eviction.

Last but not least is freedom of expression: the Court has considered freedom of expression a cornerstone of democracy, and it has considered journalism and media a 'public watchdog'*[43] and has protected

[35] *Macalin Moxamed Sed Dahir v. Switzerland*, (dec.) no. 12209/10, 15.9.2015.

[36] *Appel-Irrgang and Others v. Germany* (dec.), no. 45216/07, 6.10.2009.

[37] *Lautsi and Others v. Italy,* no. 30814/06 [GC], 18.3.2011.

[38] *SAS v. France*, no. 43835/11 [GC], 1.7.2014.

[39] *Hirst v. United Kingdom (2),* no. 74025/01 [GC], 6.10.2005.

[40] E.g., *Tagayeva and Others v. Russia*, nos. 26562/07, 14755/08, 49339/08, 26562/07, 14755/08 and 49339/08, 13.4.2017.

[41] *El Masri v. FYRM*, no. 39630/09 [GC], 13.12.2012.

[42] See, e.g., *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 20.1.2011, and *Tarakhel v. Switzerland*, no. 29217/12 [GC], 4.11.2014.

[43] See *Bladet Tromsø and Stensaas v. Norway*, no. 21980/93 [GC], §§ 59 and 62, ECHR 1999-III, and *Pedersen and Baadsgaard v. Denmark,* no. 49017/99 [GC], §71, ECHR 2004-XI.

also the imparting of ideas that may be shocking. Restrictions of freedom of expression must always be interpreted very strictly and are only allowed if they are necessary, for instance, for the protection of health or morals. Yet the media plays an increasingly important role not only in enlightenment and supporting freedom of thought but also in sometimes violating privacy rights. It goes without saying that ethics in journalism is extremely important. Furthermore, new forms of media on the Internet and in the digital world, such as social media (Facebook, blogging, etc.) have become increasingly widespread. The Court was confronted with this kind of issue for the first time in the case *Delfi v. Estonia*, where the Court found in June 2015 that there had been no violation of applicant company Delfi's right to impart information although it had been found liable in domestic courts for displaying anonymous user comments on its website with the nature of hate speech and speech inciting violence against a certain individual.*[44] The European Court of Human Rights agreed with the Estonian courts.

One can also see ethical issues related to procedural and trial rights: ethics of lawyers and prosecutors, investigators, experts and judges in order to guarantee a fair trial. Finally, procedure and judgements that have been based on ethical values have no meaning if they are not subject to implementation. This is why the Court has repeatedly held that a fair trial does not end with a judgement but also entails the execution of judgements, because rights must be not only theoretical – they must be not illusory but real and enforceable.*[45]

3. Selected judgements of the European Court of Human Rights related to freedom of research and the responsibility of researchers and universities

3.1. The essence of academic freedom and morals

Academic freedom and autonomy to exercise it is essential for development of creativity, critique and scientific capacity. It is essential for democratic society in general; it is one of the indicators of how democratic a society is. As three judges of the European Court of Human Rights have expressed in a joint concurring opinion,

> [t]here is no Chinese wall between science and a democratic society. On the contrary, there can be no democratic society without free science and free scholars. This interrelationship is particularly strong in the context of social sciences and law, where scholarly discourse informs public discourse on public matters.*[46]

International human rights law protects academic freedom generally as independently and interdependently derived from freedom of expression and the right to education.*[47]

Over time, the European Court of Human Rights has been confronted with issues touching upon cultural rights: the right to artistic expression, to cultural and linguistic identity, to seek historical truth. In the case *Leyla Sahin v. Turkey*, in 2005, the Court confirmed that the right to education applies also to higher and university education.*[48]

Of course, the Court has underlined the importance of academic freedom. According to it, academic freedom 'comprises the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction'.*[49] Referring

[44] *Delfi AS v. Estonia*, no. 64569/09 [GC], 16.6.2015.

[45] See, e.g., *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, ECtHR nos. 1474/62 et al., 13.7.1968, §§ 3 and 4; *Marckx v. Belgium*, ECtHR, no. 6833/74, 13.06.1979, §31.

[46] Joint concurring opinion of judges *Sajo, Vucinic and Kuris*, judgement in *Mustafa Erdogan and Others v. Tukrey*, no. 346/04 39779/04, 27.5.2014.

[47] *Robert Quinn, Jesse Levine*, Intellectual-HRDs and claims for academic freedom under human rights law, The International Journal of Human Rights, 2014, Vol. 18, Nos. 7–8, pp. 898–920, on p. 913. – DOI: http://dx.doi.org/10.1080/13642987.2014.976203.

[48] *Leyla Sahin v. Turkey*, no. 44774/98 [GC], 10.11.2005.

[49] *Sorguç v. Turkey*, no. 17089/03, 23.06.2009, §35.

to Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe, on academic freedom and university autonomy, the Court has stated that academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction. Academic freedom covers even controversial or unpopular views, in the areas of research, professional expertise and scholarly competence. The Court must submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings.

3.2. Classical cases at the European Court of Human Rights involving academic freedom

Classical cases of academic freedom before the Court have involved the right to impart freely ideas on university life (recruitment, elections and management) during university meetings and conferences. There have also been cases about academic views and critique related to certain subject matter in academic form in specialised journals related to the field of research of scholars who express their views, but even beyond that **academic freedom may not be limited to debates in scholarly journals**, debates in academic settings and teaching only but covers also academics' addresses to **the general public** – of which, by the way, academics themselves are also part. Sometimes the violations of academic freedom go beyond violations of freedom of expression and can consist, for example, in **confiscating certain scientific works or forbidding them from being published**, or even in some cases **ordering restrictions of travel** and hindering the free movement of higher-education personnel as with **forbidding foreign lecturers to enter the country** for reason of views expressed previously. Furthermore, violations can occur in the framework of recruitment – for instance, in the form of refusal to consider job applications of lecturers because of their views and statements. In extreme cases, academic-freedom violations can be manifested also in arbitrary detention of scholars for views they have expressed. The European Court of Human Rights has disapproved of all these kinds of violations.

An issue related to academic freedom is the question of how research results will be used and to whom the information about these results can be passed; it is related to privacy rights, data protection and copyright, as well as ownership issues.

There can also be other aspects of university life that have a link to academic freedom, such as legislation imposing entrance examinations and *numerus clausus* in certain disciplines.

In 2009 the Court found a violation of academic freedom in the case S*orguç v. Turkey*, where a university lecturer was ordered to pay damages for having, at a scientific conference, distributed a document criticising the procedures for recruiting and promoting assistant lecturers.*[50]

In a more recent judgement, of October 2015 in the case *Kharlamov v. Russia,* the Court found that a university's right to reputation under the European Convention on Human Rights is more limited than that of an individual.*[51] The case centred on a civil action on defamation brought against a university professor in physics, by his employer, Orel State Technical University, after the professor expressed at a university-wide conference the view that the university's governing body could not be considered legitimate, on account of shortcomings in the election procedure. The court decided that the domestic courts, in their decisions against the professor, had failed to take into account the specific features of academic relations and failed to strike a fair balance between the need to protect the university's reputation and Kharlamov's freedom to express his opinion on the organisation of academic life.

In another rather recent judgement, from 2014, in the case *Mustafa Erdogan and Others v. Turkey*, the Court found a violation of academic freedom.*[52] The case involved a complaint by a law professor, editor and publisher that they were ordered by the Turkish courts to pay damages to three judges of the Constitutional Court for insulting them in a law journal article that reported on a decision dissolving a political party. The Court stated that members of the judiciary acting in an official capacity should expect to be subject to wider limits of acceptable criticism than ordinary citizens. Both the context (fierce public debate on the Constitutional Court's rulings) in which the article had been written and the form (a quasi-academic

[50] Cited above.

[51] *Kharlamov v. Russia*, no. 27447/07, 8.10.2015.

[52] *Mustafa Erdogan and Others v. Turkey* (cited above).

journal, not a popular newspaper) used had not been given sufficient consideration by the national courts in the defamation proceedings against the applicants.

In a freedom of expression case, *Hasan Yazıcı v. Turkey*, ruled on in 2014, the Court was indirectly confronted with issues of plagiarism.*[53] In this case, the applicant, Hasan Yazıcı, had been ordered to pay damages for defamation of an influential academic whom he had accused of plagiarism in an article in a daily newspaper. Yazıcı, an academic himself and former head of the ethics committee of the Turkish Academy of Sciences, accused a prominent academic and former president of the Higher Education Council, Professor I.D., of plagiarising another professor's work to write one of his books. The subject matter of the article was the establishment of an ethics committee by the Higher Education Council in order to tackle plagiarism in academia, and was thus topical. The national courts ordered Yazıcı to pay the professor compensation, finding that the allegations of plagiarism were untrue and amounted to insult. The Court stated that it is not its task to rule on the issue of the veracity of the applicant's allegations of plagiarism. Rather, its examination of the issue is essentially from the standpoint of Convention conformity, the relevance and sufficiency of the reasons given by the domestic courts and the procedural guarantees applied.

3.3. Other types of academic-freedom cases and procedural rights at the European Court of Human Rights

The importance of academic freedom has also been stressed in relation to the seizure of a book that reproduced a doctoral thesis on the 'star' phenomenon. The domestic court had ordered the seizure on the grounds that it infringed the personality rights of a very well-known pop singer in Turkey.*[54] The ECtHR found a violation of the freedom of expression of the author of the book, because domestic courts failed to give any reasons for the seizure.

The Court has also weighed the freedom of expression over the right to private life and found no violation of the right to private life in the case *Aksu v. Turkey* in 2012.*[55] In this case, the applicant, Mustafa Aksu, a Turkish national of Roma origin, complained that passages in a government-funded academic book about Roma and definitions in two dictionaries were offensive and discriminatory, reflected anti-Roma sentiment and humiliated them by describing them as Gypsies and living from pick-pocketing. But the ECtHR held that in the particular circumstances of the case, the authorities had taken all the necessary steps to comply with their obligation to protect the applicant's effective right to respect for his private life as Roma but had also taken into account principles related to academic freedom.

The judgement in *Cox v. Turkey*, from 2010, addresses a new aspect of academic freedom of expression, that of a foreign university lecturer, and its consequences for leave to enter and remain in a Contracting State. The applicant, an American lecturer who had taught on several occasions in Turkish universities and had expressed opinions on Kurdish and Armenian questions, was banned from re-entering Turkey on the grounds that she would undermine 'national security'. The Court found a violation of freedom of expression.*[56]

Freedom of academic expression protected by the European Convention on Human Rights also entails procedural safeguards for professors and lecturers. In the case of *Lombardi Vallauri v. Italy*[*57], the Council of the Law Faculty of the Catholic University of Milan refused to consider a job application by a lecturer who had taught philosophy of law there for more than twenty years on annual renewable contracts, on the grounds that the Congregation for Catholic Education had not given its approval and instead had simply noted that certain statements by the applicant were 'clearly at variance with Catholic doctrine'. The European Court of Human Rights observed that the Faculty Council had not informed the applicant, or made an assessment, of the extent to which the allegedly unorthodox opinions he was accused of holding were reflected in his teaching activities, or of how they might, in consequence, affect the university's interest in providing an education based on its own religious beliefs. Therefore, the Court concluded that the university's interest in providing an education based on Catholic doctrine could not extend so far as to undercut the very essence of the procedural safeguards.

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53 *Hasan Yazıcı v. Turkey*, no. 40877/07, 15.4.2014.

54 See *Sapan v. Turkey*, no. 44102/04, 8.6.2010.

55 *Aksu v. Turkey*, no. 4149/04 41029/04 [GC], 15.3.2012.

56 *Cox v. Turkey*, no. 2933/03, 20.5.2010.

57 *Lombardi Vallauri v. Italy*, no. 39128/05, 20.10.2009.

On the contrary, in the judgement in the case *Fernández Martínez v. Spain*, of 2014[*58], the Court held by nine votes to eight that there had been no violation of the right to respect for private and family life of applicant Fernández Martínez. The case pertained to the non-renewal of the contract of a married priest and father of five who taught Catholic religion and ethics, after he had been granted dispensation from celibacy and following an event at which he had publicly displayed his active commitment to a movement opposing Church doctrine. In the ECtHR's view, it was not unreasonable for the Church to expect particular loyalty of religious-education teachers, since they could be regarded as its representatives. Any divergence between the ideas to be taught and the personal beliefs of a teacher could pose a problem of credibility when that teacher actively challenges those ideas.

In the case of *Perinçek v. Switzerland*, the European Court of Human Rights held, by a majority, that there had been a violation of the freedom of expression of applicant Perinçek, a doctor of laws and a Turkish politician who was chairman of the Turkish Workers' Party.[*59] The case centred on the criminal conviction of Perinçek for publicly expressing the view, at public gatherings in Switzerland, that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide. The Court had to strike a balance between the right to freedom of expression of Perinçek and the right to respect for private life of the Armenian community – taking into account the specific circumstances of the case and the proportionality between the means used and the aim intended to be achieved. The Court concluded that it had not been necessary, in a democratic society, to subject Perinçek to a criminal penalty in order to protect the rights of the Armenian community at stake in this case.

3.4. Use of research results and academic freedom

As far as making research materials public is concerned, in a judgement in 2012, in the case *Gillberg v. Sweden*,[*60] the Court found that applicant Gillberg, an academic in Sweden, could not rely on his right to privacy and did not have a 'negative' right within the meaning of freedom of expression to refuse to make certain research material belonging to his public employer, Gothenburg University, available. The applicant was convicted in Sweden and given a suspended sentence and a fine for misuse of office in his capacity as a public official, for refusing to grant access to two individuals, under specified conditions, to research conducted by the University of Gothenburg. The ECtHR rejected the claim by Gillberg that he could invoke a right similar to that of journalists of having their sources protected and concluded that the refusal of Gillberg to grant access hindered the free exchange of opinions and ideas on the research in question.

As far as the legislation imposing entrance examination with *numerus clausus* for access to public- and private-sector university courses is concerned (for example, in medicine and dentistry), the European Court of Human Rights found no violation of the right to education in imposing *numerus clausus* in Italy, in the case *Tarantino and Others v. Italy*, in 2013.[*61]

Conclusions

In a vast majority of cases, the European Court of Human Rights is confronted with ethical and moral issues. Some of them come down to the very core of human rights and human dignity. On some of these issues, sometimes minimum standards and consensus on European level exists; at other times, it is left for the States to approach ethical questions. The European Court of Human Rights looks at these issues with an open mind and takes into account the dynamics of the development of our society. At the same time, the Court respects, to a certain extent, traditions, history and cultural background as long as it does not result in arbitrary application and in disrespect of human rights. By carefully balancing different rights, as well as public and private interests, the Court sometimes pragmatically seeks out a middle ground. There does not necessarily need to be a 'European ethics', but there certainly exist certain common values and understandings.

58 *Fernández Martínez v. Spain*, no. 56030/07 [GC], 12.6.2014.

59 *Perinçek v. Switzerland*, no. 27510 [GC], 15.10.2015.

60 *Gillberg v. Sweden*, no. 41723/06 [GC], 3.4.2012.

61 *Tarantino and Others v. Italy,* no. 25851/09 29284/09 64090/09, 2.4.2013.

Pope Francis underlined in his speech before the European institutions in 2014 the problem of global indifference*[62]. One could also add hypocrisy. They both often prevent states from arriving at ethical solutions. Furthermore, abuse of human rights can turn good intentions into extremism. The European Court of Human Rights can hardly prevent new violations; it can point out systemic and structural problems and call for no further violations, and, while many examples have been provided in this paper, not nearly all cases find their way to the ECtHR. This is why an awareness of one's rights, involvement of NGOs and civil society and providing education and training also in ethics (starting with families and schools) is of vital importance. In 2009 the Court noted in the decision on an obligatory course in ethics in Berlin that the purpose of said course was to deal with general ethical issues and found it important.

The European Court of Human Rights looks beyond mere formalism and looks at these European values and justice because justice cannot be sacrificed for the sake of mere formalities, as long as a suitable balance between justice and legal certainty is preserved. The Court has in its case-law continuously stressed the importance of academic freedom and in most of the cases, the majority of which have been in respect of Turkey, ruled in favour of academic freedom of expression of individuals, whereas it has said that the right to reputation of a university is more limited than that of an individual. The Court, inspired by the general freedom of expression cases, has laid down certain criteria for examining this kind of case, such as where, in what context and with what content the views have been expressed. When considering the developments in research, the Court has been more modest and prudent. Here one must, of course, not forget also the importance of legislative decision-making on national level.

Anatole France has written: 'A good judge should have the spirit of a philosopher and a simple goodness.'*[63]

It is not easy to live up to the high expectations that the applicants have often set for the Court and to bear the Member States' careful and critical look at our case-law. It needs strong and solid legal, ethical and other legitimate bases for the Court to take up this huge responsibility, a responsibility that ideally should be shared with States. But it also takes a lot of courage to admit mistakes and change the case-law if really need be; after all, the European Court of Human Rights is the conscience of Europe.

[62] *Pope Francis*: Address to European Parliament – full text, Vatican Radio, 25 November 2014, http://www.news.va/en/news/pope-francis-address-to-european-parliament (1.5.2017).

[63] *Le bon juge devrait unir l'esprit philosophique à la simple bonté*. Citation d'Anatole France; Opinions sociales - 1902.

https://doi.org/10.12697/JI.2017.26.05

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Provision of Health-care Service over the Internet – the Legality of E-consultations in Estonia

1. Introduction

Medical consultation over the Internet goes back more than 15 years in Estonia (with services such as klinik.ee, inimene.ee, and arst.ee). In more recent years, several new Web sites for that purpose have been set up (e.g., amor.ee and peaasi.ee), along with ones that offer new services in this domain, among them medical and genetic testing for various pathological conditions – which may include laboratory services coupled with sales of medical devices (as with sportsgene.ee, testikodus.ee, and fertify.eu) and treatment (e.g., koneravi.ee).

A new type of service was added to the Estonian Health Insurance Fund (EHIF) list of health-care services[*1] in 2013 – *e-konsultatsioon*, consultation between a specialist and general practitioner[*2] that takes place via the health-information system for meeting with regard to a specific patient.

In 2015, the portal netiarst.ee[*3] was launched. It soon found itself the subject of a Health Board investigation. On the basis of the explanation it received from the portal operator, the Health Board maintained the position that the service offered via the portal was a health-care service and therefore required an activity licence.[*4]

As online medical consultation encompasses diverse services – general information and advice, patient instruction, general and personalised counselling (whether for a fee or free of charge), and others – the following question arises: at what point may online medical consultation become provision of a health-care service – i.e., an e-consultation, which would be governed by the same legal rules as conventional health-care services? Is e-consultation possible in the existing legal framework, or must the legal norms be adapted accordingly?

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1 Vabariigi Valitsuse 29.12.2016 määrus nr 157 „Eesti Haigekassa tervishoiuteenuste loetelu“ [‘Government of the Republic regulation no. 157 of 29 December 2016, ‘List of Estonian Health Insurance Fund health-care services’]. – RT I, 30.12.2016, Subsection 7 (25). The EHIF currently funds e-consultation in 16 specialities.

2 The general practitioner is the first person to consult with in the event of illness. The general practitioner refers the patient to a medical specialist; gives advice pertaining to the prevention of diseases; takes preventive measures; and issues health certificates, certificates of incapacity for work, and prescriptions.

3 At the moment, netiarst.ee is temporarily out of service.

4 In response, netiarst.ee’s operator chose not to apply for an activity licence and instead redesigned its service such that it intermediates a specialist service supplied by health-care service providers. The Health Board letter on the subject is in the possession of the author.

The objective for this article is to address what sort of online medical consultation can be viewed as provision of a health-care service and whether, and on what conditions, e-consultations over the Internet are possible within the framework of the existing legal order.

2. E-consultation as telemedicine

There is no generally accepted definition of telemedicine. A communication from the European Commission has taken the approach that telemedicine is provision of health-care services that uses information and communication technology (ICT) devices in situations wherein the health-care specialist and patient (or, alternatively, two health-care specialists) are in different physical locations. This involves secure transmission of medical data and information in the form of text, sound, images, or other formats for the purpose of the prevention, diagnosis, treatment, and aftercare needed by the patient. Telemedicine encompasses, among other things, teleconsultation, along with online consultation / electronic appointments or videoconferencing between health-care specialists.[*5] We can conclude from this definition that telemedicine is not an independent medical field as sometimes mistakenly believed; rather, telemedicine refers to the way in which health-care service is provided, and it should be contrasted against face-to-face communication, which still can utilise ICT devices.

E-consultation is differentiated from consultation provided by conventional means by the fact that the patient and health-care service provider are physically separate and communicate while at a physical distance from each other. The communication can take place in real time – by videoconferencing, a Skype or other 'voice over IP' connection, or telephone – or with a time lag, via e-mail or instant messaging. Such a method can be used also in fields of medicine that require an actual physical examination of the patient: The examination can be conducted by a second health-care provider, who sends the findings from the examination to the consulting health-care service provider. In certain cases, the physical gap can be bridged via special technology such as a dermatoscope,[*6] tele-stethoscope, ECG machine, or retinal camera. Special booths have been introduced in telemedicine projects in France where people can talk to a doctor over a video bridge and have their vital signs measured.[*7] As technology advances and as equipment is developed and introduced that allows physical examinations to be conducted from a physical distance, e-consultations will prove feasible in more and more cases.

The rules currently in force in Estonia do not necessarily require examination of the patient in order for a consultation to be considered provision of a health-care service. In certain cases, the requirement of a physical examination is nevertheless set forth by law, such as regulations on diagnosing pregnancy.[*8]

Thus, e-consultation – i.e., provision of health-care service to a patient without having direct physical contact with that patient – is not directly prohibited in the Estonian legal space, unlike, for instance, in Germany and Poland, where providing health-care services without a physical examination of the patient is forbidden.[*9]

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5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on telemedicine for the benefit of patients, healthcare systems and society (COM(2008)689 final). Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0689&from=EN (most recently accessed on 17.4.2017).

6 A dermatoscope is a special camera for taking an enlarged picture of a birthmark or other skin formation and sending it electronically via the Dermtest software (dermtest.ee) to a dermatologist or oncologist for diagnosis procedures.

7 La première cabine de télémédecine ouvre en Bourgogne (The first telemedicine booth opens in Burgundy). – *Business Herald*, 31.3.2014. Available at http://business-herald.com/non-classe/la-premiere-cabine-de-telemedecine-ouvre-en-bourgogne (most recently accessed on 1.5.2017).

8 Raseduse katkestamise ja steriliseerimise seadus (Termination of Pregnancy and Sterilisation Act). – RT I 1998, 107, 1766; RT I, 20.2.2015, 11, Section 10. English text available at https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/505032015003/consolide (most recently accessed on 17.4.2017).

9 UNIversal solutions in TElemedicine Deployment for European HEALTH care. Available at http://united4health.eu/wp-content/uploads/2015/10/D5.5-v1.0-U4H-Industry-Report-on-Telemedicine-Lega-land-Regulatory-Framework.pdf (most recently accessed on 15.4.2017). The opinion in Germany is that treatment and diagnosis over the Internet is insufficient, as it runs the risks of misdiagnosis and thereby poses a risk to patients (Entwurf eines Vierten Gesetzes zur Änderung arzneimittelrechtlicher und anderer Vorschriften (Draft of a Fourth Act on the Amendment of provisions on medicinal products and other regulations.)), available at https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/A/AMG-Novelle_GE.pdf (most recently accessed on 28.6.2017).

3. E-consultation as a health-care service

3.1. The definition of health-care services

According to Subsection 2 (1) of the Health Services Organisation Act (HSOA), health services are the activities of health-care professionals carried out for the prevention, diagnosis, or treatment of diseases, injuries, or intoxication in order to reduce the malaise of persons, prevent the deterioration of their state of health or development of diseases, and restore their health. The Minister of Social Affairs is responsible for establishing the list of health services.*[10]

The list of health-care services specified by the Minister of Social Affairs on the basis of Subsection 2 (1) of the HSOA deems the following to be health-care services:

1) health-care services related to diagnosing and treating the diseases listed in the tenth edition of the International Classification of Diseases (ICD-10)
2) the surgical procedures listed in the Nordic Medico-Statistical Committee's classification of surgical procedures.*[11]

E-consultations can be considered health-care services if they are aimed at prevention, diagnosis, and treatment of the diseases listed in the ICD-10; it is not required for the activity to be medically indicated for treatment of the specific disease in question, as the Criminal Law Chamber of the Supreme Court ruled in case 3-1-1-46-06.*[12]

In its letter to the operator of netiarst.ee, the Health Board likewise maintained that in the case of a service wherein a health-care professional provides a specific person, in accordance with that person's need for assistance (determined by the health-care professional on the basis of a conversation, images, additional information sent, or other content), with advice, recommendations, and instructions for prevention of disease, injury, or intoxication and asks, probes, and/or processes data in some other manner to diagnose the person's condition and/or gives the person output thereof that consists of treatment recommendations and instructions designed to alleviate that specific person's complaints, to keep said person's health from worsening or the disease from becoming exacerbated, and to restore health, this constitutes a health-care service.*[13]

Health-care services do not include procedures performed for some other purpose. In the case of genetic testing offered by SportsGene OÜ on its Web site, K. Pormeister, in the article 'Tarbijale suunatud geenitestid Eesti õigusruumis' (Consumer-oriented Genetic Tests in the Estonian Legal Space), takes the position that genetic testing does not fit the HSOA's definition of health-care services in either its nature or its purpose; the objective is neither the prevention nor the diagnosis of disease. Hence, genetic testing directed at consumers represents a service that cannot be treated as a health-care service and that is not part of a research study.*[14] Still, it is hard to concur completely. The Fertify gene test for ascertaining female fertility, intermediated by SportsGene OÜ and supplied by FutuTest OÜ, could be viewed as a health-care service.*[15]

The e-health strategy working group on law and ethics is of the opinion that if a service offered online may be a health-care service in form and substance while the goal of the health-care professional is not to provide a health-care service, it is possible to side-step definition of that service as a health-care service if the consumer is informed by way of the terms of service that the online service does not constitute provision of a health-care service.*[16]

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[10] Tervishoiuteenuste korraldamise seadus (Health Services Organisation Act). – RT I 2001, 50, 284; RT I, 21.2.2017, 5. English text available at https://www.riigiteataja.ee/en/eli/513032017001/consolide (most recently accessed on 17.4.2017).

[11] Ministry of Social Affairs regulation no. 13 of 10 January 2002, establishing a list of health-care services. RTL 2002, 14, 180 (in Estonian), Section 1.

[12] RT III 2006, 28, 255 (in Estonian).

[13] See Note 4 above.

[14] K. Pormeister. *Tarbijale suunatud geenitestid Eesti õigusruumis* (Consumer-oriented Genetic Tests in the Estonian Legal Space). *Juridica* IV (2016), pp. 263–270 (in Estonian).

[15] Fertify is a genetic test for evaluating women's potential for conception and their age-related infertility risk. On the basis of the test, individual-specific recommendations are made for preserving natural fertility and for additional medical studies related to fertility.

[16] This is in line with the view of law and ethics expressed in the Government of the Republic's e-health strategy up to 2020. See the report of the working group on law and ethics, available at https://www.sm.ee/et/strateegia (most recently accessed on 19.3.2017) (in Estonian).

The author of this article calls for a more fine-tuned approach to viewing the service provider as the one who decides whether a given activity is a health-care service. Provision of a health-care service involves providing a regulated economic service; such activity may be launched only if certain conditions are met (there is an activity-licence requirement). If a person's activity substantively matches the definition for provision of a health-care service, an activity licence must be sought,[*17] irrespective of how the service provider or the parties to the service refer to it. Initiating economic activity without having applied for an activity licence can result in an administrative body imposing state supervision measures that render further conducting of economic activity impossible if there is a heightened or significant threat to public order.[*18]

The Health Board expressed the position that what is relevant is not how health-care professionals themselves view and refer to the service but, rather, how service-users view the service and for what purpose they contact its providers – netiarst.ee in the specific case considered. If a given person must initiate contact with the service and has been provided with details for various specialists beforehand **and** been given an explanation of what the service is being provided as an alternative to, there is reason to believe that it is, in fact, a health-care service.[*19]

Consultation with a health-care professional over the Internet can, therefore, be viewed as a health-care service. If a health-care professional wishes to dispense health-related advice online in such a manner as cannot be viewed as provision of a health-care service, that professional's activity cannot substantively meet the definition for a health-care service – said professional cannot diagnose a specific person on the basis of a request from that person, not even making a hypothetical diagnosis[*20], and cannot assign treatment or give treatment recommendations.

3.2. Health-care service as a health-care professional's activity

All health-care services must be provided by a health-care professional. Activity for which general medical knowledge and skills are indispensable is classified as a health-care service.[*21]

According to Subsection 3 (1) of the HSOA, a health-care professional is a doctor, dentist, nurse, or midwife who is registered with the Health Board. For the purposes of the Medicinal Products Act, 'health-care professionals' also covers pharmacists and assistant pharmacists providing pharmacy services at a general pharmacy or hospital pharmacy, provided that they have been registered in the national register of pharmacists and assistant pharmacists maintained by the Health Board in accordance with Subsection 55 (1) of the Medicinal Products Act (Subsection 3 (4) of the HSOA).

The EHIF's list of health-care services also includes services that, because they are performed by a person who is not a health-care professional, do not fulfil the definition specified in the HSOA. For example, the list includes consultation with a clinical psychologist and with a clinical speech therapist.[*22] Neither of these is a health-care professional. Yet under EHIF guidelines, their activities do constitute health-care services, as examinations and investigations are conducted and they provide consultation and put together a treatment plan.[*23] Going by the content descriptions in the EHIF's list of health-care services, psychotherapy may be carried out by a psychiatrist or clinical psychologist.[*24] This leads us to the question of whether consultation with a clinical psychologist supplied over the Internet can be considered a health-care service if its goal is to prevent, diagnose, and treat diseases.

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17 Section 40 of the HSOA.

18 Majandustegevuse seaduse üldosa seadustik (General Part of the Economic Activities Code Act). – RT I, 25.3.2011, 1; RT I, 19.3.2015, 51, Subsection 67 (1). English text available at https://www.riigiteataja.ee/en/eli/527032015008/consolide (most recently accessed on 17.4.2017).

19 See Note 4 above.

20 Even in the course of provision of conventional health-care service, as a general rule, a hypothetical diagnosis is made at the first appointment with a doctor, which is then either corroborated with tests or not.

21 *Svetlana Lokk-Kidava v. Estonia* (see Note 12), paragraph 14.

22 List of EHIF health-care services, sections 36 and 37.

23 Speech therapy coding manual. Available at https://www.haigekassa.ee/sites/default/files/TTL/2016_08_12_logopeedia_teenuste_juhend_kodulehele.pdf (most recently accessed on 19.3.2017) (in Estonian). See also the list of health-care service descriptions – psychiatry, available at https://www.haigekassa.ee/sites/default/files/TTL/2015_01_05_psyhhiaatria_ttl2015_kirjeldused.pdf (most recently accessed on 19.3.2017) (in Estonian)

24 *Ibid.*

In summary, it can be said that e-consultations carried out by health-care professionals can be considered provision of a health-care service if the provision of the service inevitably requires medical knowledge and the activity is aimed at the prevention, diagnosis, and treatment of a disease and restoring health.

In the interests of legal clarity and certainty, the definition of health-care service should be updated so that service providers know when their activities can be treated as provision of a health-care service and whether they need to apply for an activity licence if wishing to begin such activity. This would also create greater clarity for patients, and patient rights and protections would be better guaranteed. In the opinion of this author, the definition of health-care professional should be broadened such that clinical psychologists, speech therapists, and other specialists who provide, in essence, health-care services are considered health-care professionals. The current situation is one in which, on the basis of Supreme Court interpretations, the activity of these professionals fundamentally fulfils the definition for health-care service and also appears on the EHIF's health-care service list yet formally is not considered a health-care service.

3.3. Health-care service as an economic activity

The Supreme Court has taken the position that only provision of a health-care service that is rendered in the framework of an economic or professional activity can be classified as a health-care service. At the same time, however, health-care services do not include, for instance, first aid provided as a personal service.*[25]

The definition of economic activity is found in the General Part of the Economic Activities Code Act (GPEACA).*[26] Under Subsection 3 (1) of the GPEACA, economic activity is considered to be any permanent activity that is pursued independently to generate income and that is not prohibited pursuant to the law. If a notification or authorisation obligation has been established in respect of an activity, the activity is deemed to be an economic activity even if generating income is not its purpose (Subsection 3 (2)).

The explanatory memorandum to the GPEACA accounts for this by noting that the Estonian legal system encompasses persons who are not engaged in economic activity for the purposes of Subsection 4 (1) of the GPEACA yet whose activity a decision has been made should be subject to an activity-licence or registration requirement; this makes it necessary to set forth, as an additional criterion, that the concept of economic activity also extends to other activities in regard to which a notification or authorisation obligation has been established, even if the purpose of the activity is not to generate income (law in force pertains mainly to the social, health-care, and education sphere). If an additional criterion had not been established, the GPEACA would not apply to these persons and it would have been necessary to retain or set forth provisions that are redundant with those of the GPEACA .*[27]

Thus, provision of a health-care service is always considered an economic activity, as it is subject to an activity-licence requirement, even if the provision of health-care service is not permanent and/or takes place free of charge.*[28]

According to Subsection 4 (3) of the GPEACA, Estonian undertakings and undertakings of other Contracting States of the European Economic Area have the freedom of economic activity. Under Subsection 5 (1) of the GPEACA, an undertaking is a natural or legal person who commences or pursues economic activities. According to Subsection 3 (2) of the Commercial Code,*[29] a sole proprietor shall submit a petition for his or her entry in the Commercial Register before commencement of the activity.

The HSOA governs the legal form in which medical procedures may be supplied as a service in the framework of economic and professional activity. For example, family physicians may practise as sole proprietors or through companies providing general medical care (Section 12); companies, sole proprietors, or foundations that hold corresponding activity licences may provide specialised outpatient care (Subsection 21 (1)); and a company or foundation that holds a corresponding activity licence may own a hospital (Subsection 22 (2)).

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25 *Svetlana Lokk-Kidava v. Estonia* (see Note 12), paragraph 12.

26 Majandustegevuse seaduse üldosa seadustik (see Note 18, above).

27 See the text available at http://www.just.ee/sites/www.just.ee/files/elfinder/article_files/majandustegevuse_seadustiku_uldosa_seaduse_eelnou_seletuskiri.pdf (most recently accessed on 19.3.2017) (in Estonian).

28 E.g., free-of-charge consultation supplied by health-care service providers online.

29 Äriseadustik (Commercial Code). – RT I 1995, 26, 355; RT I, 22.6.2016, 32. English text available at https://www.riigiteataja.ee/en/eli/513072016002/consolide (most recently accessed on 17.4.2017).

Hence, according to the HSOA, a health-care professional meeting the definition in Subsection 3 (2) of the HSOA may provide e-consultations only if having registered as a sole proprietor or doing so through a company in a legal form allowed by the HSOA, after having been granted an activity licence for this purpose. Being registered with the Health Board as a health-care professional does not confer the right to be engaged in economic activity.

The report from the law and ethics working group expresses the conclusion that health-care services do not include intermediation of a health-care service, which is what the operator of netiarst.ee does in providing health-care service providers with a technical platform for service provision. According to the working group's conclusion, it should be treated as an information-society service.*[30] At the moment, the European Court of Justice (ECJ) has received questions from the Spanish government, which is seeking a preliminary decision on whether Uber*[31] is a transport service or, instead, an information-society service provider. Some EU member states have taken the position that Uber is a transport company.*[32] On 11 May 2017, Advocate General Maciej Szpunar submitted an opinion in the case of Uber, according to which Uber's activity constitutes not an information-society service but a transport service.*[33] A final decision on the case is expected before the end of the year. Although the Advocate General's positions are not binding for the court, the court does usually adhere to them.

The conclusions of the court may have an impact also on the interpretation of the services offered by netiarst.ee – whether they are a health-care service or an intermediary service. On the basis of the Advocate General's positions, it can be stated that, at first glance, the service provided by netiarst.ee could be a health-care service, not an intermediary service. Whether an e-consultation is considered a health-care service or instead an intermediary service depends on the design of the service – is it a composite service, do health-care professionals carry out independent economic activity, and so forth? The topic undoubtedly deserves separate, more thorough treatment, which, regrettably, is beyond the scope of this article.

4. E-consultation as an activity subject to authorisation

Under Subsection 16 (1) of the GPEACA, an undertaking must, in the cases specified by legislation, have an activity licence prior to commencement of economic activities in a given area of activity. According to the HSOA, health-care service may be provided only by sole proprietors or legal persons with an appropriate activity licence (subsections 7 (2), 18 (1), 21 (1), 22 (2), 25 (1), and 25^1 (1)).

Provision of a health-care service without an activity licence is an illegal economic activity. Subsection 372 (1) of the Penal Code stipulates that operating without an activity licence in an area of activity that requires one is a crime.*[34]

The activity licence entitles an undertaking to commence economic activity and certifies that said undertaking has complied with certain requirements for economic activity in its area of activity. The activity licence also specifies secondary conditions for pursuing economic activity (Subsection 16 (2) of the GPEACA).

Under Subsection 40 (1) of the HSOA, an activity licence is required for provision of specialist medical care, provision of emergency medical care, supplying of general medical care on the basis of a practice list of a general practitioner, independent provision of nursing care, and independent provision of midwifery care.

The material requirements for economic activity that constitute the object of verification for the activity licence are, according to Subsection 42 (2) of the HSOA, that the staff, facilities, installations, and equipment necessary for the provision of specialised medical care comply with the requirements established on the basis of the HSOA.

[30] See Note 16 above.

[31] The netiarst.ee solution is similar to that used by Uber and the associated taxi-service app, offering a software solution that matches service providers (the driver is analogous to the health-care professional) to service consumers (in that case, people wanting to go from point A to point B rather than patients).

[32] EU court asks: Is Uber an app or taxi service? CNET News. Available at https://www.cnet.com/news/is-uber-an-app-or-taxi-service-eu-court-asks/ (most recently accessed on 19.3.2016).

[33] Opinion of Advocate General Szpunar delivered on 11 May 2017. Case C-434/15. Available at http://eu-rlex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0434 (most recently accessed on 28.6.2017).

[34] Karistusseadustik (Penal Code). – RT I 2001, 61, 364, RT I, 31.12.2016, 14. English text available at https://www.riigiteataja.ee/en/eli/519012017002/consolide (most recently accessed on 17.4.2017).

These requirements are established in Minister of Social Affairs regulation 25 of 25 January 2002, 'Requirements for Facilities, Installations, and Equipment Necessary for Provision of specialised outpatient care'.*[35]

The current legal provisions for application for activity licences do not enable sole proprietors or companies to apply for an activity licence for provision of health-care service over the Internet (e-consultations) if they do not have physical appointment rooms. Under Subsection 42 (2) of the HSOA, for an activity licence to be granted, the facilities must meet the requirements established on the basis of the HSOA. Accordingly, only health-care providers who already have an activity licence for provision of general or specialist medical care or independent provision of nursing care or who apply jointly for one have the right to apply for an activity licence to provide health-care service online. This brings us to the question of whether it is justified to restrict the right of provision of e-consultation to only those health-care providers having a physical reception unit with rooms.

Although the above-mentioned Ministry of Social Affairs regulation permits consultations with patients even if the provider does not possess the equipment needed for examination, legal acts treat face-to-face appointments but not health-care service provided online as an outpatient health-care service. Similarly to the law on online sales of medicinal products, which requires a general pharmacy activity licence, legal requirements applicable to a health-care service provider specify that said provider must have an activity licence for provision of a health-care service; this gives it the right to provide e-consultation as well.*[36]

5. E-consultation as an information-society service

E-consultation is simultaneously both a health-care service and an information-society service and is subject to the Information Society Services Act (ISSA).*[37] An information-society service is a service that is provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being simultaneously present at the same location, and such services involve the processing, storage, or transmission of information by electronic means intended for the digital processing and storage of data (ISSA, Subsection 2 (1)).

Information-society services must be entirely transmitted, conveyed, and received by electronic means of communication. Services provided by means of fax or telephone call and television or radio services and broadcasting in the sense applied in the Broadcasting Act are not information-society services (Subsection 2 (1) of the ISSA). This means that a patient's visit to a doctor during which the doctor uses, for example, electronic devices is not an information-society service, as there is no physical distance.*[38] If the contact between patient and doctor takes place with a physical distance between them and is made possible by electronic applications, as in telemedicine, then it may be an information-society service.*[39]

According to Recital 18 of the preamble to the E-Commerce Directive,*[40] activities that by their very nature cannot be carried out at a distance and by electronic means, such as medical advice requiring the physical examination of a patient, are not information-society services. The directive also applies to doctors' Web sites that promote their activity; physicians' recommendations that do not require physical examination of the patient, that are provided for a fee, or whose costs are covered by advertising or sponsorship; and the online sale of medicinal products.*[41]

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35 RTL 2002, 25, 353; RT I, 1.6.2016, 8.

36 Ravimiseadus (Medicinal Products Act). – RT I 2005, 2, 4; RT I, 4.5.2016, 4, Subsection 31 (5^1). English text available at https://www.riigiteataja.ee/en/eli/516052016002/consolide (most recently accessed on 17.4.2017).

37 Infoühiskonna teenuse seadus (Information Society Services Act). – RT I 2004, 29, 191; RT I, 6.1.2011, 12. English text available at https://www.riigiteataja.ee/en/eli/513012015001/consolide (most recently accessed on 1.5.2017).

38 Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations. Official Journal L 217, 05/08/1998, pp. 0018–0026. Annex V, Art. 1.

39 S. Callens et al. *E-health and the Law*. London: Kluwer Law International and International Law Association 2003, p. 103.

40 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Official Journal L 178, 17/07/2000, pp. 0001–0016.

41 European Commission. Study on legal and regulatory aspects of eHealth: 'Legally eHealth'. Deliverable 3, Issues of Liability and Consumer Protection. Available at http://www.crid.be/pdf/public/5603.pdf (most recently accessed on 15.4.2017).

For effectively guaranteeing the freedom to provide service and legal certainty for providers and recipients of services, the law of the Member State applying to the service provider's location is applied with regard to information-society services. Hence, an information-society service provided via a place of business located in Estonia must meet the requirements arising from Estonian law, whichever EU or EEC member state the service is provided in.*[42]

According to Article 4 (1) of the E-Commerce Directive, Member States shall ensure that the taking up and pursuit of the activity of an information-society service provider is not made subject to prior authorisation or any requirement having equivalent effect.

The ISSA sets forth the principle, stemming from the above-mentioned directive, that the provision in Estonia of services belonging to the co-ordinated field through a place of business located in a member state of the EU or member state of the EEA is not subject to restriction, except in the case of protection of morality, public order, national security, public health, and consumer rights and to the extent justified for this (Subsection 3 (2)). Any restriction must be established with regard to a specific information-society service, and it must be proportional to its objective; before establishing a restriction, a competent Estonian body shall have asked the state of the location of the place of business to establish a restriction, whereupon the latter did not establish that restriction or imposed an inadequate one; and a competent body shall have notified the European Commission and the relevant Member State of its intention to establish a restriction (Subsection 3 (3)).

In the Ker-Optika court case, the ECJ found that EU member states may not restrict the provision of e-health services solely for reason of a requirement that the patient and health-care provider be physically present simultaneously. The court ruled that, although the freedom of provision of information-society services originating in another Member State may be restricted on the basis of the E-Commerce Directive, it is not a proportional requirement either that the sale of contact lenses must be preceded by a consultation with an ophthalmologist or that contact lenses may be sold only in a physical location. Hence, consultation may be carried out online.*[43]

On the basis of the conclusions reached in the Ker-Optika case, it is, in principle, possible to launch e-consultations without a corresponding activity licence, in keeping with Article 4 (1) of the E-Commerce Directive. A Member State may, for the reasons set out in Article 3 (4) of the E-Commerce Directive, prohibit e-consultations or impose a requirement of having physical premises for provision of services. In such a case, the measure must be appropriate for achieving the objective sought and may not go beyond what is necessary for reaching that objective.

The state is quite obviously able to justify the necessity of the activity-licence requirement by citing protection of national health. More questionable is the requirement of a physical location for information-society services. At first glance, the requirement appears untenable. A physical examination would be relevant in the case of specialised services that cannot be provided without performing of an examination, since the service would thereby not conform to the standard treatment.*[44] In the case of certain specialities, such as psychiatry, examination of the patient and physical contact between the doctor and patient are indeed not necessary, as the latter can be replaced by a videoconference. Yet, if justified by the patient's interests or important from the standpoint of health protection, for objectives such as ensuring treatment continuity via provision of health-care service that is not restricted solely to e-consultation, such that the doctor could, if necessary, call the patient in for a physical examination, the requirement of physical premises and face-to-face treatment may be judged to be reasonable.

Considering that e-consultation can be viewed as an information-society service and that provision of such a service may be restricted only on the grounds provided for in the ISSA, the author of this article maintains that the situation requires more thorough analysis, which is beyond the scope of the article,*[45] so that it can be determined whether the requirement of having physical facilities for e-consultations is justified on the basis of the purpose of protecting national health or on other grounds specified in the E-Commerce Directive and, furthermore, whether that requirement is appropriate for reaching the objective. Elsewhere

[42] ISSA, Subsection 3 (1).

[43] ECJ, 2 December 2010, Case C-108/09, *Ker-Optika Bt. v. ÀNTSZ.* – ECR 2010 I-12213.

[44] E.g., the Estonian Society of Traumatologists and Orthopaedists maintains in statements to the EHIF that development of e-services in surgical specialities is complicated. There are almost no patients whose need for operative treatment could be decided upon without the patient being seen in person. The letter addressing this point is in the possession of the author.

[45] The author plans to analyse the topic in her doctoral dissertation.

in the world, e-consultations between a health-care professional and a patient without a physical appointment do take place.*[46]

6. Conclusions

To an increasing extent, medical consultation is being provided over the Internet. Yet not all consultation in the field of medicine can be construed as a health-care service. Health-care services encompass only those e-consultations that are aimed at preventing, diagnosing, and treating diseases with the goal of reducing a person's complaints, preventing the deterioration of that person's state of health or the development of diseases, and restoring health. A health-care service as defined in the HSOA can be provided only by a health-care professional. In the interests of legal certainty and clarity, the current conflict in the definition of provision of a health-care service should be eliminated – to deal with the fact that, in essence, health-care services are also provided by specialists who are not health-care professionals – and clear criteria should be set that address how to distinguish an e-consultation from general consultation over the Internet. Intermediation of a health-care service over the Internet cannot be considered e-consultation. E-consultation over the Internet is an activity that is subject to an authorisation obligation, and the HSOA specifies the legal formats in which provision of e-consultation is permissible. A prerequisite for applying for an activity licence for e-consultation is the existence of physical facilities for provision of the service, but this becomes an obstacle to those who wish to provide only e-consultations. Because e-consultation is also an information-society service, the requirement of having physical facilities must be justified by the goal of protecting morals, public order, national security, national health, and consumers; must be appropriate for achieving the objective pursued; and may not go beyond what is necessary for that objective. To sum up, one can state that e-consultations are possible and legal within the lines of the existing legal framework but that there are still restrictions on initiating provision of a service and that a lack of clarity remains with regard to the definition of health-care service.

[46] The Finnish company MeeDoc Oy offers, via its Web site fi.meedoc.com, consultations with physicians and prescription of medicinal products via video call or chat service for patients in Finland, Sweden, Norway, Ireland, England, and Spain. Also, through its Web site medgate.com, Swiss telemedicine centre Medgate offers around-the-clock e-consultation, issuing prescriptions and certificates of incapacity for work if necessary.

https://doi.org/10.12697/JI.2017.26.06

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Legal Arrangements Similar to Trusts in Estonia under the EU's Anti-money-laundering Directive

1. Introduction

To identify terrorists and money-launderers hiding behind legal entities or arrangements, EU Directive 2015/849[*1] (4AMLD) introduced the 'UBO register'. In consequence, all Member States (MSs) have to establish a central register containing data on ultimate beneficial owners (UBOs)[*2] of corporate legal entities and also of trusts and legal arrangements similar to trusts (hereinafter 'SAs').

However, before 4AMLD was transposed into the national law of the various MSs, amendments to it – referred to by the name '5AMLD' and begun with the European Commission's 'Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC of 5 July 2016' (referred to below as 'the Proposal') – were already on the table[*3]. The final text of 5AMLD has not yet been agreed on, but it seems rather likely that it is going to usher in some serious changes pertaining to trusts and SAs. *Inter alia*, it probably will list such contractual devices as *fiducie*, *Treuhand*, and *fideicomiso* as examples of SAs[*4]. The 4AMLD terms explicitly specified only foundations

1 Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 5.6.2015, L 141/73.

2 Generally, 'any natural person who exercises ownership or control over a legal entity' (Recital 12); more precise definitions are given in articles 30 (on corporations) and 31 (on trusts and SAs).

3 Available at http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0450/COM_COM(2016)0450_EN.pdf (most recently accessed on 27.6.2017). Since the release of the proposal, the Council of the EU has published several Presidency compromise texts amending and updating it. Additional parliamentary meetings and various counterproposals have contributed to the compromise texts. Several committees have reviewed the amendments – e.g., the European Economic and Social Committee (EESC) and the Economic and Monetary Affairs and Civil Liberties (EMACL) committees. After the vote by the EMACL group, the European Parliament gave the go-ahead, at the March plenary session, to start negotiations among said parliament, the Commission, and the Council on the details for the legislation. Voting in the European Parliament's plenary session is tentatively scheduled for October 2017. See http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0208(COD)&l=en (most recently accessed on 27.4.2017).

4 See the Proposal (see Note 3)'s p. 16, proposed Recital 33 (p. 27), and proposed amendments to Article 31 (p. 33).

as legal devices to which the same measures were to be applied as to trusts.[*5] Secondly, 5AMLD is going to incorporate an attempt to determine in which MS the trusts and SAs should be registered – depending on where they are administered[*6] rather than which MS's law has been chosen to govern the trust or SA (the latter having been the approach of 4AMLD). This means also that the MSs must be able to recognise trusts and SAs established under and governed by the law of other countries (those not being limited to only MSs). Thirdly, the circle of persons to whom the data of UBOs will be available will most probably broaden. According to 4AMLD, the information concerning UBOs of trusts and SAs was already to be made directly accessible to competent authorities and financial intelligence units (FIUs)[*7]. The initial proposal for 5AMLD suggested allowing public access to the data on those trusts and SAs that are 'business-type' and/or administered by professionals and granting it to those persons 'with legitimate interest' in the case of others.[*8] Since then, however, there have been proposals to disclose the UBO data of all trusts and SAs to the public.[*9]

The MSs are expected to identify SAs used in their countries and to assure the submission of the data of related UBOs to a central database.[*10] It seems that, at the moment, Estonia has chosen to take the approach that, apart from foundations, there are no devices similar to trusts in our legal practice that should be subject to UBO-register rules.[*11] The aim with this article is to show that there are, in fact, arrangements in Estonian private law that have structure or functions similar to those of trusts and hence should be considered in the listing of SAs. In the paper, I also try to highlight the difficulties that arise in this regard. The article does not cover foundations, as these are instruments clearly addressed in both Estonian legislation and the AMLD ('AMLD' hereinafter referring to the 4AMLD and 5AMLD together as to the directive in general) text, for which reason no confusion as to whether they should be included in UBO registers should arise. For similar reasons, it does not cover corporate legal entities.

For determination of the SAs in Estonian legal practice, the concept of trust should be explained firstly. The 4AMLD and 5AMLD texts do not give a definition of trust. Instead, both equate it with instruments used in civil-law systems that have similar structure or functions. Therefore, in addition to providing an introduction to trusts, the first section below gives a brief overview of the two SA types mentioned in the preparatory documents for the 5AMLD – the *Treuhand* and *fiducie* – and proceeds to highlight the similarities between these and the trust, which should later aid in ascertaining the SAs in Estonian legislation. Next, the article turns to the Estonian legal scene and attempts to find arrangements that are similar to trusts. Under consideration are family- and succession-law devices (e.g., executorship of a will), various forms of shared ownership and communities (in particular, silent partnership and contractual investment funds), mandate and commission contracts, intermediated holding of securities, and fiduciary ownership for security purposes.

2. Trusts and SAs under the directive

2.1. Trusts

Purposes. The institution of the trust has developed mainly in jurisdictions based on the English legal system. For a long time, it has been viewed as unique to common law since civil-law countries do not have a device that is this flexible and universal for extending across so many legal relationships.

5 E.g., Recital 17.

6 *Ibid.*, p. 18, proposed Recital 21 (p. 25), and proposed amendments to Article 31 (pp. 34–35).

7 MSs can decide whether access is to be provided also for obliged entities (Art. 31(4)). The persons with 'legitimate interest' are not mentioned in the case of trusts and SAs.

8 *Ibid.*, p. 10, proposed Recital 35 (p. 28), and proposed amendments to Article 31 (pp. 33–34).

9 E.g., the Opinion of the Committee on Development (1.12.2016). Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-594.116+02+DOC+PDF+V0//EN&language=EN (most recently accessed on 29.4.2017).

10 See, for instance, the added para. 10a in the draft European Parliament legislative resolution. Available at http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2017-0056&language=EN#_part1_def3 (most recently accessed on 29.4.2017).

11 See the draft legislation for implementing the 4AMLD (*rahapesu ja terrorismi rahastamise tõkestamise eelnõu*), available at https://www.riigikogu.ee/tegevus/eelnoud/eelnou/fb03e20e-caf7-463d-9b60-ddf6021742b2/Rahapesu%20ja%20terrorismi%20rahastamise%20tõkestamise%20seadus (most recently accessed on 28.6.2017).

In common-law countries, trusts are used for a great variety of purposes: protection of (family) assets; administration and provision related to vulnerable persons, such as minors, addicts, and the disabled; preservation of an object or appropriation of property for a specific use[*12]; investment (unit trusts / mutual funds)[*13]; provision for employees upon their retirement (as with pension trusts)[*14]; charity; management of the collateral in cases wherein there is a large number of creditors or when the same security is to benefit successive groups of creditors (syndicate loans, secured-bond issuance)[*15]; etc. Testamentary trusts are created by a person's will and arise upon the death of the testator.

While the above-mentioned trusts are express trusts – i.e., knowingly created by a person – there also exist trusts that are imposed by law or a court: constructive trusts, statutory trusts, and resulting trusts[*16]. Statutory trusts arise under statutes stipulating that under certain circumstances the property shall be held in trust, as in the case of trusts arising in respect of legal estates that are co-owned or with intestacy.[*17] Constructive trusts are imposed by courts as a remedy, e.g., to prevent unjust enrichment.[*18] Resulting trusts can be created (in the transferor's favour) in cases wherein property is gratuitously transferred and there is insufficient evidence to ascertain the transferor's intention – i.e. that the transferor meant to make a gift or loan and abandon his beneficial interest.[*19]

Definition and parties. The Draft Common Frame of Reference (DCFR)[*20] defines the trust as a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes. The person who constitutes the trust and defines the trust terms is called the settlor[*21]. The roles of the parties may overlap.[*22] A trust is not a legal entity or a contract[*23].

Fiduciary ownership. An essential feature of a trust is that the title[*24] to the trust fund is vested in the trustee: 'For the purposes of performing the trust the trustee is cloaked in the mantle of an outright owner.'[*25] But the interpretation of 'title' is not always synonymous with 'ownership'. In most trust jurisdictions, the trustee actually becomes the owner of the trust fund[*26]. But some civil-law jurisdictions that have

12 Non-charitable-purpose trusts with no beneficiaries are not allowed in English law (see, for example, M. Lupoi. *Trusts: A Comparative Study*. Cambridge University Press 2000, p. 123) but are possible in other jurisdictions.

13 D. Hayton et al. *Underhill and Hayton Law of Trusts and Trustees*. 18th ed. LexisNexis 2010, p. 67.

14 *Ibid*., p. 69.

15 *Ibid*., p. 60.

16 *Ibid*., p. 420.

17 *Ibid*., p. 420.

18 *Ibid*., p. 83.

19 *Ibid*., p. 81.

20 C. von Bar et al. (eds). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*. Outline edition, 2009. Available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf (most recently accessed on 29.4.2017). The trust of Book X of the DCFR is the latest example of international trust models – it takes the civil-law approach to an English trust and, accordingly, should be comprehensible also for lawyers of a civil-law jurisdiction. As it is the only trust model that has been agreed upon (to some extent) among the MSs and that could possibly serve as a model for domestic or European trust legislation in the future, the author of this article has chosen the provisions of Book X for giving an overview of the definition and main components of the trust.

21 In the DCFR, the term 'truster' is used.

22 However, under the DCFR, a person cannot be a sole trustee for solely that person's benefit (X.-9:109).

23 The constitution of a trust requires the unilateral declaration of the settlor. If it is not a self-declaration trust, wherein the settlor is also the sole trustee, the transfer of the assets from the settlor to the trustee is the second prerequisite. See p. 5680 in C. von Bar, E. Clive (eds). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Volume 6*. Oxford University Press 2010.

24 Nevertheless, it might be that the trustee further invests the trust assets. In that case, 'a custodian, on behalf of a trustee (and on trust for the trustee qua trustee), has title to what laymen consider to be the trust assets although, strictly speaking, it is the trustee who has title to his rights against the custodian, such rights actually being the trust assets,' states D. Hayton. The trust in European commercial life. – J. Lowry, L. Mistelis (eds). *Commercial Law: Perspectives and Practice*. LexisNexis Butterworths 2006.

25 C. von Bar, E. Clive (see Note 23), p. 5691.

26 In legal literature, the trust-specific situation in common law countries, where the title of an asset is held by a person who administers it for the benefit of another, has often been illustrated through the 'split ownership' concept, in which the legal title belongs to the trustee and the beneficiary has the beneficial/equitable title. Nowadays, legal scholars writing on trusts are more of the opinion that the abovementioned 'title-split' does not exist, that it has been used to clarify the trust concept to civil law lawyers and that the trustee is really the full owner. See, e.g., P. Matthews. The compatibility of trust with the civil law notion of property. – L. Smith (ed.). *The Worlds of the Trust*, p. 316. Cambridge University Press 2013. – DOI: https://doi.org/10.1017/CBO9781139505994.015.

applied the trust use different solutions: in China, Louisiana, and Quebec, 'title' to trust property is in the name of the trustee whilst ownership of the trust property is said to lie with the settlor, beneficiary, or none of the trust parties, respectively.[*27]

Even if the trustee is the owner, it must be remembered that the trust assets have only been passed to him for the purposes set forth in the trust terms. Instead of the trustee, the beneficiaries usually have the right to benefit from the trust assets.

The settlor or beneficiaries should not have the right to order the trustee around – the retaining of powers by the settlor must not extend past the limit beyond which the trust can be deemed void or 'sham'[*28]. However, some jurisdictions (mainly offshore) do allow trusts that would be considered 'sham' in others.

Segregation of patrimonies. With the trustee being the owner of the trust fund, he can be personally liable to satisfy trust debts (the first rule regarding creditors still is that they may satisfy their rights out of the trust fund)[*29], but his personal creditors shall not have recourse to the fund, as the trust fund is to be regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee.[*30] The trust fund is also immune from claims by the trustee's heirs and spouse.[*31] Neither shall the trust fund be available for creditors of the settlor or beneficiary (although they may appeal to the beneficiary's rights related to the trust fund[*32]), nor are the beneficiary and the settlor in that capacity liable to a trust creditor.[*33]

Tracing. Another specific feature of the common-law trust is the special nature of the rights of beneficiaries against third persons in the event of misappropriation of the trust assets by the trustee. Although beneficiaries are not the owners of trust assets, they might have a claim against a third-party recipient who is not an acquirer for value in good faith.[*34]

2.2. The similarity in SAs

The *Treuhand*. In Germany[*35], the *Treuhand* is a contractual relationship wherein a person (the *Treuhänder*) is entrusted with certain property (the *Treugut*), which he has to administer or dispose of, not in his own interest but in the interest of another person (the *Treugeber*) or for a specific purpose.

This institution is not explicitly regulated by law and is instead governed by academic writings and case law. Usually, the provisions regulating a mandate or contract for the management of affairs of another are applied also.[*36]

A distinction is made between the security *Treuhand* and the administrative *Treuhand*: the former protects the interests of the *Treuhänder* by providing him with security through the transfer of assets; in the case of the latter, the *Treuhänder* manages the assets in the interests of the *Treugeber*.[*37]

The *Treuhänder* becomes the owner of the assets transferred to him and, as an owner, may dispose of them. The contract creating the *Treuhand* can set certain limits for that, but these have only obligatory effect. Hence, dispositions made in breach of such obligations are generally valid.[*38] In the event of misappropriation of property by the *Treuhänder*, the beneficiary could have an *in personam* claim against the third-party transferee if the *Treuhänder* himself is insolvent and also the transferee has conspired with the *Treuhänder* to damage the *Treugeber* or the beneficiary.[*39]

27 D. Clarry. Fiduciary ownership and trusts in a comparative perspective. – *International and Comparative Law Quarterly* 63 (2014) / 4 (Oct.), pp. 901–933, on p. 926. – DOI: https://doi.org/10.1017/S0020589314000463.

28 See, for example, D. Hayton et al. (see Note 13), pp. 88–97.

29 X.-10:101(1), X.-10:201(1), and X.-10:202 of the DCFR.

30 X.-1:202(1)(2)(a) of the DCFR.

31 X.-1:202(2)(b)(c) of the DCFR.

32 X.-10:101(1) of the DCFR.

33 X.-10:203 of the DCFR.

34 See M. Lupoi (Note 12), pp. 58–65.

35 The *Treuhand* is used also in Austria, Switzerland, and Liechtenstein.

36 S. van Erp, B. Akkermans (eds). *Cases, Materials and Text on Property Law*. Hart Publishing 2012, p. 565.

37 D. Krimphove. National report for Germany. – S.C.J.J. Kortmann et al. (eds). *Towards an EU Directive on Protected Funds*, pp. 115–143. Kluwer Legal Publishers 2009, p. 117.

38 S. van Erp, B. Akkermans (Note 36), p. 583.

39 *Ibid*., p. 613.

The *Treugeber* never quite drops out of the picture: the *Treuhänder* has an obligation to report to the *Treugeber*, and it is possible for the *Treugeber* to be allowed to revoke the *Treuhand*. While the *Treuhänder* is the owner, the *Treugut* is still 'economically' deemed to belong to the *Treugeber*. Therefore, in cases of insolvency of the *Treugeber*, the creditors of the *Treugeber* can reclaim the *Treugut* from the *Treuhänder* (but this is only a personal claim).*[40] On the other hand, when the *Treuhänder* is insolvent, the *Treugeber* or third-party beneficiary can oppose attacks from personal creditors of the *Treuhänder* and demand release of assets belonging to the *Treugut* (but only if those assets have been provided to the *Treugut* directly from the *Treugeber*).*[41]

The *fiducie*. Article 2011 of the French Civil Code*[42] defines the *fiducie* as a transaction with which the *constituant*[*43] transfers things, rights, or securities to the *fiduciarie*, who, keeping them segregated from his own patrimony, acts so as to further a particular purpose for the benefit of beneficiaries.

French law explicitly states that the fiduciary patrimony is subject to execution only for debts arising from the keeping or management of this patrimony*[44] and is thereby protected from the creditors of the *fiduciarie*[*45] as well as of the *constituant*. Unlike under the law of England or Germany, only specific institutions or professions can function as a *fiduciarie*: individuals, apart from *avocats*, are excluded.*[46] It is used mainly as a security device (*fiducie-sureté*)*[47], wherein the *fiduciarie* is the beneficiary also, and for management purposes for the benefit of the *constituant* himself (*fiducie-gestion*). A *fiducie* cannot be set up for a third-party beneficiary (unless that beneficiary confers upon the *constituant* a benefit somehow equivalent to the value of the things he receives)*[48]. In France, a *fiducie* has to be registered.*[49]

The common feature. While in common law a trust is not a legal entity or a contract, the similar instruments mentioned in 5AMLD are of contractual nature, as with the *Treuhand* and *fiducie*, or are legal entities, such as foundations. Also, while with a trust the assets constituting the trust fund are ring-fenced, such that protection is included in the event of insolvency of the settlor, the *Treuhand* ends in consequence of insolvency of the *Treugeber* and the assets may then be reclaimed from the *Treuhänder*, so we can say that the segregation of property is not an obligatory feature for an arrangement to be treated as similar to trusts under the AMLD. The beneficiaries' rights against third persons in cases of misappropriation of property by the trustee are generally stronger in the case of trusts.*[50]

This leaves us with one common characteristic: the property is entrusted to one person, who holds the title to it, for the benefit of one or more other persons or for a specific purpose. Hence, from the outside the property has one person as an owner, but there exists an internal relationship also – potentially invisible to the public – which obliges the trustee to observe certain duties and which may enable another person to gain the economic benefit from the trust property. Below, the further examination of the possible SAs in Estonia proceeds from this conclusion.

3. Possible SAs in Estonia

3.1. Succession- and family-law devices

Although there are legal structures that are functionally similar to trusts in that they cater for the same sorts of needs as are dealt with by the trust in common-law countries, in the AMLD context we can presumably exclude those with no 'hidden' beneficial owner.

40 *Ibid.*, p. 614.

41 *Ibid.*

42 *Code Civil*, law no 2007-211 of 19 February 2007.

43 A legal or a natural person.

44 Article 2025(1) of the *Code Civil*.

45 Article 2024 of the *Code Civil*.

46 S. van Erp, B. Akkermans (Note 36), p. 577.

47 See, for example, F. Barrière. The security fiducie in French law. – L. Smith (ed.). *The Worlds of the Trust*, pp. 101–140. Cambridge University Press 2013. – DOI: https://doi.org/10.1017/CBO9781139505994.008.

48 S. van Erp, B. Akkermans (Note 36), pp. 576–575.

49 Articles 2010 and 2019 of the *Code Civil*.

50 S. van Erp, B. Akkermans (Note 36), p. 613.

So, although a testator can appoint an **executor of will**[*51] or a court can appoint an **administrator for the estate** of the deceased[*52], who might have the right to possess, use, or dispose of the property (while the successor does not have the right to dispose of it), the successor – and not the executor or administrator – will be recorded as the owner of the property in the respective registers. Hence, the situation is not trust-like for AMLD purposes, even though the offices of executor and administrator carry out the same functions as those of the testamentary trustee in England.

The same applies to **guardianship** of vulnerable persons – although the guardian might have obligations similar to the trustee's, the person under guardianship is still regarded as the owner, although he does not have the right to enter into transactions himself[*53]. Also, in this context, there is probably no need for a lengthy analysis of the institute of representation[*54], wherein one person can conduct transactions for another but does so not in his own name or on his own behalf but for the principal (although, again, some of his duties might be similar to duties of a trustee).

Also, the Law of Succession Act (LSA) provides for the possibility of naming a **subsequent successor**: in the case of arrival of a particular date or fulfilment of a set condition, the estate or a share thereof transfers from a provisional successor to a subsequent successor (see the LSA's §45(1)). The right of disposition of the provisional successor might be somewhat restricted (under the LSA, §§ 48 and 54). This arrangement may resemble an interest-in-possession trust[*55], but until the relevant date or condition has come to pass (and the subsequent successor is to be transferred ownership), the subsequent successor, in that capacity, will have no 'hidden' beneficial rights with regard to the estate and the provisional successor is the full owner. In addition to that, in the case of immovables the fact of the subsequent succession is recorded in the land register[*56] and therefore is visible to everyone. Needless to say, the situation of subsequent succession can only arise in the case of someone's death, which makes it an ineffective means for money laundering.

3.2. Shared ownership and communities

As was mentioned earlier in the paper, in common-law countries trusts also can be established in cases wherein, for example, land is owned by more than one person.[*57] In Estonia, when a right or a thing belongs to several persons at the same time, this is usually manifested by the entry in the relevant register[*58] – if the object of shared ownership[*59] or community (*ühisus*[*60]) has to be registered – or, in the case of movables, by the joint possession[*61]. Hence, in cases of **co-owners**[*62], **spouses**[*63], **co-successors**[*64], and an **'ordinary' partnership** (*seltsing*)[*65], there is no 'hiding' the owner and the situation cannot be deemed trust-like in that sense.

51 Under the terms of sections 78–87 of the Law of Succession Act (*pärimisseadus*). – RT I 2008, 7, 52; 10.3.2016, 16. English text available at https://www.riigiteataja.ee/en/eli/528032016001/consolide (most recently accessed on 29.4.2017).

52 See Section 112 of the LSA.

53 See Sections 8-12 of the General Part of the Civil Code Act, or *tsiviilseadustiku üldosa seadus* (GPCCA). – RT I 2002, 35, 216; 12.3.2015, 106. English text available at https://www.riigiteataja.ee/en/eli/528082015004/consolide (most recently accessed on 29.4.2017).

54 See Sections 115-131 of the GPCCA.

55 In the case of an interest-in-possession trust, one beneficiary is granted a right to the income from the trust or the right to use it, by the settlor. Upon the death of said (first) beneficiary, the rest of the fund may pass to another beneficiary.

56 See §49[1] of the Land Register Act, or *kinnistusraamatuseadus* (LRA). – RT I 1993, 65, 922; 28.6.2016, 8. English text available at https://www.riigiteataja.ee/en/eli/515122016002/consolide (most recently accessed on 29.4.2017).

57 M. Lupoi (Note 12), p. 19.

58 See the LRA, §14(2). Also, §70 of the Law of Property Act, or *asjaõigusseadus* (LPA). – RT I 1993, 39, 590; 25.1.2017, 4. English text available at https://www.riigiteataja.ee/en/eli/526012017002/consolide (most recently accessed on 29.4.2017).

59 See the LPA, §70(1).

60 If a right belongs to several persons. See the LPA's §70(7).

61 See the LPA's §32ff.

62 Under §70(3) of the LPA.

63 Under §25 of the Family Law Act (*perekonnaseadus*). – RT I 2009, 60, 395; 21.12.2016, 12. English text available at https://www.riigiteataja.ee/en/eli/527122016004/consolide (most recently accessed on 29.4.2017).

64 See §147 of the LSA.

65 See §§ 596-609 of the Law of Obligations Act, or *võlaõigusseadus* (LOA). – RT I 2001, 81, 487; 31.12.2016, 7. English text available at https://www.riigiteataja.ee/en/eli/524012017002/consolide (most recently accessed on 29.4.2017).

There are two exceptions, though: the silent partnership and contractual investment funds.

While in cases involving an 'ordinary' partnership, the parties to the partnership are visible from the outside, then in the case of **silent partnership** (§§ 610–618 of the Law of Obligations Act, modelled after the German *Stille Gesellschaft*) only one of the parties (the 'proprietor') is visible to third persons, while there exists an internal relationship that offers privacy to the other party to the contract – the silent partner. The silent partner makes a contribution (cash, services, or other assets) to the business of the proprietor and in return is entitled to share in the profits arising from the business. The contribution normally becomes the property of the proprietor. With respect to third parties, the proprietor is the owner of the commercial enterprise and carries on business in his own name. For certain operations, the proprietor should obtain the consent of the silent partner, but not having that consent does not affect the validity of the transactions concluded (the silent partner will have a personal claim against the proprietor).[*66] The silent partner is generally not liable for third-party claims arising from the business[*67]. Nevertheless, if agreement is not made otherwise, he has to participate in the losses of the business[*68]. Under the partnership agreement, the silent partner might have the right to participate in the decision-making.[*69] The partnership comes to an end when either of the parties goes bankrupt.[*70] The assets contributed to the enterprise by the silent partner are not ring-fenced: when the proprietor (either natural or legal person) has several enterprises to his name or there are personal creditors there is no segregation, and the silent partner (or the contribution) has no specific protection.

Although the silent partnership would not qualify as a trust in the 'classical' sense, it seems that it fits the SA category for AMLD purposes. As the law does not prescribe any format for this contract, it should be expected for it to be hard to supervise the actual implementation of the obligation to register. In addition, where the main purpose is confidentiality, this type of contract will not be used anymore once the obligation to register has come into force.

In the case of contractual investment funds (**common funds**), the money collected through the issue of units and other assets acquired via the investment of said money are owned jointly by the unit-holders, and the management company ('manco') shall conclude transactions with the assets of the fund for the account of all the unit-holders collectively but in its own name (see §4(1) of the Investment Funds Act (IFA)[*71]). This means that the manco will be recorded in the registries as having title to the property of the fund.[*72]

Common funds also provide trust-style segregation of patrimonies: claims of creditors of the manco cannot be satisfied out of such assets.[*73] The funds are immune also from claims by creditors of unit-holders[*74].

Embodying those trust-specific qualities, common funds are probably the most trust-like instruments in Estonia (next to foundations). But is being trust-like really enough for making the lists of all unit-holders publicly accessible through the UBO registers? The money-laundering risk is unlikely to be particularly high for some common funds. This is especially true for those subject to extensive regulation and Financial Supervision Authority oversight. It is worth mentioning too that all **pension funds** – including mandatory pension funds, in the case of which the sum accrues as a percentage of lawful income – are established as common funds in Estonia.

Also, in the case of trusts and SAs, the AMLD draws no distinction with regard to whether the beneficial owners have any actual decision-making rights (in the case of many common funds in Estonia, the unit-holders do not). However, if an investment fund were established as a corporation instead of using the contractual common fund format (in Estonia, these can be established as, for example, a public limited company or a limited

66 P. Varul et al. *Võlaõigusseadus II. Kommenteeritud väljaanne* ['Law of Obligations II, Commented Edition']. Tallinn 2007, p. 713.

67 *Ibid.*; LOA, §610(3).

68 LOA, §§ 614(1) and 618(2).

69 P. Varul et al. (see Note 66), p. 717.

70 LOA, §§ 596(1)7) and 618(1).

71 Investeerimisfondide seadus. – RT I, 31.12.2016, 3 (in Estonian).

72 In the case of immovables, a notation needs to be made in the land register, indicating the fund on whose behalf the immovable is acquired. See §23(1)(4) of the IFA. The assets may, alternatively, be registered in the name of the depositary, if there is corresponding consent of the manco; see §296(2).

73 IFA, §26(4)(6).

74 IFA, §13(4).

partnership), there would be a threshold for the registration of UBOs. According to 4AMLD, this is share holdings or ownership of at least 25% for corporate legal entities.*[75] Accordingly, many of the investment vehicles established as corporations could escape the UBO-registration requirement while common funds could not.

3.3. Commission and undisclosed mandate

By contract of commission, the agent undertakes to enter into a transaction in his own name yet on account of the principal – e.g., to buy or sell an object for the principal*[76]. This arrangement is a subspecies of authorisation agreement. Via an authorisation agreement (hereinafter also 'the mandate'), the mandatary undertakes to provide services to the mandator pursuant to the agreement*[77]. These services may include negotiating and entering into contracts with third parties.

The Law of Obligations Act (§626(3)) provides that the claims and movables acquired by the agent/mandatary shall not be subject to a claim by the mandatary's/agent's creditors. But this segregation of patrimonies does not apply to immovables or rights other than claims.*[78] There is no sufficient *Treuhand*-like case law or doctrine in Estonia. In principle, the Supreme Court has recognised the possibility of fiduciary ownership also in the case of immovables*[79]: it is possible to construct trust-like devices whereby the ownership is transferred to an acquirer whose rights as an owner are restricted in the contract – he might be obliged to exercise the owner's rights for the benefit of the transferor by, for example, letting him use the asset. However, there will be no protection of the beneficiary's rights in the event of the trustee's insolvency or misappropriation of the property – unless, of course, the beneficiary's right is somehow made visible in the land register. For instance, if the parties have agreed that the beneficiary has a future right to acquire an immovable, it would be possible to enter in the land register a notation on this, which would serve the principle of publicity and guarantee that any disposal of said immovable after the entry of the notation in the register shall be void if it violates the rights of the beneficiary*[80]. Having such a notation in the public registry would presumably remove the 'trust-like' component in AMLD context, however, and thereby release contracts of this kind from the UBO-registry burden. On the other hand, in the absence of such a notation, the practical implementation of this construction seems quite risky and hence would be expected to be infrequently applied.

3.4. Intermediated holding of securities

Commission and mandate contracts are often used in trading on stock exchanges and in other regulated markets. For the intermediated holding of securities, the specific provisions of the Securities Market Act (SMA)*[81] and Estonian Central Register of Securities Act (ECRSA)*[82] apply in addition to the Law of Obligations Act.

Intermediated holding of securities that are registered in the Estonian Central Register of Securities (ECRS), such as shares of public limited companies except investment funds, can be accomplished through **a nominee account** (ECRSA, §6). When exercising the rights and performing the obligations arising from the securities, the holder of the nominee account has to follow the instructions of the client. Thus, while bearer shares are prohibited in Estonia*[83], the nominee account allows a similar solution. However, the list

[75] Compare Article 3(6)(b), Article 31(1), Article 3(6)(a), and Article 30 of 4AMLD.

[76] LOA, §692(1).

[77] LOA, §619.

[78] P. Varul et al. *Võlaõigusseadus III. Kommenteeritud väljaanne* ['Law of Obligations III, Commented Edition']. Tallinn 2009, p. 22.

[79] CCSCd 23.9.2005, 3-2-1-80-05, paragraph 22. – RT III 2005, 29, 300 (in Estonian).

[80] LPA, §63(3)(5).

[81] Väärtpaberituru seadus. – RT I 2001, 89, 532; 7.4.2017, 4. English text available at https://www.riigiteataja.ee/en/eli/519042017001/consolide (most recently accessed on 29.4.2017).

[82] Eesti väärtpaberite keskregistri seadus. – RT I 2000, 57, 373; 31.12.2016, 25. English text available at https://www.riigiteataja.ee/en/eli/518012017004/consolide (most recently accessed on 29.4.2017).

[83] All shares have to be registered, and the rights attached to a registered share shall belong to the person who is entered as the shareholder in the share register – see §228 of the Commercial Code (Äriseadustik). – RT I 1995, 26, 355; 13.7.2016. Bearer shares were allowed until 2001.

of possible holders of nominee accounts is limited.*[84] Also, a notation shall be made in the register indicating that the account is a nominee account (the identity of the client will not be disclosed).

With regard to the creditors of the holder of a nominee account, the securities are deemed to be those of the client and not the holder of the nominee account (see §6(4)(6) of the ECRSA). The same applies for other securities held in custody for clients (under §88(6) of the SMA).

3.5. SAs for security purposes

In addition to the purposes of management or mere holding of assets, **fiduciary ownership for security purposes** – assignment of rights or transfer of ownership of things in order to provide collateral – is used.*[85] Again, there are no express provisions regulating these relationships (the only exception being **financial collateral***[86]), and they are not recognisable as such to third parties.

Using a **security agent** for purposes of securing bond issuance and syndicate loans can feature a mix of the mandate and the assignment of rights or transfer of ownership of things to the security agent. To third persons, the security agent is the holder of a restricted real right (pledge or mortgage) or an object that has been transferred to him, but he has to exercise the associated rights in the interests of the investors/lenders.*[87]

Again, those arrangements used for security purposes are definitely trust- or *Treuhand*/*fiducie*-like, but are they really dangerous money-laundering-wise and in need of being registered?*[88]

4. Conclusions

Section 2 showed that the SAs mentioned in the preparatory texts for the 5AMLD – the *Treuhand* and the *fiducie* – do not share all the elements of a common-law trust. Accordingly, the conclusion was stated that in the AMLD context being 'trust-like' rather boils down to situations wherein from the outside the property has one person as an owner but there also exists an internal relationship that obliges the title-holder to observe certain duties and that may enable another person with the economic benefit from the property.

Section 3 showed that there indeed are arrangements in the Estonian legal system that fall into this category of SAs under the AMLD. Moreover, there are arrangements that embody more than one characteristic of the trust. This is, of course, not unexpected. Even though there is no single institution under Estonian law that could perform all the functions of a common-law trust, the same legal relationships exist. That said, just as not all trusts contain comfortably hidden and untaxed piles of valuable property, not all SAs of civil-law countries are ill-intentioned – many may well, for example, only hold an item with a very small value for a very short time as an object. It is hard to believe that the drafters of the AMLD really meant that all instruments that resemble a trust should be entered in UBO registries, but the definition related to being 'similar to trusts' is pretty vague. If one really wants, some similarity with trusts can be seen in many other structures wherein the right to benefit from an asset is not clearly manifested, but it would be an

[84] Presumably, they are obliged entities with the obligation to identify their clients and perform other, respective tasks. See §6(1) of the ECRSA.

[85] P. Varul et al. *Asjaõigusseadus II. Kommenteeritud vln.* ['Property Law II, Commented Ed.']. Juura 2014, p. 434; K. Toommägi. Vallasasjade tagatisomandamine – selle olemus ja realiseerimine ['Security ownership transfers of movable assets – essence and enforcement']. MA thesis. Tallinn 2014. Available at http://dspace.ut.ee/bitstream/handle/10062/43015/toommagi_ma_2014.pdf?sequence=1&isAllowed=y (most recently accessed on 29.4.2017).

[86] Financial collateral is the transfer of a right of claim to money in an account, securities, or a credit claim in order to provide collateral when both the collateral-provider and the collateral-taker are professional securities-market participants or when at least one party is in the latter class and the other one is a large corporation. See the LPA's §314[1] *ff*.

[87] See E. Pisuke. Võlakirjaemissiooni tagatisagent ['The role of the security agent in the issuance of bonds']. MA thesis, 2013. Available at http://dspace.ut.ee/bitstream/handle/10062/32187/pisuke_erki.pdf (most recently accessed on 29.4.2017); A. Kotsjuba. Tagatisagendiga kaasnevate riskide maandamine Eesti õiguses ['Mitigation of legal risks related to security agents under Estonian law']. MA thesis. Tallinn 2013. Available at https://dspace.ut.ee/bitstream/handle/10062/30849/kotsjuba_andreas.pdf?sequence=1&isAllowed=y (most recently accessed on 29.4.2017).

[88] Firstly, on account of the nature of these relationships. Secondly, the beneficiaries might be quite easily identifiable in some cases, with one example being bondholders, who are registered in the ECRS in the case of securing bond issuance with the aid of a security agent. Then again, UBO registration in a special database is required also in cases involving corporations, whose owners are likewise identifiable via registers in Estonia.

incredible burden to start registering them all and later supervise the fulfilment of the obligation of registration. Even the registration of just the SAs considered in Section 3 would cause a disproportionate administrative hassle, costs, and loss of privacy for decent citizens, while the actual money-launderers would in the future refrain from concluding contracts deemed trust-like and find other means (e.g., using 'straw men'). Therefore, I would say that the AMLD rules require clarification based on more careful study of the concept of trust or of arrangements that are used by money-launderers. Otherwise, we will see another example of 'costly failure' and 'ill-guided activism responding to the need "to be seen to be doing something'" that anti-money-laundering policies have been accused of*[89].

As was mentioned in the introduction, Estonia seems to have chosen to take the stance that (apart from foundations) there are no SAs in our legal practice that are subject to UBO-register rules. I would dare to recommend an approach that is between the two extremes: to analyse the SAs by evaluating the risk of money laundering on the basis of aspects such as the parties involved, the arrangement's object, its value and the duration of the agreement, the costs of registering the UBOs, the proportionality of the infringement of the right to privacy of decent citizens, etc. and to work out the criteria for registration of SAs accordingly.

[89] S.K. Singh. *Bank Regulations*. Discovery Publishing House 2009, p. 44.

https://doi.org/10.12697/JI.2017.26.07

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Duties and Liability of the Members of the Supervisory Board of Limited Companies in Estonia

The First Cases from the Supreme Court of Estonia

1. Introduction

Every limited company[*1] as a legal person needs special bodies to express its will and carry out its activities.[*2] Though modern company law in all countries provides special bodies to represent and manage the company, the technical structure of these organs varies widely.

In general, two different approaches are recognisable: either the company has a single body with several members, who exercise separate functions, or there are two different bodies with separated functions.[*3] The so-called prototype for the one-tier system is the Anglo-American public limited company. Article 154 of the United Kingdom's Companies Act 2006[*4] stipulates that a private company must have at least one director and a public company must have at least two directors. However, in legal literature it has been argued that, due to flexible legal regulation, British companies can have different types of managing bodies, as the shareholders have the possibility to shape the management system as they like.[*5]

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1 In Estonia, similarly to other EU member states, there are two types of limited-liability companies: public limited company (*aktsiaselts*) and private limited company (*osaühing*). See also: M. Vutt. Aktsiaseltsi juhtimismudeli õiguslik reguleerimine ['Legal regulation of the management model of a public limited company'], master's thesis. Tartu 2006, p. 7.

2 About the legal theories of a legal person, see, for example, K. Saare. *Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine (Abgrenzung der Rechtssubjektivität der Privatrechtlichen Juristischen Person)* [in English: Delimitation of the legal subjectivity of the private legal person], doctoral thesis. Tartu 2004.

3 There are also some countries within Europe that allow public limited companies to choose between the two models (e.g., France and Belgium). M. Vutt. Aktsiaseltsi juhtimismudeli õiguslik reguleerimine ['Legal regulation of the management model of a public limited company], master's thesis. Tartu 2006, pp. 28, 37, 97–98.

4 UK Companies Act 2006. Available at http://www.legislation.gov.uk/ukpga/2006/46/contents.

5 J. Rickford. Fundamentals, developments and trends in British company law – some wider reflections. First part: Overview and the British approach. – *European Company and Financial Law Review* 1 (2004) / 4 (December), p. 405.

The classic examples of a two-tier management model are Germany and the Netherlands. As compared to the one-tier system, the two-tier model is a more recent phenomenon. The concept of a two-tier model is based on the idea of an independent supervision, which means that the control over the management must be carried out by an independent and objective body that must be separated from the everyday management.[*6] The managing bodies of the German public limited company (*Aktiengesellschaft*) are the management board (*Vorstand*) and supervisory board (*Aufsichtsrat*), both of which must be appointed by the founders of the company.[*7] The everyday activities are carried out by the management board, and the task of the supervisory board is to control the activities of the management board in general. German private limited companies (*Gesellschaft mit beschränkter Haftung*) normally have one-tier management structure,[*8] but some special regulations deriving from co-determination rules can make the supervisory board compulsory also for smaller companies.[*9]

An Estonian public limited company, similarly to the German *Aktiengesellschaft*, is managed by two separate bodies and the management model is to a great extent similar to the German one. According to Art. 243 (1) p 7 and Art. 316 of the Estonian Commercial Code[*10], every public limited company must have a supervisory board. According to Art. 189 of the CC, a private limited company shall have a supervisory board if it is provided by the articles of association of the company. As Estonian law does not foresee any co-determination rules, the formation of a supervisory board is voluntary for all private limited companies.[*11] In case shareholders decide to choose the two-tier model, the provisions of the CC concerning the supervisory board of a public company apply correspondingly to the powers and activities of the supervisory board unless otherwise provided by law.

Though Estonian case law has had many examples of claims filed against the members of the management board, Estonian courts have only lately started solving cases where the members of the supervisory board have been sued for damaging the company. The main problem seems to arise from the fact that, although the general principles for the liability are very similar to those for liability of the management board, the functions and tasks of the supervisory board are different and therefore the assumptions about the liability are yet not clear.

The article addresses the core question of the scope of the powers and obligations of the members of an Estonian public limited company's supervisory board. The main research question is: whether and to what extent the relevant Estonian case law takes into account the special features of those obligations. The purpose of the research is to compare Estonian legal regulation and case law to the relevant German regulations. The above-mentioned approach is justified because the German public limited company, as well as its Estonian counterpart, has a two-tier management model.[*12]

6 A.F. Conard. The supervision of corporate management: A comparison of developments in European Community and United States law. – *Michigan Law Review* 82 (1984), pp. 1459–1488.

7 See Art. 30 of the *Aktiengesetz* (AktG; Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), das durch Artikel 8 des Gesetzes vom 11. April 2017 (BGBl. I S. 802) geändert worden ist. Available at https://www.gesetze-im-internet.de/aktg/).

8 See Art. 52 of the German *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* GmbHG (GmbHG; Gesetz betreffend die Gesellschaften mit beschränkter Haftung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 4123-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 8 des Gesetzes vom 10. Mai 2016 (BGBl. I S. 1142) geändert worden ist).

9 H. Fleischer, W. Goette (Herausg.). Münchener Kommentar zum GmbHG. Verlag C.H. Beck München. 2. Auflage 2016. – Spindler § 52, Rn. 14.

10 Commercial Code. Adopted on 15 February 1995. – RT I 1995, 26/28, 355; RT I 22.06.2016 (in Estonian). Hereinafter 'CC'.

11 Until June 1996, Art. 189 (1) of the CC stipulated that a supervisory board is compulsory for every private limited company that has share capital that exceeds 400,000 kroons, more than 20 shareholders, or more than 100 employees during an accounting year. Until 1 January 2011, a supervisory board was compulsory for every private limited company with share capital of more than 25,000 euros and with fewer than three members of the management board.

12 The use of German law as a source for comparison can also be justified by the view, expressed by the Supreme Court of Estonia, that on many occasions the German legal system serves as a model not only for legal regulations but also, as an example for courts for the interpretation of the relevant law. See CCSCd 3-2-1-145-04, para. 39.

2. Functions and powers of the supervisory board: A comparative view

2.1. General duties of the supervisory board

According to law, the supervisory board of Estonian companies has three major functions: general management of the company, planning of the economic activities of the company, and supervision of the activities of the management board. The general list is regulated in the first sentence of Article 316 of the CC, which stipulates that the supervisory board shall plan the activities of the public limited company, organise the management of the company, and supervise the activities of the management board.

In addition to the above-mentioned generalised description of the duties of the supervisory board, some duties are also specified in other articles of the CC. The duty of the strategic general management[*13] arises from Article 317 of the CC, and as far as the shareholders have not determined the main directions of the activities with their decisions, it is the power of the supervisory board to conduct the general management. According to the first sentence of Art. 317 of the CC, the supervisory board shall give orders to the management board for organisation of the management of the company. The second sentence of the same article stresses the power of the supervisory board to supervise the actions of the management board. According to this provision, all transactions that are beyond the scope of everyday economic activities, as a rule, require the consent of the supervisory board. In general, the consent of the supervisory body is required for conclusion of, above all, transactions that bring about the acquisition or termination of holdings in other companies, the foundation or dissolution of subsidiaries, the acquisition or transfer of an enterprise or the termination of its activities, the transfer or encumbrance of immovable or registered movables, etc. One must note that the list of the transactions that require the consent of the supervisory board is an open one and serves as an example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide whether a specific transaction needs the consent of the supervisory board or not.[*14] The Estonian Supreme Court has expressed a view that, in decision on whether a certain transaction needs consent of the supervisory board or not, the extent and the nature of such transactions must be taken into consideration.[*15]

It is also important to note that the supervisory board shall also approve the annual budget of the company unless the power of deciding on such matters is granted to a general meeting by the articles of association (Art. 317 (7)).

However, the meaning and content of the duty to supervise and monitor the actions of the management board is not clearly stipulated in law. Art. 317 (7) CC foresees that the supervisory board has the right to obtain information concerning the activities of the company from the management board and to demand an activity report and preparation of a balance sheet. The law also foresees the right of each member of the supervisory board to demand the submission of reports and information to the supervisory board. An important feature of the powers of the supervisory board has also been described in Estonian legal literature: it has neither the competence nor the possibility of suspending the activities of the management board.[*16]

In addition to that, Art. 317 (6) of the CC stipulates that the supervisory board (as a body) has the right to examine all the documents of the company and to audit the accuracy of accounting, the existence of assets and the conformity of the activities of the company with the law, the articles of association, and resolutions of the general meeting. However, the law does not include the clear standard of supervision. One can conclude that those rights are granted in order to provide the supervisory board and its members the necessary information to fulfil its general duties. The law prescribes neither the exact frequency at which the documents should be checked nor the extent or exact scope of the supervision. This means that the nature of the

[13] About the strategic management, see additionally K. Saare, U. Volens, A. Vutt, M. Vutt. *Ühinguõigus I. Kapitaliühingud* ['Company Law I: Limited Companies']. Tallinn: Juura 2015, mn. 1846.

[14] According to Art. 317 (2), the articles of association may, however, prescribe that the consent of the supervisory board shall not be required or is required only in the cases specified in the articles. The articles of association may also prescribe other transactions for the conclusion of which the consent of the supervisory board is required. The articles of association may also grant the supervisory board the right to decide on other issues that are not placed within the competence of the management board or the general meeting pursuant to law or the articles of association.

[15] CCSCd 3-2-1-9-16, para. 36; CCSCd 3-2-1-26-17, para. 13.

[16] K. Saare et al. (Note 13), mn. 1864.

control the supervisory board carries out is different from that of the control carried out by the auditors of the company.

Unlike the management board, being a body that carries out everyday activities and not being obliged to hold meetings, the supervisory board must hold regular meetings. According to Art. 321 (1) of the CC, meetings of a supervisory board shall be held when necessary but not less frequently than once every three months.

As for the supervisory board of a German public limited company, it has traditionally been considered mainly as a controlling body – Art. 111 (1) of the AktG stipulates that a supervisory board must supervise the management board. Under German company law, the supervisory board, similarly to the supervisory board of Estonian limited companies, has several other obligations too. The main rights and duties of the supervisory board are stipulated in Art. 111 of the AktG, but the law also includes many other regulations, which supplement this list. For example, according to Art. 77 (2) of the AktG, the supervisory board has the right to adopt the rules of procedure for the management board (Art. 77 (2) AktG). According to Art. 90 of the AktG, it can demand that the management board should compose the management report. According to Art. 171 of the AktG, the supervisory board controls the annual financial statements, management report, and proposal for the profit distribution.

Unlike Estonian law, the German AktG clearly distinguishes between the duties of the management board and the supervisory board. Art. 111 (4) of the AktG stipulates the prohibition to transfer the powers of the management board to the supervisory board. It has been expressed in German legal literature that the clear distinction and organisational differentiation between the competence to take decisions as regards everyday actions and to supervise those actions derives from the idea that each of the bodies acts independently and is separately responsible for fulfilling its obligations.*[17] However, the articles of association of the company may determine that certain types of transactions may need the consent of the supervisory board. This is considered as a possibility for the supervisory board to participate in managing the company and therefore directly affect the management decisions (in addition to the possibility of advising the management board).*[18] Under German law, it is the supervisory board as a body (a collective entity) that performs the functions and carries the responsibility foreseen in law and not its single members. That means that, in general, it is not possible to delegate any of those obligations to a special committee or a single member of the supervisory board. However, it is possible for some actual monitoring activities to be carried out by special committees of the supervisory board.*[19]

2.2. Standard of supervision

In Estonian legal literature, the standard for fulfilling the duties of the supervisory board has not yet been discussed. In German legal literature, on the other hand, it has been expressed that the law does not require the supervisory board to monitor all the actions of the management board in detail.*[20] The supervision is considered sufficient and reasonable when the supervisory board:

- takes notice of all the reports and information it gets from the management board as well as of the developments and business events that are disclosed by the management board;
- fulfils its obligation to check the annual accounts of a company as well as the reports the management board has presented to the supervisory board about the business relations with affiliated companies;
- is convinced that the management board is properly composed and its members are appropriate for fulfilling their obligations;
- is convinced that the members of the management board co-operate properly and that all the management tools, (i.e., business planning, accounting, and reporting), as well as the company's organisation, meet the requirements;

[17] W. Goette, M. Habersack, S. Kalss. Münchener Kommentar zum AktG. Verlag C.H. Beck München. 4. Auflage 2014. – Habersack, AktG § 111 Rn. 96.

[18] *Ibid*. Rn. 96.

[19] *Ibid*. Rn. 49.

[20] W. Hölters (Hrsg). Aktiengesetz. Kommentar. Verlag C.H. Beck München. 2. Auflage 2014. – Hambloch-gesinn/gesinn, Rn 11.

- ensures that the management board fully complies with its reporting obligation pursuant to Art. 90 of the AktG;[*21]
- is able to trace all the indications that might lead the management board to a violation of its duties;
- in any case of significant deviations from the planned development, as well as in the event of any significant deterioration in earnings and assets, or in the case of material deviations as regards those indicators in comparable companies, examines whether those deviations are justified and whether the management board responds adequately.[*22]

Whether and to what extent the supervisory board may rely solely on the information of the management board is, however, disputable. There are different opinions in German legal literature about the question of whether monitoring actions of the supervisory board should be extended to subordinate levels where the management decisions are taken.[*23] Some authors are of the opinion that sufficient monitoring means, in general, that the supervisory board diligently monitors the annual (consolidated) financial statements and the management and auditor's reports and discusses and evaluates the management of the company critically with the management board.[*24] Some authors explain that the supervisory board must, for its part, carry out information-gathering activities to examine the management's actions. However, it has been stressed that the supervisory board is obliged to investigate the management's actions only if the management reports are unclear, incomplete, or identifiably incorrect or if there are credible indications of misconduct of the members of the management board.[*25] It has also been noted that the supervisory board must adjust the intensity of its monitoring to the situation of the company.[*26] The supervisory board has an obligation to interfere, which means that if it discovers a breach of the management's obligations, it must intervene and at least prompt the management board to act in a proper manner. An individual member of the supervisory board who has the appropriate evidence must ensure that the supervisory board or the responsible person deals with the matter.[*27]

It has been expressed that when the company is in crisis, but also in cases of mergers and acquisitions, the members of the supervisory board must act and take part in decision-making more actively.[*28] In general, the supervisory board is allowed to rely on the information it gets from the management board, but it must ensure the existence of adequate organisation of the reporting system and intensify the monitoring when particular circumstances arise – for example, if there are any indications that the existence of the company is threatened.[*29] After insolvency has become evident, the members of the management board are not allowed to make payments on behalf of the company and must file for bankruptcy. Has the supervisory board discovered that the company is insolvent, it must co-act in order to make sure the management board files the bankruptcy application. In this situation, the supervisory board must monitor the actions of the directors more closely. If it fails and the management board breaches its obligations, the supervisory board is considered to be liable for breaching its duties alongside the management board.[*30]

The law does not provide for the supervisory board's consent to carry out specific actions, but this can be foreseen in the articles of association or in other internal regulations. It has been expressed in legal literature that all transactions that are considered particularly important still need the supervisory board's approval.[*31]

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21 Art. 90 of AktG stipulates the list of different reports the management board is obliged to present to the supervisory board. They include e.g reports about the intended business policy of the company, fundamental questions of business planning (in particular financial, investment and personnel planning), profitability of the company (in particular the profitability of its equity), the course of business, the situation of the company as a whole, and transactions which can be of considerable importance for the profitability or liquidity of the company.

22 W. Hölters (Note 20). – Hambloch-gesinn/gesinn, Rn 11.

23 U. Hüffer, J. Koch. Beck'scher Kurz-Kommentare. Band 53. Aktiengesetz. Verlag C.H. Beck München,12. Auflage 2016. – Koch, § 111, Rn 4.

24 W. Goette, M. Habersack, S. Kalss (Note 17). – Habersack, AktG § 111 Rn 44.

25 W. Hölters (Note 20). – Hambloch-gesinn/gesinn, Rn 11.

26 W. Goette, M. Habersack, S. Kalss (Note 17). – Habersack, AktG § 111 Rn 44.

27 W. Goette, M. Habersack, S. Kalss (Note 17). – Habersack, AktG § 116 Rn. 33.

28 W. Goette, M. Habersack, S. Kalss (Note 17). – Habersack, AktG § 116 Rn 37.

29 U. Hüffer, J. Koch (Note 23). – Hüffer AktG § 116 Rn. 15.

30 BGH: Geltung des Zahlungsverbots ab Eintritt der Insolvenzreife. – NZG 2009, 550. BGH, Urteil vom 16. 3. 2009 - II ZR 280/07 (OLG Dresden).

31 U. Hüffer. Gesellschaftsrecht. 7. Auflage. Verlag C.H. Beck 2007, S 285; U. Hüffer, J. Koch (Note 23). – Hüffer, Koch, § 111, Rn 45.

According to German legal literature, in case an upcoming decision of a supervisory board can be considered unjustifiable and unacceptable, any diligent member of a supervisory board is not only obliged to vote against it but also has an obligation to explicitly reject the decision and point out reservations, depending on the circumstances of the individual case. If the management board acts recognisably unlawfully, every single member of the supervisory board must be active and initiate convocation of the supervisory board's meeting.[*32] It has also been argued that the main problem as regards the standard of supervision is the level of information the supervisory board must have. It cannot be expected that the supervisory board monitors the management board continuously in the sense that it checks all the individual transactions, income and accounting documents.[*33] German case law has expressed the view that diligent supervisory board members are not actually expected to prevent every risky business as risky transactions are part of normal business life.[*34]

2.3. Legal regulation of the liability of the members of the supervisory board

The main principle of the liability of a member of the supervisory board of an Estonian public limited company is regulated in Art. 327 (2) of the CC, and according to this provision the members of the supervisory board who cause damage to the company by violation of their obligations shall be jointly and severally liable for compensation for the damage caused. The law also foresees that a member of the supervisory board is released from liability if he proves that he has performed his obligations with due diligence. When comparing the above-mentioned regulations with the provisions that foresee the liability of the directors, one can notice that those regulations are almost identical. In Estonian legal literature, the liability of the members of the supervisory board has been explained similarly to the liability of the members of the management board.[*35] This raises the question of how one can distinguish the liability of the supervisory board from the liability of the directors and whether it is enough to ascertain that the directors have breached their duties in order to hold the members of the supervisory board liable as well.

The legal provisions on the liability of the members of the supervisory board of a German *Aktiengesellschaft* are very similar to the regulations of the Estonian CC. Art 116 (1) of the AktG stipulates that, as regards the duty of care and the liability of the members of the supervisory board, Art. 93 of the AktG, which regulates the duty of care and the liability of the management board, applies *mutatis mutandis*.[*36] The law emphasises that the members of the supervisory board are, in particular, obliged to maintain confidentiality of confidential reports and confidential consultations. The law also stipulates that the members of the management board are, in particular, obliged to compensate for the damage that arises from unreasonable remuneration.

In German legal literature, it has also been explained that, though the provisions that regulate the liability of the directors are applicable in cases of liability of the members of the supervisory board, there are still lots of differences between them. Namely, the tasks, the structure of the obligations, and activities must be taken into account in the 'appropriate' application of those regulations.[*37]

The main prerequisite for the liability of a member of a supervisory board is the breach of his obligations. German legal literature emphasises that, though the breach of duty is a necessary precondition for the liability, it is not the only one, and in order for a member of the supervisory board to be held liable, the damage must occur to the company and the damage must be caused by the breach of obligations of the member of the supervisory board. Therefore, an individual member of the supervisory board cannot be held liable if the majority of the supervisory board behave in accordance with their duties and take a decision that is fully in accordance

[32] M. Henssler. L. Strohn. Gesellschaftsrecht. Beck'sche Kurzkommentare. 3. Auflage. Verlag C. H. Beck, München 2016. – Henssler AktG § 116 Rn. 11.

[33] Reichard: Darlegungs- und Beweislast im Schadensersatzprozess gegen Aufsichtsratsmitglied. OLG Stuttgart, Beschluss vom 19.06.2012 – 20 W 1/12, rechtskräftig (LG Tübingen), BeckRS 2012, 14126. – GWR 2012, 491.

[34] BGH: Haftung eines Verwaltungsratsmitglieds in einer Massengesellschaft. – NJW 1977, 2312. BGH, Urteil vom 4. 7. 1977 – II ZR 150/75.

[35] K. Saare et al. (Note 13), mn. 1886–1890.

[36] The only exception is that the regulations about the insurance of the management board members against risks arising from their professional activities do not apply.

[37] U. Hüffer, J. Koch (Note 23). – Hüffer, § 116, Rn 1.

with the company's interest.*[38] All the members of the supervisory board must act in accordance with the minimum standard of care, but when an individual member has special knowledge, he is subject to an increased level of care, as far as his speciality is concerned.*[39] In addition to that, a higher level of care is expected from the chairman of the supervisory board, which is often reflected in correspondingly greater remuneration.*[40]

It can be concluded that, though German legal regulation as regards the powers and obligations of the supervisory board is more detailed than Estonian, there is no fundamental difference between German and Estonian laws in that respect. The authors are therefore of the opinion that, in consideration of the essential similarity between the management systems of Estonian and German public limited companies, similar interpretation of the scope of the obligations of the supervisory board members would be justified. It is important to note that Estonian legal practice should definitely avoid setting significantly higher standards when interpreting the scope of those obligations.

3. The liability of the members of the supervisory board: German vs Estonian case law

When one analyses the powers and duties of the members of the supervisory board, a question arises: what might be the specific cases when the members of the supervisory board can be held liable for causing damage to the company? Is it possible that the directors of the company are not liable but the members of the supervisory still are?

German case law knows several examples of situations wherein the members of the supervisory board have been held liable for the damage caused to the company. For example, the liability has followed in cases of the supervisory board's inactivity in a situation in which the management board acted unusually carelessly, in cases of giving consent for an under-value sales agreement on the main real estate of the company although the actual value of the property could have been easily ascertained, etc.*[41]

German case law is also of the opinion that in the case of transactions that are of particular importance to the company because of their scope, the risks associated with them, or their strategic function for the company, each member of the supervisory board must record the relevant facts and form his own judgement. This also includes a regular risk analysis.*[42]

The supervisory board members have also been held liable when suggesting that the management board should conclude a detrimental transaction without any legal or commercial justification. The same has happened when the members of the supervisory board had exercised their duties without having a proper idea about the actions of the company that was acting mainly abroad.*[43]

German case law has also taken a view that a member of a supervisory board who endangers the creditworthiness of the company by publicly making harsh remarks about an intra-company conflict violates his duty of loyalty.*[44]

The foregoing analysis shows that German case law has developed versatile practice in the application of the liability of members of the supervisory board. For Estonian case law, however, the issues related to the liability of the supervisory board are still relatively new.

The Estonian Supreme Court has nevertheless recently made two decisions as regards the liability of the supervisory board members, but the authors of this paper are of the opinion that the standard of diligence and the meaning of 'proper supervision' have still remained unclear.

The two cases had similar starting points: the claim of a bankrupted company was filed against both management and supervisory board members. The insolvency administrator, who was acting on behalf of

[38] W. Goette, M. Habersack, S. Kalss (Note 17). – Habersack, AktG § 116 Rn. 29.

[39] BGH: Haftung des Vorstands und des Aufsichtsrats einer Aktiengesellschaft. – CCZ 2012, 76. BGH, Urteil vom 20. 9. 2011 – II ZR 234/09.

[40] W. Goette, M. Habersack, S. Kalss (Note 17). – Habersack, AktG § 116 Rn. 37.

[41] U. Hüffer, J. Koch (Note 23). – Hüffer AktG § 116 Rn. 17.

[42] D. Lorenz: Pflicht zur eigenständigen Risikoanalyse für Aufsichtsräte – Piëch. – GWR 2012, 156. OLG Stuttgart, Urteil vom 29.02.2012 – 20 U 3/11 (LG Stuttgart).

[43] This decision is, however, considered problematic. See U. Hüffer, J. Koch (Note 23). – Hüffer AktG § 116 Rn. 17.

[44] D. Lorenz (Note 42).

the company,[*45] claimed that the members of the management board as well as the supervisory board had breached their obligations and thereby caused damage to the company. In both cases, the main action that was considered as a breach of duty of the directors was transferring either all of the assets of the company or a significant part of it to another person. Such transactions were allegedly concluded without the company getting proper exchange.

In the first of the above-mentioned cases,[*46] the insolvency administrator alleged that the director and three members of the supervisory board had breached their obligations and that this breach had resulted in three kinds of damage: the company lost, firstly, its cash; secondly, the main property; and, thirdly, the turnover. The insolvency administrator claimed that the supervisory board had allegedly appointed a director who later was not diligent enough and that the members of the supervisory board did not fulfil their obligation of proper supervision as they did not check the use of the assets of the company. The county court satisfied the action against all the defendants and was of the opinion that it was the supervisory board's inactivity that had partly caused the damage.[*47] At the appeal court, the action remained satisfied against the members of the management board with regard to the damage caused by the loss of cash and property. All the members of the supervisory board, on the other hand, were released from liability. The district court explained that the functions of management and supervisory boards are different as the management board performs its tasks and carries out daily business under its own responsibility and the supervisory board has no right to interfere. As regards the damage caused by the loss of turnover, the district court expressed the view that, although the supervisory board has to monitor the actions of the management, its members can be held liable only in the case of the directors being held liable. The district court also stressed that there was no causal link between the company's damage and the appointment of the new director.[*48]

The Supreme Court annulled the decision of the district court as regards the claim arising from the damage caused by the loss of turnover and referred the case partially back to the district court for a new hearing. The Supreme Court was of the opinion that the possible liability of the director arising from the loss of turnover should be investigated more thoroughly and the question of whether the members of the supervisory board could be held liable for the same damage should be reviewed as well. The Supreme Court agreed with the district court, however, that, as a rule, the members of the supervisory board can be held liable only in cases wherein the members of the management board have breached their obligations.[*49] Unfortunately, the Supreme Court did not give instructions or interpretations related to the actual standard of duty or the scope of obligations of the supervisory board members. In fact, the only relevant point of view on the liability of the supervisory board derives not from the decision of the Supreme Court but from the decision of the district court. Therefore, although the case could be considered as conceptional, the Supreme Court failed to develop Estonian company law in a field that can be considered fundamentally important for development of uniform judicial practice. One can only conclude that if the management board's behaviour does not cause damage to the company, the liability of the supervisory board is also out of the question, regardless of whether the members of the supervisory board have been acting diligently or not.

In the second case,[*50] the insolvency administrator claimed that the members of the management board had breached their obligations by selling the main property of the company to a third party. The sales agreement stipulated that the purchase price would be paid a year and a half after transfer of the assets. No warranties or pledges were established. The insolvency administrator was of the opinion that such actions were not in accordance with the business judgement rule and that the transaction was economically unjustified. He claimed that approving such a transaction meant that the members of the supervisory board had also violated their duty of care and caused the same damage alongside board members. The administrator also declared that the members of the supervisory board had breached their obligations, as they did not monitor the activities of the management board to a sufficient extent. Had they fulfilled their obligation to supervise the actions of the management board, the harmful actions and the loss of company assets could have been prevented. The members of the supervisory board argued that they could not be held liable for the actions

45 According to Art. 315 (4) and Art. 327 (4), in the case of declaration of bankruptcy of a company, only an insolvency administrator has a right to file a claim on behalf of the company.

46 CCSC 3-2-1-113-16.

47 CCSC 3-2-1-113-16, para. 6.

48 CCSC 3-2-1-113-16, para. 9.

49 CCSC 3-2-1-113-16, para. 25.

50 CCSCd 3-2-1-152-16.

of the management board as they had no knowledge of the allegedly harmful transaction and that the supervisory board has no general duty to control all the actions of the management board.

The courts of the first two instances ascertained that the supervisory board as a body had never taken any decision as regards those questionable transactions. The Supreme Court explained that, as the supervisory board had never passed a resolution approving the harmful transaction, it actually never directly decided to conclude it.[*51] The Supreme Court nevertheless emphasised that individual members of the supervisory board could still have breached their duties if they knew that the management board was about to conclude a harmful transaction but did not take any actions to call a meeting of the supervisory board (either through the chairman or directly).[*52]

The Supreme Court also stressed that the members of the supervisory board could not be held liable only because they were aware of the harmful transaction that the members of the management board had concluded. The Supreme Court annulled the decision of the appeal instance and referred the case back to the district court for a new hearing. The Supreme Court instructed the district court that on the new hearing, it should ascertain whether the defendants had had the possibility of taking steps to prevent the damaging transaction being concluded and that if they had had the possibility of avoiding the damage, they should be held liable for the consequences.[*53]

The Supreme Court justified the annulment of the decision of the court of appeal with the fact that the appeal court allegedly failed to consider whether the defendant as a member of the supervisory board was aware of the harmful nature of the transaction. The Supreme Court also noted that if he had had the above-mentioned knowledge, he should have exercised the supervision more diligently.

In general, this approach can be considered justified, but the authors of the article are of the opinion that the above-mentioned reasoning of the Supreme Court and the instructions given to the court of appeal for a new hearing seem to be contradictory. On the one hand, the Supreme Court explains that no member of a supervisory board can be held liable only on the basis of an accusation that he has not provided enough supervision of the actions of the management board. On the other hand, the Supreme Court orders the court of appeal to ascertain whether the members of the supervisory board could have prevented the harmful actions (meaning whether they had provided enough supervision).

The authors of the article note that in assessment of breach by both management and supervisory board members, the main principle is that one cannot conclude that a director or a member of the supervisory board breached his obligations only because the outcome was negative. Any court decision must include the explanations of those differences, and if the court finds that a director has breached his duties, the court should explain how the defendant should have been acting instead.[*54] The question has a member of a supervisory board fulfilled his obligations or violated them cannot be adequately assessed by looking for an answer to the abstract question of whether the supervision was sufficient. Although the case is still pending, the Supreme Court should have given some guidelines to the district court as regards the application of business judgement rule when establishing the liability of the supervisory board members. When assessing the fulfilment of the obligations and establishing the infringement by the members of the supervisory board, one must compare the standard of action (i.e., what the members of the supervisory board should have done) to the actual steps taken (i.e., what they actually did).[*55]

The authors of the article are of the opinion that 'insufficient supervision' itself is not a breach of duties. The actual breach that should be assessed in discussion of the possibility of holding the supervisory board liable is an improper action taken by the supervisory board, or inactivity when it should have acted instead.

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51 CCSCd 3-2-1-152-16, para. 17.

52 According to Art. 321 (1) of the CC, a meeting of the supervisory board shall be called by the chairman of the supervisory board or by a member of the supervisory board substituting for the chairman.

53 CCSCd 3-2-1-152-16, para. 19.

54 The general obligation of proper reasoning for the court decision derives from Art. 436 (1) of the Estonian Code of Civil Procedure (Code of Civil Procedure, adopted on 20.4.2005. – RT I 2005, 26, 197; RT I, 28.12.2016), which stipulates that a court judgement shall be lawful and reasoned. The requirement of reasoning means that the judicial reasoning must be understandable, traceable, and associated with the circumstances that have been identified by the court in this specific matter. This specific procedural requirement of judicial decisions as a prerogative of a lawful court decision has been several times expressed in Estonian case law: see, for instance, CCSCd 3-2-1-13-17, para. 15; CCSCd 3-2-1-42-16, para. 13-15; CCSCr 3-2-1-70-15, para. 20; CCSCd 3-2-1-129-15, para. 15, etc.

55 The same principle is applicable in assessment of breach of duties of the member of the management board (see CCSCd 3-2-1-129-15, para. 15).

The breach of one's duties can be considered as a 'performance gap', and it can only be ascertained via comparing the actions taken to those that should have been taken. The main principle about the liability of the members of the supervisory board cannot be ascertained significantly differently from that about the liability of the directors.

4. Conclusions

The authors are of the opinion that neither of those two decisions of the Supreme Court as a matter of fact answers to the question, what is the actual liability standard of a member of a supervisory board. Both decisions lack the proper application of the business judgement rule, and this approach contradicts the previous approach the Supreme Court has taken when assessing breach of duties of the directors. It is important to note that the breach of duties by a member of a supervisory board as well as by a director can be established only by comparing the obligation with the actual behaviour of the person in question. The above-mentioned decisions might therefore give the false impression that the fact that a director has breached his obligations means automatically that the members of a supervisory board must have also breached their obligations, as obviously the supervision has not been sufficient. This conclusion is however unjustifiable – the breach of the obligations of the management board cannot be considered as the only prerequisite of the liability of the supervisory board.

The analysis also showed that the powers and obligations of the supervisory board of Estonian and German public limited companies are quite similar and therefore it would be reasonable to take the viewpoints expressed in German legal literature and case law at least as a general example when interpreting Estonian legal regulations. One can therefore conclude that the breach of duties of the supervisory board must be assessed separately, with application of the business judgement rule similarly to that in the situation wherein breach of duties of the directors is assessed. The law does not require the supervisory board to monitor all the actions of the management board in detail, and the standard of supervision depends heavily on the circumstances. In the case of the directors of the company having breached their duties, this might but does not necessarily mean that the members of the supervisory board have breached their duties as well.

https://doi.org/10.12697/JI.2017.26.08

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Court Supervision of the Determination of the Votes at the First General Meeting of Creditors in Estonian Bankruptcy Law

1. Introduction

Creditors' votes have supreme power in bankruptcy proceedings. The creditors have a right to take decisions in the proceedings by using their votes. Those decisions are adopted by a simple majority of the votes of the creditors participating in the meeting. The decisions put to a vote at the first general meeting (hereafter FGM) of creditors constitute the most important issues in the proceedings. These decisions influence the status of the subsequent proceedings, and sometimes this effect may determine the general direction of the proceedings. Hence, it can be said that the process of determining creditors' votes in bankruptcy proceedings is crucial. However, as in many other countries, in Estonian bankruptcy law the process of determining the votes is problematic.

Estonia's first Bankruptcy Act was passed 25 years ago, in 1992, and has been continuously amended. In addition to undergoing several minor amendments, the Bankruptcy Act was amended in its entirety in 1996, 2003, and 2009.[*1] Estonian bankruptcy law has provided three distinct procedures for the determination of votes at the FGM of creditors: 1) the votes are determined only by the trustee; 2) the votes determined by the trustee are approved by the court; or 3) under the current law, the court intervenes only if there is a dispute over the determination of the votes.

One of the main issues over the years, which there have been attempts to resolve, is the problem of determining the votes before the defence of claims. This problem was recognised already in 1993–1994, for the amount of the claim is not clear before the defence of the claims.[*2] However, the number of votes of each creditor corresponds to the amount of the creditor's claim. During preparation of the Bankruptcy Act,

1 P. Varul. Maksejõuetuse areng Eestis ['Developments in insolvency law in Estonia']. – *Juridica* 2013/4, p. 234 (in Estonian).

2 P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. – *Juridica* 1993/3, p. 52 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. – *Juridica* 1994/1, p. 6 (in Estonian).

it was stated that the main object of the law is to protect the creditors' interests.[*3] Hence, questions arise as to which procedure for determination of the votes at the FGM of creditors is in the creditors' best interests and what should be the scope of court supervision in keeping with the principle of procedural economy.

In drafting of the Bankruptcy Act, the legislator's objective was that the workload of the courts would be as small as possible. Since the creditors' claims are satisfied out of the bankruptcy estate, they should have been given decision-making power. In drafting of the Bankruptcy Act, the court was entrusted with resolving issues that needed an independent decision-maker.[*4] One of these is the issue of the determination of the votes. However, since the decisions put to a vote at the FGM determine the future course and status of the proceedings, both the court and the trustee play an important role in protecting the common interests of the creditors.

Hence, the law does not set in place clear regulations on how to determine the votes. The disputes are long-term, because there is no regulation of when the court should render its ruling on the determination of the votes so that the FGM could continue. There is also no regulation addressing which disputes should be resolved in the proceedings related to the determination of the votes and which disputes should be resolved in the proceedings related to the defence of the claims.

The objective with this article is to find the answer to the following questions: does the current procedure for the determination of the votes at the FGM of creditors protect the rights and interests of the creditors, which procedure was the best in 1992–2015, does the current procedure protect the common interests of the creditors, and does it follow the principle of procedural economy?

2. Court supervision of determination of the votes at the FGM of creditors in 1992–2015

2.1. The scope of court supervision in 1992–2003

Since 1992, Estonian bankruptcy law has provided many, different regulations. This stems from the fact that when Estonia regained independence, in the turbulent situation of 1992, a new legal order based on comparative law, on the experiences and legal concepts of other countries, had to be quickly created. A completely new bankruptcy law had to be developed[*5], whereas Estonian civil law has largely Germanic and Swedish roots.[*6]

The most important reference source for developing Estonia's first Bankruptcy Act[*7] was the Swedish Bankruptcy Act[*8], as the concept of the determination of the votes at the FGM of creditors. According to §26 (4) of the BA 1992, the creditors' votes are determined by the trustee. According to subsection 5 of the same provision, if a creditor does not agree on the votes, the votes are determined by the general meeting of creditors. If the creditors do not agree with the meeting's decision, they have the right to file a complaint to the court (§27[1] (3) of the BA 1992). However, if the court passes judgement that the general meeting's decision was not justified, then the court declares the general meeting's decision invalid and the votes are determined by the court.

Notwithstanding the existence of disputes over the determination of the votes, the general meeting of creditors was entitled to adopt decisions (§27 (2) of the BA 1992). If the court decided to decide on a number of votes that differed from the votes determined by the general meeting and this would have resulted

3 P. Varul. Selgitavaid märkusi pankrotiseadusele ['Clarifying remarks on the law of bankruptcy']. – *Juridica* 1993/1, p. 6 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['Elucidatory notes on the bankruptcy law']. – *Juridica* 1994/1, p. 2 (in Estonian).

4 P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory remarks on the law of bankruptcy']. – *Juridica* 1994/1, pp. 5–6 (in Estonian).

5 P. Varul (see Note 1), p. 234.

6 M. Käerdi. Estonia and the new civil law. – H.L. MacQueen, A. Vaquer, S. Espiau (eds). *Regional Private Laws and Codification in Europe*. Cambridge 2003, p. 250. – DOI: https://doi.org/10.1017/CBO9780511495007.012.

7 Pankrotiseadus. – RT 1992, 31, 403 (in Estonian).

8 P. Varul. Selgitavaid märkusi pankrotiseadusele ['Clarifying remarks on the law of bankruptcy']. – *Juridica* 1993/1, p. 6 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['Elucidatory notes on the bankruptcy law']. – *Juridica* 1994/1, p. 2 (in Estonian). P. Varul. On the development of bankruptcy law in Estonia. – *Juridica International* 1999 (IV), p. 173.

in a different decision being adopted, the court declared this decision invalid at the creditors' or trustee's request (§27[1] (3) of the BA 1992).

Similarly to Estonian bankruptcy law in force from 1992 to 2003, Chapter 15, Section 3 (3) of the current Finnish *Konkurssilaki*[*9] provides that in the event of disagreement, the estate administrator or, if the matter is discussed at the creditors' meeting, the chairperson decides on the voting strength conferred by a claim. This indicates that the provision on the determination of the votes in the FGM of creditors that was in the Estonian BA in 1992–2003 is possible today.

Although the FGM could continue and votes could be determined at the same meeting, the fact that the bankruptcy trustee determined the number of votes at an early stage essentially alone was considered problematic. The confirmation of the votes determined was not done by the court as an independent person. However, it is incomprehensible why the regulation was considered problematic, because, according to §29 (3) of the BA 1992, the trustee must be independent of the debtor and the creditor. Moreover, the court has not confirmed the votes determined by the trustee since 2010. The same rules and the reasons that were the basis for the amendment of the law turned out to be inaccurate.

Furthermore, the procedure had to be amended because the votes assigned to the creditors determined the power relations between them in the bankruptcy proceedings.[*10] When a dispute arose, the procedure became time-consuming and complex. This, in turn, could lead to the cancellation of the general meeting's decision. Therefore, it was decided to amend the Bankruptcy Act.

2.2. The scope of court supervision in 2004–2009

In 2004–2009, the procedure for determination of votes specified in the Bankruptcy Act[*11] was radically amended. The bankruptcy judge was involved in the procedure for the determination of the votes. The judge resolved disputes over the votes and also confirmed the votes determined by the trustee. However, a question arose as to whether the judge's confirmation was necessary when there were no disputes over the votes.

If a creditor participating in a general meeting did not agree with the number of votes assigned, the votes were determined by the judge participating in the meeting (§82 (4) of the BA 2004). In such cases, the court resolved the dispute and verified whether there was sufficient basis for the determination of the votes. The law did not prescribe a deadline for the ruling.

The court also made the ruling when there were no disputes over the votes (§82 (5) of the BA 2004). The court confirmed the number of votes determined by the trustee. However, applying the regulation was rather a formality, because in fact the court did not verify the proof of claim, on which basis the votes were determined. The court also did not verify whether the trustee determined the votes in accordance with the principles of protecting the creditors' interests and equal treatment. Nevertheless, the Supreme Court pointed out that in the case of resolving disputes over the votes as well as in the case of confirming the votes, the court should verify the requirements prescribed in §82 of the BA.[*12] Since court supervision of confirming the votes determined by the trustee was a formality, the act was amended again.

2.3. The scope of court supervision since 2010

Since 2010, the procedure for the determination of the votes was supposed to be simpler so that bankruptcy proceedings would go smoothly.[*13] According to § 82 (3) of the BA[*14], the number of votes for each creditor participating in the FGM of creditors is determined by the trustee. According to subsection 4 of the same provision, if a creditor does not consent to the votes as assigned, the votes are determined by a ruling of the

9 *Konkurssilaki*. – 120/2004 (in Finnish).

10 IX Riigikogu stenogramm. VIII istungijärk. 15. Pankrotiseaduse eelnõu (1085 SE) esimene lugemine ['Report of the proceedings of the IX Riigikogu. VIII session. 15. The first reading of the bill of the Bankruptcy Act']. Available at http://stenogrammid.riigikogu.ee/et/200212041300 (most recently accessed on 23.3.2016) (in Estonian).

11 Pankrotiseadus. – RT I 2003, 17, 95; RT I 2009, 11, 67 (in Estonian).

12 CCSCr 21.4.2005, 3-2-1-42-05, para. 14. Available at http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-42-05 (most recently accessed on 23.3.2017) (in Estonian).

13 P. Varul (see Note 1), p. 235.

14 Pankrotiseadus. – RT I 2003, 17, 95; RT I, 22.6.2016, 25 (in Estonian).

judge participating in the general meeting. An appeal may be filed against such a ruling. However, the law does not provide clear rules for resolving disputes over the determination of the votes. Furthermore, judges participating in the general meetings implement §82 (4) of the BA in different ways, which leads to non-uniform court practice. However, it is unclear when the judge will make the court ruling that enables the meeting to continue. Nevertheless, quick and effective proceedings ensure the protection of the creditors' rights and interests.

The current BA does not stipulate which disputes essentially belong to the procedure of determination of the votes; however, the Supreme Court has significantly influenced the development of the bankruptcy law.[*15] The Supreme Court stated in case 3-2-1-144-11 that the determination of the number of votes could not be resolved in a dispute that was by nature a dispute over the acceptance of claims. On the other hand, the court stated that such claims could be excluded as obviously and for reason of their legal nature cannot be satisfied in the proceeding. The court gave as an example that the question of the expiry of the claim cannot be resolved in the context of disputes over the votes. However, proofs of claim with formal deficiencies can be disputed, as can proofs of claim in the case of which there have been some legal changes.[*16] The Supreme Court's position must be honoured. Otherwise, the bankruptcy proceedings are extended significantly, which is in conflict with the principles of speed and efficiency of proceedings.

Nevertheless, irrespective of the Supreme Court's opinion, most disputes over the determination of the votes are, by nature, disputes over the acceptance of claims. In practice, the number of disputes over the determination of the votes at the FGM has decreased since the Supreme Court's ruling in case 3-2-1-144-11. The ruling may have contributed to uniform application of the bankruptcy law, as in many cases the law does not give an explicit answer.[*17] On the other hand, the ruling may lead the trustees to fear that any dispute over the determination of the votes may be a substantive dispute. However, if an objection is not submitted when necessary, the creditors' interests may be harmed.

Furthermore, when a dispute arises, court supervision is quite minimal. However, §82 (4) of the BA, related to disputes over the determination of the votes, has remained unchanged since 2004. The court will be involved only in the event of a dispute over the determination of the votes and exercises supervision over the lawfulness of bankruptcy proceedings. So the court may deny the right to vote, determine the total number of votes, or restrict the number to a partial amount.

In practice, judges do not implement the provisions of §82 (4) of the BA properly and do not make the ruling at the same general meeting. According to a literal interpretation of the law and in line with the legislator's objective, the number of votes assigned via a court ruling should be determined immediately at the same meeting. The time it takes to make a ruling depends on the judge. Furthermore, in practice, the FGM does not take place when there are disputes over the determination of the votes. Therefore, bankruptcy proceedings cannot continue, because important decisions are not adopted.

The concept of the determination of the votes by the court under current bankruptcy law is based on the German *Insolvenzordnung*[*18] (InsO). According to §77 (2) of the InsO, the judge makes the decision about the determination of the votes immediately at the same meeting. In order for Estonian bankruptcy law to be applied in accordance with the legislator's objective, the provision for the court ruling on the determination of the votes should be rephrased: it should be unambiguous, understandable, and applicable by each judge. The law should prescribe when the court ruling should be issued in cases of disputes. Pursuant to the legislator's objective, the ruling should be made immediately at the same FGM of creditors.

On account of the above, in 1992–2003 the problem was that the creditors' votes were determined only by the trustee. In 2004–2009, the confirmation of the determined votes was a so-called formal process, in which the court did not verify the basis for the determination of the votes. Therefore, §82 (5) of the BA was declared invalid. Therefore, currently the votes are again determined by the trustee, which was found problematic in 1992–2003, and the court intervenes only in the event that there is a dispute.

However, a question arises as to whether the legislator made a reasonable decision by changing §26 (5) of the BA as in force in 1992. It prescribed that if a creditor does not accept the votes, the number of votes is determined by the general meeting of creditors, and this enabled the meeting to continue. However, in

15 P. Varul (see Note 1), p. 235.

16 CCSCr 10.1.2012, 3-2-1-144-11, para. 14. Available at http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-144-11 (most recently accessed on 23.3.2017) (in Estonian).

17 P. Varul (see Note 1), p. 235.

18 Insolvenzordnung vom 5 Oktober 1994. – BGBl. I p. 2866 (in German).

consideration of §82 (4) of the current act, the problem may in practice result from the fact that judges are not implementing the law pursuant to the legislator's objective. It has been stated in the literature that problems encountered in the implementation of the bankruptcy law can be divided into two groups: problems that can be solved by means of interpretation and problems that can be solved only by amendment of the law.[*19] Current practice indicates that the solution is to amend the law.

The law should prescribe the term for the court ruling. However, there is also the problem of which issues belong to the sphere of disputes over the votes. The nature of disputes over the votes cannot be stated in legislation, so it must be established by court practice. Prescribing the term by law and making court practice uniform enables ensuring the creditors' rights and interests while also rendering the proceedings quick and effective.

3. The basis for determination of the number of votes

If a creditor submits the proof of claim together with documents proving the circumstances to the trustee, a dispute over the determination of the votes does not arise. However, in practice, there are a lot of problems related to which documents must be submitted for obtaining votes at the FGM.

Creditors assigned votes at the FGM must file proper proof of claim with the trustee on time. Pursuant to §94 (1) of the BA, the trustee is notified of a claim by proof of claim. The proof of claim should set out the content of, basis for, and amount of the claim and whether the claim is secured by a pledge. Documents proving the circumstances specified in the proof of claim should be annexed thereto. According to subsection 3, when the proof of claim is not properly prepared, the trustee grants a term of at least 10 days for elimination of the deficiencies. When the deficiencies nonetheless are not eliminated, the general meeting of creditors may deem the proof of claim not to have been submitted.

Although the law provides formal requirements for the proof of claim, in cases of more complex legal relationships, the creditor should also substantiate the proof of claim in order to obtain votes from the trustee at the FGM. Nevertheless, the Supreme Court has taken a different position on which documents should be filed with the trustee before the FGM of creditors.

The Supreme Court has stated, in civil case 3-2-1-8-15, that the proof of claim filed should provide information about the claim's content and basis and shall also state the amount of the claim and whether it is secured by a pledge. The Supreme Court also stated that, depending on the circumstances, it may be appropriate to annex the documents proving the claim (i.e., which substantiate the claim), in order to avoid ambiguity and subsequent disputes. Despite the fact that terms are given in the law, the Supreme Court states that if documents proving the circumstances are not annexed to the proof of claim, there is no basis for the general meeting of creditors to deem proof of claim not to have been submitted. The documents proving the claim may be submitted up to the time of the court proceedings for the defence of the claims.[*20]

The author of this article does not agree with the Supreme Court's position. To obtain votes at the FGM of creditors, the creditor must submit all documents proving the claim. Otherwise, the creditor may obtain votes and have an important position in the bankruptcy proceedings while possibly not, in fact, having a claim against the debtor. It is not – and cannot be – the legislator's objective to assign votes to a creditor who has not proved the claim against the debtor.

Furthermore, pursuant to §55 (1) of the BA, the trustee protects the rights and interests of all creditors and of the debtor and ensures a lawful, prompt, and financially reasonable bankruptcy procedure. Protection of the creditors' interests is the trustee's common obligation.[*21] The trustee cannot determine the votes unless the proof of claim is sufficiently substantiated: it must be clear, understandable, and verifiable. Pursuant to §235 of the Code of Civil Procedure[*22] (CCP), substantiation of an allegation means giving the court reasons for that allegation so that, presuming that the reasoning is correct, the court can deem the allegation to be plausible. The creditor must eliminate potential conflicts and ensure sufficient clarity of the proof of claim. The creditor is required to submit all the information necessary for the trustee to identify the

19 P. Varul. Pankrotiõiguse probleeme ['Issues concerning bankruptcy law']. – *Juridica* 1999/8, p. 376 (in Estonian).

20 CCSCr 8.4.2015, 3-2-1-8-15, para. 12. Available at http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-8-15 (most recently accessed on 23.3.2017) (in Estonian).

21 P. Varul. Nõuetest pankrotimenetluses ['Claims in bankruptcy proceedings']. – *Juridica* 2004/2, p. 98 (in Estonian).

22 Tsiviilkohtumenetluse seadustik. – RT I 2005, 26, 197; RT I, 28.12.2016, 22 (in Estonian).

claim. The trustee must be able to make sure readily whether the creditor has a claim against the debtor. Unclear proof of claim is not justified by §94 (1) and §82 (4) of the BA, and, hence, the creditors have no just cause to obtain the votes.

Furthermore, the essential documents supporting the claim should be submitted to the trustee not later than three working days before the general meeting, to give the trustee sufficient time to verify whether the proof of claim corresponds to the requirements prescribed by §94 (1) of the BA. Otherwise, the term for verifying the documents would not be prescribed in the law. According to §94 of the BA, it is an important element of the proof of claim that it must be supplemented with documents proving the circumstances.

Because of the above, a creditor assigned votes at the FGM must submit proper proof of claim to the trustee in three working days. This gives the trustee sufficient time to verify whether the claim is in accordance with the requirements prescribed by law. In addition to formal requirements pertaining to the proof of claim, documents proving the specified circumstances must be annexed thereto, for avoidance of disputes over the votes.

4. The efficiency aspect: Implementation of the principles of speed and efficiency in making the ruling on the determination of the number of votes

The purpose of civil procedure is to guarantee adjudication of civil matters by the court within a reasonable period of time (§2 of the CCP). Bankruptcy proceedings should also be conducted as quickly and efficiently as possible. The proceedings should be addressed and resolved in an orderly, quick, and efficient manner and with minimal costs.[*23] In the literature, it has been stated that quick bankruptcy proceedings are effective.[*24] Accordingly, the question arises of how to ensure fast and effective proceedings in cases of disputes over the determination of the votes, with the aim of protecting the creditors' rights and interests.

The bankruptcy proceedings can be carried out quickly if there are no disputes over the votes. However, achieving ideal bankruptcy proceedings is difficult. As mentioned before, in a case involving a dispute, the time for making the ruling about the votes may differ, depending on the judge. Some county court judges take a break at the FGM of creditors and determine the votes immediately. However, other judges determine the votes at the follow-up general meeting, which might take place in the same week or even a few months later. In the interim period, the meeting will generally not be continued and decisions will not be adopted. If an appeal is made against such a ruling to the district court and to the Supreme Court, the FGM will not be continued until the ruling is in force. However, when the meeting will continue despite the dispute over the votes, this may give rise to another dispute. According to §83 (1) of the BA, the court may, if the creditors' common interests are harmed, revoke the decisions adopted.[*25]

The author of this article can cite some cases involving the determination of the votes in Estonian practice. The objective for presenting the cases is to indicate how long the process of determination of the votes by a judge could be. A lenghty process of determination of the votes makes bankruptcy proceedings inefficient, whereas the proceedings should be as quick as possible.

In civil case 2-10-59818, a dispute over the determination of the votes was appealed to the Supreme Court. The FGM of creditors took place on 2.2.2011. Creditors participating in the meeting did not agree with the number of votes assigned by the trustee. Harju County Court made a ruling on the determination of the votes on 2.3.2011.[*26] Since Harju County Court dismissed the appeal, it was sent to Tallinn District Court, which issued a ruling on 28.6.2011.[*27] The ruling was also appealed to the Supreme Court. The Supreme Court made a ruling in case 3-2-1-144-11 on 10.1.2012 and sent the case back to the county

23 United Nations Commission on International Trade Law (UNCITRAL). Legislative Guide on Insolvency Law, p 12. Available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (most recently accessed on 6.12.2015).

24 T. Saarma. Pankrotimenetluse põhimõtted. ['The principles of bankruptcy law']. – *Juridica* 2008/6, p. 353 (in Estonian).

25 CCSCr 15.4.2015, 3-2-1-27-15, para. 14. Available at http://www.riigikohus.ee/?id=11&tekst=222577856 (most recently accessed on 23.3.2017) (in Estonian). CCSCr 10.6.2015, 3-2-1-59-15, para. 12. Available at http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-59-15 (most recently accessed on 23.3.2017) (in Estonian).

26 Ruling of Harju County Court 2-10-59818 (in Estonian).

27 Ruling of Tallinn District Court 2-10-59818 (in Estonian).

court for a new hearing.[*28] The county court made a ruling within two weeks after the general meeting, but the district court issued its ruling about four months after the county court's ruling. The Supreme Court's ruling, in turn, was made almost six months after the ruling of the district court. In this case, it took almost one year to resolve the dispute over the determination of the votes. This duration for such a fundamentally important dispute as that over determination of the votes, on which the entire future of the bankruptcy proceedings depends, is in conflict with the principles of speed and efficiency.

Furthermore, in civil case 2-13-32716, wherein the FGM of creditors was held on 23.10.2013, the trustee did not determine the votes for some creditors, and Harju County Court made a ruling on the matter on 5.11.2013.[*29] This was two weeks after the first meeting of creditors was held. The creditor appealed against the ruling to Tallinn District Court, which issued its ruling about the votes on 31.3.2014.[*30]

In civil case 2-13-13251, the FGM of creditors was held on 4.2.2014. The trustee determined the votes for each creditor proportionally to the amount of the creditor's claim pursuant to §82 (1) of the BA. The creditors filed an appeal against the votes assigned, on the basis of §82 (4) of the BA. Harju County Court made a ruling on 20.2.2014.[*31] This was two weeks after the first meeting of creditors was held. An appeal was filed with the district court. Tallinn District Court made a ruling on 10.5.2014, in accordance with which the county court's ruling was not changed.[*32] The ruling was appealed to the Supreme Court. Harju County Court's decision came into force on 10.6.2014. Thus, this civil case was settled four months after the FGM of creditors.

In civil case 2-15-13938, the FGM of creditors took place on 24.11.2015 and on 11.12.2015. The court determined the votes on 18.12.2015, because some creditors did not agree with the votes determined by the trustee.[*33] One of the creditors filed an appeal against the ruling. However, the court refused to accept that appeal on 17.2.2016.[*34] The court stated at the FGM that the meeting would continue when the court ruling enters into force. Although the ruling entered into force on 12.3.2016, the court decided that the FGM of creditors was to take place on 17.6.2016. Hence, even though the ruling about the votes entered into force on 12.3.2016, the FGM was still held three months later.

Although only a few cases are presented in this article, they provide sufficient proof that the determination of the votes is a long-term process. It can, however, be said that since 2011 the amount of time taken for settling disputes over the votes determined has decreased. Nevertheless, by the time the ruling has come into force, some important deadlines might have passed. Therefore, it would be wise to specify a term within which the county court, district court, and Supreme Court must resolve disputes over the determination of the votes and determine the date for the FGM of creditors. After all, the legislator's objective was that the votes be determined by the county court ruling immediately, at the same meeting.

Furthermore, the creation of specialised insolvency courts, which has also been considered for establishment in the Estonian insolvency law, might help to enhance the efficiency of insolvency proceedings.[*35] The World Bank has drawn attention to the fact that insolvency courts ensure quick proceedings, which, in turn, enable obtaining the best value for the property.[*36] The Cork Committee too opines that bankruptcy courts are important.[*37] The bankruptcy courts do not have a heavy workload of other civil cases, and urgent disputes over the determination of the votes could be resolved within reasonable time. Therefore, with the existence of bankruptcy courts, a case could be settled 'ASAP', which would ensure that the principles of speed and efficiency of the procedure are followed.

On account of the above, the court must ensure prompt and effective bankruptcy proceedings, to resolve the dispute within a reasonable amount of time. In accordance with the legislator's objective, the ruling

28 CCSCr 10.1.2012, 3-2-1-144-11.

29 Ruling of Harju County Court 2-13-32716 (in Estonian).

30 Ruling of Tallinn District Court 2-13-32716 (in Estonian).

31 Ruling of Harju County Court 2-13-13251 (in Estonian).

32 Ruling of Tallinn District Court 2-13-13251 (in Estonian).

33 Ruling of Tallinn County Court 2-15-13938 (in Estonian).

34 Ruling of Tallinn County Court 2-15-13938 (in Estonian).

35 P. Varul (see Note 1), p. 236.

36 The World Bank. Principles and Guidelines for Effective Insolvency and Creditor Right Systems. April 2001, pp. 56–57. Available at http://www.worldbank.org/ifa/ipg_eng.pdf (most recently accessed on 6.12.2015).

37 K. Kerstna-Vaks. Järelevalve pankrotimenetluses ['Supervision over bankruptcy proceedings'], p. 52. Master's thesis, Tartu 2005 (in Estonian).

about the votes should be made at the same FGM immediately, when the dispute arises. A major problem in court practice may be resolved by prescribing the term in the act that states when the dispute should be settled, so that the judges would implement the provision properly. Furthermore, to ensure that disputes are resolved within reasonable time and that the principles of speed and efficiency are followed, insolvency courts should be created. Doing so protects the common interests of the creditors.

5. The fairness aspect: The creditors' real purpose in submitting the proof of claim

As mentioned above, in accordance with §94 (1) of the BA, a creditor wishing to have the right to vote at the FGM of creditors is required to submit proper proof of claim three working days before the meeting. Nevertheless, although the creditors may have submitted a proper claim, its purpose might be contrary to the objective of bankruptcy proceedings and to good faith. However, in the literature it has been stated that legal rules as rules that regulate human behaviour should be based on the most important idea of the law – on justice.*[38] Furthermore, *ius est ars boni et aequi.*[*39]

In spite of that, some creditors may participate in insolvency proceedings in order to adopt decisions at the creditors' meeting whereby they wrongfully obtain funds recovered during the insolvency proceedings. In civil case 3-2-1-27-15, the Supreme Court stated that creditors cannot be allowed to contest the votes for tactical reasons. This would lessen the possibility of carrying out the bankruptcy proceedings within a reasonable period of time and of protecting all the common interests of the creditors by means of smooth proceedings.*[40]

Pursuant to §138 (1) of the General Part of the Civil Code Act*[41], rights are to be exercised and obligations are performed in good faith. Even in application of provisions that are not in direct conflict with the legislation, acting for such a purpose may be unlawful. This is confirmed by §138 (2) of the General Part of the Civil Code Act: a right shall not be exercised in an unlawful manner or with the objective of causing damage to another person. Also, §200 (1) of the CCP prescribes that a participant in a proceeding is required to exercise the procedural rights in good faith, and subsection 2 states that participants in a proceeding and their representatives or advisers are not allowed to abuse their rights, delay the proceeding, or mislead the court.

Furthermore, if the creditor is a person connected with the debtor as defined in §117 of the BA, it is justified to apply stricter requirements for verification and substantiation of the claim. In the case of related-party transactions as well as in circumstances wherein the transaction is made by one and the same person, the trustee must pay more attention to the verification and determination of the votes (Harju County Court ruling No. 2-13-32716, from 5.12.2013). In the literature, it has even been stated that specific terms on the determination of the votes assigned to persons connected with the debtor should be imposed. However, Estonian bankruptcy law does not prescribe specific regulation on creditors connected with the debtor.

Consequently, in order to reach the objective of the law, the trustee, in co-operation with the court, has the right and obligation to verify and evaluate the documents substantiating the claim in order to prevent unjustified claims (for example, due to ostensible transactions) from conferring control over the bankruptcy proceedings. A system that is fair on and equitable to the creditors must be enforced.

6. Conclusions

In conclusion, Estonian bankruptcy law has had three totally different regulations on the determination of the votes at the FGM of creditors in bankruptcy proceedings. In 1992–2003, the problem was that the creditors' votes were determined only by trustee. Therefore, in 2004–2009 the judge was involved. However, the confirmation of the votes determined was a formal process, in which the court did not verify the bases

[38] R. Narits. *Õiguse entsüklopeedia* ['Law Encyclopaedia']. Juura 2004, p. 11 (in Estonian).

[39] R. Narits (*ibid.*).

[40] CCSCr 15.4.2015, 3-2-1-27-15, para. 14.

[41] Tsiviilseadustiku üldosa seadus. – RT 2002, 35, 216; RT I, 12.3.2015, 106 (in Estonian).

for the determination of the votes. Hence, nowadays the votes are again assigned by the trustee, which had been found problematic in 1992–2003. Moreover, the court intervenes only in the event of a dispute over the determination of the votes. However, the disputes are long-term, and, therefore, the FGM of creditors is held several months or even a year after the initial FGM. In contrast, bankruptcy proceedings should be as quick and efficient as possible. The current procedure for the determination of the votes at the FGM of creditors does not protect the rights and interests of the creditors, does not protect the common interests of the creditors, and does not follow the principle of procedural economy.

Hence, current legislation on the determination of the votes at the FGM of creditors is not perfect. However, none of the regulations that have been in force since 1992 have been perfect as regards the protection of the creditors' common interests and the principle of efficiency. In fact, it seems that the legislator did not make a reasonable decision by changing §26 (5) of the BA as in force in 1992. That provision prescribed that if a creditor does not consent to the number of the votes assigned, the votes are determined by the general meeting of creditors. This regulation ensured that the meeting could continue immediately. It did protect the creditors' common interests, because the bankruptcy proceedings could continue. However, in case of a dispute, the decisions adopted could be changed by the judge. Therefore, resolving the dispute was time-consuming and complex, and when the dispute over the votes was opened in court, application of the principle of procedural economy was affected.

Considering §82 (4) of the current BA, one finds that the actual problem in practice results from the fact that judges are implementing the law in a way that deviates from the legislator's objective. The court must ensure prompt and effective bankruptcy proceedings, to resolve the dispute within reasonable time. The ruling on the votes should be made immediately at the same FGM. Therefore, the law should provide a term that specifies the time by which court rulings on the determination of the votes should be made. Important decisions thus could be adopted at the same general meeting, and bankruptcy proceedings could continue. Furthermore, to ensure that disputes are resolved within reasonable time and that the principles of speed and efficiency are honoured, insolvency courts should be created.

There is also the problem of determining which issues belong to the disputes about votes. However, as the nature of the disputes over the votes cannot be stated in the law, it must be established by court practice. In order to reach the objective of the law, the trustee, in co-operation with the court, has the right and obligation to verify and evaluate the documents substantiating the claim in order to prevent unjustified claims from conferring control over the bankruptcy proceedings. A creditor assigned votes at the FGM must file proof of claim, together with documents proving the circumstances, with the trustee in three working days. In order to protect the creditors' interests, a fair and equitable system must be employed.

https://doi.org/10.12697/JI.2017.26.09

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Special Job-sharing Regulation – a Promoter of Flexible Working?

1. Introduction

Economic-demographic changes taking place in the European Union (EU) present a challenge to standard full-time employment. With regard to contemporary employment relationships, standard full-time employment may not be enough to meet everybody's needs in the labour market. Various needs have led to diverse new ways to organise work, including working time, and these represent a growing trend in the EU. Since 2000, the European Foundation for the Improvement of Living and Working Conditions (Eurofound) has detected nine new forms of employment in the EU.[*1] Job-sharing is one of the new forms of work listed in the Eurofound report.

Job-sharing (working in pairs or work that involves 'twinning') was introduced first in the United States of America (USA) in the '60s and was characterised mainly through flexibility in the organisation of working time, with 'two people sharing the same employment relationship corresponding to one full-time job'.[*2] Teaching and nursing were among the first professional positions to be shared thus, filled largely by women wishing to combine a career and family life.[*3]

Benefits offered by job-sharing caused this alternative employment form to spread from the USA to Europe. In Europe, the concept of job-sharing was introduced initially during recessionary times in the 1980s and the early 1990s. In those times, Europe faced a tremendous increase in unemployment rates. As a remedy, work-sharing was proposed by the Organisation for Economic Co-operation and Development (OECD) Europe. The forms of work-sharing used thus far have been job-sharing (filling a single work post with more than one person) and 'trading hours for jobs' (reducing working time for workers under contract, to create jobs).[*4]

Nowadays, job-sharing is distinguished from work-sharing in that the latter is a more generic concept applied for any steps taken to redistribute work in order to reduce unemployment[*5] and usually refers to an

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1 Eurofound. New forms of employment, pp. 1–2. Available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1461en.pdf (most recently accessed on 18.4.2017).

2 S. Isola. Il contratto di job sharing ['The job-sharing contract'], p. 6. Available at http://www.tosc.cgil.it/ftp/centrodocumentazione/files/tesi_isola.pdf (most recently accessed on 18.4.2017) (in Italian).

3 K. Marshall. Job sharing, p. 6. Available at http://ivt.crepuq.qc.ca/popactive/documentation2002_A/1997/pear1997009002s2a01.pdf (most recently accessed on 18.4.2017).

4 T. Miyakoshi. The efficacy of job-sharing policy. – *Applied Economics Letters* 8 (2001) / 7, pp. 437–439. – DOI: http://dx.doi.org/10.1080/135048501750267105.

5 J.G. Pesek, C. McGee. An analysis of job sharing, full-time and part-time work arrangements: One hospital's experience. – *American Business Review* 7 (1989) / 2, pp. 34–40.

organisation's short-term response to a particular economic situation.[*6] Many countries facilitate the use of work-sharing as a labour-market policy tool aimed at preserving existing jobs or creating new ones. Unlike work-sharing, job-sharing is generally not used as a measure to avoid layoffs, retain employees by spreading less work among an existing workforce (as an alternative to job losses), or increase employment.[*7] Job-sharing is seen in the EU primarily as one of the new flexible work paradigms that can aid in combating the age-related problems arising in the EU labour market (associated with demographic changes) and offering working-time flexibility for those who are not open to full-time employment.

In countries where various new forms of work have existed for some time or are widespread or deliberately promoted by the government, specific regulation has been adapted to unify the application practices. For example, job-sharing as a new form of work has specific regulation in Germany, Slovakia, Hungary[*8], and Lithuania. The Government of the Republic of Lithuania set a goal of modernising labour regulations and increasing the associated flexibility. A new Labour Code[*9] was adopted in Lithuania that introduced new forms of work, including job-sharing. Italy had a specific regulation on job-sharing until it was abolished by the 2015 labour reforms referred to as the Jobs Act.[*10] The Association for International and Comparative Studies in Labour and Industrial Relations (ADAPT)'s professional fellow A. Tea commented on the abolishment of the job-sharing labour form in Italy as follows: the repealing of job-sharing provisions 'is not acceptable since it's a flexible tool and an expression of labour modernization and contractual flexibility arrangement, as shown by the experience of other European countries. On the contrary, the Italian legislator should have clarified current legislation regulating job sharing'.[*11]

There are various European Union member states (hereinafter 'MSs') where no specific regulation of job-sharing exists but the new employment form is nevertheless practised.[*12] The exploitation of new forms of work in the situation wherein regulation specific to it is absent has raised questions over whether and under what conditions it is reasonable to allow parties to an employment relationship to enter into agreement on new forms of work. In discussion of the optional regulations, it has been considered essential to guarantee the parties the desired flexibility, workplace safety, and the protection of employment rights.

The need for additional flexibility in the form of job-sharing has forced parties to an employment relationship in the context of absence of special job-sharing regulations to operate within the framework of standard labour regulations. National standard labour norms may provide some guidelines on the application of new forms of work, but concern remains as to whether the standard labour regulation is sufficient and clear enough to make the entrance into new forms of employment (including job-sharing) effective.

The goal set for this paper was to determine from the example of job-sharing (as a new form of work) and Estonian[*13] labour law whether the absence of special regulation on national level precludes or unreasonably restricts the opportunities of parties to an employment relationship to increase the flexibility of that relationship and enter into a corresponding regime (here, one for job-sharing) in comparison to those

6 B. Olmsted. Job sharing: An emerging work-style. – *International Labour Review* 118 (1979) / 3, pp. 283–297, on p. 284.

7 ILO. Work-sharing and job-sharing, p. 1. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect---/protrav/---travail/documents/publication/wcms_169673.pdf (most recently accessed on 18.4.2017).

8 Part II, Chapter XV of the new Labour Code regulates special employment relationships (including job-sharing), which were mostly unknown in Hungary before 2012. For more information, consult J.K. Járai. Modernising of work organization: New forms of employment in Hungary, p. 4. Available at https://www.employment.gov.sk/files/slovensky/ministerstvo/medzinarodna-spolupraca/dynamicky-vysehrad/modernising-work-organization.pdf (most recently accessed on 18.4.2017).

9 Lietuvos Respublikos darbo kodekso patvirtinimo, isigaliojimo ir igyvendinimo istatymas (Law on the Approval, Entry into Force, and Implementation of the Labour Code of the Republic of Lithuania), of 14 September 2016, No. XII-2603 (in Lithuanian). The new Labour Code, as adopted in Lithuania on 14.9.2016, came into force on 1.7.2017.

10 OECD Economic Surveys: Italy, p. 9. Available at http://www.oecd.org/eco/surveys/Overview_Italy_2015_ENG.pdf (most recently accessed on 18.4.2017).

11 A. Tea. 'The (bad) end of Job Sharing': Another paradox of the Italian labour (market) reform that aims at the future but recedes into the past..., p. 4. Available via http://adapt.it/englishbulletin/wp/the-bad-end-of-job-sharing-another-paradox-of-the-italian-labour-market-reform-that-aims-at-the-future-but-recedes-into-the-past/ (most recently accessed on 18.4.2017).

12 For example, job-sharing has recently emerged as a company practice in the Czech Republic and Poland without being specifically regulated. For more details, see the Eurofound piece cited in Note 1, p. 31.

13 Estonian labour regulation does not prohibit the use of job-sharing; neither does the national law contain specific regulation of job-sharing.

countries where special regulation does exist. The results presented in the article should enable other MSs to decide on the necessity of special job-sharing regulation.

The methods used for the study are of a comparative, historical, and analytical nature. The work is based on the examination of Estonian labour law. In addition, references are made to national laws wherein job-sharing as an employment form was (Italy) and is (Germany, Slovakia, Hungary, and Lithuania) specifically regulated on national level.

The comparative analyses of Italian, German, Slovakian, Hungarian and Lithuanian job-sharing regulations enable covering the theme from the perspective of all national normative sources now available in the EU. References to all of the job-sharing regulations and practices of EU countries where job-sharing is specifically stipulated aid in offering solutions for the problems detected with respect to the associated research area.

2. Plurality of definitions

Introducing new forms of employment on national level enables one to increase the flexibility of the labour market and modernise it by giving parties to an employment relationship additional opportunities to organise work and working time. The European Commission has issued a Green Paper, 'Modernising Labour Law to Meet the Challenges of the 21st Century'[*14], wherein the need to encourage flexible work relations and modernise labour-law regulations has been emphasised.

The process of modernisation of labour laws among MSs has been erratic. Some MSs have modernised their labour regulations so as to enable the concerned parties to apply job-sharing, while other MSs prefer to stay rather conservative in the process of introducing any new form of work. To enable employed persons or prospective employed persons to enter into job-sharing, it is considered essential from the uniformity standpoint to provide its definition on the national level. For example, in Estonia, where job-sharing is not regulated on the national level, there is no single definition available for this new form of work. That enables parties to an employment relationship to give the term 'job-sharing' its own meaning, which can vary from each employment relationship to the next.

The fact that job-sharing can be defined in various ways is concretised through the comparative analysis of job-sharing definitions on national and supranational levels. For example, various supranational organisations have defined job-sharing through its common characteristics. For instance, the International Labour Organization (ILO) defines job-sharing as 'a voluntary arrangement whereby two persons take joint responsibility for one full-time job and divide the time they spend on it according to specific arrangements made with the employer'.[*15] Eurofound has defined job-sharing as 'an employment relationship in which one employer hires several workers, but normally just two, to fill a single full-time position'.[*16]

Not many MSs have made efforts to establish a definition for job-sharing on national level. In Italy, for example, job-sharing was regulated at first by articles 41 to 45 of Legislative Decree 276/2003.[*17] Article 41's first sentence stipulated that 'the contract for job-sharing is a special employment contract by means of which two employees jointly assume the fulfilment of a unique and identical work obligation'. The characteristic element of this type of contract was deemed to be the presence of a contractual obligation shared by two obligors, who were bound firmly to fulfil that obligation.[*18] The formality requirements for such a contract included a written form wherein certain elements, such as the task share and the time allocation, had to be specified in detail and communicated to the employer.[*19] In Italy, employers can no longer resort to a 'job-sharing model' unless it would be likely to be possible through an atypical contract, as addressed by Article 1322 of the Italian Civil Code.[*20]

14 Green Paper 'Modernising labour law to meet the challenges of the 21st century'. Available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/385633/IPOL-EMPL_ET(2007)385633_EN.pdf (most recently accessed on 18.4.2017).

15 ILO (see Note 7), p. 1.

16 Eurofound (see Note 1), p. 31.

17 Decreto Legislativo 10 settembre 2003, n. 276 (Legislative Decree of 10 September 2003, no. 276). – *Gazzetta Ufficiale* N. 235 del 9 ottobre 2003 (in Italian).

18 S. Isola (see Note 2), p. 24.

19 Decreto Legislativo 10 settembre 2003 (see Note 17), Art. 42.

20 A. Tea (see Note 11), p. 3.

The Italian and Lithuanian definitions for job-sharing are similar, as both allow sharing a job only between two employees. Under a Lithuanian job-sharing employment contract, 'two employees can agree with the employer on sharing one job position'.[*21] It is noteworthy that other MSs where job-sharing is regulated on national level have not limited the number of employees in the job-sharing scheme. For example, the Slovakian Labour Code[*22] defines job-sharing as 'a job in which employees in an employment relationship with reduced working time themselves distribute amongst themselves the working time and the job description appertaining to the job'. In Germany[*23], the employer and employee may agree that a workplace is shared by two or more employees, and in Hungary[*24], the employer may conclude an employment contract with several workers for carrying out the functions for a job jointly.

Job-sharing can be distinguished as defined mainly in terms of mutual work obligations of the job-sharers and seldom through the joined organisation of working time (as in Slovakia). According to definitions given by supranational organisations, only full-time work can be shared among the job-sharers; thereby, the possibility of sharing a part-time job is ruled out. National regulations have side-stepped this limitation and allow sharing any kind of job, even a part-time one.

The comparative analysis points to a plurality of elements through which job-sharing as a new type of work can be identified. In Estonia, where no definition for job-sharing exists on national level, any of various agreements can be reached that provide a unique definition for it, specific to the employment relationship. The plurality of definitions may lead to a situation wherein people in various employment relationships are treated differently while working under the same actual form of work (here, job-sharing). A corresponding situation can cause confusions in practice and diminish the willingness of parties to an employment relationship to apply job-sharing.

Applying an unambiguous definition for job-sharing enables one to distinguish job-sharing from other forms of work and practices and thereby ensure harmonised application on national level. In those MSs where no special job-sharing regulation exists, the answer for harmonised implementation of job-sharing may lie in collaboration with social partners in MSs where the industrial relations are well developed. In MSs where the role of such social partners in the employment relationships is marginal, as it is in Estonia, rectification may not result, however. From the flexibility standpoint, it is important to strengthen the industrial relations and hence provide possibilities for employees and employers to agree on the definition and application of job-sharing via collective agreements.

3. Regulation of part-time work as an effective entry point to addressing job-sharing?

Job-sharing has elements in common with standard part-time work. This has made it possible for various MSs and supranational organisations to define job-sharing as a form of part-time work.[*25] For example, the ILO considers job-sharing to be a form of part-time work, stipulating that the 'part-time work can take special forms, such as job sharing (one full-time job is split into two part-time jobs)'.[*26]

Irrespective of its origin, job-sharing differs from traditional part-time work in several ways. For example, job-sharing is unlike part-time work in that it can be applied for specific positions wherein the working time (for reasons related to the nature of the work or the employer's desire to maintain the job in its

21 Labour Code of Lithuania (see Note 9), Art. 93, para. 1.

22 Zákonnik práce. Zákon č. 311/2001 Z. Z. (Labour Code of Slovakia). – Zbierka zákonov SR 311/2001 Z. z. znenie 18.06.2016 (in Slovakian), Art. 49a. English text available at http://www.ilo.org/dyn/eplex/docs/50/labour-code-full-wording-january-2012.pdf (most recently accessed on 18.4.2017).

23 Stipulated specifically in the Act on Part-Time and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz), Art. 13, Section 1, 'Arbeitgeber und Arbeitnehmer können vereinbaren, dass mehrere Arbeitnehmer sich die Arbeitszeit an einem Arbeitsplatz teilen (Arbeitsplatzteilung)'.

24 The Hungarian Labour Code: Törvény a munka törvénykönyvéről. – optiJUS 2012.06.25; optiJUS 2017.01.01 (in Hungarian), Section 194, Subsection 1. English text available at http://www.ilo.org/dyn/travail/docs/2557/Labour%20Code.pdf (most recently accessed on 18.4.2017).

25 Eurofound (see Note 1), p. 31.

26 ILO. Part-time work, p. 1. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_170717.pdf (most recently accessed on 18.4.2017).

entirety) cannot be reduced to less than hours per day (40 hours per week) or divided between multiple part-time employees. Also, an obligation to co-operate and communicate distinguishes job-sharers from part-time workers.[*27]

Special features and often the special job-sharing regulation in place differentiate job-sharing from standard part-time work. For example, the job-sharing arrangement in Italy was determined by the labour norms to entail a special type of employment contract, with its own characteristics that distinguished it from the other types of contracts. In Italy, job-sharing as a special type of employment was regulated separately from part-time work. The aim of regulating job-sharing separately from part-time work was a clear indication that part-time employment contracts were not a suitable option for the case of job-sharing. The latter approach can be distinguished in the Labour Code of Lithuania and of Hungary, wherein job-sharing is treated as involving a new type of contract and not as a form of part-time work. A different approach can be detected in Slovakia and Germany. In Slovakia, job-sharing is classified in the Labour Code as a form of employment relationship with reduced working time, and job-sharers in Germany are considered part-time employees within the meaning of the provisions of the Part-Time and Limited Term Employment Act.[*28]

In Estonia, job-sharing as a new form of work in the legislative domain is unknown. There are no special provisions in Estonian labour law regulating job-sharing agreements. According to the general principle of law, regulation of contracts not regulated specifically in the laws is implemented in accordance with analogy to existing contract types.[*29] The features common to part-time work enable parties to an employment relationship to apply job-sharing via the regulation of part-time work. Employers are free to enter into part-time work agreements with each job-sharer and negotiate the contract terms in either employment contract. Therefore, the absence of special job-sharing regulation cannot impede the parties' entry into a job-sharing regime.

In Estonia, when treated as part-time workers, job-sharers have to be guaranteed the same rights as full-time workers. For example, the amount of annual leave (28 calendar days) has to be the same in Estonia between full-time workers and part-time workers.[*30] This means that each job-sharer when treated as a part-time worker has to be guaranteed annual holiday of 28 calendar days. In MSs where special job-sharing regulation exists, the holiday time is generally aggregated and allocated on a *pro rata* basis, which provides employers with a substantial cost-related advantage relative to Estonian practice.

The study indicates in the case of Estonian labour law that the part-time work regulation when directly applied to job-sharing may be beneficial for job-sharers, but from the perspective of employers' economic costs, entrance into a job-sharing regime may become irrational. It has been detected that the direct application of part-time work regulation does not support parties' decision to enter into a job-sharing arrangement. The benefits arising from job-sharing have to be mutual for the parties to an employment relationship to choose this new form of work over the traditional options. The cost-related constraints can be eliminated only by stipulating special job-sharing provisions on national level. Through national support and special regulation, job-sharing as a new form of work can be made acceptable for both parties.

4. Variety of contracts for entering job-sharing

Traditionally, employment contracts are formed between one employer and one employee. The emergence of job-sharing has created a situation wherein two or more employees are related to one job. The plurality of the parties is considered a new situation for many MSs, Estonia among them.

Eurofound has described, in the report on new forms of employment, two distinct contractual options related to job-sharing. National practices encompass some MSs wherein all job-sharers have their own

27 B. Olmsted (see Note 6), p. 284.

28 Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Teilzeitund Befristungsgesetz - TzBfG) (Part-Time and Limited Term Employment Act). – 21.12.2000 (BGBl. I S. 1966), 20.12. 2011 (BGBl. I S. 2854) (in German). English text available at http://www.mayr-arbeitsrecht.de/wp-content/uploads/2016/05/Part-Time-and-Limited-Term-Employment-Act.pdf (most recently accessed on 18.4.2017).

29 P. Varul et al. Võlaõigusseadus I. Kommenteeritud väljaanne (Law of Obligations Act I, commented edition). Tallinn 2016, p. 5 (in Estonian).

30 Töölepingu seadus (Employment Contracts Act), ECA). – RT I 2009, 5, 35; RT I, 7.12.2016, 1 (in Estonian), Section 55. English text available at https://www.riigiteataja.ee/en/eli/530122016002/consolide (most recently accessed on 1.5.2017).

individual contract of employment and also MSs in which job-sharing is based on a single contract covering two or more workers.*[31]

According to the ILO, a commonplace form of job-sharing is to split one full-time job into two part-time jobs.*[32] Entering into a separate employment contract with each job-sharer is practised in, for example, Germany, Lithuania, and Slovakia. In Germany, an employer wishing to create shareable jobs has to enter into an employment contract with at least two or more prospective part-time employees, who will share a full-time job. The new Lithuanian Labour Code*[33] stipulates that 'in both employment contracts the type of the employment contract, [the] identity of the other employee and his contact details, [and] the employee's rate of working time (the number of working hours per week) shall be indicated'.*[34] In Slovakia too, each employee-to-be is expected to enter into an individual agreement on job-sharing. The Slovakian legislator emphasises that 'an agreement on the assignment of an employee to a job sharing concluded between an employer and an employee must be done in writing, otherwise it shall be invalid'.*[35]

Unlike in Germany and Slovakia, job-sharing in Italy was regulated separately from part-time work and other types of contracts. It was determined on the national level that 'the contract on job-sharing is a special employment contract by means of which two employees jointly assume the fulfilment of a unique and identical work obligation'.*[36] Prospective job-sharers in Italy were expected to enter into a joint employment contract, prescribing the most important employment conditions concerning each job-sharer. The characteristic element of this type of contract was the presence of a contractual obligation shared by two obligors, who were bound firmly to the fulfilment of one job.*[37] The formality requirements of such a contract included a written form wherein certain elements, such as the task share and the time allocation, had to be specified in detail and communicated to the employer.*[38]

In a similarity to Italian practice, the plurality of parties to an employment relationship, and the right to enter into one employment contract with several workers, is coherently stipulated in Hungarian labour law. It is determined that 'the employer may conclude an employment contract with several workers for carrying out the functions of a job jointly'.*[39]

In Estonia, it is common to have only one employer and one employee on each side of the employment contract. A single employment contract with two or more employees or employers is not directly allowed; neither is it prohibited. The right to enter into an employment contract that involves multiple employees or employers is not regulated in the Estonian Employment Contracts Act (ECA). Leaving the matter unregulated does not mean that the parties entering an employment relationship are not allowed to conclude an employment contract with multiple employees or employers.

The author concludes that the corresponding right (to enter into an employment contract involving multiple employees or employers) can be derived from various legal acts.*[40] In the explanations to the ECA it has been stipulated that for those questions not answered through regulation in the ECA, the general part of the Estonian Law of Obligations Act*[41] (LOA) and the General Part of the Civil Code Act*[42] apply.*[43] The general part of the LOA makes it possible for parties entering an employment relationship to enter into a single job-sharing contract. The position is supported by the definition of 'contract' provided by the LOA, according to which 'a contract is a transaction between two or more persons (parties)'.*[44] Therefore, in every

[31] Eurofound (see Note 1), p. 31.

[32] ILO (see Note 7), p. 1

[33] Labour Code of Lithuania (see Note 9).

[34] *Ibid*., Art. 93, Section 2.

[35] Labour Code of Slovakia (see Note 22), Section 49a, Subsection 3.

[36] Decreto Legislativo 10 settembre 2003 (see Note 17), Art. 41.

[37] S. Isola (see Note 2), p. 24.

[38] Decreto Legislativo 10 settembre 2003 (see Note 17), Art. 42.

[39] Hungarian Labour Code (see Note 24), Section 194, Subsection 1.

[40] For example, from the Estonian Employment Contracts Act, Law of Obligations Act, and General Part of the Civil Code Act.

[41] Võlaõigusseadus (Law of Obligations Act). – RT I 2001, 81, 487; 31.12.2016, 1 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/524012017002/consolide (most recently accessed on 18.4.2017).

[42] Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). – RT I 2002, 35, 216; RT I, 12.3.2015, 5 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/528082015004/consolide (most recently accessed on 1.5.2017).

[43] E. Käärats et al. *Töölepingu seadus. Selgitused töölepingu seaduse juurde* ['Employment Contracts Act – Explanations to the Employment Contracts Act']. Juura 2013 (in Estonian), p. 16.

[44] Law of Obligations Act, Section 8, Subsection 1.

obligatory relationship there have to be at least two parties, and also it is allowed to have multiple parties on each side of the contract. The principle of plurality of parties applies, through the general part of the LOA, to employment relationships, referring to the possibility of entering into a single employment contract with multiple employees or employers.

The author's position can be confirmed from the perspective of contracts of partnership[*45]. Under a contract of partnership, the partners (two or more) can enter into an employment contract **only** jointly, because the consent of all the partners is needed for any transaction to be concluded – including employment contracts. Additionally, the example confirms the right of the parties entering an employment relationship to enter into a single contract with multiple employees or employers.

The comparative study indicates that special job-sharing regulations have a tendency to prescribe the contract type that the parties have to utilise if wishing to enter into a job-sharing arrangement. The choice of contract option is either a single employment contract or an option for each employee to sign a separate employment contract with the employer. Thereby, the special regulation reduces the range of options to one. In Estonia, where no special job-sharing regulation exists, the parties entering an employment relationship are allowed to choose either form of employment contract (separate or joint). Compared to the MSs where special job-sharing regulation exists, Estonia with its general labour law offers job-sharers more flexibility in the context of contractual choice. Plurality of contractual choice can increase the parties' options for entering a job-sharing regime, but, that said, at the same time it can also promote unharmonised practices in job-sharing and lead to confusion related to the management of a joint employment contract.

5. Constraints related to transferring to job-sharing

Ability to enter into a job-sharing regime is directly affected by the norms stipulated on national level. Constraints to entrance to a job-sharing arrangement may be validated deliberately at the national level or, alternatively, proceed from general labour regulations. Unreasonable limitations hinder opportunities to participate in a job-sharing regime and to achieve the required flexibility in the employment relationship.

Of the MSs compared here, Slovakia with its Labour Code does not set any restrictions on entering into a job-sharing regime. The parties' agreement is the only criterion that has to be met.[*46] Mutual agreement is considered the main criterion also in Hungary, Lithuania, and Italy. The Italian Ministry of Labour issued a communication in 1998 clarifying the following: job-sharing arrangements 'can be applied to all categories of workers without any kind of constraints or limitations'.[*47] Mutual agreement is essential also in Germany when, at the beginning of the employment relationship, the parties decide to apply job-sharing. In addition, Estonian general labour law does not foresee any limitations for entering into a job-sharing regime under regulations pertaining to part-time work. The parties' mutual agreement is the only criterion that has to be met, in an echo of the comparable MSs wherein special job-sharing regulation exists.

Normative limitations can appear when an employee requests to move over from full-time work to a job-sharing regime. In Germany, the limitations established for part-time work extend to job-sharing. The duration of employment and the number of employees in the enterprise determine an employee's right to be transferred from full-time work to job-sharing arrangements. In principle, only employees who have worked more than six months in a company with more than 15 employees have the right to claim a reduction of working time in the form of job-sharing.[*48] It has to be noted that the limitation does not preclude the right of parties to an employment relationship to negotiate more favourable terms for the employees than stipulated in the law.

The right to request job-sharing after having worked in the enterprise for more than six months enables maintaining stability in the organisation of work. The limitation related to the number of employees of the enterprise may place employees of small enterprises in a less favourable position than employees with

45 Law of Obligations Act, Part 7.

46 Labour Code of Slovakia (see Note 22), Section 49, Subsection 1.

47 Eurofound. Job-sharing introduced in Italy, p. 1. Available at https://www.eurofound.europa.eu/observatories/eurwork/articles/job-sharing-introduced-in-italy (most recently accessed on 18.4.2017).

48 Part-Time and Limited Term Employment Act of Germany (see Note 28), Section 8, subsections 1 and 7.

larger enterprises. For example, in Estonia, where most of the enterprises (90%) are classified as micro-enterprises*[49], with fewer than 10 employees*[50], the limitations as stipulated in Germany would extensively affect employees' options to request job-sharing. Often, small enterprises are the ones that need additional flexibility to manage the workload with the existing number of employees. Limiting the options for them would influence a considerable number of employees. To treat micro-enterprises any differently would demand reasonable cause.

Entering into a job-sharing regime may be impeded also by the employer, whose consent is needed for employees to be transferred from full-time work to job-sharing. For example, the labour regulations in Slovakia, Hungary, Italy, and Estonia do not stipulate the conditions in which the refusal of working-time reduction (i.e., refusal of an employee request to apply job-sharing) is justified. This state of affairs may encourage employers to exert the force of their will in the decision-making process, in the form of unjustified refusal, and thereby limit employees' option of entering a job-sharing relationship. Germany has solved the problem by giving the employer the right to decline a request for job-sharing only if an operations-related reason for doing so is given. Such reasons exist in particular if the reduction of working time would fundamentally impair the establishment's organisation, work processes, or safety or would cause the establishment to incur unreasonable costs.*[51] Employers' obligation to justify the refusal by way of operations-based reasons increases employees' opportunities to enter into a job-sharing regime. German practice points to potential for increasing employees' chances of entering job-sharing through special regulation. Employees can have certainty of the conditions with which their job-sharing requests are managed and insist on the employer's actions complying with the norms. In comparison to German practice, certainty is not guaranteed – and entrance into a job-sharing regime is limited – in those MSs (Estonia among them) where employers have been given the freedom to decline employee applications for any reason. The German practice should be followed so that employers do not exercise 'self-will' with respect to the transfer process and so as to increase employees' opportunities to enter into job-sharing.

6. Conclusions

This article was prepared to examine the example of job-sharing (as a new form of work) and Estonian labour law for purposes of ascertaining whether the absence of special job-sharing regulation on national level precludes or unreasonably restrains the opportunities for parties wishing to enter an employment relationship to increase the flexibility by entering a job-sharing arrangement, as compared to those countries where special job-sharing regulation exists.

The comparative analysis indicates a plurality of elements through which job-sharing as a new type of work can be identified. In Estonia, where no definition for job-sharing exists on national level, agreements of various sorts can be reached. Hence, a unique definition of job-sharing can be supplied for every individual employment relationship. The plurality of definitions may lead to a situation wherein parties to employment relationships of various sorts are treated differently while actually applying a form of work that is defined in a uniform way in other MSs (i.e., job-sharing).

It has been detected that the direct application of part-time work regulation does not support the parties' choice to enter into job-sharing. The cost-related constraints can be eliminated only by stipulating special job-sharing provisions at the national level.

The comparative study indicates that special job-sharing regulation tends to prescribe a certain type of contract that the parties have to follow if wishing to enter into a job-sharing regime. The option may be either a single employment contract or each employee signing a separate employment contract with the employer – the number of options is reduced to one. In Estonia, where no special job-sharing regulation exists, the parties in an employment relationship may operate under either form of employment contract (separate or joint). Compared to the systems of the other MSs considered, where special job-sharing

[49] Ettevõtete majandusnäitajad, 2014 ['The economic indicators, 2014'], p. 1. Available at http://www.stat.ee/78415?highlight=mikroettev%C3%B5tted (most recently accessed on 18.4.2017).

[50] *Eesti Statistika aastaraamat 2016* ['Estonian Statistics Yearbook 2016'], p. 215. Available at https://www.stat.ee/valjaanne-2016_eesti-statistika-aastaraamat-2016 (most recently accessed on 18.4.2017).

[51] Part-Time and Limited Term Employment Act of Germany (see Note 28), in Section 8, Subsection 4, stipulates that the legitimate reasons for rejection may be specified also in collective agreements.

regulation exists, Estonian general labour law offers job-sharers more flexibility in the context of contractual choice. The plurality of contractual choice can increase the parties' options for entering a job-sharing regime, but at the same time it can promote unharmonised practice in implementation of job-sharing and create confusion related to the management of a joint employment contract.

Entrance into job-sharing is limited in those MSs, including Estonia, where the employers have been given the freedom to decline employees' applications for any reason. German practice should be followed if one wishes to avoid employers' exercise of 'self-will' in the transfer process and hence increase employees' options for moving over to job-sharing.

https://doi.org/10.12697/JI.2017.26.10

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Die Verantwortungsstruktur bei der Privatisierung der Rehabilitationsleistungen im estnischen Sozialrecht

1. Einleitung

Die Kooperation zwischen dem Staat und den Privaten zur Erfüllung gemeinwohlorientierter Aufgaben ist in unterschiedlichen Ausprägungen in ganz Europa verbreitet.*[1] Das Gesundheitswesen und soziale Dienstleistungen stellen hier keine Ausnahme dar.*[2] Es wird von einem generellen Trend vom „Erfüllungsstaat" in die Richtung „Gewährleistungsstaat" gesprochen*[3], dessen näherer Inhalt rechtswissenschaftlich diskutiert wird.*[4]

Mit diesen Entwicklungen sind unterschiedliche Erwartungen verbunden*[5], unter denen höhere Effektivität und erweiterte Selbstbestimmung der Bürger sowie die daraus folgende Befähigung zur Bewältigung ihrer Lebenslagen hervorgehoben werden können. Eine Gestaltung der sozialen Marktwirtschaft zur Erbringung von Sozialdienstleistungen wird auf der EU-Ebene ausdrücklich gefordert.*[6]

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1 H. Wollmann, G. Marcou, eds. The provision of public services in Europe: Between state, local government and market. Edward Elgar Publishing, 2010, S. 240; Zur Ausgestaltung der Kooperation zwischen dem Staat und den Privaten zur Erbringung öffentlicher und sozialer Dienstleistungen in historischer, länderübergreifender und rechtsvergleichender Sicht siehe: H. Wollmann, I. Koprić, G. Marcou, eds. Public and Social Services in Europe: From Public and Municipal to Private Sector Provision. Springer, 2016.

2 M. Huber, M. Maucher, B. Sak. Study on social and health services of general interest in the European union. Vienna/Brussels, European Centre for Social Welfare Policy and Research, ISS, CIRIEC, 2008, S. 227.

3 M. Huber, M. Maucher, B. Sak. Study on social and health services of general interest in the European union. Vienna/Brussels, European Centre for Social Welfare Policy and Research, ISS, CIRIEC, 2008, S. 227; D. Ehlers, H. Pünder (Hrsg). Allgemeines Verwaltungsrecht: Mit Online-Zugang zur Jura-Kartei-Datenbank. Walter de Gruyter GmbH & Co KG, 2016, § 10, Rn 8.

4 Knauff, der Gewährleistungsstaat: Reform der Daseinsvorsorge, 66-67. *Voßkuhle* VVDStRL 62, 2003, 266, 310 ff.; C. Franzius. Gewährleistung im Recht: Grundlagen eines europäischen Regelungsmodells öffentlicher Dienstleistungen. Vol. 177. Mohr Siebeck 2009, S. 134 ff.

5 Übersichtlich: J. P. Schaefer, Die Umgestaltung des Verwaltungsrechts: Kontroversen reformorientierter Verwaltungsrechtswissenschaft. Vol. 256. Mohr Siebeck, 2016, 314-315; Burgi, Privatisierung öffentlicher Aufgaben—Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf, Gutachten D zum 67. Deutschen Juristentag. 2008, S 23. Erhältlich unter: http://www.bppp. de/media/file/65.DJT-Gutachten_Prof._Burgi. pdf

6 Entschließung des Europäischen Parlaments vom 05.07.2011 über die Zukunft der Sozialdienstleistungen von allgemeinem Interesse (2009/2222(INI)), P. 38.

Aus wissenschaftlicher Sicht stellt sich mit der Einbindung gewerblicher Anbieter die Frage von der Verantwortungsteilung zwischen den Letztgenannten, dem Staat und den Bürgern. Besondere Aufmerksamkeit benötigt dabei die mögliche Gefährdung individueller Rechtsstellung des schutzbedürftigen Leistungsempfängers.[*7]

Nach der Privatisierungsschwelle neunziger Jahre des 20. Jahrhunderts, geführt von „neo-liberalen" Politik und „New Public Management"[*8], gibt es in jüngerer Zeit Indizien für einen teilweisen „Rückschwung des Pendels"[*9], der von einigen Wissenschaftlern als eine notwendige Balanzierung zwischen Vermarktlichung und Rechtswerte ausgewertet wird.[*10]

In diesem Hintergrund ist es besonders interessant ein gegenläufiges Beispiel aus dem estnischen Sozialrecht vorzubringen. Dieser Beitrag widmet sich der kürzlich erfolgten Vermarktlichung von Leistungen der sozialen Rehabilitation der behinderten und arbeitsunfähigen Menschen (weiter bezeichnet als „Teilhabe").[*11] Die Erneuerung trat im Verlauf des Kodifikationsvorhabens des estnischen Sozialrechts (und der parallel laufenden Arbeitsfähigkeitsreform) im Rahmen des ersten besonderen Teils des Sozialgesetzbuches – dem Fürsorgegesetz[*12] (FsG) – am 01.01.2016 in Kraft. Zu den wichtigsten Veränderungen auf der Strukturebene zählt die Auflösung des bisherigen Verwaltungsvertrages zur Erfüllung der öffentlichen Aufgabe, die in Übereinstimmung mit den Leitfaden der Europäischer Kommission[*13] durch eine alternative Lösung ersetzt wurde: alle Marktteilnehmer haben gleiche Möglichkeit eine Zulassung zu beantragen, um die Leistungen zu erbringen; der Leistungsberechtigte kann nunmehr zwischen den Anbietern frei wählen (s.g. *system of choice*); die Anforderungen an die Leistungserbringung, die Auflistung der einzelnen Leistungen sowie ihre Preise sind gesetzlich festgelegt. Auffällig ist, dass die vertraglichen Beziehungen zwischen dem Staat und den Leistungserbringern sowie zwischen den Leistungserbringern und den Leistungsberechtigten, anders als früher, privatrechtlich ausgestaltet wurden.

Ohne hier eine ganzheitliche Betrachtung aller mit der Reform verbundenen dogmatischen und verfassungsrechtlichen Fragen vorzunehmen, beschränkt man sich hier zum einen darauf, die umgeordneten Dreiecksverhältnisse anhand teleologischer und systematischer Argumente in die privatisierungstheoretischen Kontext zu setzen und dabei zu prüfen, inwieweit die Änderungen des Teilhaberechts den Voraussetzungen des Verwaltungskooperationsgesetzes entsprechen (2. Abschnitt). Später wird die infolge des Rollenwechsels des Staates umgeordnete Verantwortungsstruktur näher behandelt (3. Abschnitt) und bewertet, wie mit der heutigen Rechtslage der staatlichen Gewährleistungsverantwortung Rechnung getragen wird.

Da sich die estnische Jurisprudenz mit den Privatisierungsfragen der Sozialleistungen bisher nicht befasst hat, stütze ich mich auch auf den theoretischen Diskurs des deutschen Rechts. Eine Rechtfertigung dafür bietet – historisch bedingt[*14] – die ähnliche Ausprägung des estnischen und des deutschen Rechts hinsichtlich der klaren Trennung zwischen dem öffentlichen und privaten Recht und der damit verbundenen Fragen der Beteiligung Privater an der Erfüllung öffentlicher Aufgaben.

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7 Näher zum Problemhorizont siehe z. B: P. Aerschot. Activation Policies and the Protection of Individual Rights: A Critical Assessment of the Situation in Denmark, Finland and Sweden, 2012.

8 Zur Definition siehe: F. Walther, New public management: The right way to modernize and improve public services?. International Journal of Business and Public Administration, vol 12, no 2, 2015.

9 T. Klenk, E. Pavolini, eds. Restructuring Welfare Governance: Marketization, Managerialism and Welfare State Professionalism, Edward Elgar Publishing, 2015, S. 259.

10 A. Benish, A. Maron, Infusing Public Law into Privatized Welfare: Lawyers, Economists, and the Competing Logics of Administrative Reform. Law and Society Rev, 50, 2016, S. 953–984. Die Entwicklung europäischer Wohlfahrtssyteme ist somit nicht einheitlich, sondern eher als „eigenartig" und „pluralistisch" zu gekennzeichnen. K. Schubert, P. de Villota, J. Kuhlmann, eds. Challenges to European Welfare Systems. Springer, 2016, S. 5.

11 Die Leistungen zielen auf Entwicklung der Fähigkeiten zur selbstbestimmtes Leben, zur Beteiligung in der Gesellschaft, zum Erlangen der Arbeitsfähigkeit im gewissen Umfang und auf die Entwicklung oder Wiederherstellung der Bereitschaft für die Aufnahme einer tragbaren Arbeit (Verweis 12).

12 Sotsiaalhoolekande seadus (Fürsorgegesetz) – RT I, 21.12.2016, 21 (auf Estnisch).

13 Arbeitsunterlage der Kommissionsdienststellen. Leitfaden zur Anwendung der Vorschriften der Europäischen Union über staatliche Beihilfen, öffentliche Aufträge und den Binnenmarkt auf Dienstleistungen von allgemeinem wirtschaftlichem Interesse und insbesondere auf Sozialdienstleistungen von allgemeinem Interesse. SWD(2013) 53 final/2. Brüssel, 29.4.2013. Erhältlich unter: http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_de.pdf

14 K. Merusk. Administrative Law Reform in Estonia: Legal Policy Choices and Their Implementation, Juridica International, 2004, No. 1, S. 61.

2. Von hoheitlicher Leistungserbringung zur materiellen Privatisierung?

2.1. Funktionale Privatisierung nach Maßgaben des Verwaltungskooperationsgesetzes?

Bis Ende 2015 wurden die Rechtsverhältnisse zwischen dem Staat und den Leistungserbringern zur Erbringung der Teilhabeleistungen durch Verwaltungsverträge reguliert und fielen somit unter das Verwaltungskooperationsgesetz[*15] (VwKG), das die grundlegenden Voraussetzungen und das Verfahren für die Einbeziehung Privater in die selbstständige Erfüllung öffentlicher Aufgaben vorsieht. Die Privaten dürfen zur Erfüllung einer Verwaltungsaufgabe aufgrund Gesetzes, Verwaltungsaktes oder Verwaltungsvertrags beauftragt werden, wenn (1) die Erfüllung der Aufgabe von einer juristischen Person oder einer Einzelperson wirtschaftlich gerechtfertigt ist, unter Berücksichtigung der möglichen Kosten für die Beauftragung, mögliche Finanzierung und die Verwaltungsaufsicht; (2) die Beauftragung mit der Erfüllung einer Verwaltungsaufgabe die Erfüllungsqualität nicht verschlechtert; (3) die Beauftragung mit der Erfüllung einer Verwaltungsaufgabe die öffentlichen Interessen oder die Rechte der Betroffenen nicht schädigt (§ 5 Abs. 1 VwKG). Der Beauftragte wird Träger öffentlicher Gewalt.[*16] Die hoheitliche Aufgabenwahrnehmung des Leistungserbringers, der im Verhältnis zum Leistungsberechtigten als Behörde auftritt, entspricht weitgehend der deutschen Rechtsfigur der Beleihung.[*17]

Es wird im Vorfeld der Privatisierung eine Analyse gefordert (Abs. 2) über die Massnahmen zur Gewährleistung der Kontinuität und Qualität der Erfüllung sowie über die rechtliche und faktische Wirkung für die Betroffenen. Die Entscheidung ist also mit einer erhöhten Begründungspflicht[*18] verbunden. Die geordnete Analyse dient der Erfüllungsverantwortung die – zusätzlich zu der eigenständigen Verantwortung des Privatisierungssubjektes – auch nach der Beauftragung bei dem Staat verbleibt. Insoweit lässt sich auch von einer bei dem Hoheitsträger belassenen „Aufgabenzuständigkeit“ und „Aufgabenverantwortung“ zu sprechen.[*19]

Die vorgestellten Anforderungen greifen nicht bei der Heranziehung von Privaten durch einen privatrechtlichen Vertrag, was sich damit rechtfertigen lässt, dass die Tätigkeit des privaten Akteurs in diesem Fall dem Verwaltungsorgan unmittelbar zugerechnet wird.[*20]

Eine Prüfung, inwieweit die Änderungen des Teilhaberechts den Erfordernissen vom VwKG entsprechen, verursacht zunächst Verwirrung. Es werden zwar die personellen, sachlichen und informationellen Anforderungen gesetzlich festgelegt, da es aber an einer ausdrücklichen Zuweisung der Aufgabe an ein verpflichtetes Verantwortungssubjekt fehlt, kann nicht von einer gesetzlichen Beauftragung ausgegangen werden. Mit der Zulassung der gewerblichen Anbieter wird eine Möglichkeit, nicht gleich eine Betriebspflicht geschaffen.

Ein Abschluss des Verwaltungsvertrags wird vom Gesetzgeber ausdrücklich verweigert.[*21] Allerdings wird zwischen dem zur unmittelbaren Staatsverwaltung zugehörigen Sozialversicherungsamt und dem Leistungserbringer ein privatrechtlicher Vertrag geschlossen[*22], was die Frage aufwirft, ob der

15 Zur Entstehungsgeschichte vom Verwaltungskooperationsgesetz (RT I, 30.12.2015, 79, auf Estnisch) siehe: K. Merusk. Administrative Law Reform in Estonia, S. 61.

16 Begründung zum Gesetzesentwurf des Verwaltungskooperationsgesetzes (SE 474). (Auf Estnisch).

17 Siehe z. B. GVwR, 2006, § 12 Rn 106 (Schultze-Fielitz); Burgi, DJT S 40.

18 Vrg auch Stober, Privatisierung öffentlicher Aufgaben. Phantomdiskussion oder Gestaltungsoption in einer verantwortungsgeteilten, offenen Wirtschafts-, Sozial- und Sicherheitsverfassung? Neue Juristische Wochenschrift 2008/32, S 2308.

19 Schoch, Gewährleistungsverwaltung: Stärkung der Privatrechtsgesellschaft? NVwZ 2008, S. 246.

20 Laut § 3 Abs. 4 VwKG kann zur Erfüllung einer Verwaltungsaufgabe ein zivilrechtlicher Vertrag nur geschlossen werden, wenn das Gesetz nicht den Abschluss eines Verwaltungsvertrages vorsieht, wenn mit dem Vertrag die Rechte und Pflichten vom Nutzer der öffentlichen Dienstleistung oder von sonstigen Dritten nicht berührt werden, wenn der Staat oder die Gemeinden nicht von ihren Pflichten befreit werden und bei der Erfüllung der Aufgabe keine Hoheitsbefugnisse genutzt werden. Im Umkehrschluss ergeben sich aus der Vorschrift die Kriterien, wenn bei der Einbeziehung Privater ein Verwaltugsvertrag erforderlich ist.

21 Begeründungen zum Gesetzesenwurf (Seletuskiri sotsiaalhoolekande seaduse, tööturuteenuste ja -toetuste seaduse ning teiste seaduste muutmise seaduse eelnõu juurde), 693 SE, Anhang 1. Erhältlich unter: https://www.riigikogu.ee/download/2ec35a2d-d1a1-4cfd-a38f-e2bcdaed3a28 (auf Estnisch).

22 So die Begründung zum Gesetzesentwurf 693 SE, S. 19. Erhältlich unter: https://www.riigikogu.ee/download/7a99e5ed-62ba-420c-ae6c-7a985be44d92 (Auf Estnisch).

Leistungserbringer aufgrund dieses Vertrages zur Bedarfsermittlung und –Planung sowie zur Leistungserbringung verpflichtet wird. Die Vorschrift überdeckt sich im Wesentlichen mit dem neueren Verständnis der deutschen Jurisprudenz zur theoretischen Konzept der selbstständigen Verwaltungshilfe.[*23] Ein Indiz für die Einordnung dieser Aufgabenübertragung als funktionale Privatisierung ist die fortbestehende staatliche Aufsicht über die Leistungserbringer. Andererseits, während für die Tätigkeit des Verwaltungshelfers[*24] die Behörde weiterhin verantwortlich bleibt, wird im vorliegenden Fall der Teilhabeprivatisierung die Erfüllungsverantwortung einschliesslich der Bedarfsermittlung und Hilfeplanung den Leistungserbringern überlassen. Die möglichen Streite über die Rechtsmässigkeit der Bedarfsermittlung, soweit von Leistungserbringern ausgeführt, sowie die Leistungsstörungen sind nunmehr im privatrechtlichen Rechtsverhältnis zu beseitigen – das verwaltungsrechtliche Widerspruchsverfahren wird ausgeschlossen. Eine Änderung ist im Gesetz nur daran zu erkennen, dass die privaten Leistungserbringer fortan gesetzlich zur Bereitstellung einer Ordnung für die Streitbelegung verpflichtet werden, ohne an dieses Verfahren genauere Anforderungen zu stellen.

Der Inhalt des Vertrags ist laut Gesetzes auf die Festlegung der Modalitäten der Kostenübernahme begrenzt (§ 65 FsG), nicht auf die Übertragung der Aufgabenerledigung gerichtet. Ob mit diesem Vertrag eine Betriebspflicht bzw. Kontrahierungszwang im Verhältnis zur Klientel[*25] geschaffen wird, lässt sich aus dem Gesetz nicht entnehmen. Dadurch wird klar, dass die gewählte Kooperationsart durch § 3 Abs. 4 VwKG nicht umfasst wird.

2.2. Materielle (Teil-)Privatisierung der öffentlichen Aufgabe?

Die Umstrukturierung der Dreiecksbeziehungen[*26] im Teilhaberecht in Anlehnung an den bereits oben vorgestellten Leitfaden der Europäischen Kommission lassen sich daher anhand der Vorgaben des VwKG nicht erklären. Damit stellt sich die Frage, ob Teilhabe überhaupt noch als öffentliche Aufgabe angesehen wird und anzusehen ist. Beim näheren Anschauen zeigt sich tatsächlich, dass es sich aus Sicht des Gesetzgebers bei den Leistungserbringern **nicht mehr um Erfüllern öffentlicher Aufgabe** handelt.[*27] Diese Aussage bedarf aus mehrfacher Hinsicht kritischer Würdigung.

Hinsichtlich der Teilhabeleistungen besteht kein grundsätzliches Privatisierungsverbot.[*28] Der Staat verfügt über die „Kompetenzverteilungskompetenz" zu entscheiden, ob er eine Aufgabe als öffentliche Aufgabe wahrnimmt, oder entsprechende hoheitliche Regulierung schafft, aufgrund deren die Privaten die Aufgabe wahrnehmen.[*29] Die Anerkennung einer Aufgabe als öffentliche Aufgabe setzt nicht zwingend eine Ausübung der Staatsgewalt aus.[*30]

Unter den Aufgaben des zur unmittelbaren Staatsverwaltung gehörenden Sozialversicherungsamts ist auch die „**Gewährleistung der Erbringung von Teilhabeleistungen**" genannt. Dem entspricht das subjektiv-öffentliche Recht des Bürgers auf Kostenübernahme für die privatrechtlich erbrachte Leistung (§ 56 FsG). Die ausdrückliche Verweigerung einer Erfüllung öffentlicher Aufgabe könnte bedeuten, dass der Gesetzgeber von einer Trennung von hoheitlicher Gewährleistungsverantwortung und einfacher Leistungserbringung ausgeht, so dass die Letztere von der öffentlichen Aufgabe nicht mehr umfasst wird. Diese Abspaltung hat zur Folge, dass der Staat **sich von der Erfüllungsverantwortung zurückzieht** und die Privaten bei der Leistungserbringung nicht eine formell öffentliche Aufgabe erfüllen, sondern die

23 Di Fabio, S. 590; Burgi DJT, S 34.

24 Näher zum Konzept der Verwaltungshilfe siehe: M. Burgi DJT, S. 41.

25 Zu unterschiedlichen Dimensionen der Nutzerstellung des Bürgers im Sozialrecht siehe: Rechtliche Dimensionen der Nutzerstellung im Sozialrecht, in: Gerhard Igl (Hrsg.), Verbraucherschutz im Sozialrecht. Sozialleistungsberechtigte als Verbraucher, Nutzer und Mitgestalter sozialer Leistungen: Auf dem Weg zu einem eigenständigen Verbraucherschutz im Sozialrecht, Berlin, 2011, S. 23.

26 Ausführliche Analyse der Dreicksbeziehunen vor und nach dem Reform siehe: M-L. Viirsalu., Eraõiguslik sotsiaalõigus: vastutuse muutumine sotsiaalse rehabilitatsiooni õigussuhete kolmnurgas, Juridica 2/2017 (Privatrechtliches Sozialrecht: Veränderung der Verantwortung in Dreiecksbeziehungen der sozialen Rehabilitation), S. 83-85.

27 Begeründungen zum Gesetzesenwurf (Seletuskiri sotsiaalhoolekande seaduse, tööturuteenuste ja -toetuste seaduse ning teiste seaduste muutmise seaduse eelnõu juurde), 693 SE, Anhang 1, S 4. Erhältlich unter: https://www.riigikogu.ee/download/2ec35a2d-d1a1-4cfd-a38f-e2bcdaed3a28 (auf Estnisch).

28 Viirsalu, S. 89.

29 Parrest, Segadus mõistetes seoses avaliku võimu ülesannetega. – Juridica 2014/10, S. 737.

30 Urteil des Staatsgerichtshofes vom 14.12.2011, 3-3-1-72-11, P. 8.

Aufgabe als ihre eigene wahrnehmen.*[31] Dieses Konzept weicht von der bisherigen Auffassung des Staatsgerichtshofes ab.*[32] Um die Künstlichkeit der Trennung zu überwinden und dieses Konzept brauchbar zu machen, soll zu Instrumenten des Gewährleistungsstaates gewandt werden (siehe Abschnitt 3.1).

Werden die öffentlichen Aufgaben von staatlicher Erfüllungsverantwortung „abgekoppelt"*[33] bzw. Leistungen aus dem Verwaltungsbereich herausgenommen*[34], wandelt sich der Modus der Staatsaufgabenwahrnehmung, wobei die öffentliche Aufgabe bestehen bleibt.*[35]

Zu diesem Punkt wird die Unterscheidung zwischen **vorbereitender und ausführender Art der Einbeziehung Privater** relevant. Die Leistungserbringer werden nicht nur bei der Ausführung der inhaltlichen Teilhabeleistungen tätig, sondern verfügen über einen beachtlichen Entscheidungsspielraum (der die Ausfüllung unbestimmter Rechtsbegriffe und einen hohen Prognoseanteil enthält) auch bei der **Bedarfsfeststellung und Hilfeplanung** (Umfang, Art, Länge und Häufigkeit der Leistungen). Die Einbeziehung Privater in die Entscheidungserfindung erfolgt in komplizierten Fällen, in denen nicht der hoheitliche Leistungsträger selbst, sondern der zum Leistungserbringer gehörige Rehabilitationsteam die Bedarfsermittlung durchführt und ihre Ergebnisse in einem Rehabilitationsplan zwingend festlegt.*[36] Formell erfolgt das Verfahren konsensuell im Rahmen des privatrechtlichen Leistungsvertrags, materiell ist wegen einer scharfen Wissensasymmetrie zwischen der behinderten Person und den Rehabilitationsexperten eine einseitig auferlegte Entscheidung anzunehmen.*[37]

Gesetzlich ist die Ausführung der Bedarfsfeststellung die Aufgabe des Sozialversicherungsamts (§ 62 FsG). Eine explizite Ermächtigung der Leistungserbringer liegt nicht vor, obwohl eine gewisse Legitimation durch die Zulassung geboten wird. Die Aufgabenübergabe könnte als Verfahrensprivatisierung*[38] eingeordnet werden, die aber letztlich ausscheidet, weil nicht nur die Vorbereitung der Entscheidung an Private überlassen, sondern auch die eigentliche **Entscheidungsverantwortung** abgegeben wird, da die Bedarfsfeststellung und Hilfeplanung nicht durch eine behördliche Letztentscheidung bestätigt werden müssen.*[39] Ein nachträgliches Informieren der Behörde gilt an dieser Stelle nicht als effektives Steuerungsinstrument.

Mit der Neuregelung ist eine deutliche Annäherung an das Gesundheitsrecht stattgefunden: auch der Behandlungsvertrag ist gemäss Schuldrechtsgesetzes*[40] ein privatrechtlicher Vertrag und über die nötige Behandlung wird eben auch im Rahmen dieses Vertrags privatrechtlich entschieden. Ein wesentlicher Unterschied besteht aber in den legitimierenden und die Rechtsstellung des Bürgers sichernden Schutzmassnahmen – die Beteiligung des Bürgers sichernden Schutzvorschriften sowie eine Möglichkeit zur Zweitbegutachtung und objektive vorgerichtliche Stelle für die Begutachtung der Leistungsqualität – die es für die soziale Rehabilitation derzeit nicht gibt.

Widersprüchlicherweise wird in der Gesetzesbegründung trotz der expliziten Aufgabenzuweisung das Fortbestehen der Gewährleistungsverantwortung hinsichtlich der Leistungsgewährung in Zweifel gezogen. In den Begründungen zum Gesetzesentwurf steht, dass der Markt selbst die angemessene Versorgung mit erforderlichen Dienstleistungen gewähre und der Staat anstatt der Naturalleistung lediglich zur Kostenübernahme verpflichtet bleibe. Das bietet auch eine Erklärung zur Nichtbeachtung der Anforderungen des § 5 vom Verwaltungskooperationsgesetz.

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31 In diese Richtung geht auch die in der Literatur neuerdings vertretene Auffassung, dass die Leistungserbringung nicht unbedingt eine öffentliche Aufgabe sein muss, wenn ihre Gewährleistung als öffentliche Aufgabe gilt. Parrest, S. 737. Teilweise wird diese künstliche Trennung einer Gesamtaufgabe auch in der Literatur abgelehnt: Knauff, S 81.

32 Der Staatsgerichtshof hat mehrmals die Auffassung vertreten, dass das Wesen der öffentlichen Aufgabe sich nicht durch eine private Durchführung ändert und das es um Erfüllung öffentlicher Aufgabe auch dann handelt, wenn eine Private vom zuständigen Organ ermächtigt oder verpflichtet wird, im öffentlichen Interesse eine solche Leistung zu erbringen, für die der Staat eine Letztverantwortung trägt. Siehe: Beschlsüsse des Staatsgerichtshofes vom 13.02.13, 3-3-1-49-12, P. 23 und vom 16.02.2010, 3-3-4-1-10, P. 5.

33 Schaefer, Die Umgestaltung des Verwaltungsrechts: Kontroversen reformorientierter Verwaltungsrechtswissenschaft. Vol. 256. Mohr Siebeck, 2016, S. 412.

34 Kämmerer, Privatisierung: Typologie-Determinanten-Rechtspraxis-Folgen. Vol. 73. Mohr Siebeck, 2001, S. 440.

35 Kämmerer, S. 439-440.

36 Näher Viirsalu, S. 91-93.

37 Zwar entfalten die gesetzlich gebotene Beteiligungsrechte gewisse legitimierende Wirkung, aber wesentlich ist die früher hoheitlich ausgeführte Bedarfsfeststellung unverändert geblieben.

38 Näher zum Konzept siehe: Burgi, DJT, S 33.

39 Viirsalu, S. 85.

40 Võlaõigusseadus (Schuldrechtsgesetz). RT I 2001, 81, 487 (auf Estnisch), Abschnitt 41 („Behandlungsvertrag").

Tatsächlich fehlt es an gesetzlich festgelegter Sicherstellung der Leistungserbringung wie es im deutschen Teilhaberecht zu finden ist.*[41] Als einziges Zeichen der Letztverantwortung gilt die Regelung über die maximale Länge der Wartezeit (1 Jahr)*[42], die entweder eine Anerkennung der Strukturverantwortung oder blindes Vertrauen des Gesetzgebers in Marktkräften bedeuten kann. Es fehlen jedenfalls Kriterien für ein flächendeckendes Vorhandensein der erforderlichen Leistungen sowie einer Betriebspflicht von gewerblichen Anbietern. Übernimmt der Staat die Garantenstellung nicht, wird es als eine rechtswidrige Aufgabenprivatisierung zu bewerten sein.

Materiell bewertet gibt es bei den Teilhabeleistungen ein enger Gemeinwohlbezug*[43] und damit das öffentliche Interesse*[44] sowie die verfassungsrechtliche Grundrechtsverbindung*[45], die nach Wesentlichkeitstheorie (ableitbar von § 3 GG) Argumente für die Anerkennung als öffentliche Aufgabe darstellen. Das estnische Grundgesetz beinhaltet im § 28 soziale Grundrechte*[46], die durch die internationalen Verpflichtungen präzisiert und teilweise erweitert worden sind.*[47] Trotz breiten Entscheidungsspielraums des Staates zur Bewältigung der sozialen Risiken, darf die Bestimmung jedoch nicht in der Weise ausgelegt werden, dass der Staat zum bloßen Zahlstelle degradiert wird – es müssen auch notwendige Dienstleistungen vorhanden sein.*[48] Anders als in Deutschland, wo die allgemeine Gewährleistungsverantwortung vornehmlich als theoretisches Konzept aus dem Sozialstaatsprinzip hergeleitet wird*[49], wird dieses Verständnis im estnischen Recht durch ein eigenartiges Paragraf des Grundgesetzes gestärkt: § 14 GG*[50] verpflichtet alle drei Gewalten zur **Gewährleistung** von Grundrechten und formt somit eine besondere Bindungswirkung*[51], die zum Schutz der Grundrechte aktives Tätigwerden fordert.

2.3. Bewertung

Der Versuch, die umgeordneten Dreiecksverhältnisse anhand der theoretischen Privatisierungstypen*[52] zu systematisieren, scheitert einerseits an widersprüchlicher Gesetzgebung. Ohne dogmatische Fundierung erfolgte Änderungen bergen Elemente sowohl der funktionalen als auch der materiellen Privatisierung.*[53] Andererseits wird die Erkenntnis bestätigt, dass die theoretischen Privatisierungsarten und ihre vielfältigen

41 Vrgl. § 23 SGB IX.

42 Im konkreten Fall sprechen auch systematische Argumente gegen eine Beschränkung auf die blosse monetäre Verpflichtung. Nämlich wird übersehen, dass das allgemeine Teil des Sozialgesetzbuches bereits die „Kostenübernahme" als eine Sonderform der Naturalleistung definiert (SGB AT § 14). Der Anspruch auf Übernahme der Leistungskosten wäre auch nicht logisch zu realisieren, wenn es keine Dienstleistung gäbe. Zur analoge Auslegung der Kostenübernahme der Jugendhilfeleistungen im deutschen Sozialrecht siehe: Wiesner, SGB VIII, Kinder- und Jugendhilfe, 5. Auflage 2015, Vorbemerkungen, Rn. 16.

43 Zu den Zielen der Teilhabeleistungen siehe Verweis 11.

44 Zum öffentlichen Interesse aus Sichtweisen der Verwaltungslehre, Wirtschaftslehre, Philosophie und Rechtswissenschaft: G. Vonk. Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state.12 Eur. J. Soc. 2010, S 2-15; Das öffentliche Interesse an Sozialdienstleistungen von allgemeinem Interesse wird auch auf der EU-Ebene bestätigt:„Neben seiner Aufgabe, die Finanzierung der Sozialdienstleistungen von allgemeinem Interesse sicherzustellen, ist der Staat insgesamt dafür verantwortlich, unter Wahrung der Zuständigkeiten der beteiligten Akteure das **Funktionieren der Sozialdienstleistungen zu gewährleisten** und ein hohes Qualitätsniveau aufrechtzuerhalten." – Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses zu der „Mitteilung der Kommission: Umsetzung des Gemeinschaftsprogramms von Lissabon — Die Sozialdienstleistungen von allgemeinem Interesse in der Europäischen Union", KOM(2006) 177 endg.

45 G. S. Katrougalos. Constitutional limitations of Social Security Privatisation: A human rights approach. Eur. J. Soc. Sec. 12 (2010): 16.

46 § 28 Abs. 2 GG: „Jeder estnische Staatsbürger hat das Recht auf staatliche Unterstützung im Alter, bei Arbeitsunfähigkeit, Verlust des Ernährers oder in Notlagen. Die Art der Unterstützung, ihr Umfang und ihre Bedingungen sowie die Verfahren werden durch Gesetz bestimmt."

47 Mit weiteren Hinweisen auf europäische Sozialversicherungsinstrumete siehe: E. Eichenhofer, Social security as a human right. Research handbook on European social security law. F. Pennings, G. Vonk (Eds), Edward Elgar 2015, S. 26 ff.

48 Viirsalu, S. 88. Vrg. Gegenmeinung am Beispiel des Sozialhilfedreiecks, nach der mit dem Übergang vom Sachleistungs- zum Geldleistungssystem die Gewährleistungspflicht entfälle: D. Meyer. Markt – Staat – Wettbewerb in der Sozialwirtschaft. – Review of Economics 2008 (59) 2, lk 114–140.

49 Mit Ausnahme der bereichsspezifischen verfassungsrechtlichen Vorschriften zur Flugsicherung, Postdienste und Eisenbahnen (Art. GG Artikel 87d, GG Artikel 87e, GG Artikel 87f GG). Schoch, S. 243.

50 „Die Gewährleistung der Rechte und Freiheiten ist eine Pflicht der gesetzgebenden, vollziehenden und rechtsprechenden Gewalt wie auch der örtlichen Selbstverwaltungen."

51 R. Alexy. Põhiõigused Eesti põhiseaduses. – Juridica 2001, Sonderausgabe, Abs. 2.1.2.

52 GVwR Bd I 2006, § 12 Rn 108ff (Schultze-Fielitz).

53 Genauer siehe: Viirsalu, S. 93.

Unter- und Zwischenformen auch nicht völlig dafür taugen, die gezielten Änderungen zu erklären und zu bewerten.[*54] Am nächsten zur vorliegenden Konstellation, in der sich der Staat der Handlungsformen des Privatrechts bedient, wobei eine Garantenstellung hinsichtlich der Leistungserbringung behalten wird, steht die „unechte Aufgabenprivatisierung[*55]". Ansonsten bietet die Privatisierungstheorie keine klaren Antworten, wie der Staat die ihm verbleibende Garantenstellung und Steuerung eines angemessenen Interessenausgleichs in Dreiecksbeziehungen ausführen muss.

Als Leitbild für die rechtliche Ausgestaltung der Teilhabe kann das Universaldienstmodell gesehen werden. Bei Universaldienstleistungen findet ebenso eine echte Verlagerung einer Leistung in den privaten Sektor statt.[*56] Obwohl auch die Ausführung der Gewährleistung der Leistungserbringung nach wie vor von enger Kooperation zwischen dem Staat und den privaten Leistungserbringern geprägt ist, wird diese vom § 5 VwKG, in dem von originärer Leistungspflicht des Staates ausgegangen wird, nicht erfasst. Allerdings gibt es keinen Grund, die Begründungspflicht im Vorfeld der Privatisierung im vorliegenden Fall auszuschließen. Vielmehr hätte es hinsichtlich des Grades des möglichen Steuerungs- und Kontrollverlustes[*57] noch strenger sein müssen. In Anbetracht der klaren Ausrichtung der EU auf die marktförmige Erbringung der Sozialleistungen sollten die aus § 5 VwKG ausgehenden Anforderungen an die Begründetheit der Privatisierung (Wirtschaftlichkeit, Qualität, Nachhaltigkeit, Grundrechtsrelevanz für die Betroffenen sowie faktische und rechtliche Einwirkung auf ihre Rechte) auf Fälle, wie diese hier ausgedehnt werden. Als allgemeiner Grundsatz soll sie nicht nur die Exekutive, sondern auch den Gesetzgeber selbst binden.

Der Übergang zur Wettbewerbsstruktur und damit bewirkte Loslösung von dem VwKG hat zur Folge, dass der Leistungserbringer nicht mehr als Träger öffentlicher Gewalt auftritt und damit keine unmittelbare Verbindung zu Grundrechten und rechtsstaatlichen Verfahrensgarantien begründet wird. Das gilt nicht für Bedarfsfeststellung, deren Durchführung nach wie vor als Verwaltungsaufgabe geregelt wird und zur Übertragung an Private dem VwKG unterliegen muss.

3. Wettbewerbliche Leistungserbringung durch Regulierung und Gewährleistungsverantwortung

3.1. Inhalt der Gewährleistungsverantwortung

Der Rollenwechsel von *providing* zu *enabling,* d. h. das wettbewerbliche Tätigwerden der Privaten zur gemeinwohlförderlichen Wahrnehmung[*58] der Leistungspflichen und die Befreiung des Staates von der Erfüllungsverantwortung, lassen sich klarer mit den Begrifflichkeiten der **Regulierung** und **Gewährleistungsverantwortung** beschreiben, weil sie die konkreten Handlungsformen und Steuerungsinstrumente bereitstellen.

„Regulierung"[*59] wurde ursprünglich durch den Zweck der (bloßen) Schaffung der Bedingungen zum Wettbewerb bzw. Ermächtigung der Marktkräfte beschrieben. In neuerer Literatur zum Regulierungsrecht wird allerdings auch der Zweck der Gemeinwohlsicherung in den Regulierungsbegriff einbezogen.[*60] So wird der marktwirtschaftlicher Wettbewerb als Instrument der Gemeinwohlverwirklichung eingesetzt.[*61] So verstanden sind die Regulierung und Privatisierung zwei Seiten einer Medaille: zur Erfüllung der nach der Privatisierung erhalten gebliebenen Gewährleistungspflicht wird primär Regulierungsinstrumentarium eingesetzt (s.g. Privatisierungsfolgerecht[*62]). Die Ausführung der Gewährleistungsverantwortung setzt eine klare Verantwortungsteilung aus.[*63]

54 Zur schwachen Aussagekraft der herkömmlichen Privatisierungstypen siehe auch Burgi, DJT, S 26; Kämmerer, S.28.

55 Kämmerer, S. 27.

56 Schoch, S. 246.

57 Ehlers, Verantwortung im öffentlichen Recht. Die Verwaltung 46.4, 2013, S. 482.

58 Ehlers, Verantwortung, S. 484.

59 Zu Definitionsmöglichkeiten des Regulierungsbegriffs siehe: Franzius, S. 65; Zum historischen Kontext des Begriffes: Schaefer, S. 318.

60 Fehling/Ruffert, Regulierungsrecht, § 7, Rn 58.

61 Schoch, S. 245.

62 Schoch, S. 243.

63 Katz, Verantwortlichkeiten und Grenzen bei „Privatisierung" kommunaler Aufgaben, NVwZ 2010, NVwZ 2010, S 408.

Obwohl mit der Privatisierung oft die Entlastung des Staates bezweckt wird, stellt die Gewährleistungsverantwortung dem Staat umfangreiche Anforderungen an Steuerung, Aufsicht und Finanzierung, die nicht unbedingt zur Entlastung führen. Jede Abstufung der Verpflichtungen bedarf einer Rechtfertigung aus dem Grundgesetz.

Daher liegt es nahe, dass die Verpflichtung zum Schutz der Rechte betroffenen Personen und die Erreichung der im öffentlichen Interesse liegenden Ziele als die wichtigsten inhaltlichen Elemente der Gewährleistungsverantwortung anzusehen sind.*[64] Dementsprechend trägt der Staat anstatt einer Erfüllungspflicht nun eine Ergebnisverantwortung.*[65]

Als verfahrensrechtliche Elemente der Verantwortung gilt die Gewährleistung von Objektivität und Neutralität*[66], was die Gestaltung einer eigenständigen Verfahrensordnung voraussetzt, weil das Verwaltungsverfahrensrecht nicht unmittelbar anzuwenden ist. Die Objektivität und Neutralität bei der Bedarfsfeststellung und Hilfeplanung wird schon durch § 28 GG gefordert, zumal die Art und der Umfang der sozialen Hilfen dem Gesetzesvorbehalt unterliegen.

Um die Erreichung der Ziele sicherstellen zu können, bedarf es hinreichender staatlicher*[67] oder spezieller, auf die Gemeinwohlsicherung und auf den Schutz der Rechte Betroffener gerichteter Gewährleistungsaufsicht.*[68] Bei der sozialen Teilhabe ist die Staatsaufsicht erhalten geblieben, obwohl im Gesetzesentwurf lediglich eine auf Gefahrenabwehr und -Vorsorge gerichtete Überwachung der Wirtschaftstätigkeit vorgeschlagen wurde. Im Jahr 2018 wird in Estland das freiwillige europäische Qualitätsrahmen für Sozialdienstleistungen*[69] für die Leistungserbringer verbindlich gemacht. Inwieweit dieses, dogmatisch zu Eigenüberwachung gehörige Instrument*[70] das Fortbestehen der staatlichen Aufsicht beeinflusst oder ihre Lücken effektiv kompensieren kann, ist abzuwarten.

Da die Privatisierung der Leistungserbringung meist mit den Vorteilen des Wettbewerbs gerechtfertigt wird, soll auch die Iniziierung und Moderierung des Wettbewerbs*[71] zur Gewährleistungsverantwortung gezählt werden.

Letztlich – und hier ist der Gesetzgeber in der Gesetzesbegründung falsch ausgegangen – trifft den Staat im Falle des Marktausfalles eine Auffangsverantwortung*[72], bis der Markt wieder handlungsfähig wird. Dies ist allerdings mit erheblichen praktischen Schwierigkeiten verbunden, falls der Staat von der Erfüllung der Aufgabe lange zur Seite geblieben ist.*[73] Es ist wohl eine Frage mit Praxisrelevanz, weil die Eigenart der Sozialleistungen diese (besonders im ländlichen Raum) hinsichtlich der Marktausfälle verletzlicher macht als in sonstigen Wirtschaftsbereichen.*[74]

3.2. Bewertung

Die grundlegenden Änderungen in der Verantwortungsstruktur infolge der Privatisierung wirken in mehrfacher Hinsicht zu Lasten der besonders schutzbedürftigen Leistungsempfänger aus. Unzulässigerweise ist es zur Rückführung der öffentlich-rechtlichen Regelungsdichte gekommen, ohne dass mit dem Wechsel des Rechtsregimes zugunsten des Privatrechts nötige Schutzvorschriften geschaffen worden

64 Burgi, DJT, S. 101-102.

65 Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung, S. 311 (A. Vosskuhle); Schoch, S. 245.

66 Burgi, DJT, S. 103.

67 Schaefer, S. 412.

68 B. Schmidt am Busch. Gewährleistungsaufsicht zur Sicherstellung privater Aufgabenerledigung. Eine dritte Kategorie zwischen Staatsaufsicht und Wirtschaftsaufsicht. – Die Verwaltung 2016 (49) 2, S. 205-232. Aber auch schon früher: Vosskuhle, Beteiligung Privater, S. 321.

69 Ausschuss für *Sozialschutz* 2010, SPC/2010/10/8 final, erhältlich unter: http://ec.europa.eu/social/BlobServlet?docId=6140&langId=en

70 Grundlagen des Verwaltungsrechts. Band III: Personal, Finanzen, Kontrolle, Sanktionen, Staatliche Einstandspflichten. H. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Hrsg.). Verlag C. H. Beck 2013, § 45, Rn 199 (B. Huber).

71 Burgi, DJT, S. 105; Schaefer, S 412, 322.

72 Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung, S 326 (A. Vosskuhle); Schaefer, S. 412; Franzius, S. 125; Ehlers, S. 484.

73 Gleiche Befürhtungen äußern: Franzius, S. 634; H. Trute. – G. Schuppert. Jenseits von Privatisierung, S. 34.

74 So R. M. Blank, R (2000). When can public policy makers rely on private markets? The effective provision of social services. The Economic Journal, 110(462), 49.

wären. Auch ist es merkwürdig, dass diese Änderungen nicht schon früher Aufmerksamkeit der Juristen gewonnen haben.

Die Lücken können allerdings durch weise Regulierung und Wahrnehmung der Gewährleistungsverantwortung geschlossen werden. Eine mangelnde Grundrechtsverbindung lässt sich durch gesetzliche oder vertragliche Verpflichtungen begründen.*[75] Auch beim s.g. *system of choice* kann und muss eine staatliche Letztverantwortung bestimmt sein sowie gesetzlich sichergestellt werden, dass ausreichende Leistungen zu vertretbaren Preisen auf dem Markt vorhanden und zugänglich sind. Ähnlich zu den anderen nach dem Universaldienstmodell ausgestalteten Leistungen muss eine Betriebspflicht bzw. Kontrahierungszwang bestehen.

Bei der Bedarfsfeststellung kommt in besonderer Weise die Anforderung zum objektiven und neutralen Verfahren zum Ausdruck, da die Entscheidung eine unmittelbare Wirkung auf die grundrechtliche Positionen der Teilhabeberechtigten hat und – um das öffentliche Interesse zu betonen – öffentliche Mittel eingesetzt werden. Es ist deshalb eine genauere „rechtsstaatliche Vorkonturierung" im Sinne einer Verfahrensgestaltung zum Schutze des Leistungsberechtigten nötig. Zusätzlich muss eine Möglichkeit der Zweitbegutachtung und eine neutrale vorgerichtliche Streitstelle geschaffen werden.*[76] Hinsichtlich der Rechtschutzmöglichkeiten ist bedauerlich, dass auf die Privatrechtsregime umgeschaltet worden ist, ohne die schutzbedürftigen Leistungsempfänger oder ihre Vertretungsorganisationen dafür vorzubereiten. Zusätzlich wäre an eine Zulässigkeit der Verbandklage zu denken.

Die oben betonte klare arbeitsteilige Verantwortungsteilung muss zukünftig verhindern, dass die vom Sozialversicherungsamt hoheitlich ausgeführte Bedarfsfeststellungen (in „einfachen Fällen") und bei den Leistungserbringern erfolgte privatrechtliche Bedarfsfeststellung (in „komplizierten Fällen") unterschiedlicher Gerichtsbarkeit und Verfahrensordnungen unterfallen, was die Bürger mit voraussichtlich höheren Schutzbedürftigkeit wegen Privatrechtsregime schlechter stellt.

Um weiterhin von der Wissenspotential des Privatsektors zu profitieren, wäre es grundsätzlich denkbar, die Bedarfsfeststellungsaufgabe im größeren Umfang den Privaten zu überlassen, vorausgesetzt, dass damit die demokratische Verantwortlichkeit gesichert werden kann. Kritisch betrachtet muss man zugleich hinnehmen, dass ein gewisser Verlust an staatlicher Steuerungsmöglichkeit doch unvermeidbar ist.*[77] Deswegen ist der Gesetzgeber aufzurufen, im Vorfeld jeder Privatisierungsentscheidung sorgsam der erhöhten Begründungspflicht nachzukommen und nüchtern zu bewerten, ob die Eigenart der Leistung (deren ökonomische Attraktivität) und die Schutzbedürftigkeit der Betroffenen eine Überlassung der Leistung auf den Markt rechtfertigen.*[78] Eine Abwägungshilfe bietet dafür auch die aus dem Rechtstaatsprinzip abgeleitete Wesentlichkeitstheorie, die je nach Intensität des Grundrechtsbezugs eine engere Einbeziehung öffentlicher Verwaltung fordert.

[75] Vosskuhle, Beteiligung Privater, S. 319. Jedoch stehen die Grundrechte der gewerblichen Leistungserbringer den Rechten des Bürgers gegenüber, was ihre praktische Durchsetzung erschweren kann.

[76] *Nichtwirtschaftliche* Dienstleistungen *vom allgemeinen Interesse sind vom Zuständigkeitsbereich der vorgerichtlichen Streitbelegungsinstanz beim* Verbraucherschutzamt ausgegrenzt. Die Analyse, ob die Tätigkeit von Rehabilitationserbringern unter diesen Begriff fällt, kann an diesem Ort nicht geleistet werden.

[77] So im Ergebnis auch: Schoch, S. 245, 247.

[78] Kriterien für solche Prüfung bietet: R. M. Blank. When can public policy makers rely on private markets? The effective provision of social services. The Economic Journal, 110, 2000, S. 462.

https://doi.org/10.12697/JI.2017.26.11

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The Pension System of Ukraine: On Its Way to a Fundamental Reform

1. Introduction

Since the introduction of the first pension laws, no country has achieved perfection, and if it has reached high efficiency of the pension system, then over time that has still had to be modified in line with economic requirements. The Ukrainian pension system was formed in the era of industrialisation, rapid population growth, and the administrative-planned economy. Although it should be noted that until 1939, in the territory of today's western Ukraine, which was part of the Second Polish Republic, a very effective and, for the inter-war period, progressive pension system was functioning in Europe. The collapse of the Soviet Union and the transition to a market economy, persistent economic and demographic crises, and political instability (through which, among other things, pension reform became a hostage to political speculation and the flowering of social populism) led to the fact that in more than 25 years of independence of Ukraine, an effective pension system that would guarantee decent pensions to the citizens was not created. The research presented here is an attempt to summarise the history and current state of pension reform in contemporary Ukraine, and to point out vital issues that are being resolved and ones that still need to be addressed. An important aspect of understanding the correctness or inappropriateness of the reforms' direction is the conformity of newly valid legal acts to international standards in the social sphere.

2. The place of Ukraine's pension provision in the globalised world

Pension provision is one element of the economic system of Ukraine. The rights to pension are among the key social rights defined by the Constitution of Ukraine and the laws of Ukraine, rights that not only are proclaimed or declared but also are implemented in practice and affect each person who is an active participant in public life.

The supreme law of the land declares Ukraine to be a welfare state, and its second section clearly states that citizens have the right to social security, which includes the right to be financially supported in the event of complete, partial, or temporary disability; widowhood; unemployment as a result of circumstances beyond their control; old age; and other circumstances envisaged by law. This right is guaranteed via

compulsory state social insurance at the expense of insurance contributions effected by citizens, enterprises, institutions, and other organisations, as well as budgetary and other sources of social security; through establishment of a network of state, municipal, and private institutions for taking care of the disabled and others.

Pensions and other social benefits and payments that are the main source of livelihood should ensure a standard of living that is not lower than the subsistence minimum specified by law[*1].

Normative consolidation of social rights in Ukrainian legislation is generally in line with European standards (the formal fixing of various rights in the field of pension provision) – namely, the European Social Charter (revised) (1996), signed by Ukraine in 2006[*2], and the European Code of Social Security (revised) (1990)[*3], which was signed by Ukraine in 2016. Ukraine has also ratified several conventions of the International Labour Organization: Convention Concerning Minimum Standards of Social Security (No. 102)[*4], ratified in 2006; Convention Concerning Basic Aims and Standards of Social Policy (No. 117)[*5], ratified in 2015; Convention Concerning Equality of Treatment of Nationals and Non-nationals in Social Security (No. 118)[*6]; and Convention Concerning Invalidity, Old-Age and Survivors' Benefits (No. 128)[*7]. However, as is rightly pointed out by Georg Lohmann and Stefan Gosepath, socio-economic rights are positive, since certain positive measures need to be taken to ensure their provision. In contrast, classical civil rights are negative ones, since others must refrain from certain actions for their implementation[*8]. The main problem of the Ukrainian social sphere in general and pension provision in particular is not that one or another right is not fixed but that the realisation of that right may be complicated by dint of the imperfect mechanism of its implementation. In addition, the weakness of the Ukrainian economy, which has a direct impact on social protection, cannot be ignored. There can be no high level of social protection in conditions of permanent economic crisis, a high level of shadow employment, etc. The combination of these factors leads to a low level of pension, which can be raised only under a comprehensive reform of labour; tax; and, of course, pension legislation.

Studying the data from the international ranking Global AgeWatch Index[*9] (which covers 96 countries, or 91% of people who have reached 60 years of age) shows that the world is home to 901 million people who have reached 60 years of age, which is 12.3% of the world's population; by 2030, this figure will have increased to 16.5%, or 1,402 million, and by 2050 the number will be 2,092 million, or 21.5% of the inhabitants of the planet. Today, nearly 150 million people do not get pension benefits. By 2050, in such countries as China, India, and the United States, the number of pensioners in each will have risen to more than 100 million. According to estimates, women who have reached 60 years of age are very likely to live to age 82, and 60-year-old men to 79 years. A positive trend is that between 1990 and 2015 the number of countries that had implemented a pension system increased by 50%.

In this ranking for 2015, Ukraine occupies 73rd position out of 96 countries: it is one of the lowest positions among the countries of the Eastern Europe; the situation is worse only in Moldova (77nd position). Neighbouring and nearby countries hold the following positions: 23 for Estonia, 29 for Georgia, 32 for

1 The Constitution of Ukraine. 28 June 1996. Available at http://zakon2.rada.gov.ua/laws/show/254к/96-вр (most recently accessed on 20.7.2017).

2 The European Social Charter. 1996. Available at http://www.coe.int/en/web/turin-european-social-charter/charter-texts (most recently accessed on 20.7.2017).

3 The European Code of Social Security. 1990. Available at http://www.coe.int/en/web/turin-european-socia-lcharter/treaties1 (most recently accessed on 20.7.2017).

4 Convention Concerning Minimum Standards of Social Security. (1955). Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312247 (most recently accessed on 20.7.2017).

5 Convention Concerning Basic Aims and Standards of Social Policy. (1962). Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C117 (most recently accessed on 20.7.2017).

6 Convention Concerning Equality of Treatment of Nationals and Non-nationals in Social Security. 1964. Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C118 (most recently accessed on 20.7.2017).

7 Convention Concerning Invalidity, Old-Age and Survivors' Benefits. 1967. Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C128 (most recently accessed on 20.7.2017).

8 S. Hosepat, H. Lomann (eds). *Філософія прав людини / За редакції Ш. Ґосепата та Ґ. Ломанна; Пер. з нім. О. Юдіна та Л. Доронічевої* ['Philosophy of Human Rights, Edited by S. Hosepat and H. Lomann and Translated from the German by O. Yudin and L. Doronicheva']. Kiev: Ніка-Центр 2008 (in Ukrainian), p. 21.

9 The Global AgeWatch Index 2015. Available at http://www.helpage.org/global-agewatch/population-ageing-data/infographic/ (most recently accessed on 20.4.2017).

Poland, 35 for Latvia, 39 for Hungary, 40 for Slovakia, 45 for Romania, 63 for Lithuania, 64 for Belarus, and 65 for Russia. The first five positions are occupied by Switzerland, Norway, Sweden, Germany, and Canada, and the bottom positions in the ranking, from 92nd place downward, are held by Pakistan, the West Bank and Gaza (Palestine), Mozambique, Malawi, and Afghanistan.

According to the data of the Pension Fund of Ukraine, as of 1 April 2017 there were over 11,900 million pensioners in Ukraine.[*10] The average pension in the country is 1,832 UAH (approx. 61 euros)[*11]; however, the amount depends on the structure of the economy of a given region. The average salary in Ukraine on 1 May 2017 was 6,840 UAH[*12] (equivalent to 228 euros). The statistics show that at present the pension corresponds to replacement of 30% of salary, which is in line with neither ILO Convention 102 nor the European Social Security Code, according to which the proportion of salary to replacement pension shall not be lower than 40%.

In addition to economic factors, it is necessary to take into consideration such important aspect as transformation – as a concept and as part of the essence of the social state.

3. Changing the paradigm of social protection in the twenty-first century

In the context of the future development of social rights – their extension in general and social security in particular – it is possible to draw an unambiguous conclusion that Ukraine is influenced by global trends. It is obvious that the twentieth century was a century of consolidation and affirmation of the right to social security. In fact, the basic index of social rights was formed in the last century (it is not exhaustive and will be supplemented in connection with the development of society). Basic social rights not only became enshrined in the constitutions of the countries of the world but became common to the mass consciousness of citizens. In the twentieth century, high standards of social protection were laid down also, standards that Ukraine is still only trying to meet. In the twenty-first century, new challenges are appearing, among which are various major economic crises, globalisation, ageing of populations, unemployment, migration and internally displaced persons, wars, and issues of refugees. The objective of Ukraine in this connection is to maintain its social standards and improve them such that they fulfil the standards of the European Union and International Labour Organization. A global trend that can be observed in Ukraine as well is a movement away from the concept of the paternalistic social state in which the main burden of social protection lies with the state. The associated problem is especially acute in Ukraine. This trend is inevitable. Although the process is proceeding slowly, the state is moving away from paternalism, interpreted as material support of any and all citizens who are in trouble in the form of direct payments from the state budget. Today in Ukraine, the birth of a neopaternalistic state can be observed, in which this social function is performed through wider application and extension of methods of social-policy implementation, based on prevention of social risks.

In addition, future social-security recipients should be aware that the availability and quantity of social benefits depends on their active work and participation in the social-insurance system. At the heart of a new approach to the development of the social state, the principle of personal responsibility of citizens should come above all. Everyone must do his utmost to maintain his standard of living, now and in the future. The incorporation into the labour and social-security legislation of the principle of personal responsibility for financial security in cases of old age and disability will be decisive in the formation of a new paradigm for the state of social welfare. The state under such circumstances is modified, transformed from provider into the guarantor of social protection and a regulator and organiser of the effective functioning of social protection of citizens.

Professor Gaabriel Tavits is among those who speak about the need for new approaches in the sphere of social security. Social-security schemes built upon the principle of mandatory membership do not function well in the new economic conditions. There is need to redefine the social-security protection, in a manner that takes into account the changes in employment relationship. The social-security ideology and

[10] See http://www.pfu.gov.ua/pfu/doccatalog/document?id=273640 (most recently accessed on 20.4.2017).

[11] Available at http://www.pfu.gov.ua/pfu/doccatalog/document?id=280384 (most recently accessed on 20.7.2017).

[12] Available at http://index.minfin.com.ua/index/average/ (most recently accessed on 20.7.2017).

principles established in the nineteenth century no longer serve very well. The understanding that social-security protection should be applied for employees is valid within a general framework, but in the digital economy is only partly applicable. Social security needs to protect only those people who are willing to get protection and who are interested in such protection. In cases wherein a working person is not interested in social-security protection, that person's protection should not be mandatory. Especially in cases of new forms of employment, there is a need to rethink mandatory social-security protection when the working people themselves are not interested in such protection. It is the right time to reconsider the position and the meaning of social-security protection, in the digital age and in the age of Industry 4.0*[13].

In our opinion, one of the examples of such development in the social sphere that Ukraine could follow is that of the Kingdom of the Netherlands, which is in the mainstream of social-sphere reform in Europe. The new monarch of this wealthy country, Willem-Alexander, in his first recourse to Parliament in 2013, said: 'The classical welfare state is slowly but surely evolving into a "participation society".' The point is that the public systems should start encouraging self-reliance over government-dependency*[14]. First of all, this is linked to the fact that modern mechanisms of high-level social protection either are not working well today or will not be able to function effectively in the near future. If the twentieth century focused on social protection by the state of its citizens, such a philosophy can not justify itself in the twenty-first century. Consequently, it is necessary to change the philosophy for social protection. In our opinion, the idea of self-sufficiency of citizens in their old age is decisive today. The state is not a provider of pensions but a pension-provision administrator. Today, every country in Europe is looking for its own recipes to prevent reduction in the level of pensions. The most widespread ingredients in these are increasing of the retirement age, lengthening of the insurance period, maximisation of the introduction of private (accumulative) forms of pension insurance, and the like. Regrettably, nowadays in Ukraine's parliament, society, and science of social-security law, a vision of the problem through the prism of public social security 'from cradle to grave' dominates, by and large. It is obvious that the economic reality is relentless, and if we do not start changing the system of social protection with evolutionary methods rooted in modernity, the market economy will do so with revolutionary methods that must not be allowed in any case, because the risks with such changes are unpredictable.

4. Stages of pension-system reform in Ukraine

Pension legislation in Ukraine is described as having undergone three significant changes. These are the reforms of 1991, 2003, and 2011. To these it is now possible to add those of 2015, which was marked by significant legislative changes. It can be said without exaggeration that in that year, Parliament made a breakthrough in reforms to special pension provision. It involved assignment of new special pensions. This marks a significant step towards the establishment of social justice in pension provision. It ultimately entails, above all, the cancellation of special pensions ('VIP pensions') except pensions of military personnel and scientists. However, the author would go further: the author believes that in the future, only pensions for servicemen should remain, as expressly envisaged by Article 17 of the Constitution of Ukraine. In additional changes in 2015, the legislation pertaining to regulation of pensions for the service period was significantly changed. On one hand, the insured period of service required for the awarding of these types of pensions was extended. On the other hand, a retirement age was introduced for the first time in the history for the special pensions. A minimum certain service period was introduced, which, though shorter than the service period for general pensions, still constitutes an additional legal fact without which pension for the service period can not be awarded.

The turning point for the Ukrainian pension system may be 2017, provided that the fifth stage of the reform of pension legislation, its improvement, comes to pass. The main changes would involve the modernisation of the solidarity system for pensions (the first level). Among the main changes proposed by the

[13] Gaabriel Tavits. Changing world of labour and social protection. – N.M. Parkhomenko et al. (eds). *Ефективність норм права. Зб. наук. праць. Матеріали VII міжнар. наук.-практ. конф. (Київ, 17 лист. 2016 р.) / за заг. ред. Н.М. Пархоменко, М.М. Шумила, І.О. Ізарової* ['Effectiveness of Norms of Law: A Collection of Scientific Works – Materials of the VII International Scientific-Practice Conference (Kiev, 17 Nov. 2016), Edited by N.M. Parkhomenko, M.M. Shumylo, and I.O. Izarova']. Kiev: Ніка-Центр 2016. Available at http://idpnan.org.ua/files/-1-efektivnist-norm-prava.pdf (most recently accessed on 20.7.2017), pp. 426–429.

[14] The Dutch rethink the welfare state. *Nima Sanandaji*, 11.2.2013. Available at http://www.newgeography.com/content/004028-the-dutch-rethink-welfare-state (most recently accessed on 20.4.2017).

government*[15] is the final cancellation of special pensions for civil servants, prosecutors, local government officials, academics, etc.

Regrettably, the Ukrainian parliament has only today come to consider this issue, while the establishment of uniform pension rules for civil servants and for other citizens in Central and Eastern Europe came about in the '90s. Basic pension laws were adopted then in Latvia (1995), Estonia (1993), Lithuania (1995), Hungary (1991), Slovakia (1992), and Poland (1999).

In addition, the draft law 'On Amendments to Certain Legislative Acts of Ukraine Pertaining to Pension Rises' (registration number 6614), which is extremely important, envisages a gradual increase in the qualifying level of insurance-covered time from 15 to 35 years by 2028 and making establishment of a retirement pension in the first place contingent on it. That is, a person who has reached the age of 60 may receive a retirement pension if he or she has accumulated 35 years of insurance; otherwise, such a person may retire at the age of 63. If, having reached the age of 63, a person still has not completed a 35-year insurance period, the right to a pension may arise when that person reaches the age of 65. However, if a person who has reached age 65 does not have the required insurance experience (again, 35 years), that person may not have the right to a retirement-age pension and shall receive a monthly social benefit from the state. Through the mechanism of increasing the insurance experience required, the retirement age is raised; doing this is necessary, but the issue is causing a flurry of criticism in Parliament.

One of the controversial proposals made by the government is that during the period of participation in the system of compulsory state pension insurance, the value of one year of insurance be set equal to 1% instead of the current 1.35%. Such a novel move will necessarily lead to a reduction in the size of the pension of people who enter retirement after the entry of this law into force. The main motivation of the government here lies in the fact that such an innovation would render it possible to raise pensions for those who are already in retirement. Such changes would lead to a further reduction in the rate of replacement of wages by the pension, which is already lower than the 40% defined as appropriate by international standards. This approach is not supported by international experts or the scientific community.

Ministry of Social Policy of Ukraine does not plan to implement the second level of the reform – the accumulation-based system – in 2017. In our opinion, that state of affairs does not contribute to the stability and effectiveness of pension provision in Ukraine. Hence, one can talk about the inhibition of pension reform, which does not contribute to the establishment of the classical three-level system.

Since 2003, Ukraine has had private pension provision in place (i.e., the third level). Although non-state pension provision is foreseen by the current legislation, it does not operate on national scale and is hostage to the economic crisis. However, even under such conditions, non-state pension insurance remains one of the most progressive legal mechanisms for ensuring and guaranteeing decent security in old age. Its appearance with the adoption of Law of Ukraine 1057, titled 'On Private Pension Provision' (of 9.7.2003), constituted to some extent a revolution in the system of pension provision. Rejection of the mandatory method of legal regulation in the sphere of pension provision granted the latter greater autonomy in the law of social security. Availability of this legal mechanism of pension provision singles out pension legislation, pulling this individual element of social-security law to a qualitatively new level. A private form of pension provision indicates the possibility of functioning of the latter beyond mandatory standards. The basis for the regulation of the system of private pension provision is a contract – in the terminology of the legislation, a pension contract.

However, more than a decade of its existence notwithstanding, it is difficult to assess the private pension system as having experienced broad establishment. Let us consider the situation on 1 January 2017, when the State Register of Financial Institutions (SRFI) contained data*[16] on 64 non-state pension funds (NPFs) and 22 administrators (reference figures for comparison: in early 2016, there were 76 NPFs and 23 administrators of NPFs; in 2015, there were 81 and 27, respectively).

According to the information from the SRFI, there are NPFs registered in eight regions of Ukraine, with the largest number of NPFs associated with Kiev: 46, or 71.9% of the total number of registered NPFs.

[15] Проект закону "Про внесення змін до деяких законодавчих актів України щодо підвищення пенсій" ('Draft for the law "On Amendments to Certain Legislative Acts of Ukraine Pertaining to Pension Rises"'), registration number 6614 (in Ukrainian) Available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=6614&skl=9 (most recently accessed on 20.7.2017).

[16] Available at http://nfp.gov.ua/content/stan-i-rozvitok-npz.html (most recently accessed on 20.4.2017).

The situation on 31.12.2016 was that administrators of NPFs had concluded 62,600 pension contracts; that is 4.9% (or 2,900 contracts) more than the 2016 total. The breakdown of pension contracts in 2016 is as follows:

- 55,200 contracts with the depositors being physical entities
- 100 contracts with the depositors being individual entrepreneurs
- 7,300 contracts with the depositors being legal entities

By the reckoning on 31.12.2016, the total number of NPF participants was 834,000 people (comparative figure representing the situation on 31.12.2015: 836,700 people), of whom 81,300 were receiving pension benefits (9.7% of the total number of participants).

Total income earned from the investment of pension assets amounted to 10,800 UAH (around 37.9 million euros) on 31.12.2016, having increased in comparison to the situation on 31.12.2015 by 208.3 million UAH (7.3 million euros), or 23.9%.

Expenses reimbursed for from the account of pension-fund assets had, on 31.12.2016, increased by 14.2% from the equivalent figure for 2015 and in general for the period of the pension funds' lifetime amount rose to 245.7 million UAH (6.8 million euros), or 11.5% of the total value of NPF assets.

5. The form of pension provision

The issue of the form of social or pension legislation has been brought up repeatedly both in scientific discussions and at the level of draft laws. Thus, in the early years of communist power, there was a certain 'trend' toward codification, and at precisely this time the first draft Penal Code of the Ukrainian Soviet Socialist Republic on social security was developed (1929)[*17], yet this project has never been completed – there was no discussion of the Pension Code at that time. Since the declaration of Ukraine's independence, discussions of codification in the social sphere have undergone certain reformulation, with some scholars having returned to the idea of codification of all social protection and adoption of the Social Code, among them N. Bolotina[*18], S. Synchuk[*19], S. Prylypko[*20], O. Moskalenko[*21], and others. Others are supporters of the idea of codification of pension legislation in the form of a new Pension Code: O. Tyshchenko[*22], Y. Simutina[*23], I. Gumeniuk[*24], L. Knyazkova[*25], etc. I belong to the second group of scientists. Parliament

17 I.B. Usenko (И.Б. Усенко). *Первая Кодификация законодательства Украинской ССР: монография* ['First Codification of Legislation of the Ukrainian SSR: A Monograph']. Kiev: Scientific Thought 1989, pp. 96–99) (in Russian).

18 N.B. Bolotina (Н.Б. Болотіна). *Законодавство України в сфері соціального захисту населення та перспективи його розвитку // Соціальне законодавство України: теоретичні та практичні проблеми розвитку: матер. наукової конференції (Київ, 23 березня 2005 р.)* ['Legislation of Ukraine in the Sphere of Social Protection of the Population and the Perspectives on Its Development / Social Legislation of Ukraine: Theoretical and Practical Problems of Development – Material from a Scientific Conference (Kiev, 23 March 2005)']. Харків 2007, p. 16 (in Ukrainian).

19 S.M. Synchuk (С.М. Синчук). *Правовідносини соціального забезпечення: суб'єкти, зміст, об'єкти: монографія* ['Legal Relations of Social Provision: Subjects, Content, Objects: A Monograph']. Lviv, Ukraine: ЛНУ імені Івана Франка 2015 (in Ukrainian), pp. 352–353.

20 S.M. Prylypko (С.М. Прилипко). *Проблеми теорії права соціального забезпечення: монографія* ['Problems of the Theory of Social Provision: A Monograph']. Kharkiv, Ukraine: Берека Нова 2006 (in Ukrainian), pp. 240–241.

21 O.V. Moskalenko (О.В. Москаленко). *Основні засади зазальнообо'язкового державного соціального страхування в умовах ринкової економіки* ['The Basic Principles of General Compulsory State Social Insurance in the Conditions of a Market Economy']. Kharkiv, Ukraine: Юрайт (in Ukrainian), pp. 318–328, 352–353.

22 O.V. Tyschenko (О.В. Тищенко). *Право соціального забезпечення України: теоретичні та практичні проблеми формування і розвитку галузі: монографія* ['The Law on Social Provision of Ukraine: Theoretical and Practical Problems of Formation and Development of the Area: A Monograph']. Kiev: Прінт-Сервіс 2014 (in Ukrainian), pp. 123–126, 390–393.

23 N.M. Khutorian (Н.М. Хуторян) et al. *Правові проблеми пенсійного забезпечення в Україні / Н.М. Хуторян, М.М. Шумило, М.П. Стадник та ін.: монографія* ['Legal Problems of Pension Provision in Ukraine, by N.M. Khutorian, M.M. Shumylo, M.P. Stadnyk, and Others: A Monograph']. Kiev: Ін Юре 2012 (in Ukrainian), pp. 106–123.

24 I.O. Gumeniuk (І.О Гуменюк). Особливості кодифікації пенсійного законодавства ['Peculiarities of pension legislation's codification']. – *Наукові записки Інституту законодавства при Верховній Раді України* ['Scientific Notes of the Institute of Legislation of the Verkhovna Rada of Ukraine'] 2014/5) (in Ukrainian), p. 70-73.

25 L.M. Kniazkova (Л.М. Князькова). *Деякі питання систематизації пенсійного законодавства України / Проблеми кодифікації трудового законодавства України: тези доповідей учасників наукової конференції (Київ, 26 квітня 2017 р.).* ['Some Issues of Systematisation of Pension Legislation of Ukraine – Problems of Codification of Labour Legislation in Ukraine: Theses of Reports of Participants in a Scientific Conference (Kiev, 26 April 2017)']. Kiev: Прінт Сервіс 2017 (in Ukrainian), pp. 241–244.

has responded to such tendencies in the theory of social-security law; therefore, three projects related to the Social Code of Ukraine were undertaken (numbers 6170 (2005)[*26], 11061 (2012)[*27], and 2311 (2013)[*28]; at the same time, there have been two projects focused on the Pension Code: No. 5460/p (2000)[*29] and No. 4290a (2014)[*30]. All of these projects were rejected; while there were various reasons for this, the main issue was that their developers were individual MPs or groups thereof, rather than the Ministry of Social Policy of Ukraine or the Pension Fund of Ukraine – this led to a low standard of the draft codes. Today, the government has initiated and is implementing a pension reform that on 13.7.2017 was supported in the first reading by Parliament[*31]; in author's opinion, this is a good reason to raise the issue of codification of pension legislation again.

As was mentioned above, Ukraine's pension legislation has undergone significant reform four times, but there are several reservations pertaining to the form as well as the content of such novelties. One of the main shortcomings of the previous pension reforms was the failure to select a correct form of its implementation. In our view, pension-provision reform should be carried out with the involvement of a wide range of experts in law, economics, demographics, etc., including legal scholars, economists / economics practitioners, and representatives of civil society. It is necessary to work out the concept to be used for reforms to Ukrainian pension legislation; the need for its systematisation is obvious. The outcome of the pension reform should be a Pension Code of Ukraine that takes into account the provisions of the current legislation and consolidates the novel elements that will improve pension provision for citizens. It can be noted that the pension legislation has turned into a confusing cobweb of legal norms that is incomprehensible to the average citizen. Regrettably, the proliferation of pension legislation has brought harm to the pension system of Ukraine. With a burgeoning body of normative legal acts, the efficiency of legal regulation does not increase, and in some cases it declines. All these factors together led to misuse of legislative norms, and, hence, a significant proportion of the administrative is made up of disputes about awarding, payment, and recalculation of pensions. The only way out of this situation may be adoption of a Pension Code of Ukraine – a single, consolidated normative legal act that unites all three levels of the Ukrainian pension system; addresses special pension provision; and addresses the issues of payment of the individual social contributions and of awarding, payment, and recalculation of pensions. During the codification, it will be necessary to complete the pension reform in Ukraine, since the so-called reforms of 1991, 2003, 2011, and 2015 cannot be considered to be fully accomplished. They only partially reformed some aspects of pension provision; despite being stages of a single, perennial pension reform that lasted more than 20 years. Now, the Pension Code of Ukraine could crown this, completing the effort.

Summing up the issue of the form of pension legislation, we can conclude that there is an objective need for the elaboration and adoption of the Pension Code, but there is no political will. The long-term negative practice of carrying out successive stages of pension reform by means of laws on amendments to other laws is being continued.

[26] Проект Соціального кодексу України № 6170 (Draft of the Social Code of Ukraine, No. 6170) (in Ukrainian). Available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc2_5_1_J?ses=88&num_s=2&num=6170&date1=&date2=&name_zp=&out_type=&id= (most recently accessed on 20.7.2017).

[27] Проект Соціального кодексу України № 11061 (Draft of the Social Code of Ukraine, No. 11061) (in Ukrainian). Available at http://search.ligazakon.ua/l_doc2.nsf/link1/JF8J900A.html (most recently accessed on 20.7.2017).

[28] Проект Соціального кодексу України № 2311 (Draft of the Social Code of Ukraine, No. 2311) (in Ukrainian). Available at http://search.ligazakon.ua/l_doc2.nsf/link1/JG1S700A.html (most recently accessed on 20.7.2017).

[29] Проект Пенсійного кодексу України № 5460/п (Draft of the Pension Code of Ukraine, No. 5460/p) (in Ukrainian). Available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=8797 (most recently accessed on 20.7.2017).

[30] Проект Пенсійного кодексу України № 4290a (Draft of the Pension Code of Ukraine, No. 4290a) (in Ukrainian). Available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=51712 (most recently accessed on 20.7.2017).

[31] Проект закону "Про внесення змін до деяких законодавчих актів України щодо підвищення пенсій" (Draft of the law 'On Amendments to Some Legislative Acts of Ukraine Pertaining to Pension Rises') (see Note 15).

6. The decisions of the Constitutional Court of Ukraine in the field of pension provision

The most important problem facing the modern pension system is, without exaggeration, the application of pension legislature by courts. In this context, it is possible to discern three main components: the application of pension legislation within the constitutional and administrative judiciary and by the European Court of Human Rights (ECHR).

An important role in ensuring compliance with the Constitution in general and its provisions for social rights in particular is played by the Constitutional Court of Ukraine (CCU), which is the sole body of constitutional jurisdiction in Ukraine. The task of the CCU is to guarantee the supremacy of the Constitution of Ukraine as supreme law of the state all over Ukraine. That is, the CCU is a body that does not allow narrowing of the content and scope of existing rights and freedoms in the course of adoption of new laws or of amendment to current legislation, including the resolutions of the Cabinet of Ministers of Ukraine. In all, in its activity since 18 October 1996, the CCU has adopted 18 resolutions that are related in one way or another to the right to social protection. These resolutions can be classified on the basis of the subject of the dispute: those dealing with the constitutionality of some provisions of the law of Ukraine on budget (6 adjudications), dealing with social protection of special categories of citizens (civil servants, police officers, prosecutors, military personnel, etc.) (5 adjudications), addressing social protection of judges (4 adjudications), on issues of workplace accidents and occupational illnesses (2 adjudications), and dealing with other matters (one case each to do with temporary disability, court jurisdiction for social lawsuits, and payment of pensions to persons permanently residing abroad).

The Court's resolutions on the constitutionality of provisions of paragraph 2 of Part 1 of Article 49 and the second sentence of Article 51 of the law of Ukraine titled 'On Mandatory State Pension Insurance', of 7.10.2009 (No. 25-op/2009), are absolutely fair. The Constitutional petition raised the question of unconstitutionality of certain provisions of said law related to cancellation of payment of pensions to pensioners throughout the time of their permanent residence abroad if Ukraine has not concluded an international agreement on pension provision with the respective state and if consent for the ratification of such an international treaty was not granted by the Verkhovna Rada of Ukraine.

In that case, the Court stated that by the disputed provisions of the law, the Constitutional right to social protection was made contingent on the fact of Ukraine concluding an international agreement on pension provision with the respective state. Thus, the state, contrary to the Constitution's guarantees of social protection for all persons who are eligible for old-age pension, at the legislative level deprived pensioners of this right in cases wherein they have chosen for permanent residence a country with which a relevant agreement has not been concluded. In light of the legal, social nature of pensions, a citizen's right to receive the awarded pension shall not be connected with such conditions as permanent residence in Ukraine; the state, in accordance with its Constitution's principles, is obliged to guarantee this right irrespective of where the person who was awarded pension lives – in Ukraine or abroad.

On the above-mentioned grounds, the provisions of the law related to cancellation of payment of pensions to pensioners during the time of their permanent residence (or stay) abroad in cases wherein Ukraine has not concluded an international agreement with the respective state were found to contradict the requirements of the Constitution of Ukraine on the strengthening and protection of human rights and freedoms, inadmissibility of restrictions to Constitutional rights and freedoms, equality of Constitutional rights between citizens without regard for their place of residence, guaranteeing of care and protection to those citizens of Ukraine who are living or staying abroad, and the right to social protection in old age. Therefore, the CCU recognised the legal provisions in question as being inconsistent with the Constitution of Ukraine and violating the Constitutional right to social protection. This resolution has not found its implementation in the law yet and is not yet honoured by the Pension Fund of Ukraine, although this position of the CCU was indicated in paragraph 2 of the informational letter of the Supreme Administrative Court of Ukraine of 18.2.2014 (No. 212/11/14-14), which provides that from 7 October 2009 the payment of pensions to citizens who go abroad for permanent residence is regulated by the norms of the law On Mandatory State Pension Insurance in account of the CCU's resolution of 7 October 2009 (25-op/2009).

7. The European Court of Human Rights on the protection of pension rights

The importance of the practice of the ECHR has been repeatedly emphasised by representatives of legal science, as well as by judges, human-rights activists, and lawyers.

Professor P.M. Rabinovitch notes that the Court's rather extensive (nearly forty-years') and non-substantive practice of protecting rights demonstrates the fairness of its decisions. This can be traced mainly in two directions: 1) adjustment by the respondent state to the national legislation for reason of the relevant decisions of the Court and 2) compensation for losses incurred by the victim (applicant). In addition, this legal scientist emphasises that the decision of the Court is evidence of the validity of the interpretation of the phenomenon of human rights as a social one, 'earthly' (and not biological, psychophysiological, cosmic, 'divine', etc.). The Court's activity convincingly demonstrates the universality of those general regularities of social cognition that are most fully and clearly formulated by the dialectical epistemology of social determinism. These regularities have come to triumph in the law-justifying, law-making, law-enforcement activity of such a venerable international body as the Court (which features, as we know, qualified professional lawyers from all member states of the Council of Europe)*[32].

S.V. Shevchuk, who is currently a judge with the Constitutional Court of Ukraine and in 2009–2012 was a judge of the European Court of Human Rights, notes that the acts of the Court have normative indications and that its practice is a recognised source of law in Ukraine. The legal scientist continues by stating that the ECHR in Ukraine should be applied in a comprehensive way as a set of rules of law together with sound practice in their application*[33].

The positive impact of the Court's judgements is obvious and indisputable for improvement and Europeanisation of the Ukrainian legal system. No decent modern-day research in the field of law omits analysis of the practice of the ECHR. The law on social security in general and scientific studies of pension law in particular are no exception. As of 2016, researchers of pension-provision problems and reforms to the pension system of Ukraine have analysed the ECHR resolution from the case *Pichkur v. Ukraine**[34] principally, on application 10441/06, which came into force on 7.2.2014. The essence of the grievance was that people who go abroad for permanent residence are denied the right to receive pension. The above-mentioned decision of the ECHR was unprecedented for legal practice in the protection of the right to pension. For the first time, a pension-related case against Ukraine was heard, and a resolution was handed down in favour of the applicant. An interesting feature of this resolution is that the ECHR took into account and analysed in detail the resolution of the CCU. With the ECHR decision taken into account, the position of the national body for Constitutional control is an indication that not only the CCU refers to the legal position of the ECHR; this is a mutual process in cases related to Ukraine. A result of hearing of this case was support for the resolution of the CCU and commitments by Ukraine to pay out Mr Pichkur's pension.

The ECHR turned its attention to pension provision again and issued a resolution in the *Petrychenko. v. Ukraine* case*[35] on 12 July 2016, on application 2586/07. In this case, which was brought on 12 December 2006, the court recognised infringement of paragraph 1 of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms due to the fact that in this case the judges of domestic courts had not considered the applicant's arguments with direct reference to Article 46 of the Constitution of Ukraine that the amount of his pension was lower than that set at the appropriate time as a minimum for subsistence. In consequence, the ECHR ruled that Ukraine was to pay the applicant, within three months, 1,200 euros' compensation for moral damage and an additional amount equal to any tax that might be charged.

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[32] P.M. Rabinovitch (П. М. Рабінович). *Рішення Європейського суду з прав людини: до характеристики концептуально-методологічних засад їх обґрунтування // Практика Європейського суду з прав людини. Рішення. Коментарі* ['Resolutions of the European Court of Human Rights: On the Characteristics of the Conceptual and Methodological Foundations of Their Justification / The Practice of the European Court of Human Rights – Decision, Comments'], 1999/1, pp. 358–365 (in Ukrainian).

[33] S.V. Shevchuk (С.В. Шевчук). *Загальнотеоретичні проблеми нормативності актів судової влади: автореф. дис. … д-ра юрид. наук* ['General Theoretical Problems of Normative Acts of the Judiciary: Author's Abstract']. A Dissertation by Doctor of Law S.V. Shevchuk'] (in Ukrainian). Kharkiv, 2008, p. 25.

[34] Case of Pichkur v. Ukraine, No. 10441/06. Materials available at http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-127810&filename=001-127810.pdf (most recently accessed on 20.7.2017).

[35] Case of Petrychenko v. Ukraine, No. 2586/07. Materials available at http://zakon2.rada.gov.ua/laws/show/974_b58 (most recently accessed on 20.7.2017).

Firstly, analysis of the ECHR resolution clearly demonstrates that it is of a formal rather than substantive character. That is, the Court pointed out the violation of the form of hearing – namely, that the applicant had complained under paragraph 1 of Article 6 of the convention that the domestic courts had not considered his arguments that the amount of his pension had been calculated in contradiction to the provisions of the Constitution.

Thus, the ECHR did not consider the merits of the case and confined itself simply to the arguments of Mr Petrychenko not having been taken into account by the national courts. This resolution is universal and can be applied to any category of cases if at any stage of court hearing arguments or evidence is not taken into account, especially if the arguments or evidence is envisaged by the laws of the land. Furthermore, the ECHR thereby gave attention to this problem for a second time, since an identical resolution related to Ukraine, also in the sphere of pension provision, had been issued in 2006, in the case *Pronina v. Ukraine* *[36], on application 63566/00.

By its nature, the ECHR resolution does not assess the size of pensions in Ukraine. Moreover, it does not recognise low pensions to constitute a violation of an individual's rights. In addition, the applicants' claims had been rejected when the pension-insurance system was newly introduced, and deviation from elementary principles of pension provision had just begun. Nowadays, there are no pensions paid in the solidarity system that are below subsistence-minimum level, and one can state therefore that the ECHR resolution is relevant only in a retrospective sense and related to specific applicants. However, it raises the other important issue, that the courts ignore direct orders – in this case, found in Constitutional guarantees.

The resolutions of the European Court of Human Rights in the social sphere are extremely important for Ukraine: 1) they are a source of law and must be honoured; 2) for avoidance of further appeals by citizens of Ukraine to the ECHR, the legislation that violates the Convention should be amended; 3) ECHR resolutions have become an integral part of the implementation of justice in Ukraine – they are referred to and their legal position is used in the arguments in litigation – and 4) the ECHR resolution is a subject of scientific analysis that promotes a deeper understanding of human rights. In general, an ECHR resolution is a guideline for the further consolidation and protection of human rights in general and social rights in particular.

8. Conclusions

In summary, the overall conclusion that pension provision in Ukraine is far from perfect both in form and in content can be drawn. However, it should be recognised also that there are no ideal pension systems. Each country in its own way is trying to ensure decent pension in terms of its own demographic, economic, political, and social conditions, and Ukraine is no exception in this regard. Ukraine is, in this context, in a much more difficult situation than other Eastern European countries, as 74 years in the Soviet Union have had a negative impact on all spheres of public life. Only today, with the advent of a new generation – a changing of the guard in public policy – are major reforms in various spheres, including social ones, starting. The reforms that are currently under way or planned are far from perfect, but most important, the author believes, is that the process of changes in the sphere of pension provision is in progress. It has not stalled.

Certainly, Ukraine's experience today cannot be interesting for most countries of Western and Eastern Europe, since they are in the mainstream of social reforms and, in fact, often in a position to give guidance for reforming Ukraine, but the Ukrainian experience and Ukrainian mistakes on the path to reform may be of interest for post-Soviet countries (with the exceptions of Estonia, Latvia, and Lithuania) that, have undergone serious economic and moral deformations caused by the Soviet authorities, which have not yet been fully overcome, along with those countries that are moving towards the achievement of European standards for quality of life after retirement.

[36] Case of Pronina v. Ukraine, No. 63566/00. Materials available at http://freecases.eu/Doc/CourtAct/4524971 (most recently accessed on 20.7.2017).

https://doi.org/10.12697/JI.2017.26.12

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Internally Displaced Persons and Their Legal Status

The Ukrainian Context

1. Introduction

The problem of internally displaced persons not only is topical in Ukraine but also has been seen all over the world, in various historical periods. According to research[*1] cited by the United Nations High Commissioner for Refugees on movements in the world in late 2014, the number of internally displaced persons was 59.5 million then, with 38.2 million of these being internally displaced persons (hereinafter also 'IDPs'). Among the reasons for such movements are natural and manmade disasters / 'acts of God', but most of the displacement is caused by the necessity of escaping armed conflicts in the country of residence. For example, military actions in Georgia in 1992 - 1993 and military aggression of Russia in 2008 (in Abkhazia and South Ossetia) are well-known, with the number of IDPs coming to around 257,989[*2] in 1991 in Azerbaijan (Nagorny-Karabakh) - about 789,000 people[*3]; roughly 210,000 people being forced to change their place of residence in the case of Serbia (Kosovo) in 1999; about 130,000 residents[*4] of Moldova leaving their homes (Transnistria) in the 1990s; etc. The problems of internally displaced persons were addressed in several ways in these countries, from creating the appropriate committees, departments, and individual

1 UNHCR report 'Global Trends Forced Displacement in 2014', p. 2. Available at http://www.unhcr.org/556725e69.html (most recently accessed on 14.4.2017).

2 The United Nations High Commissioner for Refugees released research on intentions to implement long-term solutions, focusing on the thoughts of internally displaced persons in Georgia, on 1 June 2015. Details are available at http://www.refworld.org.ru/cgi-bin/texis/vtx/rwmain?page=search&docid=55e575c24&skip=0&query=%D0%B2%D0%BD%D1%83%D1%82%D1%80%D0%B5%D0%BD%D0%BD%D0%B5%20%D0%BF%D0%B5%D1%80%D0%B5%D0%BC%D0%B5%D1%89%D0%B5%D0%BD%D0%BD%D1%8B%D0%B5%20%D0%BB%D0%B8%D1%86%D0%B0&coi=GEO (most recently accessed on 12.4.2017). The figure comes from p. 9 of these materials.

3 The figure comes from p. 1 of statistical information on the consequences of the military aggression of Armenia, provided by the Ministry of Defence of the Republic of Azerbaijan in 2017. Available, in Azerbaijani, at http://mod.gov.az/ru/posledstviya-voennoj-agressii-armenii-statistika-412/ (most recently accessed on 10.4.2017).

4 O. Horelova, H. Shelar. Title of document goes here ['The costs of the Transnistrian conflict and the benefits of its settlement']. Chisinau, Moldova: Center for Strategic Studies and Reforms 2009, p. 10. Available at http://www.cisr-md.org/pdf/Report%20RUS%20Master%20Final%20vGS.pdf (most recently accessed on 10.4.2017) (in language_name).

legal frameworks, through limiting the making of additions or other changes to the existing regulatory framework, to the adoption of programmes for IDP issues that had not been recognised, and carrying out of regulatory consolidation of these persons' separate legal status. For example, the resolution of IDP-related problems was assigned to the appropriate authority; specific legislation was developed to provide a definition of 'IDP' and the introduction of a distinct terminological framework; provisions on legal, economic, and social guarantees were set forth; and rights and duties for immigrants[*5] and others in Georgia were specified. In contrast, problems of IDPs in Moldova have not been resolved at the legislative level: a legal status for such persons has not been provided, and social and benefits-related issues have been addressed only sporadically.

The appearance of IDPs in Ukraine has created the need to provide a state system of social protection for this category of people – a necessity for development and implementation of normative legal acts, to give the competence to the relevant bodies. To date, the legal regulation of IDPs has been determined by a self-created legislative base, the provisions of which are developed in account of the norms of recognised principles and standards of international law, along with the experience of other countries that have experienced such a phenomenon.

The main purpose with this article is to examine the problems of displaced people in Ukraine, their legal status and place in the national legal system, the peculiarities of the established norms, and the compliance of the Ukrainian approach with the international requirements. In essence, the article offers a general description of the legal framework for the legal regulation surrounding internally displaced people, the influence of the norms of international law on its formation, the categorical apparatus, intelligence and reference information, and the associated issues of social protection.

2. A general overview of the international legal regulation of IDPs

As noted above, IDP is not a new category for the world, and issues of these persons' international legal regulation have long remained relevant. However, today, within the framework of international co-operation, there is only one international document on IDPs, which, although being recommendatory, is based on the norms of international law, especially in the field of human rights, among them the provisions of international humanitarian law (the International Covenant on Civil and Political Rights[*6] of the United Nations, from 16.12.1966; the International Covenant on Economic, Social and Cultural Rights[*7] of the UN, from 16.12.1966; the Convention on the Status of Refugees[*8], from 28.7.1951; etc.). The above-mentioned international document serves as a guide for developing a national policy for countries facing the problems of mass forced internal displacement. This document is the main set of guidelines addressing displacement of people within a country[*9], developed by the representative of the United Nations General Secretary with regard to internally displaced people and published in 1998 (hereinafter 'the Principles'). The Principles provide a definition for IDP, stipulated rights and guarantees, the forms of protection envisaged for internally displaced people, recommendations for countries facing such a problem, etc. According to paragraph 2 of the introductory part of the Principles, 'internally displaced people are people or groups of persons who were forced to flee or leave their homes or places of usual residence as a result or in order to avoid the

5 The law of Georgia on 'persons displaced from the occupied territories of Georgia – internally displaced people', dated 6.2.2014, No. 1982. Available, in language_name, at http://www.refworld.org.ru/type,LEGISLATION,,GEO,5577019a4,0.html (most recently accessed on 22.7.2017).

6 International Covenant on Civil and Political Rights. A UN multilateral treaty (international document from 16.12.1966) available, in Russian, at http://www.ohchr.org/RU/ProfessionalInterest/Pages/CCPR.aspx (most recently accessed on 22.7.2017).

7 International Covenant on Economic, Social and Cultural Rights. A UN multilateral treaty (international document from 16.12.1966) available, in Russian, at http://www.un.org/ru/documents/decl_conv/conventions/pactecon.shtml (most recently accessed on 22.7.2017).

8 Convention on the Status of Refugees. Available, in language_name, at http://unhcr.org.ua/img/uploads/docs/1951%20convention.pdf (most recently accessed on 23.7.2017).

9 See the main guidelines on displacement of people within the country that were published by the Economic and Social Council of the United Nations (ECOSOC) on 22 July 1998. Available, in Russian, at http://www.un.org/ru/documents/decl_conv/conventions/internal_displacement_principles.shtml (most recently accessed on 10.4.2017).

consequences of a military conflict, mass violence, human rights violations, natural disasters or disasters caused by human activities and those, who have not crossed internationally established state borders'.*[10] Attention is drawn to protection against discrimination, primarily on the grounds that the latter are IDPs, to ensure their rights and freedoms, in accordance with the norms of international law and national legislation. There are provisions for recognition of the legal personality of IDPs, which should allow them to exercise the rights set forth in the national legislation and take advantage of the guarantees provided therein. For example, in accordance with Principle 20, for national authorities, supplying of all documents necessary for the realisation of the lawful rights of IDPs (a passport, certificate of registration as an IDP, and birth (along with marriage, if relevant) certificate) is envisaged for said authorities. In consequence of this, an IDP should be able to exercise the right to education, employment, pension, etc. The IDP is guaranteed the right to freedom of thought, conscience, belief, and expression; freedom to speak in a language acceptable to him or her; and freedom to take part in public affairs and to exercise electoral rights (to participate in voting). Provisions are specified for guarantees of return or alternative settlement, reintegration, and other actions. According to Principle 3, the responsibility for providing protection and humanitarian assistance to displaced people rests with national authorities, and displaced people, in turn, have the right to request and receive such protection, humanitarian aid, and charitable help.

However, a question arises as to the legal force of such an international document. First of all, its binding nature for countries experiencing the phenomenon in question should be considered. In the author's opinion, the Principles are legally binding, since they are elaborated upon and adopted within the powers of the UN bodies, which are defined via the provisions of the UN Charter (articles 10 and 13)*[11]. The compulsory nature of the provisions of the Principles for countries can be achieved by signing, by ratifying, or by acceding. According to the document, the agreeing country gives its consent to be bound by the provisions of the act; that is, it expresses willingness to the international community to assume its obligations to comply with the document's requirements. Today, this practice does not exist, however; the Principles remain an international document that has the nature of a recommendation in reality. Their content is actively employ by international structures and bodies, international humanitarian organisations, and national authorities, they are the basis of the legal framework for the formulation of a state policy in terms of protection of internally displaced people. Ukraine is one participant in this work. In my view, the Principles represent a successful international decision (as an act) on international legal regulation of issues related to IDPs in the modern world, which has sufficiently substantial content. However, I believe that it would be advisable to give them a mandatory character, thereby, substantially expand the range of problematic issues with specific causes and linked to factors of internal movements of other countries.

3. Internally displaced persons for the Ukrainian state: History and contemporaneity

The problem of mass forced displacements is not new for the Ukrainian state, law, and science. History knows numerous cases of mass forced internal migration among the Ukrainian population from places of permanent residence as caused by political, economic, ecological, technological, and defence factors. Several could be named, among them the construction of the Yavoriv firing range in the Lviv region, which started in the early 1940s; 'exchange of populations' under the agreement between the Government of the Ukrainian Soviet Socialist Republic and the Polish Committee of National Liberation on the evacuation of the Ukrainian population from the territory of Poland and Polish citizens from the territory of the USSR*[12] from 9.9.1944; the construction of reservoirs for the Dnieper hydro-cascade in the 1950s–1970s; and the accident at the Chernobyl nuclear power plant in 1986. In all these cases, residents who were forced to

[10] *Ibid.*, paragraph 2.

[11] The UN Charter, an international document whose relevant portion is available, in Russian, at http://www.un.org/ru/sections/un-charter/chapter-iv/index.html (most recently accessed on 24.4.1017).

[12] Agreement from 9.9.1944. Legislation of Ukraine database, from the Verkhovna Rada of Ukraine. Available, in Ukrainian, at http://zakon5.rada.gov.ua/laws/show/616_065 (application date: 9.5.2016).

move within the territory of Ukraine (or the Ukrainian SSR, as part of the USSR) actually were internally displaced persons and in need of social protection from the country's authorities. However, the earlier legislation surrounding them did not apply such terms as 'internally displaced persons'. Identical in meaning have been the following designations: forced migrant, exile, evacuated person, person affected by the incident at the Chernobyl nuclear power plant, and others. The framework for legislation related to them consisted of acts adopted for a set term that specified the circumstances of resettlement and measures for security and social orientation. However, in most cases, such measures were not sufficient to protect the rights and freedoms of the migrants or even violated them. While research on forced displacements of Ukrainians in a historical context is engaged in by a significant number of scientists (Y. Slyvka[*13], M. Buhai[*14], N. Lobas-Danylyha[*15], T. Pron[*16], N. Horlo[*17], and others), scientific study of the problems associated with forced internal displacements in their present form, especially their legal regulation in the system of social protection of Ukraine, remains sparse, with various open and unexplored issues. There are only rare cases of such studies: the work of O. Skrypniuk[*18] and O. Kudryavtseva[*19]. Hence, definition of the legal status of IDPs in Ukraine and ways to improve the legal regulation related to them forms one of the main tasks of science considering the right to social security.

The question of IDPs intensified in early 2014 in Ukraine in consequence of military aggression by the Russian Federation, which caused temporary occupation of the Autonomous Republic of Crimea, the city of Sevastopol, and certain districts in the Luhansk and Donetsk regions. Residents of these areas experienced real fear for their life and health, so they were forced to change their place of residence and work. The Ukrainian-government-controlled territories became a second home for many families who witnessed the military aggression from Russia, people who lost their job, documents, and material property acquired over the course of life. According to statistics from the Ministry of Social Policy of Ukraine[*20], as of 3.4.2017, there were 1,590.056 migrants or 1,278.204 families from Donbass and the Crimea region registered. Most of the migrants are geographically located in the portions of the Luhansk and Donetsk regions controlled by the Ukrainian government; in territories in the Kharkiv, Dnipropetrovsk, and Kiev regions; and in the city of Kiev itself. A smaller percentage are distributed across regions of western Ukraine.

The appearance of such a large number of persons suffering forced internal displacement has become a challenge for the country, society, and the modern science of law and social security, and it has grown into a key issue in terms of the ability of the country to ensure proper and adequate social protection for this category of citizens. In significant numbers, scientists have carried out historical research on the problems of mass deportation of Ukrainians, but, as noted above, scientific study of the problem of forced internal displacement in its present form, particularly with regard to legal regulation within the system of social protection of Ukraine, is open and scarcely explored. Therefore, determination of the legal status of the people in question and ways to improve legal regulation surrounding internally displaced persons is one of the main tasks of the modern science of law of social security of Ukraine.

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13 Y. Slyvka et al. (eds). *Deportations: Western Lands of Ukraine, Late 30's – Early 50's: Documents, Materials, Memoirs*. Lviv, Ukraine 1996, Vol. 1, p. 380; Vol. 2.

14 N.F. Buhai. The peoples of Ukraine in the 'Stalin Special Folder'. – *International Russian History*. Moscow: Nauka 2006, p. 115.

15 N. Lobas-Danylyha. Conditions of resettlement of Ukrainians from Poland to the western regions of Ukraine in 1944–1946. – A.O. Chemerys (ed.). *Effectiveness of Public Administration: Collection of Scientific Works in General*. Lviv, Ukraine 2004 (6th ed.) / 2005 (7th ed.), p. 155.

16 T. Pron. Soviet–Polish exchange of territories in 1951 in the legends of soldiers of the steppe of Ukraine. Available in a Ukrainian version at http://dspace.nbuv.gov.ua/bitstream/handle/123456789/71094/21-Pron.pdf?sequence=1 (application date: 26.6.2017).

17 N. Horlo. Payment of compensations to the settlers during the construction of reservoirs of the Dnipro hydroelectric cascade as a manifestation of neglect of the human factor (50–70-ies of the XX century). – H.V. Samoilenko (ed.). *Literature and Culture of Polissya: Regional History and Culture in the Ukrainian and Eastern European Context*. Nizhyn, Ukraine 2005. Issue 29, p. 195.

18 O.V. Skrypniuk. Problems of children's rights and freedoms in armed conflict: New challenges for Ukraine. – *Almanac of Law* 2015/6, pp. 20–24.

19 O. Kudryavtseva. Constitutional principles of protection of children's rights and freedoms in Ukraine: Experience, problems, perspectives – *Historically* (a legal journal of Constitutional, administrative, informational and financial law) 2014/3 (P.II. 1), pp. 49–53.

20 See the Ministry of Social Policy of Ukraine's statistics on internally displaced person in Ukraine as of 3.4.2017. Available, in Ukrainian, at http://www.msp.gov.ua/news/12860.html (most recently accessed on 3.4.2017).

The Ukrainian legislator is guided by the principles and provisions of international legal agreements in the development of state policy pertaining to honouring of the rights and freedoms of internally displaced persons, the members of which are Ukraine, in line with the relevant conventions, UN Security Council resolutions, and Parliamentary Assembly of Council of Europe (PACE) documents. The set of fundamental documents applied should include the International Covenant on Civil and Political Rights[*21] (from 16.12.1966); the International Covenant on Economic, Social and Cultural Rights[*22] (from 16.12.1966); the Convention on the Rights of the Child'[*23] (of 20.11.1989); the optional protocol to the latter on the involvement of children in military conflicts[*24], from 23.6.2004; the PACE resolution titled 'The Humanitarian Situation on Ukrainian Refugees and Forced Migrants'[*25], from 27.1.2015; and the above-mentioned guiding principles on internally displaced people[*26], from 1998. The following elements are among the key provisions found in these: the freedom of political and civil rights for the person; free exercise of social, economic, and cultural rights; a non-discriminatory attitude towards people, regardless of their race, skin colour, gender, political or other opinions, national or social origin, birth, and property; respect for the honour, dignity, etc. of the person; determination of measures to ensure protection and care for children affected by military conflict; the obligation of adherents (countries and others) to promote physical and psychological recovery; social reintegration of a child who has become a victim of military conflict; and prohibition of children being involved in / participating in military activities and armed conflict. A separate role is stipulated by the Principles, in accordance with which the concept of IDP in Ukraine has been formulated. On the basis of their content, Ukraine has formed its provisions on legal personality so as to include rights and freedoms of the latter; addressed issues of guarantees of return, alternative resettlement, reintegration, receiving of social assistance, and participation in society; determined the nature of co-operation with international humanitarian organisations; etc.

4. The issue of legal status and legal regulation for internally displaced persons in Ukraine

As mentioned above, legal regulation of IDPs is carried out in accordance with the new legal framework. Its foundation is the law of Ukraine titled 'On Ensuring the Rights and Freedoms of Internally Displaced Persons'[*27], from 20.10.2014 (No. 1706) – hereinafter also 'the Law'. Some issues have been identified via the following resolutions of the Cabinet of Ministers of Ukraine: that on registration of internally displaced persons[*28], from 1.10.2014 (No. 509); that on certain issues of realisation of social-benefit payments to internally displaced persons[*29], from 8.6.2016 (No. 365); the resolution on certain issues related to financing of budgetary institutions, the implementation of social-benefit payments, and provision of financial

21 International Covenant on Civil and Political Rights of 16.12.1966 (see Note 6).

22 International Covenant on Economic, Social and Cultural Rights of 16.12.1966 (see Note 7).

23 Convention on the Rights of the Child, of 20.11.1989. Available, in Ukrainian, at http://zakon5.rada.gov.ua/laws/show/995_021 (most recently accessed on 4.4.2017).

24 Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in military conflicts, from 23.6.2004. N 1845. Available, in Ukrainian, at http://zakon3.rada.gov.ua/laws/show/995_795 (most recently accessed on 4.4.2017).

25 Yevropeyska pravda's commented translation of the PACE resolution titled 'The Humanitarian Situation on Ukrainian Refugees and Forced Migrants', from 27.1.2015. Available at http://www.eurointegration.com.ua/articles/2015/01/28/7030164/ (most recently accessed on 12.4.2017) (in Ukrainian).

26 Paragraph 25 of the guiding principles on internally displaced people, as published by the Economic and Social Council of the United Nations on 22 July 1998 (see Note 9).

27 The law of Ukraine on 'ensuring the rights and freedoms of internally displaced persons', from 20.10.2014, No. 1706. Available, in Ukrainian, at http://zakon2.rada.gov.ua/laws/show/1706-18 (most recently accessed on 5.4.2017).

28 The resolution of the Cabinet of Ministers of Ukraine on registration of internally displaced persons from 1.10.2014, No. 509. Available in Ukrainian, at http://zakon3.rada.gov.ua/laws/show/509-2014-%D0%BF (most recently accessed on 5.4.2017).

29 The resolution of the Cabinet of Ministers of Ukraine on certain issues of realisation of social-benefit payments to internally displaced persons from 8.6.2016, No. 365. Available in Ukrainian, at http://zakon3.rada.gov.ua/laws/show/365-2016-%D0%BF (most recently accessed on 5.4.2017).

support to private enterprises and other organisations from the Donetsk and Luhansk regions[*30], from 7.11.2014 (No. 595); and the one providing monthly targeted assistance to internally displaced persons to cover living expenses, including payment for housing and communal services[*31], dated 1.10.2014 (No. 505).

With the law of Ukraine On Ensuring the Rights and Freedoms of Internally Displaced Persons[*32], for the first time in Ukraine's history there was formulated a definition of IDP, along with grounds for obtaining the legal status of IDP, specification of the rights and obligations of citizens falling into this category, and a set of guarantees for their social protection and support. Other new elements included provisions dealing with the order and terms for consideration of requests for registration, renewal and extension of social-benefit payments to internally displaced persons; provision of them with social and medical services; and others. Principle 25[*33] is reflected in the national legislation via Article 18 of the Law, which stipulates that Ukraine co-operates with other countries and with international organisations on the protection and honouring of the rights and freedoms of internally displaced persons and accepts international humanitarian, charitable, technical, and other irretrievable assistance provided to IDPs that has a special purpose and is distributed in accordance with the needs of the persons for whom it is of primary importance (disabled people, women and children, pensioners, and elderly people).

According to Article 1 of the Law, an internally displaced person is a citizen of Ukraine, foreigner, or stateless person who is in the territory of Ukraine on solid legal grounds and has the right of permanent residence in Ukraine, where that person has been forced to leave his or her place of residence in consequence of or in order to avoid the negative effects of military conflict, temporary occupation, widespread violence, human rights violations, and emergencies arising from natural or manmade disaster. This concept is consistent with the definition given in the Principles, sharing certain core features. There are differences, though. For example, whereas in the Principles the subject structure has a generalised notation – individual-linked and without reference to the grounds for the stay (residence) in the country – the Ukrainian legislator provides certain clarifications in this respect: a citizen of Ukraine, a foreigner, and a stateless person all are covered, and legality of the stay and residence in the national territory is a condition. In my opinion, the fact of the Ukrainian legislator's appeal to international acts (first of all, the Principles) determines their significance for the legal system of Ukraine.

So the legal definition specifies internally displaced persons as a category of persons who initially require social protection because the circumstances that resulted in their forced movement appeared suddenly; led to change in their usual way of life; and caused a need for material assistance, housing, employment, and restoring of the benefits they normally gained from society. At the same time, however, the legislator does not provide privileged status with reference to other categories of citizens, including those who need special attention (invalids, orphans, pensioners, etc.).

The primary and most fundamental prerequisite for implementation of the law on social protection with regard to a citizen, a stateless person, or a foreigner who reluctantly changed place of residence for reason of the above-mentioned circumstances and truly is an internally displaced person is acquiring the status of IDP (the Georgian legislator refers to such persons as applicants for the status of IDP[*34]).

A displaced person obtains the status of internally displaced person with effect from the moment at which the legal fact arises – internal displacement with the grounds stated by the law (armed conflict, temporary occupation, manifestations of violence throughout the country, violations of human rights, or emergency situations stemming from natural or manmade disaster), confirmed by receiving a certificate of

30 The resolution of the Cabinet of Ministers of Ukraine on certain issues of financing of budgetary institutions, the implementation of social-benefit payments, and provision of financial support to private enterprises and organisations of the Donetsk and Luhansk regions from 7.11.2014, No. 595. Available in Ukrainian, at http://zakon3.rada.gov.ua/laws/show/595-2014-%D0%BF (most recently accessed on 5.4.2017).

31 The resolution of the Cabinet of Ministers of Ukraine on providing monthly targeted assistance to internally displaced persons to cover living expenses, including payment for housing and communal services, from 1.10.2014, No. 505. Available in Ukrainian, at http://zakon2.rada.gov.ua/laws/show/505-2014-%D0%BF/paran21#n21 (most recently accessed on 5.4.2017).

32 The law of Ukraine on 'ensuring the rights and freedoms of internally displaced persons', from 20.10.2014, No. 1706 (see Note 28).

33 See the guiding principles on internally displaced people as published by the Economic and Social Council of the United Nations on 22 July 1998 (see Note 9).

34 The law of Georgia on 'persons displaced from the occupied territories of Georgia – internally displaced people', dated 6.2.2014, No. 1982 (see Note 5).

registration as an internally displaced person (hereinafter 'registration certificate'), which is valid indefinitely except when conditions have arisen that terminate its validity (as will be explained below) and being registered in the unified-information database on IDPs. It is interesting that Ukrainian legislation specifies the establishment of the fact of forced displacement as taking place by court decision.[*35]

In my opinion, with regard to acquisition of the status of IDP, it is important to take into account the age limit. Under the terms of the Law, IDP status may be obtained not only by a person who has reached the age of 18 but also by a child, even one who arrived without parents or other legal representatives. Therefore, the presence of IDP status for a child (or minor) entails receiving all of the designated state guarantees, especially those of security and social welfare. An example of this can be found in the provisions of the resolution of the Cabinet of Ministers of Ukraine on providing monthly targeted assistance to internally displaced persons to cover living expenses, including housing and communal services[*36], from 1.10.2014 (No. 505), paragraph 3 of which provides for cash payments (starting for six months, with the possibility of renewal on the grounds specified in the resolution) for disabled persons (of pension age and children) in the amount of 884 UAH (equivalent to 31 euros) per person (family member), SPECIFY THE AMOUNT HERE for able-bodied persons, and 442 UAH (equivalent to 15.5 euros) for an adult but non-pension-age disabled person, with the total amount of payments per month for a given household not to exceed 2,400 UAH (equivalent to 84.2 euros). However, the indicated sums of payments are not enough for both ensuring human life and also meeting the other immediate needs of the migrants. Hence, according to Article 7 of the law of Ukraine 'On the State Budget of Ukraine for 2017'[*37], from 1.5.2017, the subsistence minimum per able-bodied person is set at 1,684 UAH (about 57 euros), for children under six years old at 1,426 UAH (around 48 euros), and for children 6–18 years old at 1,777 UAH (approx. 60 euros); at the same time, there is no increase in the amount of monthly targeted assistance for the IDP. In May 2017, the International Organization for Migration investigated issues related to the needs and provision status of IDPs, and, according to the results cited, it was found that the average monthly income of a forced migrant in Ukraine is approximately 1,990 UAH (quoted at 75 USD or 70 euros), which comes to approximately 2.50 USD or 2.30 euros per day.[*38] And the price policy is significantly higher than the amounts provided. In contrast, Article 11 of the International Covenant on Economic, Social and Cultural Rights[*39] of 16.12.1966 (of which Ukraine is a signatory state) provides for the right of everyone to have an adequate standard of living for self and family, encompassing sufficient food, clothing, and housing, and for the steady improvement of living conditions. The covenant also refers to taking measures to ensure the implementation of this right.

Along with offering the definition of the grounds on which acquisition of the status of IDP is possible, the Law indicates the conditions under which said status is to be terminated. According to Article 12 of the Law, these are[*40] 1) application for a statement of rejection of the registration certificate; 2) commission of a crime wherein the actions were aimed at violent change, overturning of the Constitutional order, or the seizure of state power; infringement of territorial integrity and the inviolability of Ukraine; involvement in the commission of a terrorist act; public appeals for carrying out a terrorist act; the creation of a terrorist group or terrorist organisation; facilitation of the commission of a terrorist act; financing of terrorism; or implementation of genocide, crimes against humanity or war crimes; 3) return to the abandoned place of permanent residence; 4) departure for a permanent place of residence abroad; 5) and knowing submission of false information. Upon termination of said status, the person immediately becomes no longer entitled to receive targeted social assistance or temporary accommodation but shall still enjoy the rights and exercise responsibilities under the law of Ukraine on a general basis. In the Ukrainian judiciary, there exists the practice of appeal against the actions of state authorities with regard to unlawful termination of payments

35 The Decision of Novoaydarskyi district court, of the Luhansk region, from 28.3.2017 in Case 419/3478/16-ц, proceedings for No. 2-0/419/31/2017.

36 The resolution of the Cabinet of Ministers of Ukraine on providing monthly targeted assistance to internally displaced persons to cover living expenses, including payment for housing and communal services, from 1.10.2014, No. 505 (see Note 32).

37 Article 7 of the law of Ukraine 'On the State Budget of Ukraine for 2017', from 21.12.2016. Available in Ukrainian, at http://zakon3.rada.gov.ua/laws/show/ru/1801-19 (most recently accessed on 24.7.2017).

38 UN News Centre. Title of document goes here ['Ukraine: Internally displaced persons live on 2.50 USD a day'], 16.5.2017. Available at http://www.refworld.org.ru/docid/591c4e194.html (most recently accessed on 22.7.2017) (in Ukrainian).

39 Article 11 of the International Covenant on Economic, Social and Cultural Rights, of 16.12.1966 (see Note 7).

40 The law of Ukraine on 'ensuring the rights and freedoms of internally displaced persons', from 20.10.2014, No. 1706 (see Note 28).

for IDPs, and positive decisions have been made on these. For example, by the decision of the Management of Social Welfare body, payment of monthly targeted assistance of Ukraine was denied to displaced people from the city Irmino, in the Luhansk region, on the basis of the registration certificate's expiry and the absence of location registration in the Migration Service system, which confirms the status of IDPs. The Court recognised the illegality of the decision by the state body, and the payment of monthly targeted assistance was restored (with payment of the justified assistance amounts that had not been received)[*41].

5. Social protection of internally displaced persons in Ukraine: Legal regulation of social benefits and housing provision

The issue of rights and obligations, as well as protections of rights and freedoms of IDPs, is regulated by the above-mentioned national law on ensuring the rights and freedoms of internally displaced persons' and by other normative and legal acts. Under Article 14 of the Law[*42], IDPs have the same rights and freedoms as other citizens of Ukraine residing permanently in the territory of Ukraine. In accordance with Principle 20, IDPs in Ukraine have the right to recognition of their legal personality. National authorities issue identity documents confirming Ukrainian citizenship or identity documents confirming their special status (passports, registration certificates, and birth and/or marriage certificates). For persons residing in territories not currently under the control of Ukrainian authorities, the realisation of said right is possible via a court decision. For example, to obtain a Ukrainian birth certificate for a child born in temporarily occupied territory, the parent(s) or other legal representative(s) must apply to any court in the territory controlled by the Ukrainian authorities, with the application form, necessary documents, and payment of court fees. The case is considered promptly, and a decision based on its results is made on the satisfaction of the application, its return for resubmission, or refusal to satisfy it. In our opinion, this provision is a positive step towards the realisation of rights not only for those who were forced to move to the territories that remain under Ukrainian control but also for those left to live in temporarily occupied territories. For IDPs, the law specifies the right to work and to receive pension, compulsory state social insurance, education, housing, medical care, and the right to vote.

At the same time, this act of law defines certain responsibilities for IDPs. Hence, Article 9 of the Law[*43] obliges them to observe the Constitution and laws of Ukraine and other legislative acts; report any change of place of residence to the government unit charged with social protection of the citizens of the district (part of the City of Kiev's state-level administrations), to executive bodies of the relevant city, and (when one exists) to the council of the district within the city associated with the new place of residence within 10 days from the date of arrival in that new place of residence; and fulfil other obligations. Frequently, the issue of this reporting is a source of dissatisfaction among IDPs, because, in their view, the latter violates their personal rights. While failure to perform this reporting may result in the termination of benefits, jurisprudence accepting the IDPs' arguments exists in the Ukrainian legal process. For example, in the city of Pavlohrad, in the Dnipropetrovsk region, the Court satisfied the claim of a displaced woman whose pension payments were discontinued by the Pension Fund of Ukraine, which had referred to Resolution 365 of the Cabinet of Ministers of Ukraine on certain issues of social benefits to internally displaced persons[*44] (from 8.6.2016). While the latter provides an opportunity for termination of pension payments in cases of cancellation of

41 Title of document goes here ['News for displaced people: Displaced people began to recover payments by the court, Ukraine']. Available at http://www.idps.in.ua/2016/06/16/pereselentsyi-nachali-vosstanavlivat-vyiplatyi-cherez-sud/ (most recently accessed on 24.7.2017) (in Ukrainian).

42 Article 14 of the law of Ukraine on 'ensuring the rights and freedoms of internally displaced persons', from 20.10.2014, No. 1706 (see Note 28).

43 *Ibid.*, Article 9.

44 The resolution of the Cabinet of Ministers of Ukraine on certain issues of realisation of social-benefit payments to internally displaced persons from 8.6.2016, No. 365 (see Note 30).

an IDP certificate's validity for reason of prolonged absence (i.e., absence of more than 60 days) from the registered place of residence. Payment of the woman's pension was reinstated*[45].

The issue of social protection is crucial for persons who are forced to move within the country and also for the country itself, as a guarantor of the implementation of such protection. The issue is primarily associated with the initiation, renewal, and payment of social benefits, but providing temporary housing for migrants, paying them cash benefits and other compensation, supplying social and medical services, and providing other social protection are important too.

Institution (and recovery) of social benefits for IDPs is regulated by an order on 'appointment' (or recovery) of social benefits for internally displaced persons, an order approved via the above-mentioned resolution of the Cabinet of Ministers from 8.6.2016 on various issues related to social benefits for IDPs*[46]. That order specifies the mechanism for initiation or recovery of pensions (in the form of a monthly lifetime financial allowance), lifetime state grants, all other kinds of social benefits and compensation, financial security, provision of social services, and subsidies and benefits from the state budget and from funds linked to compulsory state social insurance to internally displaced persons. In order for social benefits to be assigned or reinstated for IDPs, in the cases determined by law, its legal representative shall submit the corresponding application to the body that makes social payments in the territory. This is done where the relevant person is registered, at the place where he or she actually resides / is staying, irrespective of the fact of the place of registration/stay. Upon receipt of such an application, the competent state authorities verify the authenticity of the information provided (on IDP status, residing or staying at the specified address, etc.). In line with the findings, an approval decision or a decision to refuse is taken. Such a complicated procedure was developed to reduce the number of cases of unlawful payments.

In my opinion, the real issue is granting and receiving of pensions and other social benefits for residents who have continued living in temporarily occupied parts of the Donetsk and Luhansk regions and in annexed Crimea. According to Article 1 of the law of Ukraine on ensuring the rights and freedoms of citizens and the legal regime of the temporarily occupied parts of Ukraine*[47] (No. 1207), from 15.4.2014 (specified by the normative act), the temporarily occupied territories within Ukraine are an integral part of the territory of Ukraine covered by the Constitution and laws of Ukraine. In other words, citizens living in these territories remain citizens of Ukraine and have the same rights as citizens of Ukraine living in territories controlled by the Ukrainian authorities. In contrast, however, specified by the normative act establishes a special legal regime; defines peculiarities of the activity of public bodies, local authorities, enterprises, institutions, and other organisations in terms of this regime; and addresses the honouring and protection of rights and freedoms of the person or citizen, alongside the rights and legitimate interests of entities in these territories, on this basis. For example, peculiarities are aligned with geographical limits of the temporarily occupied territory, with a special procedure for ensuring the rights and freedoms of citizens of Ukraine residing in that temporarily occupied territory, for performing deeds, such us conducting elections and referenda, and for the realisation of other rights and freedoms of the person and citizen.

The provisions of the law to ensure the rights of persons residing in the temporarily occupied territory and on employment, pensions, compulsory state social insurance, social services, etc. seem important. According to Article 7 of the Law*[48], implementing of the above-mentioned rights for such residents is carried out in accordance with the laws of Ukraine. But today complexity is visible in the fact that the temporarily occupied territories have no structural units of the relevant bodies of the state government of Ukraine and are missing the departments of financial institutions and other enterprises/organisations that once carried out accumulation and distribution of the funds and ensuring of enforcement of the citizens' rights to receive a pension and other mandatory social payments. In these territories, delivering such funds for some categories of citizens is dangerous and inappropriate, because they could be used instead for other

[45] Title of document goes here ['The right for protection: Advocacy and legal assistance for internally displaced persons']. Available at http://vpl.com.ua/uk/news/3172/ (most recently accessed on 24.7.2017) (in Ukrainian).

[46] The resolution of the Cabinet of Ministers of Ukraine on certain issues of realisation of social-benefit payments to internally displaced persons from 8.6.2016, No. 365 (see Note 30).

[47] The law of Ukraine on 'ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine', dated 15.4.2014, No. 1207. Available, in Ukrainian, at http://zakon5.rada.gov.ua/laws/show/1207-18 (most recently accessed on 12.4.2017).

[48] Article 7 of the law of Ukraine on 'ensuring the rights and freedoms of internally displaced persons', from 20.10.2014, No. 1706 (see Note 28).

purposes by the occupying power's authorities. Therefore, in order to ensure the rights specified by the Constitution and laws of Ukraine on social security, which is shown as well as initiation (or recovery) and payment of cash benefits, the legislator entered certain limitations into law. Hence, Resolution 595 of the Cabinet of Ministers of Ukraine, from 7.11.2014, on various issues of financing for budgetary institutions, the implementation of social payments, and provision of financial support to private enterprises and other organisations in the Donetsk and Luhansk regions*[49], specified a temporary scheme of financing for budgetary institutions, the implementation of social-benefit payments, and provision of financial support to the relevant organisations in those regions. In accordance with Clause 2 of the above-mentioned order, for state authorities that are based in the temporarily occupied territory and not exercising their powers, expenditures from the state budget, the budget of the Pension Fund of Ukraine, and budgets of other funds for obligatory state social insurance are to be disbursed only after the return of said territory to the control of public authorities. In other words, all cash payments that the law dictates for payment to citizens of Ukraine (pensioners, single mothers, the disabled, and others) residing in the temporarily occupied territory while it remains occupied are credited to their personal accounts and can be paid in accordance with the conditions defined by the legislation of Ukraine. The main conditions are 1) the individual departing to territories controlled by the Ukrainian government, for temporary or permanent residence; receiving the status of IDP in accordance with the requirements of applicable law; and registering with the relevant department of the social-protection body (the terms and conditions for initiation or resumption of social benefits are described above) and 2) the relevant parties completing the anti-terrorism operation in certain districts of the Luhansk and Donetsk regions and restoring the structural units of the authorities of the state government of Ukraine, branches of financial institutions, and other enterprises/organisations. Therefore, the citizens of Ukraine living in the temporarily occupied territory are not deprived of the right to be assigned and receive pension and other social benefits; instead, they have a specially defined procedure for the implementation of their rights. Upon completion of the anti-terrorism operation in the districts in the Luhansk and Donetsk regions in question and once the above-mentioned structural units of the authorities of the government of Ukraine, branches of financial institutions, and other enterprises or other organisations are restored, the special legal regime can be changed or eliminated. However, in my opinion, the procedure and mechanism for obtaining social benefits is quite complex, especially for persons of retirement age. Therefore, it needs to be simplified. One step already made in this direction is simplification of the way of obtaining old-age pension payments for Ukrainians residing in the temporarily occupied territories in the Luhansk and Donetsk regions and who were granted such a pension before 20.2.2014 (in line with Article 1 of the law of 15.4.1207 on ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied areas of Ukraine (No. 1207), the date on which the temporary occupation began. In order for these persons to receive the payments, it should be enough for the latter to arrive in territory controlled by the Ukrainian authorities and, at the appropriate department of the Pension Fund of Ukraine, present a passport and a pension certificate.

One of the key real-world issues still affecting IDPs is housing. This issue is regulated by the regulations of the Cabinet of Ministers on providing monthly targeted assistance to internally displaced persons to cover living expenses, including housing and communal services*[50] (No. 505), from 1.10.2014 (the provisions of which were analysed above), and on providing temporary accommodation for families who migrated from the Autonomous Republic of Crimea and the city of Sevastopol*[51] (No. 213), from 25.6.2014 (its provisions too were analysed above). The content of both resolutions sets forth details of a financial allowance intended to cover payments for accommodation. Repayment periods are set at six months, with the possibility of renewal under the conditions specified by this regulatory act. It specifies one authorised bank, the State Savings Bank of Ukraine, as the immediate source of such assistance; that bank is to open and maintain current accounts for receiving the financial allowance. In accordance with Clause 3 of the

[49] The resolution of the Cabinet of Ministers of Ukraine on certain issues of financing of budgetary institutions, the implementation of social-benefit payments, and provision of financial support to private enterprises and organisations of the Donetsk and Luhansk regions from 7.11.2014, No. 595 (see Note 31).

[50] The resolution of the Cabinet of Ministers of Ukraine on providing monthly targeted assistance to internally displaced persons to cover living expenses, including payment for housing and communal services, from 1.10.2014, No. 505 (see Note 32).

[51] The regulation of the Cabinet of Ministers of Ukraine titled 'Providing Temporary Accommodation for Families Who Migrated from the Autonomous Republic of Crimea and the City of Sevastopol', from 25.6.2014, No. 213. Available, in Ukrainian, at http://zakon3.rada.gov.ua/laws/show/213-2014-%D0%BF (most recently accessed on 12.4.2017).

above-mentioned order*[52], which was approved via Resolution 213 of the Cabinet of Ministers, the amount of the financial allowance is determined by a rate setting it at up to 75% of the cost of accommodation per day but not more than 200 UAH (approx. 7 euros) for each family member. It is paid by means of a non-cash transfer by the authorities, as specified in the prescribed manner, to the accounts of places where temporarily displaced persons are housed sanatoria and other health institutions, agencies, and establishments for social protection of the population, along with hostels. For IDPs, Article 9 of the law of Ukraine on ensuring the rights and freedoms of internally displaced persons*[53] from 20.10.2014 (i.e., No. 1706) also provides the possibility of free temporary residence (when the person has made payment in the value of the associated communal services) for six months from the date of registration as an IDP; this term can be extended for large families, the disabled, and the elderly.

The issue of resettlement of displaced residents has been addressed thus: the disabled, pensioners, and low-income families were placed in sanatorium facilities and other health institutions or social-security institutions, other categories of people were accommodated in hostels, hotels, and specially constructed modular towns. However, for most IDPs, who live in residences they have found themselves, the financial assistance provided under the Ukrainian legislation is not enough in the current economic conditions. According to internal research on resolving housing issues for IDPs*[54], as of September 2016, 95.5% of migrants were living in rented flats. Another issue now being raised in Ukrainian society is that of discriminatory attitudes towards IDPs. There are cases wherein people who seek to rent a home are denied it on the grounds that they are IDPs. Refusal to hire occurs also, on the same grounds. This position is unacceptable and in contradiction with Principle 1 and with Article 5 of the law of Ukraine on ensuring the rights and freedoms of internally displaced persons*[55] (No. 1706).

The progress toward resolving the housing issue is seen most strongly in the construction of individual housing units for IDPs, such as construction of residential complexes for migrants that are designed for 500 flats each, and expressions of desire to develop these areas. Nonetheless, this matter could create social conflict, because, alongside IDPs, who definitely need help at the level of the country, there are other categories in Ukrainian society – such as the disabled, Chernobyl victims, and 'mother-heroines' – who need residence. Also, ordinary citizens should not be forgotten here; they are no exception to the phenomenon of facing long-term queues for a place of residence.

Hence, the issue of legal regulation of housing for IDPs and the real-world provision of that housing has been important for the Ukrainian legislator and remains so. In my view, for that issue's resolution, it would be appropriate to provide allowance for places in new public housing stock could be provided, from which the IDP can buy a flat through partial payment of its value – for example, 25% of the total cost. In my opinion, the latter proposal is appropriate for repair or reconstruction of abandoned, empty buildings that are on state or municipal property with the involvement of foreign investors and the use of innovative technologies. This housing can be put to good use for the temporary settlement of migrants.

6. Conclusions

Today, the issue of the status of IDPs and the legal regulation related to them constitutes a key concern not only for Ukraine but also for the whole world. An important component of state policy in protecting the rights and freedoms of forced migrants in Ukraine is to create an effective foundational legal framework and an effective mechanism for its implementation. The legislative framework for legal regulation surrounding IDPs in Ukraine is based on the norms of international law. The 1998 guidelines on internally displaced

[52] Clause 3 on the procedure for using funds from the state budget reserve fund to provide cash assistance for the temporary residence of families who have moved from the Autonomous Republic of Crimea and from Sevastopol. See http://zakon3.rada.gov.ua/laws/show/213-2014-%D0%BF (most recently accessed on 25.7.2017) (in Ukrainian).

[53] Article 9 of the law of Ukraine on 'ensuring the rights and freedoms of internally displaced persons', from 20.10.2014, No. 1706 (see Note 28).

[54] I. Shevchenko. Title of document goes here ['The housing issue of displaced people: Two years of searching for a home place'], 7.9.2016. Available via the UNIAN news agency at https://www.unian.ua/society/1508883-kvartirne-pitannya-pereselentsiv-dva-roki-mitarstv.html (most recently accessed on 12.4.2017) (in Ukrainian).

[55] The law of Ukraine on 'ensuring the rights and freedoms of internally displaced persons', from 20.10.2014, No. 1706 (see Note 28).

people have particular importance – many provisions of the Principles are reflected in the national legislation on forced displacement and are sufficiently effective. Examples are the principles on legal personality, the responsibility of the national authorities for assistance to IDPs, assistance in obtaining humanitarian assistance from international organisations, obtaining of medical assistance, and others. But there are highly relevant fields in which state assistance and legal improvements are needed. These are evident in cases of discriminatory attitudes toward IDPs on the grounds that the latter are IDPs, insufficiency of financial assistance, housing constraints, etc. Issues of social protection of IDPs – particularly linked with the initiation, restoration, and payment of social benefits and pensions, including those for people who live in areas of Ukraine not controlled by the national authorities – remain open too. In my opinion, if we are to resolve the IDPs' problems, it is important to improve the existing norms in accordance with the emerging needs of IDPs and to cease the actions that are not relevant, simplifying the mechanisms for obtaining social benefits. For example, the mechanism for obtaining old-age pensions for Ukrainian citizens could be simplified in the manner outlined above.

Implementation of innovative approaches to solve the problems faced by IDPs and borrowing solutions from the experience of other countries that have encountered problems of massive forced internal displacements should create an effective system of protection of the rights and freedoms of internally displaced persons in Ukraine.

https://doi.org/10.12697/JI.2017.26.13

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A Review of Magda Papede's Verwertungsgesellschaften im europäischen Kontext

Das Beispiel der baltischen Staaten[*1]

Collecting societies have received quite some focus recently in the European arena, extending from implementation of Directive 2014/26/EU (the Collective Rights Management Directive)[*2] to a groundbreaking German district court judgement[*3] challenging the very existence of GEMA, Germany's central collecting society for musical works, by denying it a share in the profits raised from publishing of musicians' creations[*4]. Much less research or published work has considered collecting societies and the associated regulations and practices in the Baltic States, at both international and regional level.

Dr Papede's thorough study is an attempt to fill this gap, and it fully succeeds in doing so on various levels. After a comprehensive introduction to the instrument of the collecting society as such and to its function and its regulation under European law (in chapters 1 and 2), the author devotes Chapter 3 to examining the existing legal frameworks for collecting societies in the Baltic States, for ascertaining differences and also practical implications (in this respect, the author's professional background as a practising lawyer in the field adds considerably to the value of the work). Chapter 4 is dedicated to comparative analysis of the three Baltic legal systems, but the work goes further, also considering them in relation to German law and the European approach to the issue, especially with respect to the establishment of collecting societies (Chapter 4), their relationship to authors (Chapter 5), and finally their connection to users (Chapter 6). The final chapter tackles the question of how advisable a reform of the present system of Baltic collecting societies would be, not only in the general interest of legal harmonisation but also in response to critical mass ultimately not being achieved for three 'sets' of national collection societies in the Baltic States, on account of their small size. According to the author, such a reform should be applied cautiously, without undue keenness to establish entirely free competition among collecting societies (as envisaged in line with

1 Vol. 32 in the 'Karlsruher Schriften zum Wettbewerbs- und Immaterialgüterrecht series, from Carl Heymans Verlag, 2016, ISBN 978-3-452-28778-6.

2 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72.

3 Judgement of Kammergericht Berlin from 14 November 2016 (24 U 96/14).

4 Recently discussed by Stefan Ventroni. Paukenschlag zur Verlegerbeteiligung: Aus für die Verteilungspraxis der GEMA? ['The leading decision on publishers' shareholding schemes: Major German collecting society's royalty-distribution practice declared unlawful']. – *Zeitschrift für Urheber- und Medienrecht* 2017/3, pp. 187–207.

the European trend anyway), because small collecting societies – and those of small countries such as the Baltic States – would not be competitive. Instead, the author favours closer co-operation among the Baltic societies but also between them and bigger collecting societies further afield, for creation of synergies and maintaining of national (which is in this case always cultural also) independence to at least the necessary minimal extent in this essential field.

With regard to content, any legal professional who deals with collecting societies or even intellectual property in general in the Baltic States would profit considerably from this meticulous work. While detailed legal research in the IP domain has traditionally been more scarce than practice and legal scholarship would desire, this has been especially true with regard to collecting societies. Yet the author does not stop by filling this gap. The work not only provides a thorough, up-to-date, and well-balanced overview of the three Baltic systems but evaluates them objectively by setting them in a European context in chapters 4–6. This renders the book of considerable interest also to readers of non-Baltic background or interests. The comparative analysis of co-operation models (in Chapter 3) or the determination of tariffs (in Chapter 6) especially works out general patterns that are applicable to all collecting societies active in Europe.

The seventh chapter, which forms the most standalone part of the work, addresses the challenge that various, mutually contradictory interests must be led to a compromise when it comes to justifying the diversity of Baltic collecting societies, marked by parallel purposes and often minuscule circles of authors or users. The author correctly points out the significance of the cultural independence of all three of the Baltic States, where individual collecting societies definitely are consistent with a demand for making creations publicly available in the respective titular language and in the traditional forms of publications, just as the risks of too liberal an approach in terms of free international competition among collecting societies are coherently characterised. The only flaw in this otherwise well-researched and also balanced analysis is that the author shies away somewhat from recognising the entirety of the potential that an academic work such as this one holds in serving this function: Beyond any doubt, there is no silver bullet for resolving the intricacies of the situation and the diverse perspectives of collecting societies in the Baltic States: no mere scratch of a pen holds an answer. But why not take the opportunity of academic freedom and draft some sort of specific proposal in any case? After all, the author has demonstrated enviable command of her field in the preceding chapters, which should lead the reader to trust fully in her expertise for drafting any proposal justifiably. In that context, it is not even relevant whether such a specific proposal presents modes of co-operation, a reform aimed at unification, a pan-Baltic or even pan-European solution, or something entirely different: With such a contribution, the author could have set a benchmark for future discussion in both academia and the practical realm. Certainly, in mindfulness of the many details and complications laid out in the pioneering work that the author has produced, one could only have expected such a proposal to be far from perfect and not to be directly implementable, but it could still have spurred on and greatly intensified the all-too-rare legal discussion in this field, which is so important today.

Hence, a follow-up to this analysis that goes further by proactively proposing some measures to be taken to alleviate the starkest discrepancies of the present situation is something the academic community would certainly be eagerly looking forward to. Therefore, one hopes that the author continues her work in th is direction. In addition, a summary of this important work in English (if one does not yet exist at the time of publication) or the online availability of even a portion or some version of this work would probably be very well-received.

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