Dear reader,

This issue of Juridica International is mostly dedicated to legal journalism as a singular cultural phenomenon. Journalism as a whole can be treated as a mirror or seismograph of cultural and social processes. Legal journalism mirrors the day-to-day of legal culture and records its motions. Historically legal periodicals can be treated as the memory of legal culture. Legal periodicals carry a special role within the media of law and jurisprudence (legal acts, court judgments, scientific monographs, textbooks, etc.). Formally, periodicals are the most dynamic media of law. In essence, they can be called the medial crossing-point (M. Stolleis) where legal science, judicial and administrative practice, legal politics and also general politics meet. In short: any given day of a particular legal culture.

Several articles in this issue were prepared on the basis of the presentations at the conference "Law Journals: National, Regional, International", held in Tartu on 30 November and 1 December 2009. In part, the conference was connected with a significant anniversary for Estonian legal science—the year 2009 marked 100 years of Estonian-language legal journalism. In its purpose, however, the conference was international, focusing on the identity-related problems of legal journalism in the context of different but near national legal cultures.

The authors of the articles analysing legal periodicals come mostly from the countries bordering the Baltic Sea. The political history of the countries of the Baltic Sea region in the 19th and 20th centuries was so diverse that one cannot but ask what the role of law was in processes such as the hegemonialism of great powers and the territorial and national pursuit for autonomy in its contrast, nation building, development of the legal order of national states and also of national legal language, development of the interpretational thrust of the new legislation, implementation of the totalitarian state goals, rule-of-law transformation of post-Soviet legal orders, etc.

Thus, the articles in this issue allow for a comparison of the relatively more stable legal cultures of Scandinavia with the legal cultures of the eastern and southern shores of the Baltic Sea, which have had to survive major, not always political, upheavals over the past few centuries. That period also coincides with the period of evolution and etablation of special journalism. Legal periodicals might be that useful litmus paper which allows the researcher to obtain an insight into the internal changes and working mechanisms of legal cultures. It is also important to ask the question whether the fragmentation brought about by globalisation might be confronted by the tools of regionalisation, which can be achieved by the shaping of the legal public with the aid of relevant periodicals.

Marju Luts-Sootak Merike Ristikivi

Contents:

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Die Rolle der juristischen Zeitschriftenliteratur bei der Harmonisierung des Privatrechts in Europa*

1. Einleitung

Mir ist die Aufgabe zugedacht, über die Rolle der juristischen Zeitschriftenliteratur bei der Harmonisierung des Privatrechts in Europa zu sprechen. Ich hätte es besser wissen müssen, aber wahr ist, dass mir, als ich die Einladung annahm, keineswegs klar war, dass sich hinter diesem Thema eine nicht geringe Herausforderung verbirgt. Heute muss ich gestehen, dass es mir in der kurzen Vorbereitungszeit für meinen Vortrag nicht möglich gewesen ist, mich der mir zugedachten Aufgabe in angemessener Weise zu stellen. Ich hätte es mir zwar einfach machen können, indem ich sage, was vielleicht sogar von mir erwartet wird: dass nämlich die Rolle der juristischen Zeitschriften bei der Angleichung des Privatrechts in Europa groß und wichtig sei. Aber das erschien mir dann doch zu banal – mit der Folge, dass ich mich plötzlich mit einem ebenso interessanten wie umfangreichen Fragenkatalog konfrontiert sah. Verstehe ich das Thema richtig, dann geht es nämlich (i) um eine Ermittlung des Europäisierungsgrades der rechtswissenschaftlichen Zeitschriften in der Europäischen Union, (ii) um eine vergleichende Bewertung des so erhobenen Befundes und (iii) um eine Einschätzung der wissenschaftlichen und der rechtspolitischen Wirkmächtigkeit von Zeitschriftenaufsätzen zu unserem Generalthema, der Privatrechtsangleichung in Europa. Zu diesen drei Fragenkreisen kann ich indes nicht viel mehr als einige erste Beobachtungen beisteuern. Methodisch valide Aussagen hätten einer breiteren Erhebungsbasis als der bedurft, die ich mir habe erarbeiten können.

2. Zahlen

Wie viele rechtswissenschaftliche Zeitschriften es derzeit gibt, scheint niemand auch nur annähernd verlässlich sagen zu können. Die Datenlage ist außerordentlich unbefriedigend. Das hängt nicht zuletzt damit zusammen, dass Juristen unter einer juristischen „Zeitschrift" meistens etwas anders verstehen als Bibliothekare. Letztere zählen in aller Regel auch Entscheidungssammlungen, Gesetzblätter, Jahrbücher, ja manchmal selbst Lose-

* Dieser Artikel wurde mit der Unterstützung des ESF Grant Nr. 7923 veröffentlicht.

blattsammlungen und Fortsetzungswerke anderer Art zu den „Zeitschriften". Wir Juristen verstehen unter einer „juristischen Zeitschrift" dagegen ein regelmäßig erscheinendes Publikationsorgan für rechtswissenschaftliche und rechtspolitische Aufsätze. Dass man den Begriff des rechts ‚wissenschaftlichen' Aufsatzes verhältnismäßig weit fassen muss, ändert daran nichts. Die Zeiten, in denen ein Autor seine Erkennntnisse veröffentlichte, weil er glaubte, etwas Neues gefunden zu haben, scheinen in manchen Ländern Europas allmählich einer Kultur zu weichen, in der Autoren den Schritt in die Öffentlichkeit schon dann suchen, wenn sie glauben, etwas verstanden zu haben!

Die Zeitschriftendatenbank der zur Stiftung preußischer Kulturbesitz gehörenden Staatsbibliothek in Berlin (die ZDB[*1]), eine der größten Datenbanken für Titel- und Besitznachweise fortlaufender Sammelwerke, verzeichnet mehr als 1,5 Mio. Titel in den meisten Sprachen der Erde. Nachgewiesen sind die gedruckten und elektronischen Zeitschriftenbestände deutscher und österreichischer Bibliotheken seit dem Jahre 1500. Diese Datenbank ist damit zwar umfassend und zuverlässig – für die Beantwortung der Frage, wieviele juristische Zeitschriften es auf der Welt (oder wenigstens in Europa oder in Deutschland) gibt, aber nicht wirklich hilfreich. Zwar kann man in ihr nach Fachgebieten und Unterfachgebieten selektieren. Aber die Datenbank enthält eben nicht nur juristische Fachzeitschriften im engeren Sinn, sondern Titel- und Besitznachweise zu allem, was irgendwie mit Recht in Verbindung gebracht werden kann, und sie kommt so allein für Deutschland auf die exorbitante Zahl von 15.689 Titeln, davon 4.765, die dem Privatrecht zugerechnet werden könnten. Weltweit verzeichnet sie 86.069 juristische Sammelwerke. Aber was hat man schon von dieser Information, wenn man weiß, dass auch der Haushaltsplan der Stadt Berlin und die „Informationen des Personalamtes der Stadt Mainz" in der Datenbank nachgewiesen sind!

Ich musste also andere Wege beschreiten und mich mit Schätzwerten begnügen. Die Rechtsbibliographie Kuselit[*2] verzeichnet für Deutschland 789 aktuelle juristische Zeitschriften, wertet allerdings – wenngleich in geringer Zahl – auch historische, politische, wirtschaftswissenschaftliche und soziologische Zeitschriften aus. Der bibliothekarische Dienst meiner Universität[*3] schätzt deshalb auf dieser Grundlage die Zahl der deutschen rechtswissenschaftlichen Zeitschriften auf ca. 700; etwa ein gutes Drittel von ihnen soll sich zumindest auch mit privatrechtlichen Themen befassen. Die Zahl der deutschsprachigen juristischen Zeitschriften (d.h. unter Einrechnung Österreichs, der Schweiz und Liechtensteins) liegt natürlich noch etwas höher, vielleicht bei insgesamt 850.

Im Vereinigten Königreich soll es nach einer schon etwas älteren Erhebung der Universität Warwick im Jahre 1998 194 rechtswissenschaftliche Zeitschriften gegeben haben[*4]; rechnen wir also heute mit ca. 200. Der Portugalreferent unseres Osnabrücker Instituts zählt für sein Land 50 im heutigen Buchhandel erhältliche juristische Fachzeitschriften[*5], der Italienreferent gleich das Neunfache, nämlich 453.[*6] Die entsprechende Recherche für Irland ergab 32 Titel, incl. der nordirischen Zeitschriften[*7], diejenige für Griechenland 62[*8], diejenige für Ungarn 102[*9], diejenige für Belgien die erstaunliche Zahl 226[*10] und eine datenbankgestützte Recherche für Polen insgesamt 297 Titel. Zusammen mit den dort nicht erfassten Zeitschriften dürfte sich für Polen eine Gesamtzahl von ca. 350 juristischen Fachzeitschriften ergeben.[*11] Weitere Zahlen habe ich leider nicht ermitteln können. Für Frankreich und Spanien muss man noch einmal mit großen, in den übrigen Ländern dagegen mit geringeren Zahlen rechnen. Eine verlässliche Hochrechnung auf die Staaten der Europäischen Union ist mir gleichwohl nicht möglich gewesen. Wenn man eine Größenordnung haben will, wird man vielleicht mit einer Zahl um die 4.000 nicht völlig falsch liegen. Das entspräche einer juristischen Fachzeitschrift auf etwa 125.000 Unionsbürger. Europa, das jedenfalls lässt sich sagen, hat einen enormen ‚output' an juristischen Publikationen.

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1 Zugänglich unter http://www.zeitschriftendatenbank.de/suche/zdb-katalog.html (10.05.2010).

2 Zugänglich unter http://www.kuselit.de/cms/index.php (nur mit Password nutzbar).

3 Ich danke besonders Frau Dipl.Bibl. Friederike Dauer, Osnabrück.

4 Zugänglich unter http://www2.warwick.ac.uk/fac/soc/law/elj/directory/ (10.05.2010).

5 Ich verdanke diese Recherche Herrn José Carlos de Medeiros Nóbrega, Osnabrück.

6 Recherche von Fabio Massimo Scaramuzzino, Osnabrück.

7 Recherche von Padraic McCannon, Osnabrück.

8 Recherche von Tina Kalouta, Osnabrück.

9 Nach einer Recherche von Ferenc Szilágyi, Osnabrück, und einer fernmündlichen Auskunft der ungarischen Parlamentsbibliothek (der zentralen juristischen Bibliothek des Landes) verfügt Ungarn über 98 gedruckte und vier elektronische (*Jogelméleti Szemle*: http://jesz.ajk.elte.hu/ (10.05.2010); *Themis:* http://www.ajk.elte.hu/index.asp (10.05.2010); *Debreceni Jogi Műhely*: http://www.law.klte.hu/jogimuhely/02_hun_index.htm (10.05.2010) und *De Iurisprudentia et iure publico*: http://www.dieip.hu/ (10.05.2010)) juristische Zeitschriften.

10 Nach einer Recherche von Xavier Borremans, Osnabrück, der das Verzeichnis der Université Libre de Bruxelles ausgewertet hat: http://www.bib.ulb.ac.be/fr/bibliotheques/bibliotheque-de-droit/collections/revues-en-droit-classees-par-pays/revues-en-droit-belge/index.html (10.05.2010).

11 Recherche von Mateusz Badowski, Osnabrück.

3. Arten und Veränderungen

Aus der großen Menge rechtswissenschaftlicher Zeitschriften sind für unsere Zwecke allerdings nur einige wenige wirklich relevant. Zwar befasst man sich in vielen Ländern der Welt auch mit Fragen der Rechtsangleichung in Europa, in China, Japan, Korea, Russland und Südafrika z. B., und in einigen dieser Länder finden sich sogar spezielle Zeitschriften zu unserem Thema, etwa das Moskauer *European Legal Cultures* und das auch in Europa nicht ganz selten zitierte *Tulane European and Civil Law Forum.* Fragen der Rechtsangleichung in Europa werden außerdem natürlich auch von den allgemeinen Zeitschriften zur Rechtsvergleichung aufgegriffen, u.a. von dem *American Journal of Comparative Law* und dem *Electronic Journal of Comparative Law.* Die in den außereuropäischen Ländern veröffentlichten Zeitschriftenbeiträge sind freilich ihrer Zwecksetzung gemäß oft doch mehr beschreibender als analytischer Natur. Sie stellen der jeweiligen nationalen Leserschaft vor, was in Europa geschieht. Aufsätze, mit denen sich ein Autor unmittelbar in die hier laufenden Debatten einschalten will, veröffentlicht er dort also besser nicht.

Aber auch in Europa, genauer: in den Ländern der Europäischen Union, bleibt die Zahl der für unser Thema relevanten Zeitschriften letztlich doch überschaubar. Die zahlreichen Titel zum öffentlichen Recht und zum Strafrecht scheiden von vornherein aus der Betrachtung aus, nicht freilich die oft bemerkenswert weltoffenen Zeitschriften zum Arbeits- und Sozialrecht, und auch nicht diejenigen zum Recht des Geistigen Eigentums, des Gesellschafts- und des sonstigen Wirtschaftsrechts. In der Natur der Sache liegt es, dass die durchaus umfangreiche Zeitschriftenliteratur zum Internationalen Privatrecht und zum internationalen Zivilverfahrensrecht eine kontinuierlich steigende Zahl von Beiträgen zu gemeinschaftsrechtlich überlagerten Fragen bringt: Große Teile dieser Materien sind eben längst schon reines Gemeinschaftsrechtrecht. Nur noch in Teilbereichen – dem Internationalen Familien- und dem Internationalen Erbrecht z. B. – geht es hier noch um rechtspolitisch streitige Angleichungsfragen; alles andere ist bereits angeglichen und wird deshalb schriftstellerisch nicht anders als „ganz normales" innerstaatliches Recht begleitet und dogmatisch überformt. Generell sind die Liebhaber des Internationalen Privatrechts aber sozusagen die „natürlichen Gegner" der Angleichung des materiellen Rechts. Letztere wird als Gefahr für die Artenvielfalt im Garten des Kollisionsrechts begriffen. Zeitschriften wie der weltberühmten *Revue critique de droit international privé* werden deshalb typischerweise Artikel angeboten, welche den Prozess der Angleichung des europäischen Vertragsrechts als überflüssig und unerwünscht „entlarven".[*12]

In der europäischen Zeitschriftenlandschaft haben sich in den vergangenen Jahren einige signifikante Veränderungen zugetragen. Bemerkenswert ist zunächst das Auftauchen zahlreicher elektronischer Publikationsformen. Man findet sie heute in nahezu allen Mitgliedstaaten. Soweit es um darin veröffentlichte Aufsätze geht, scheint mir ihr Einfluss auf aktuelle Debatten zwar noch vergleichsweise gering zu sein; die wirkmächtige deutsche Kommentarliteratur z. B. nimmt von dieser Form des Publizierens ebensowenig Notiz wie die geradezu überbordende Ausbildungsliteratur.

Die elektronischen Publikationsformen sind aber dort auf dem Vormarsch, wo es sich um die Veröffentlichung von Gerichtsentscheidungen handelt, und das kann wiederum dramatische Rückwirkungen auf die rechtswissenschaftliche Aufsatzkultur haben. So sind z. B. das portugiesische *Boletim do Ministério da Justica* (*BMJ*) vollständig und die *Colectânea de Jurisprudência* bzw. die *Colectânea de Jurisprudência do Supremo Tribunal* jedenfalls als Printmedien[*13] eingestellt worden, weil das Justizministerium eine umfassende Rechtsprechungsdatenbank im Internet verfügbar gemacht hat.[*14] Das *BMJ* ist damit auch als Plattform für juristische Debatten weggefallen. Es war zeitweilig die vermutlich wichtigste Rechtszeitschrift Portugals. Vaz Serra hat in ihr alle seine (durchweg rechtsvergleichend angelegten) Studien im Vorfeld der Kodifikation des Jahres 1965 veröffentlicht; an der Debatte um den CFR und die weitere Europäisierung des Privatrechts hat das *BMJ* nun keinen Teil mehr.

Von Land zu Land unterschiedlich kann die Veröffentlichungskultur aber auch noch in anderer Beziehung sein. Es gibt Länder, in denen jede Rechtsfakultät, die etwas auf sich hält, eine eigene Zeitschrift herausgibt (in dem eben erwähnten Portugal sind das z. B. Coimbra, Porto und die beiden Lissaboner Fakultäten), es gibt Länder, in denen wenigstens einige herausragende Fakultäten eigene Zeitschriften veröffentlichen (z. B. Cambridge, Prag und Oxford), und es gibt Länder, in denen so etwas völlig unüblich ist (wie z. B. in Frankreich und Deutschland).

Die für unser Thema wichtigste Veränderung in der europäischen Zeitschriftenlandschaft dürfte aber das Auftauchen einer großen Zahl von Zeitschriften zum europäischen Recht sein, oft speziell zum europäischen Privatrecht oder sogar zu einem seiner Teilgebiete, etwa dem europäischen Gesellschaftsrecht[*15] oder dem

[12] Beispielsweise H. J. Sonnenberger. L'harmonisation ou l'uniformisation européenne du droit des contrats sont-elles nécessaires? Quels problèmes suscitent-elles? – Réflexions sur la Communication de la Commission de la CE du 11 juillet 2001 et la Résolution du Parlement européen du 15 novembre 2001. – Rev.crit.dr.internat.privé 91 (2002), S. 405–434.

[13] Sie bestehen weiterhin als elektronische Erzeugnisse: www.colectaneadejurisprudencia.com (10.05.2010).

[14] Zugänglich unter www.dgsi.pt (10.05.2010).

[15] Ein Beispiel liefert die in den Niederlanden erscheinende *European Company Law.*

europäischen Vertragsrecht, letzteres z. B. in Gestalt der in Berlin erscheinenden *European Review of Contract Law (ERCL*).*[16] Die in ihnen veröffentlichten Beiträge stellen so etwas wie die Speerspitze der gesamteuropäischen Diskussion dar. Sie bringen entweder vergleichende Studien zum Recht einzelner Mitgliedstaaten oder Analysen von Rechtssetzungsprojekten auf Gemeinschaftsebene bzw. von Urteilen der europäischen Gerichte. Selbst die Autoren eines kleinen Landes wie Estland können sich auf diese Weise – in ihrem Fall mit der *Juridica International* – europaweit Gehör verschaffen. Ein ebenfalls eher kleines Land wie Ungarn verfügt gleich über vier Zeitschriften, die sich auf das Recht der bzw. innerhalb der Europäischen Union konzentrieren*[17], Portugal*[18] und Griechenland*[19], wenn man die Zeitschriften für Rechtsvergleichung mit hinzurechnet, über drei, und auch Irland hat sein *Irish Journal of European Law*.

Vielleicht trete ich aber niemandem zunahe, wenn ich die These wage, dass die für die Europäisierung des Privatrechts vermutlich wichtigsten Zeitschriften derzeit in Deutschland, Italien und den Niederlanden erscheinen. Ganz auf unser Thema ausgerichtet sind in Deutschland neben der *Zeitschrift für Gemeinschaftsprivatrecht (GPR)* vor allem die einflussreiche *Zeitschrift für Europäisches Privatrecht (ZEuP),* in Italien *Europa e diritto privato* und in den Niederlanden die dortige Konkurrentin der ZEuP, die *European Review of Private Law (ERPL)*. Besonderer Hervorhebung bedarf ferner das *Maastricht Journal of European and Comparative Law.* Die vorerwähnte ZEuP hat es in einem deutschen „Ranking juristischer Fachzeitschriften" sogar auf den 13. Platz gebracht. Die Siegerin dieses Rankings, die Tübinger *Juristenzeitung*, war so vornehm – und hat dadurch ihren Ruf nur noch vermehrt –, es nicht in ihrem Hauptteil, sondern in dem gewöhnlich nicht zum Binden vorgesehenen Teil mit den Sternchenseitenzahlen abzudrucken.*[20] Die Autoren des Rankings bemerken darin, dass ihre Befragten zwar immerhin 31 ausländische Zeitschriften zur Aufnahme in die Liste vorgeschlagen hätten, keine von ihnen jedoch zureichend oft benannt worden sei, um berücksichtigt werden zu können. Die meisten Nennungen hätte noch die *Common Market Law Review* erzielt.*[21]

Die großen, klassischen Zeitschriften zur Rechtsvergleichung haben ihre allgemeine Ausrichtung zwar beibehalten, sich aber doch in erheblichem Maße auch des Themas der europäischen Privatrechtsangleichung angenommen. *Rabels Zeitschrift für ausländischen und internationals Privatrecht (RabelsZ)* gehört z. B. in diese Kategorie, aber natürlich auch die belgische *Revue de droit international et de droit comparé*, in der vor kurzem eine größere kritische Studie zum DCFR erschienen ist.*[22] Bemerkenswert ist aber vor allem der hohe Europäisierungsgrad einiger neuerer schuldrechtlicher Zeitschriften, also Zeitschriften, denen man vom Titel her kaum ansieht, welch intensive europäische Ausrichtung sie haben. Beispiele aus dieser Kategorie liefern die deutschsprachige *Zeitschrift für das gesamte Schuldrecht* und die französische *Revue des contrats*. Letztere hat soeben die zahlreichen Beiträge zu der Pariser Konferenz 2008 der französischen Ratspräsidentschaft zum (D)CFR veröffentlicht*[23], und sie wird Anfang 2010 auch die von Jacques Ghestin besorgte französische Übersetzung der model rules der ersten drei DCFR Bücher publizieren.

Eine großartige Informationsquelle über alle neueren Publikationen zur Rechtsangleichung in Europa sind die meisterhaft von Ewoud Hondius regelmäßig für die *NTBR*, die *Nederlands Tijdschrift voor Burgerlijk Recht*, verfassten *Kronieken*. In ihnen finden sich neben Monographien auch alle wichtigen Beiträge zu unserem Thema in den führenden Fachzeitschriften der lateinischen, der englischen und der deutsch-niederländischen Sprachenfamilien rezensiert. Reichhaltige bibliographische Hinweise finden sich laufend auch in der von Unidroit in Rom zweisprachig herausgegebenen *Revue de droit uniforme/Uniform Law Review*. Ihr Lieblingssujet sind natürlich weder die PECL noch der DCFR, sondern die PICC, die Unidroit Principles of International Commercial Contracts. Immerhin hat die Uniform Law Review soeben aber eine umfangreiche Synopse der Unidroit Principles und der entsprechenden model rules des DCFR herausgebracht.*[24]

[16] Sie bringt zahlreiche Publikationen zum DCFR bzw. zum CFR, siehe jüngst z. B. wieder die schöne Studie von A. Cristas. Portuguese Contract Law: The search for regimes unification? – European Review of Contract Law (ERCL) 2009, S. 357–367.

[17] Nämlich *Európai jog: az Európai Jogakadémia folyóirata / Európai Jogakadémia* (Budapest seit 2001 [Europäisches Recht: Zeitschrift der europäischen Rechtsakademie]); *Európai bírósági ítéletek* (Budapest seit 2003; enthält Entscheidungen des EUGH); *Európai tükör: a Külügyminisztérium folyóirata / Magyar Köztársaság Külügyminisztériuma* (Budapest seit 1996 [Europäischer Spiegel: Zeitschrift des Außenministeriums]) und *Földrész: nemzetközi és európai jogi szemle: referált nemzetközi és európai jogi folyóirat* **(**Budapest seit 2008 [Kontinent: Rundschau zum internationalen und europäischen Recht]).

[18] *Scientia ivridica, Temas de Integração* und die *Revista de Estudos Europeus*.

[19] *Elliniki Epitheorisi Evropaikou Dikaiou* (Überblick über das Europäische Recht); *Kinodikion*; *Revue hellenique de droit international*.

[20] M. Gröls, T. Gröls. Ein Ranking juristischer Fachzeitschriften. – JZ 2009, S. 488–499.

[21] AaO S. 497.

[22] S. Grundmann. La structure du DCFR – Quelle forme pour un droit européen des contrats? – Rev.dr.int.dr.comp. 2009, S. 423–453.

[23] Revue des contrats 2009, Heft 2.

[24] M. J. Bonell, R. Peleggi. Unidroit Principles of International Commercial Contracts and Draft Common Frame of Reference: a Synoptical Table. – Rev.dr.unif./Unif.L.Rev. 2009, S. 437–554.

4. Bedeutung und Einfluss

Die Diskussion um die Harmonisierung des Europäischen Privatrechts hat sich für geraume Zeit ganz überwiegend in Spezialzeitschriften abgespielt. Damit meine ich nicht so sehr Überblicks- und Einführungsartikel zu irgendeiner neuen Richtlinie oder Verordnung, sondern ich meine die Diskussion um die *Principles of European Contract Law* (PECL), den (D)CFR und das Optionale Instrument, d.h. die Diskussion um eine Angleichung der Kernmaterien des europäischen Obligationenrechts. In diesem Kontext sei erwähnt, dass auch die ersten Übersetzungen der hier erarbeiteten Modellregeln in die Sprachen, die nicht Arbeitssprachen der jeweiligen Forschergruppen waren, typischerweise in den genannten Spezialzeitschriften erschienen sind. Dazu gehören insbesondere die meisten PECL-Übersetzungen.[*25] Die bislang vorliegenden Übersetzungen des DCFR sind dagegen bereits in allgemeineren Rechtszeitschriften erschienen. Neben der erwähnten französischen Übersetzung gilt das z. B. für die tschechische Übersetzung der Interim Outline Edition, die in der *Karlovarská Právní Revuei*, der Zeitschrift der Juristischen Fakultät der Prager Karlsuniversität, publiziert wurde.[*26] Vielleicht ist das ein gutes Zeichen; die Europäisierung des Privatrechts beginnt, weitere Kreise anzusprechen.

Aufsätze in allgemeinen juristischen Zeitschriften (d.h. in Zeitschriften ohne besondere Spezialisierung) dringen wohl überall in Europa viel tiefer in das Bewusstsein der Fachöffentlichkeit ein als Beiträge in den genannten Spezialzeitschriften. Ich habe das am eigenen Leibe erlebt, nachdem plötzlich und ohne mein Wissen oder gar meine Genehmigung in den im Ausland eher unbekannten, in Frankreich aber viel gelesenen *Annonces de la Seine* eine Übersetzung eines von mir im Plenarsaal des Kassationshofes gehaltenen Vortrages über die Europäisierung des Schuldrechts erschienen war[*27]; meine These, dass modernes Schuldrecht die Zukunft nur gewinnen kann, wenn es europäisch ist, löste im Frankreich des Jahres 2002 zwar einen Sturm der Entrüstung aus[*28], aber sie wurde wenigstens wahrgenommen. Als Hans Schulte-Nölke und ich drei Jahre später die deutsche Fachöffentlichkeit über die Gründung des Exzellenznetzwerkes zum DCFR unterrichten wollten, war es auf unserer Seite des Rheins noch nicht einmal möglich, die auflagenstarke *Neue Juristische Wochenschrift* für das Thema zu interessieren; wir mussten in die weit weniger prominente *Zeitschrift für Rechtspolitik* ausweichen.[*29] Kaum jemand wird unseren Aufsatz damals gelesen haben!

Inzwischen wenden sich allerdings auch die allgemeinen, „großen" juristischen Zeitschriften dem Thema des Common Frame of Reference zu, selbst besagte *Neue Juristische Wochenschrift*.[*30] Das ist für seine Verbreitung von ausschlaggebender Bedeutung. Juristen nehmen nicht gerne Texte in fremder Sprache zur Kenntnis; sie haben aus ihrer Sicht nicht „wirklich" etwas mit Recht zu tun. Es ist deshalb ganz etwas anders, ob Ole Lando einen seiner zahlreichen Aufsätze in Deutschland, England oder Frankreich veröffentlicht, oder ob er auch einmal in seinem eigenen Lande, in dänischer Sprache und in der führenden *Ugeskrift for Retsvæsen* schreibt.[*31] Erst im letzteren Fall erreicht die Botschaft auch die heimische Leserschaft. Ähnlich liegt es, wenn Sisula-Tulokas ihre Studien zum Deliktsrecht des DCFR in der führenden *Tidskrift utgiven af Juridiska Föreningen i Finnland* auf schwedisch veröffentlicht.[*32]

Juristen wissen zudem fein zwischen den verschiedenen Publikationsorganen zu unterscheiden. Welche Auflagenstärke das rumänische *Buletinul de informare legislative* hat, vermag ich zwar nicht zu beurteilen, aber ich bin mir sicher, dass einem Bericht wie dem von Vitca über den DCFR[*33] auch und gerade deshalb besonderes Gewicht beigemessen wird, weil es sich bei dem Bulletin um das Informationsblatt des rumänischen *Consiliul Legislativ*, dem Gesetzgebungsrat des Landes, handelt und weil der Autor den für das Privatrecht zuständigen Bereich dieses Rates leitet.

Dem jeweiligen Veröffentlichungsorgan wohnen in der Wahrnehmung der Fachöffentlichkeit oft ein Seriositäts- und ein Relevanzindikator inne. Erst als das zunächst rein international betriebene Projekt der *Study*

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[25] Übersicht über sie in http://frontpage.cbs.dk/law/commission_on_european_contract_law/.

[26] Die Übersetzung wurde von einem von Professor Přemysl Raban geleiteten Team verwirklicht und in Karlovarská Právní Revuei 2/2008, 1-222 veröffentlicht.

[27] C. von Bar. Des principes à la codification: perspectives d'avenir pour le droit privé européen. – Les Annonces de la Seine, 3. Juni 2002, no. 33, S. 1–4

[28] Z.B. G. Cornu. Un code civil n'est pas un instrument communautaire. – Recueil Dalloz (D) 2002 Chron. S. 351–352; Y. Lequette. Quelques remarques à propos du projet de code civil européen de M. von Bar. – D. 2002, S. 2202–2214.

[29] C. von Bar, H. Schulte-Nölke. Gemeinsamer Referenzrahmen für europäisches Schuld- und Sachenrecht. – Zeitschrift für Rechtspolitik (ZRP) 2005, S. 165–168.

[30] Z.B. H. Schulte-Nölke. Arbeiten an einem europäischen Vertragsrecht – Fakten und populäre Irrtümer. – NJW 2009, S. 2161–2167 sowie N. Jansen, R. Zimmermann. Was ist und wozu der DCFR? – NJW 2009, S. 3401–3406.

[31] Wie in O. Lando, P. A. Nielsen. Europæisk obligationsret. – Ugeskrift for retsvæsen (UfR) 2008 B, S. 187–193.

[32] Z. B. L. Sisula-Tulokas. Ersättning för ideell personskada – Norden och utvecklingen i Europa. – Tidskrift utgiven av Juridiska Föreningen i Finland (JFT) 2000, S. 634–653.

[33] L. M. Vitca. Calrului comun de referință în materia dreptului privat european: baza de pornire a viitorului Cod civil European. – Buletinul de informare legislativa 2009, S. 3–11.

Group und der *Acquis Group* in dem würdigen *Archiv für die civilistische Praxis* erörtert wurde[*34], scheint es für die gesamte deutsche Zivilrechtswissenschaft zum Thema geworden zu sein, und ebenso wichtig war es für den DCFR, dass uns die *Kwartalnik Prawa Prywatnego* eine Plattform zur Vorstellung unserer Konzeption in polnischer Sprache gab.[*35]

Wenn man sich allerdings, als Gegner der DCFR-Bewegung, Alarm zu schlagen bemüßigt fühlte, dann musste die Auseinandersetzung in auch von „praktischen" Juristen gelesene Zeitschriften getragen werden, also zum Beispiel in das niederländische *Weekblad voor privaatrecht, notariaat en registratie*[*36], in den französischen Recueil Dalloz[*37], in die englische *Law Quarterly Review*[*38] und in die deutsche *Juristenzeitung*. Wer sich kurzfristig einer Breitenwirkung versichern will, mache es wie mein Münchener Kollege *Eidenmüller* und seine Co-Autoren, publiziere in besagter *Juristenzeitung*[*39] und sorge außerdem dafür, dass eine große Tageszeitung schon vor Erscheinen des Aufsatzes über ihn berichtet.[*40] Thesen wie die, dass der DCFR die Vertragsfreiheit gefährde, setzen sich dann, wenn man kritisch ist und Glück hat, in einigen Zirkeln erst einmal fest, ganz gleich, ob der Vorwurf stimmt oder nicht.[*41]

Wie dem aber auch sei: der Umstand, dass sich die Arbeiten am DCFR spätestens seit 2008 ihren Weg auch in die „großen" Fora des Privatrechts gebahnt haben, stellt einen Fortschritt dar. Er ist es auch deshalb, weil sich die Diskussion anfangs überwiegend nicht einmal in den Spezialzeitschriften (und schon gar nicht in der Gebrauchsliteratur) abgespielt hat, sondern in Tagungsbänden und Festschriften, also in den konkurrierenden Publikationsformen für juristische Aufsätze. Die große Zahl an Tagungsbänden zu unserem Thema erklärt sich aus dem Bedürfnis der Mitglieder der Forschergruppen, durch persönliche Kontakte und im unmittelbaren Gespräch mit Spezialisten Anregungen zu gewinnen und eine pro-europäische Stimmung für das Projekt zu erzeugen. Der schier unendlichen Fülle von Missverständnissen und Sorgen, so dachten viele von uns in den ersten Jahren, konnte, wenn überhaupt, nur durch den Versuch begegnet werden, Vertrauen zu schaffen. Aber genau da wuchs dann ungewollt auch ein Problem heran: die so entstandene Spezialliteratur blühte eben doch nur im Verborgenen, blieb einem schmalen Leserkreis vorbehalten und verschärfte das Gefühl vieler Juristen, ausgeschlossen zu sein.

Ähnlich lag (und liegt es teilweise noch immer) bei der Festschriftenliteratur. Den Redakteuren der juristischen Fachzeitschriften sind in den Festschriften bedeutende Konkurrenten erwachsen. Festschriften waren noch vor dreißig Jahren ein außerordentliches Ereignis; in manchen Ländern geradezu unbekannt oder so selten, dass ihre Übergabe mit der Übergabe eines Ehrendegens verknüpft wurde. Heute sind Festschriften für Professoren, die aus dem aktiven Dienst ausscheiden, etwas Alltägliches, manche Universitäten (wie z. B. Coimbra mit seinen *Studia Iuridica*) haben ganze Reihen zu dem Zweck gegründet, neben den Tagungsbänden auch der Festschriftenflut Herr zu werden. Festschriften finden sich heute überall in Europa, und da die Zahl der internationalen Kontakte seit der Gründung und den verschiedenen Beitrittswellen zu der Europäischen Union exorbitant zugenommen hat, man es als Ausländer dem Geehrten aber oft nicht zumuten will, ausschließlich über das eigene Recht zu schreiben, werden für Festschriften oft europäische oder rechtsvergleichende Themen gewählt.

5. Schluss

Dass nicht alles, was zum DCFR veröffentlicht worden ist, eine Antwort erheischt, liegt auf der Hand; außerdem war in der abschließenden Phase der Redaktion der sechsbändigen „full edition"[*42] – die meisten der zuvor erwähnten Zeitschriftenbeiträge stammen schließlich aus 2008 und 2009 – ein literarisches Eingehen auf sie gar nicht möglich. Insgesamt habe ich freilich ohnehin den Eindruck, dass manche Diskutanten, Befür-

[34] Über das Entwicklungspotential des Referenzrahmens hier erstmalig T. Pfeiffer. Methodik der Privatrechtsangleichung in der EU. – AcP 2008 (208), S. 240–244.

[35] C. von Bar. Między projektem naukowym a politycznym kształtowaniem woli: funkcje i struktura Wspólnego Systemu Odniesienia. – Kwartalnik Prawa Prywatnego 2009 (VIII) 2, S. 357–370.

[36] Z.B. J. M. Smits. Het ontwerp-Gemeenschapelijk Referentiekader (GRK) voor een Europees privaatrecht. – Weekblad voor privaatrecht, notariaat en registratie (WPNR) 2008, S. 109–111.

[37] Nachweise oben in Fn. 28.

[38] Z.B. S. Whittaker. A Framework of Principle for European Contract Law? – L.Q.R. 2009 (125), S. 616–647.

[39] H. Eidenmüller, F. Faust, H. C. Grigoleit, N. Jansen, G. Wagner, R. Zimmermann. Der Gemeinsame Referenzrahmen für das Europäische Privatrecht. – Juristenzeitung (JZ) 2008, S. 529–550.

[40] In diesem Fall die Frankfurter Allgemeine Zeitung, siehe R. Müller. Ungesteuerte Richtermacht. – Frankfurter Allgemeine Zeitung (FAZ) vom 5. Juni 2008, S. 8.

[41] Natürlich stimmt er nicht: C. von Bar. Die Struktur des Common Frame of Reference. – R. Schulze, C. von Bar, H. Schulte-Nölke (Hrsg.). Der akademische Entwurf für einen Gemeinsamen Referenzrahmen. Tübingen 2008, S. 35–45.

[42] C. von Bar, E. Clive (eds.). Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition. Munich: Sellier European Law Publishers 2009. Sechs Bände, xxii, 6.563 S.

worter wie Kritiker, die rechtspolitische Wirkmächtigkeit ihrer Beiträge überschätzen. Rechtswissenschaftler schreiben überwiegend für die eigene Zunft. „Stakeholder" (oder Lobbyisten) dagegen lesen nach meiner Beobachtung nur einen geringen Ausschnitt aus dem großen Kreis der juristischen Fachzeitschriften, und über das Lektüreverhalten der politischen Entscheidungsträger kann ich nur Mutmaßungen anstellen. Sie nehmen wahrscheinlich eher Artikel in der allgemeinen Presse wahr (die es auch zum DCFR inzwischen zahlreich gibt), doch sind solche Artikel wie Strohfeuer: energiegeladen und schnell aufgezehrt.

Anders die Beiträge zu den juristischen Fachzeitschriften. Letztere sind die Transformationsriemen der Rechtsentwicklung, und Entwicklung des Privatrechts bedeutet heute Entwicklung eines Europäischen Privatrechts. Wir brauchen seine Vision, um zusammenzuführen, was zusammengehört. Mein Eindruck ist, dass sich die überwiegende Zahl der einschlägigen juristischen Fachzeitschriften dieser Verantwortung inzwischen bewusst geworden ist.

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Multiple Modernität in den juristischen Zeitschriften – Rechtstheorie ist super![*]

I. Juristische Zeitschriften als systemische Bestandteile der Rechtskultur

Es erscheint mir sehr vielversprechend, im Rahmen dieser Tagung eine Auswahl juristischer Zeitschriften unter dem Aspekt zu untersuchen, welchen *Zugang* sie (i) zur Analyse staatlich organisierter Rechtssysteme als einzelner und (ii) im Vergleich zueinander eröffnen. Dies kann in nationaler, aber auch in internationaler Perspektive geschehen. Es geht mir darum, wie der jeweilige *Beitrag* dieser Zeitschriften zur Charakterisierung moderner Rechtssysteme und des zugehörigen modernen Rechtsdenkens einzuschätzen ist.

Die von den Veranstaltern getroffene Entscheidung, sich – was den zeitlichen Rahmen angeht – auf einige ausgewählte, führende Rechtszeitschriften in diversen nordeuropäischen Ländern seit dem 19. und vereinzelt auch seit dem 20. Jahrhundert zu konzentrieren, erscheint problemführend und richtig gewählt, auch wenn dabei nur ein Ausschnitt aus dem modernen Recht in den Fokus der Betrachtung gerückt wird.

Da es sich hier um juristische Zeitschriften aus Dänemark und Schweden, aus Finnland, Estland und Lettland, aber auch aus Deutschland und Russland handelt, haben wir es mit einem halbwegs kohärenten, in sich konsistenten Gegenstand zu tun. Natürlich durfte Russland hier nicht fehlen, vor allem was die Rechtszeitschriften im 19. Jahrhundert angeht. Schließlich geht es heute – in Rückanbindung an die Rechtsgeschichte und das seinerzeit geltende Recht – um eine Wiederanknüpfung an die Rechtslage und eine Rekonstruktion des russischen Rechtsdenkens *vor* der Oktoberrevolution.[*1] Ohne eine wie auch immer beschaffene Kooperation mit Russland kann auch das vereinigte Europa (EG, EU) seine eigenständige Existenz nicht gewährleisten. Russland wäre zu groß, um es in die Europäische Union aufzunehmen.[*2] Daher erscheint die Kooperation und Kommunikation im Rahmen einer Modernitätspartnerschaft mit dem heutigen Russland vonnöten.

Im Folgenden werden die juristischen Zeitschriften, welcher Art auch immer, als Kommunikationsmedien betrachtet. Sie vermitteln in der juridischen Kommunikation von Recht vermöge der Schriftsprache (Alltagssprache, Fach- und Berufssprache des Juristen) in gedruckter Form oder auf elektronischem Wege, auf dem

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1 Eingehend hierzu: S. Kabanov. Recht und Rechtskommunikation in modernen Rechtssystemen. Zur rechtstheoretischen Standortbestimmung des russischen Zivilrechts im Kontext der deutschen und europäischen Rechtsordnung. Berlin 2010, S. 95 *ff.*, 153 *ff.*

2 W. Bergmann, W. Krawietz. Perestrojka als politisch-rechtliches Prinzip? Herkunft und Zukunft einer Leitidee in zivilgesellschaftlicher und globaler Perspektive. – Rechtstheorie 40 (2009), S. 149–158.

sie von den Lesern der jeweiligen Zeitschrift ‚heruntergeladen' werden können, die normativen Rechtsinhalte, die in der Kommunikation von Recht benötigt werden. Juristische Zeitschriften sind somit kommunikative „Verbreitungsmedien", hier verstanden im Sinne der Medientheorie Luhmanns.[*3]

Mein Zugang zum Rahmenthema ist die Rechtstheorie. Ich unterscheide im Folgenden zwischen (i) Rechtstheorie als einer – heute relativ eigenständigen – Disziplin der Rechtswissenschaft und (ii) der gleichnamigen Zeitschrift *Rechtstheorie*. Im Rahmen und als Teile dieser Zeitschrift sind auch zwei Sonderhefte erschienen, die sich mit der Rechtstheorie und Rechtsphilosophie in Estland befassen.[*4] Neben und mit der eigentlichen Zeitschrift zu berücksichtigen sind ferner bislang 21 Beihefte mit den Proceedings Internationaler Symposien, Weltkongresse u.a.m. Sie werden ergänzt durch die im selben Verlag erscheinende Reihe monographischer *Schriften zur Rechtstheorie* (mit gegenwärtig insgesamt 253 Werken), die gleichfalls den Themen und Problemen dieses Gegenstandsbereichs gewidmet sind, aber nicht unmittelbar zur Zeitschrift gehören.

Die inzwischen 40 Jahrgänge der Zeitschrift *Rechtstheorie* – sie erscheint seit 1970 – zeigen mehr als andere juristische Zeitschriften, dass in der modernen Gesellschaft und im modernen Recht tiefgreifende evolutionäre Veränderungsprozesse im Gange sind. Sie werden mit der rechtstheoretischen Kennzeichnung des Rechts bzw. des Rechtsdenkens als *Modernisierung*[*5], als *Transition*[*6] oder als *Transformation*[*7] der Rechtsordnung nur unzureichend beschrieben.

Ich gehe hier nicht der Frage nach, was sich daraus ergibt, dass die Bezeichnung *Law Journal* im Deutschen mit „juristische Zeitschrift", aber auch mit „Rechtszeitschrift" übersetzt werden kann und wird. Letzteres bedeutet eine Erweiterung des Gegenstandsbereichs, die auch kennzeichnend für das moderne deutsche Recht ist und eine perspektivische Expansion der Rechtsbetrachtung beinhaltet. Sie geht weit über das hinaus, was die juristischen Professionen (Richter, Rechtsanwalt, Staatsanwalt pp.) am geltenden Recht und der Rechtsdogmatik interessiert und führt nahezu zwangsläufig zu einer Revision des Rechtsbegriffs. Ich zähle deshalb gewisse Jahrbücher, die eben diese Entwicklung dokumentieren und vorantreiben, zu den Rechtszeitschriften, wie beispielweise das *Jahrbuch für Rechtstheorie und Rechtssoziologie* (seit 1970) oder das *Russian Yearbook of Legal Theory* [*Rossijskij ežegodnik teorii prava*], das seit 2008 in russische Sprache erscheint, oder *Doxa* in Spanien. Sie sind dadurch gekennzeichnet, dass in ihnen die rechtsinhaltliche Beschäftigung mit der konventionellen Rechtsdogmatik (*legal dogmatics*) an den Rand rückt und den – im engeren Sinne professionellen – juristischen Zeitschriften überlassen bleibt, deren Erkenntnisinteressen aus leicht nachvollziehbaren Gründen gewöhnlich nicht auf die Gewinnung rechtstheoretischer Einsichten gerichtet sind. Jahrbücher sind eben dadurch in hervorragendem Maße geeignet, jenseits des Alltagsgeschäfts[*8] des Juristen einen kommunikativ-verstehenden Zugang zur jeweiligen Rechtskultur[*9] zu eröffnen, deren systemische Bestandteile sie sind. Ein Überblick über diese Rechtszeitschriften, der naturgemäß weit über die Grenzen einer nationalen und regionalen Rechtsbetrachtung hinausreichen müsste und die weltgesellschaftliche Entwicklung allen Rechts in Betracht zu ziehen hätte, ist hier nicht beabsichtigt und könnte auf dem knappen Raum auch gar nicht geleistet werden. Die detaillierte inhaltliche Kenntnis dieser Rechtszeitschriften kann durch meine Darstellung nicht ersetzt, sondern muss hier vorausgesetzt werden.

Wenn ich im folgenden für eine stärkere Berücksichtigung der Rechtstheorie in *allen* juristischen Zeitschriften plädiere, so nicht im Interesse von Rechtstheorie als Grundlagenwissenschaft der Rechtswissenschaft, sondern im Interesse einer theoretisch notleidenden dogmatischen Rechtswissenschaft, die – wie allenthalben deutlich wird – dabei ist, ihr wissenschaftliches Profil und Prestige zu verlieren, weil sie mit den zeitgenössischen Neuansätzen in der Methodologie und Theorie des Rechts nicht schrittgehalten hat. Wohlgemerkt: Es handelt sich hier *nicht* darum, eine *Apologie für Rechtstheorie* zu betreiben. Dies ist bei den raschen Erkenntnisfortschritten, die in den letzten Jahrzehnten auf den diversen Problemfeldern der modernen allgemeinen Theorie

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[3] N. Luhmann, S. Systeme. Grundriss einer allgemeinen Theorie. Frankfurt am Main 1984, S. 220 *ff.*, 224 *f.*

[4] Vgl. I. Sonderheft Estland, Rechtstheorie 31. Band (2000), Heft 3 / 4: W. Krawietz, R. Narits (Hrsg.). Gesetzgebung und Rechtspolitik. Berlin 2002. Ferner: II. Sonderheft Estland, Rechtstheorie 38. Band (2007), Heft 2 / 3: W. Krawietz, R. Narits (Hrsg.). Multiple Modernität, Globalisierung der Rechtsordnung und Kommunikationsstruktur der Rechtssysteme. Berlin 2007.

[5] Eingehend hierzu: E. E. Dais, R. Kevelson, J. M. van Dunné (Hrsg.). Consequences of Modernity in Contemporary Legal Theory. Berlin 1998; D. Wyduckel. Verhältnis von Moderne und Postmoderne in der zeitgenössischen Rechtstheorie. – Rechtstheorie Beiheft 19 (1998), S. VII–XI; B. J. Edgeworth. Legal Postmodernization. – Rechtstheorie Beiheft 19 (1998), S. 109–121, 114 *ff.*, 117 *f.*

[6] W. Krawietz, E. Pattaro, A. Erh-Soon Tay (Hrsg.). Rule of Law. Political and Legal Systems in Transition. Berlin 1997. Vgl. ferner: W. Krawietz, C. Varga (Hrsg.). On Different Legal Cultures, Premodern and Modern States and the Transition to the Rule of Law in Western and Eastern Europe. Berlin 2002.

[7] Zum Verhältnis von Tradition und Transformation: W. Krawietz, A. Sproede (Hrsg.). Gewohnheitsrecht – Rechtsprinzipien – Rechtsbewusstsein. Tranformationen der Rechtskultur in West- und Osteuropa. Berlin 2004.

[8] Sehr treffend hierzu: S. Strömholm. Human Rights and Philosophy of Law. – C. Dahlmann, W. Krawietz (Hrsg.). Values, Rights and Duties in Legal and Philosophical Discourse. Berlin 2005, S. 1–7, 3 *f.*, der im Hinblick auf den latenten, noch immer verbreiteten juristischen Positivismus des praktischen Rechtsbetriebs mit freundlichem Spott von der alltäglichen „bread-and-butter doctrine of practitioners" spricht.

[9] K. Veddeler. Rechtstheorie versus Kulturtheorie? Plädoyer für eine aufgeklärte Kulturtheorie des Rechts. – Rechtstheorie 29 (1998), S. 453–473; ders., Das Recht als Kultur – Was steckt dahinter? – M. Atienza *et al.* (Hrsg.). Theorie des Rechts und der Gesellschaft. Berlin 2003, S. 99–108; M. Van Hoecke. Western and Non-Western Legal Cultures. – Rechtstheorie 33 (2002), S. 97–217, 202 *ff.*, 207 *ff.*

des Rechts und der Gesellschaft, wie beispielweise der Normen- und Handlungstheorie, der Strukturtheorie von Recht und Gesellschaft und der juridischen Informations- und Kommunikationstheorie, gemacht wurden und unser juristisches Weltbild revolutioniert haben, gar nicht erforderlich.

Vielmehr geht es darum, einige Desiderate in der modernen Rechtsforschung aufzuzeigen, bei deren näherer Identifikation und Behebung die juristischen Zeitschriften als Kommunikationsmedien beizutragen vermögen.

In der höchst prekären Entwicklung der Europäisierung und Globalisierung des Rechts hilft es nicht weiter, im Gewande des Analytikers ökonomische Vernunft o.ä. zu predigen und eine wirkliche oder vermeintliche Wertegemeinschaft (Prinzipien, apriorische Werte, ‚vernünftige' Grundsätze) zu beschwören, die es nur noch zu optimieren gelte und der sich alle vernünftig Denkenden notwendigerweise anschließen müssen oder doch sollten. Wa(h)re Werte? Auch der gängige, an Kosten-Nutzen-Erwägungen orientierte politisch-rechtliche Pragmatismus nordamerikanischer philosophischer Provenienz bietet keinen gangbaren Ausweg oder gar eine sozialadäquate rechtstheoretische Begründung, wenn es um eine kritisch reflektierte normative Autopoiese des Rechts geht bis hin zur wissenschaftlich begleiteten Rechtsgewinnung im Einzelfalle. Angebracht sind hier geduldige und intensive rechtstheoretische Forschungen, die sich auf die normativen Funktionen, Strukturen und Prozesse richten, durch die das moderne Recht in der Gesellschaft (Regionalgesellschaft, Weltgesellschaft) bestimmt wird. Insofern ist Rechtstheorie, wie ich finde, wirklich super, da sie als der Königsweg erscheint, auf dem alle rechtswissenschaftliche Erkenntnis voranzuschreiten vermag.

II. Rechtskulturelle Einbettung der Rechtsordnungen und deren Rekonstruktion und Reflexion im Rahmen rechtstheoretischer Fachzeitschriften

Wir leben heute in einer *Informations-* und *Kommunikationsgesellschaft*, die in allem Erleben und Handeln auf immens gesteigerten Wissenserwerb ausgerichtet ist. Sie prägt unser gesamtes alltägliches Erleben und Handeln. Dies geschieht in einem Ausmaß, dessen wir uns sehr häufig und sehr weitgehend gar nicht bewusst werden, ganz zu schweigen von den Konsequenzen und nicht beabsichtigten Nebenfolgen, die damit in kommunikativer Hinsicht verbunden sind. Dies gilt auch für die gewöhnlich staatlich*[10] organisierten Rechtssysteme, die durch neuartige *Formen normativer Kommunikation*, insbesondere im Bereich des Rechts, gekennzeichnet sind. Sie stellen zugleich ganz neuartige *Anforderungen an das rechtliche Erleben und Handeln* derjenigen, die an der juridischen Kommunikation beteiligt sind.

Mir geht es darum, in der Rechtstheorie sämtliche Formen menschlichen Erlebens und Handelns in kommunikativer Perspektive zu deuten und zu rekonstruieren. Dies läuft im Ergebnis darauf hinaus, in der allgemeinen Theorie des Rechts, insbesondere in der Normen- und Handlungstheorie, die herkömmliche *Willens- und Subjekttheorie* durch eine umfassende Theorie normativer Kommunikation des Rechts zu substituieren. Dies kann hier natürlich nicht geleistet werden, doch habe ich mich hierzu wiederholt schon bei früherer Gelegenheit geäußert.

Ich betrachte juristische Zeitschriften (mit ihren mehr oder weniger organisierten Redaktionen, Wissenschaftlichen Beiräten pp.) als auf normative Information und Erkenntnis ausgerichtete *soziale Kommunikations- und Handlungssysteme.* Sie üben in der juridischen Kommunikation in Recht und Rechtswissenschaft einen bestimmenden und maßgebenden Einfluss aus. Ich werde mich im Folgenden ausschließlich mit der juridischen Kommunikation in modernen Rechtssystemen befassen.

Dies schließt natürlich nicht aus, dass auch in archaischen oder prämodernen Rechtssystemen unter den Bedingungen vorneuzeitlicher Hochkulturen in ihren diversen jeweiligen Lebensformen und Kommunikationsmedien Recht kommuniziert wird, ist aber hier nicht Gegenstand unserer Überlegungen. In modernen Rechtssystemen sind juristische Zeitschriften, wie ich es verstehe, vor allem und in erster Linie *Medien der juridischen Kommunikation in Rechtspraxis und Rechtswissenschaft.* Sie stellen in den Rechtssystemen der modernen Gesellschaft das erforderliche Wissen und die notwendigen Informationen bereit, auf die alle Rechtspraxis, hier verstanden im weitestmöglichen Sinne, d.h. unter Einschluss alltäglicher Rechtsgeschäfte, angewiesen ist.

Ich bin übrigens froh, dass ich nicht über die deutschen juristischen Zeitschriften im 19. und 20. Jahrhundert zu berichten habe. Ich wüsste nicht einmal, wie viele juristische Zeitschriften es gegenwärtig in Deutschland gibt. Bei uns wird jeder Zipfel der deutschen Rechtsordnung von einer Fachzeitschrift betreut, damit keine Information verloren geht. Im 19. Jahrhundert erblicke ich – vom Standpunkt des halb internen, halb externen

[10] Hierzu: W. Krawietz. Beyond Methodological and Theoretical Individualism – Are There Collective Actors or Collective Subjects in Modern Legal Systems? – E. Czerwinska-Schupp (Hrsg.). Values and Norms in the Age of Globalization. Frankfurt am Main 2007, S. 385–396.

Beobachters[*11] moderner Rechtssysteme und der sozialen Wirklichkeit des jeweiligen Rechts – einen neuen *Take off* im Rechtsdenken bei Savigny[*12] und vor allem bei Jhering[*13], der internationale Auswirkungen zeitigte.

Im Folgenden konzentriere ich meine Überlegungen auf das Problem der Modernität in den juristischen Zeitschriften. Letztere erweisen sich bei näherem Hinsehen als eine bislang nicht hinreichend genutzte Fundgrube, wenn es darum geht, die Modernität des Rechts näher zu bestimmen, auch wenn die Ergebnisse bisweilen zu wünschen übrig lassen.

Ob diese Formen der juridischen Kommunikation von Recht, die durch die moderne Rechtstheorie bestimmt und vorangetrieben werden, unter den Bedingungen einer sich in Umrissen abzeichnenden Weltgesellschaft (*World Society*, *Global System*) zu einem Weltrecht (*World Law*) zu konvergieren[*14] vermögen, wie manche meinen, steht auf einem anderen Blatt. Ich komme darauf weiter unten zurück.

III. Multiple Modernität versus Globalisierung von Gesellschaft und Recht?

Juristische Zeitschriften sind, kommunikations- und systemtheoretisch gedeutet, die *Beobachtungsstationen*, von denen aus die Rechtsentwicklung eines Landes beobachtet, begleitet und beeinflusst werden kann. Auch geben sie darüber Auskunft, in welchem Ausmaße die heute erforderliche und ganz unvermeidbare *Modernisierung des jeweiligen Rechtssystems* vorankommt. Paul Varul hat in seinem Einleitungsreferat in exemplarischer Weise eindrucksvoll belegt, dass – aus der systemischen Perspektive Estlands gesehen – die estnischen Law Journals *Juridica* und *Juridica International* in nationaler, aber auch in internationaler und regionalgesellschaftlicher Hinsicht optimal aufgestellt sind.

Wie Varul meine auch ich, dass in den staatlich organisierten, arbeitsteilig differenzierten Rechtssystemen – in den juristischen Zeitschriften ganz deutlich erkennbar – eine *nationale Einfärbung des Rechts und der Rechtstheorie* identifiziert werden kann. Der Ausdruck *national* kann insoweit in der Tat als Referenzbegriff genutzt werden, um *ab initio* die *Abhängigkeit aller internationalen von nationalen sozialen Systemreferenzen* widerzuspiegeln. Auch die zugehörigen Rechtstheorien lassen nicht selten eine nationale Einfärbung erkennen, wie sie beispielweise in den diversen *Varianten eines skandinavischen Rechtsrealismus* in Erscheinung tritt. Dass bei der Einbettung nationaler wie regionaler Orientierungen in die gemeinschaftlichen Ordnungsstrukturen des Rechts deren nationale Systemreferenzen zu berücksichtigen sind, hat sogar die Europäische Union konzediert, wenn es in Art. 6 Abs. 3 ihres Vertrags heißt: „Die Union achtet die nationale Identität ihrer Mitgliedstaaten". Aber wer ist die Union? Verdient sie ihre zur Schau getragene Selbstachtung und Selbsteinschätzung, wenn ein zu weit getriebener Europäismus einzelnen Mitgliedstaaten in der Krise kaum tragbare Lasten aufbürdet?

Meine These ist, dass es sich heute bei den hier in Rede stehenden Rechtsordnungen, wie die zugehörigen juristischen Fachzeitschriften erkennen lassen, um eine – wenn auch in unterschiedlichem Maße voranschreitende – *Modernisierung der Modernisierung des Rechts* handelt. Sie tritt vor allem in Erscheinung

(1) als *Europäisierung des Rechts*, deren charakteristische Merkmale freilich noch umstritten sind;
(2) als *Globalisierung des Rechts*, die noch ihrer näheren Bestimmung harrt.

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[11] Zu dieser vielschichtigen Problematik vgl. vor allem: M. Schulte. Begriff und Funktion des Rechts der Gesellschaft. Eine Selbst- und Fremdbeschreibung des Rechtssystems. – M. Atienza (Fn. 9), S. 767–789, 768 *f.*; ders., Konditional- und Zweckprogrammierung des Rechtsystems in der Selbst- und Fremdbeschreibung der Rechtstheorie. – Rechtstheorie 38 (2007), S. 379–394, 380 *f.*

[12] W. Krawietz. Zur Kritik der Juristischen Methodenlehre seit Friedrich Carl von Savigny. – Savigny y la ciencia juridica del siglo XIX. Anales de la Catedra Francisco Suarez 18/19 (1978–79), S. 101–131. Vgl. ferner: W. Krawietz. Juristische Konstruktion, Kritik und Krise dogmatischer Rechtswissenschaft. – ders. (Hrsg.). Theorie und Technik der Begriffsjurisprudenz. Darmstadt 1976, S. 1–10; ders., Begriffsjurisprudenz. – Historisches Wörterbuch der Philosophie. Bd. 1. Basel, Stuttgart 1971, Sp. 809–814; ders., Interessenjurisprudenz, ebd., Bd. 4, 1976, Sp. 494–514. Vgl. ferner: M. J. García Salgado. Rechtliche versus gesellschaftliche Interessen? Philipp Hecks Konflikttheorie als Beitrag zur modernen Rechtstheorie. – M. Atienza (Fn. 9), S. 613–633, 616 *f.* Jetzt auch: M. J. García Salgado. La Jurisprudencia de Intereses de Philipp Heck. Oviedo 2010.

[13] F. Belvisi. Die Positivität des Rechts beim frühen Jhering: Zwischen Formalismus und Realismus. – M. Atienza (Fn. 9), S. 429–459, 431 *ff.*, 439 *f.* Vgl. ferner die materialreiche Studie von: J. Rückert. Der Geist des Rechts in Iherings ‚Geist' und Iherings ‚Zweck'. Teil 1. – Rechtsgeschichte 5 (2004), S. 128–146; Teil 2 (Forts.), ebd. 6 (2005), S. 122–142. Wohl zustimmend: Thorsten Süß, Wer war eigentlich … Rudolf Jhering? – Ad Legendum 7 (2010), S. 151–152. Für ihn ist Jhering wohl „der größte deutsche Jurist überhaupt – noch vor Savigny". Reiches Material und weiterführende Überlegungen bietet: J. Rückert. ‚Große' Erzählungen, Theorien und Fesseln in der Rechtsgeschichte. – T. J. Chiunsi *et al.* (Hrsg.). Das Recht und seine historischen Grundlagen. Berlin 2008, S. 963–986, 964 *f.*, 985 *f.*

[14] Eingehend hierzu: W. Krawietz, G. Riechers, K. Veddeler (Hrsg.). Konvergenz oder Konfrontation? Tranformationen kultureller Identität in den Rechtssystemen an der Schwelle zum 21. Jahrhundert. Berlin 1998. W. Krawietz. Konflikt verschiedenartiger Rechtskulturen oder universales Rechtssystem – Auf dem Wege zu einem Kerneuropa. – Rechtstheorie 33 (2002), S. VII bis XXI; R. Stichweh. Das Konzept der Weltgesellschaft: Genese und Strukturbildung eines globalen Gesellschaftssystems. – Rechtstheorie 39 (2008), S. 329–355; M. Schulte, R. Stichweh (Hrsg.). Weltrecht. Berlin 2008.

Beide Modernisierungsschübe schreiten rasch voran und sind noch nicht abgeschlossen.

Wir haben es, in Anlehnung an einen Ausdruck, den Anthony Giddens in seinen „Consequences of Modernity“[*15] verwendet, mit einer *Form reflexiver Modernität* zu tun, die sich auch auf das Recht und das Rechtsdenken erstreckt. Das heißt: indem die Modernisierung des Rechts in Prozessen der Europäisierung und Globalisierung *reflexiv*, d.h. *auf sich selbst angewandt* wird, kommt es zu einer *Steigerung der juridischen Rationalität des Rechts*. Recht und Rechtsordnung, verstanden als reflexive soziale Mechanismen, beispielweise als *Normieren des Normierens*, das im Wege der Selbstorganisation erfolgt, aber auch die Rechtstheorie, die ihre Reflexion auf sich selbst richtet, bevor sie ihren Gegenstand bearbeitet, sind selbstreflexiv geworden.

Wir haben es also – und darauf haben sich die juristischen Fachzeitschriften, aber auch die sonstigen Rechtszeitschriften trotz oder gerade wegen ihrer Spezialisierungen noch nicht hinreichend eingestellt! – mit einer tiefgreifenden *Differenz zwischen nationalstaatlichen, regionalgesellschaftlichen und weltgesellschaftlichen Rechtskulturen* zu tun, welche die moderne Kommunikationsgesellschaft prägen und determinieren, aber zugleich die notwendige rechtliche Integration mit den bisherigen eingelebten arbeitsteiligen Ordnungen und Lebensformen, in denen wir uns eingerichtet haben, verhindern. Ich kann und muss mich hier kurzfassen. Ich nehme insoweit Bezug auf die Studie von Dessau über „Nationale Aspekte einer transnationalen Disziplin“[*16], womit die Rechtstheorie als Fach gemeint ist. In seiner Greifswalder juristischen Dissertation behandelt der Autor die *rechtskulturelle Einbettung der Rechtstheorie* in Finnland, Schweden und Deutschland. Er konzentriert sich dabei leider nur auf den Zeitraum zwischen 1960 und 1990. Er beschränkt sich außerdem auf die Forschungen von Aarnio, Peczenik und Alexy[*17], bietet also nur einen kleinen Ausschnitt, den er für exemplarisch wichtig hält, der aber naturgemäß nicht *pars pro toto* angesehen werden kann.

Ich halte es demgegenüber für angebracht, nicht von einer transnationalen Disziplin zu sprechen, sondern von einer *allgemeinen* Rechtstheorie, da Rechtstheorie in allen Rechtssystemen auch als nationale entwickelt und betrieben wird. Letztere muss ferner mit *allen* uns bekannten (und nicht bloß mit den westlichen) Rechtssystemen kompatibel sein (unter Einschluss der auch *pro futuro* wirklich möglichen Rechtssysteme!).

In einer Studie, die Harold Berman vom Standpunkt seiner *geschichtlich-gesellschaftlichen Theorie des Rechts* der Bestimmung der umstrittenen rechtlichen Qualität einer *lex Mercatoria* und eines darüber noch hinausreichenden *transnationalen* Rechts gewidmet hat, werden die mit diesen Worten und Begriffen umschriebenen und gekennzeichneten Gegenstandsbereiche und Strukturen des modernen Rechts ausgewiesen als Kernstück eines sich in unserer Informations- und Kommunikationsgesellschaft rasch ausbreitenden Weltrechts (*World Law*), das seinerseits für die zusammenwachsende Weltgesellschaft (*World Society, Global System*) charakteristisch ist.[*18] Die Einsichten Bermans, die sowohl „innerhalb als auch außerhalb der westlichen Erfahrung“ zu suchen und zu finden sind, verdanken sich einer von ihm entwickelten Denkweise, die – entgegen der üblichen Periodisierung – die Genese und Geltungsgrundlagen der westlichen Tradition als ein Ganzes zu beschreiben sucht, nicht als Geschichte einzelner Nationen. Dies macht es nicht nur möglich, sondern vielmehr erforderlich, über die bloß geschichtliche Rechtsbetrachtung hinaus eine vergleichende Rechts*theorie* zu entwickeln. Zu dieser Position, die in den modernen Rechtszeitschriften bislang nur am Rande berücksichtigt wurde, aber ein hohes kritisches Potential besitzt, das wir nicht ignorieren sollten, kann man nach Auffassung von Berman nur gelangen, wenn man (i) der Gleichsetzung nationalen Rechts mit dem Recht überhaupt zu begegnen sucht, (ii) die Irrtümer einer rein philosophischen und moralischen Rechtsauffassung (Naturrecht, Vernunftnaturrecht, philosophische Prinzipienlehren o.ä.) und einer bloß analytischen („vernünftigen“) Jurisprudenz zu vermeiden trachtet sowie (iii) diejenigen einer rein historischen und sozialökonomischen Rechtsauffassung („Historische Schule“) überwindet. Theorie des Rechts ist nun einmal eine auf geschichtlicher *und* gesellschaftlicher Erfahrung und Beobachtung beruhende normative Disziplin, die sich an der Positivität *allen* Rechts zu orientieren hat.

Im Folgenden fokussiere ich meine Überlegungen auf eine einzige Fragestellung. Sie hat im Beobachtungszeitraum für die juristischen Fachzeitschriften zunehmend an Bedeutung gewonnen und steht heute im Zentrum aller rechtlichen Überlegungen, an denen sich auch die juristischen Zeitschriften zu orientieren haben. Es geht – ausgesprochen oder unausgesprochen – um die Frage nach der Modernisierung des Rechts.

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[15] A. Giddens. The Consequences of Modernity. Cambridge 1990.

[16] C. Dessau. Nationale Aspekte einer transnationalen Disziplin. Zur rechtsstrukturellen Einbettung der Rechtstheorie in Finnland, Schweden und Deutschland zwischen 1960–1990. Berlin 2008.

[17] Grundlegend: A. Aarnio, R. Alexy, A. Peczenik. The Foundation of Legal Reasoning. – Rechtstheorie 12 (1981), S. 133–150, 257–279, 423–448. Vgl. ferner die von den Autoren für die Zeitschrift Rechtstheorie verfasste Übersetzung ins Deutsche von: Aarnio, Alexy, Peczenik. Grundlagen der juristischen Argumentation. – W. Krawietz, R. Alexy (Hrsg.). Metatheorie juristischer Argumentation. Berlin 1983, S. 9–87 (mit zum Teil kritischen Beiträgen von Jan Broekman, Enrico Pattaro, Robert Summers, Ota Weinberger und Jerzy Wrøblewski). Hierzu das Vorwort zu diesem Band von: W. Krawietz. Juristische Argumentation und Argumentationstheorien auf dem Prüfstand, ebd., S. 3–8.

[18] Dazu und zum Folgenden: H. J. Berman. Recht und Revolution. Die Bildung der westlichen Rechtstradition. 1. Aufl. Harvard 1983, dtsch. Übersetzung. Frankfurt am Main 1995, S. 19 *ff.*, 65 *f.*, 73 *f.*; ders., World Law. – Fordham International Law Journal 18 (1995), S. 1617–1622; ders., Integrative Jurisprudence and World Law. – M. Atienza (Fn. 9), S. 3–16.

Die rechtssprachlichen Ausdrücke *modern*, *Modernisierung* und *Modernität* haben mit der weitgehenden Transformation dessen, was sie in Gesellschaft und Recht bezeichnen, ihre Bedeutung tiefgreifend verändert, ohne dass dies in weiten Kreisen der Rechtstheorie hinreichend zur Kenntnis genommen wird, von der Rechtsdogmatik ganz zu schweigen. Wir haben es gegenwärtig, wie vor allem Shmuel Eisenstadt in einer Reihe von Feldstudien zur Modernisierung im politischen System und im Recht in weltgesellschaftlicher Perspektive herausgearbeitet hat, im Zuge einer strukturellen Evolution der modernen Gesellschaft mit *multiplen Modernitäten* zu tun.[*19] Mit Blick auf diejenigen, die *in puncto* Recht das Neue der Rechtsentwicklung tendenziell in der Globalisierung allen (!) Rechts erblicken, vertrete ich demgegenüber – in Anlehnung an die Untersuchungen von Preyer – vom Standpunkt der Rechtstheorie die These, dass das „Paradigma Multipler Modernitäten", wie Preyer verallgemeinernd formuliert, als eine indirekte Antwort auf die Globalisierungsforschung und ihre Theoretisierung seit Ende der 1980er Jahre anzusehen ist. Dem kann und muss man wohl zustimmen. Wenn überhaupt Globalisierung von Recht, dann in der Form einer ‚Glokalisierung', die globale und lokale rechtliche Regelungen miteinander strukturell koppelt, wie ich bei früherer Gelegenheit ausgeführt habe. Dies schiebt die Modernitätsdebatte, wie ich hier leider nicht näher ausführen kann, auf ein anderes Gleis. Die *Modernisierung der Modernisierung von Gesellschaft und Recht* verbreitet sich zwar auf kommunikativem Wege global, führt aber – auch unter den Bedingungen der Positivität allen Rechts – *nicht* zu einer *universalen Weltrechtsordnung*, wie es dem Natur- und Vernunftrechtsdenken alteuropäischer Provenienz vorschwebte, sondern zu einer Vielzahl und Vielfalt von miteinander vernetzten modernen Rechtssystemen. Dies hat, ob man es will oder nicht, einen *Dialog zwischen den diversen Rechtskulturen* und kulturell unterschiedliche *Interpretationen ihrer Modernität* zur Folge.

Meine zentrale *These einer multiplen Modernität der Rechtssysteme*, die ich hier nur im Umriss entfalten kann, besagt, dass die Moderne in der Evolution von Gesellschaft und Recht *kein allgemeingültiges*, normativ fixes, institutionell auf Dauer gestelltes *Muster der rechtlichen Modernisierung* hervorgebracht hat, wie von manchen westlichen Rechtstheoretikern und Philosophen angenommen wird. Sie propagieren unverdrossen in Verfolgung eines verspäteten Idealismus, der seine Erneuerung zu betreiben sucht, ihre Ideen von universalen Menschenrechten u.a.m., weil sie sich mit deren Positivität nicht abfinden wollen und in sich selbst das Zeug zum moralischen Gesetzgeber verspüren. Einem derartigen Vorgehen kann nur mit der gebotenen Skepsis begegnet werden.

Das Informations- und Kommunikationssystem des Rechts insgesamt ist, so wie ich es sehe, ein *normatives, institutionell auf Dauer gestelltes Netzwerk, das sich aus systemischen Kommunikationen und Operationen zusammensetzt*.[*20] Es baut sich auf und entwickelt sich fort aus einer kontingenten Anzahl von Rechtskommunikationen, die in der alltäglichen Rechtspraxis normativ miteinander *verkettet*, d.h. *strukturell*, *prozedural und organisatorisch miteinander gekoppelt* werden.[*21] Dieses Netzwerk kann mit Mitteln des Rechts, normen- und handlungstheoretisch[*22] gesehen, jederzeit nach Belieben erweitert werden, alle Sozialbereiche menschlichen Erlebens und Handelns erfassen, programmieren und konditionieren und auf diese Weise praktisch die ganze Welt umspannen, immer vorausgesetzt, dass die sozietalen und rechtssprachlichen Transformations- und Übersetzungsprobleme bewältigt werden.

Was aber geschieht, wenn die *normative* Kommunikation – über die territorialen und kulturellen Grenzen hinweg – nicht mehr als nationale, sondern als inter- und transnationale fungiert und verstanden wird? Hondrich hat diese Fragestellung, welche die „Weltgesellschaft" angeht, letztere von ihm verstanden als „Gesellschaft der Gesellschaften"[*23], sehr präzise auf den Punkt gebracht. „Wie sollen über sechs Milliarden Menschen, die diese Weltgesellschaft bevölkern, sich mitteilen und verständigen?" Nicht von ungefähr hält Hondrich deshalb die Vorstellung, „dass man auf eine globale Universalstruktur zusteuere", für „ebenso einfältig wie abwegig". Da helfen auch keine juristischen Fachzeitschriften.

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[19] Dazu und zum Folgenden: S. N. Eisenstadt. The First Multiple Modernities: Collective Identity, Public Spheres and Political Order in the Americas. – L. Roniger, C. H. Waisman (Hrsg.). Globality and Multiple Modernities: Comparative North American and Latin American Perspectives. Brighton 2002; ders., Multiple Modernities. A Paradigma of Cultural and Social Evolution. – Protosociology 24 (2007), S. 20 *ff.*, 47 *ff.*, 57 *ff.* Vgl. hierzu ferner das Vorwort von G. Preyer. Protosociology 24 (2007), S. 4 *ff.*, 7 *ff.*

[20] W. Krawietz. Juridische Kommunikation im modernen Rechtssystem in rechtstheoretischer Perspektive. – W. Brugger, U. Neumann, S. Kirste (Hrsg.). Rechtsphilosophie im 21. Jahrhundert. Frankfurt am Main 2008, S. 181–206, 190 *ff.*, 198 *ff.*, 202 *f.*, 205.

[21] A. Schemann. Strukturelle Kopplung. Zur Festlegung und normativen Bindung offener Möglichkeiten sozialen Handelns. – W. Krawietz, M. Welker (Hrsg.). Kritik der Theorie sozialer Systeme. Auseinandersetzungen mit Luhmanns Hauptwerk. Frankfurt am Main 1992, S. 215–229; ders., Konvergenztheorem oder Kulturkreisparadigma? – Rechtstheorie 29 (1998), S. 565–578, 573 *ff.*

[22] Zur Normenkommunikation, insbes. zur Rechtskommunikation im Hinblick auf die faktische, empirische und systemische, d.h. soziale Existenz von Normen: W. Krawietz. Recht als normatives Kommunikat in normen- und handlungstheoretischer Perspektive. – E. Garzón Valdéz *et al.* (Hrsg.). Normative Systems in Legal and Moral Theory. Berlin 1997, S. 369–390, 381 *f.*, 385 *ff.*, 388. Vgl. ferner: W. Krawietz, B. Pieroth, B. N. Topornin (Hrsg.). Kommunikation und Recht in der modernen Wissensgesellschaft – national oder international? Berlin 2003.

[23] K. O. Hondrich. Der kommunizierende Mensch – und seine Missverständnisse. – ders., Der Neue Mensch. Frankfurt am Main 2001, S. 139–162, 141. Vgl. ferner: W. Krawietz. Moderne Rechtstheorie als Theorie primärer und sekundärer sozialer Systeme des Rechts. – G. Preyer (Hrsg.). Neuer Mensch und kollektive Identität in der Kommunikationsgesellschaft. Wiesbaden 2009, S. 249–271, 250 *f.*, 260.

Normative Kommunikation, vor allem diejenige des Rechts, expandiert in nationaler wie in inter- und transnationaler Dimension über Netzwerke, die das Recht der modernen Gesellschaft nachhaltig bestimmen, prägen und alle weiteren Rechtskommunikation strukturieren. Dies verweist den Menschen, der in „Herkunfts*bindungen*" steht, d.h. „in *nicht selbstgewählten* Primärbeziehungen, die gar nichts anderes sein können als Herkunftsbindungen an Familie, Sprach-, Wertgemeinschaft"[*24] u.a.m., und der seine Bestimmung und *rechtlichen* (!) *Bindungen* zu erkennen sucht, darauf, im Rahmen der ihn umgebenden rechtlichen *Frameworks* nationaler, internationaler und transnationaler Provenienz sein Leben, so weit wie möglich, in eigene Regie zu nehmen und immer erneut selbst zu bestimmen. Mit Blick auf die Verwissenschaftlichung der gesamten sozialen Lebenswelt bedarf er dabei einer rechtspraktischen und rechtstheoretischen Orientierung.

Die juridische Kommunikations- und Systemtheorie des Rechts, so wie ich sie verstehe, begreift die *Theorie des Rechts* nicht nur im Hinblick auf Interaktionssysteme und Organisationen, sondern zugleich *in regional- bzw. weltgesellschaftlicher Perspektive*. Dies geschieht mit Blick auf die Verflechtung der Normen mit ihrer *emotional-praktischen Dimension* der Handlungsorientierung in Form einer *Theorie primärer und sekundärer sozialer Systeme*, zu der ich mich wiederholt geäußert habe.

a) Die Bezeichnung der Theorie als *juridisch* kann sich, begriffsgeschichtlich gesehen, auf die in der Jurisprudenz seit jeher geläufigen Wort- und Begriffsverwendungen berufen, wie sie beispielweise in den Ausdrücken *logica iuridica* (lat.), *logique juridique* (frz.) und *lógica jurídica* (span.) in Erscheinung treten, die – im Gegensatz zur abstrakten *Vernunft* und formalen Logik philosophischer Provenienz! – in methodischer und theoretischer Hinsicht die *juridische Rationalität* kennzeichnen.[*25] Auch die russische Rechtssprache kennt übrigens seit jeher den bedeutungsgleichen Ausdruck *juridičeskaja logika* (*юридическая логика*).

b) Bei aller fortschreitenden Vergesellschaftung und Rationalisierung wird das alltägliche Leben auch in der Moderne, insbesondere im modernen Recht, nach wie vor nachhaltig geprägt durch sozietale *Gemeinschafts*bildungen, die sich nicht bloß strukturell gleichbleibend reproduzieren und erneuern, sondern immer weiter ausdifferenzieren. Sie erstrecken sich von Familie, Verwandtschaft, Nachbarschaft und Gemeinden, ganz zu schweigen von einer Vielzahl und internationalen Vielfalt sonstiger sozialer Verbandsbildungen bis hin zu nationalstaatlichen, föderalen und internationalen vertraglichen Formen des gemeinschaftlichen Zusammenlebens. Sie reichen aber auch, wie manche neuartigen Rechtsgemeinschaften im Bereich des Wirtschaftsrechts, weit hinein in internationale und transnationale Lebensbereiche, die im weltgesellschaftlichen Zusammenhang in nur schwer durchschaubarer Weise miteinander verbunden sind. Wir haben es somit im modernen Recht, insbesondere in dem von der Positivität geprägten kontinentaleuropäischen Recht in der gesamten Rechtsentwicklung, wie übrigens schon Max Weber[*26] erkannt hat, mit *zwei* nebeneinander herlaufenden, sich wechselseitig beeinflussenden *Tendenzen* zu tun, nämlich mit einer fortschreitenden rationalen *Vergesellschaftung*, die ihrerseits strukturell gekoppelt erscheint mit differenzierten Formen der *Vergemeinschaftung* der rechtlichen Lebenswelt.

c) In ihren Untersuchungen dieser neuartigen Problemkonstellation, die mit dem Wort und Begriff *Globalisierung* mehr etikettiert als charakterisiert wird, hat Miriam Meckel sehr treffend darauf hingewiesen, dass es im Weltkontext heute "unmöglich (ist), wirtschaftliche Notwendigkeiten, politische Entscheidungen oder soziale Prozesse auf eine affektuelle oder traditionale Grundlage zu stellen, weil es eben diese nicht gibt". Recht fungiert, bezogen auf das menschliche Verhalten (Handeln und Unterlassen), nach einer verbreiteten Auffassung, die auch ich teile, nicht bloß als normative *Struktur*, sondern auch als kommunikatives *Medium*. Daher läuft die These von Meckel darauf hinaus, dass der Globalisierungsprozess, wie auch immer beschaffen, eine "strukturell vernetzte Welt*gesellschaft*" induziert, aber keine "rational integrierte Welt*gemeinschaft*" erzeugt.[*27]

Die *mediale Vergesellschaftung* vollzieht sich hauptsächlich in und durch Kommunikation. Sie kann aber jeweils nur "sachlich und zeitlich begrenzte Handlungspotentiale aktivieren", wie beispielweise für den Bereich des Informations-, Telekommunikations- und Medienrechts. Es geht im modernen Recht somit *nicht* um die

[24] W. Krawietz. Primäre und sekundäre Systeme. – G. Preyer (Fn. 23), S. 251, 270 *f.* Vgl. ferner: ders., Modern Society and Global Legal System as Normative Order of Primary and Secondary Social Systems – An Outline of Communication Theory of Law. – Protosociology 26 (2009), S. 121–149.

[25] W. Krawietz. Juristische Logik. – Historisches Wörterbuch der Philosophie. Bd. 5. Basel 1980, Sp. 423–434, 428 *f.*; ders., Sprachphilosophie in der Jurisprudenz. – Philosophy of Language. An International Handbook of Contemporary Research, Vol. 2, Nr. 102. Berlin, New York 1996, Sp. 1440–1489, 1471 *ff.*

[26] Zum Verhältnis von Vergesellschaftung und Vergemeinschaftung bei Weber, der in grundbegrifflicher Hinsicht auf dem kategorialen Apparat von Tönnies aufbaut: M. Weber. Wirtschaft und Gesellschaft. 5. Aufl. Tübingen 1976, 1. Hlbd., S. III, 21 *ff.*, 141, 212 *ff.*, 219, 235; 2. Hlbd., S. 514 *ff.* Vgl. ferner: T. Parsons. Some Afterthoughts on Gemeinschaft and Gesellschaft. – W. J. Cahnman (Hrsg.), F. Tönnies. A New Evolution. Leiden 1973, S. 151 *ff.*, 153; W. Krawietz. Gemeinschaft und Gesellschaft. Das Tönnies'sche Handlungs- und Forschungsparadigma im neueren Rechtstheorien. – Rechtstheorie 35 (2004), S. 579–652, 608 *ff.*, 619 *f.*, 626 *f.*

[27] M. Meckel. Kulturelle Konfrontation oder kommunikative Konvergenz in der Weltgesellschaft? Kommunikation im Zeitalter der Globalisierung. – Rechtstheorie 29 (1998), S. 425–440, 427 *f.*, 430 *ff.*

Vorstufe eines integrativen Entwicklungsprozesses mit dem optionalen Endstadium der ‚Weltgemeinschaft' als der integrierten Gesamtheit aller Denkprozesse, Kommunikationen und Handlungen im globalen Kontext. Vielmehr handelt es sich dabei, wie Meckel sehr treffend auch mit Blick auf die analytisch-begriffliche Konzeption der Systemtheorie bemerkt, um „nichts anderes und vor allem nicht mehr als das ‚theoretische Konstrukt der Möglichkeit von Weltgesellschaft'".[*28] Dem steht natürlich die Annahme nicht entgegen, dass die gemeinschaftlich strukturierten sozialen Kommunikations- und Handlungssysteme realiter existieren und damit zum Gegenstand immer wieder erneuter (Re-)Konstruktionsbemühungen avancieren.

Kommunikation hat es auch nicht, wie bisweilen angenommen wird, zu tun mit einer privilegierten Verbreitung westlicher Werte, die vielleicht auch noch hegemonial gehandhabt werden müssten. Die Modernisierung der Gesellschaft darf nicht mit *Verwestlichung* gleichgesetzt werden und führt auch nicht notwendig zu westlichen Strukturen, vor allem und schon gar nicht im Bereich des Rechts. Infolgedessen wird hier deshalb in rechts- und gesellschaftstheoretischer Perspektive zwar zwischen (i) *westlichen* Gesellschaften und (ii) *nichtwestlichen* Gesellschaften unterschieden, aber kein Hegemonialverhältnis unterstellt. Es ist – entgegen einer verbreiteten Meinung – auch nicht so, dass diese Gesellschaften konvergieren. Dies geht etwas über unser heutiges Tagungsthema hinaus, ist aber Gegenstand von Rechtszeitschriften und bedürfte vermehrter Beachtung.

Unter den führenden Rechtstheoretikern und Rechtsphilosophen der westlichen Welt, die in ihrer *allgemeinen* Theorie des Rechts zunehmend die nationalen Grenzen ihrer Rechtssysteme überschreiten, hat sich schon im Verlaufe der letzten Jahrzehnte, aber seit Beginn des 21. Jahrhunderts noch verstärkt die – mehr intuitive als wissenschaftlich bewiesene – Einsicht verbreitet, dass die westliche moderne Gesellschaft mit ihren äußerst vielschichtigen Rechtstraditionen und ihrer tradierten, aber bloß konventionellen Konzeption von Rechtswissenschaft in eine bislang „noch nie dagewesene Krise der Werte und des Denkens auf dem Gebiete des Rechts" geraten ist.[*29] Sie bedarf deshalb selbst einer grundlegenden Erneuerung. Was diese Aufgabenstellung angeht, ist *kein* Rekurs auf ein substanzhaftes *Wesen* oder gar auf das *wahre* Wesen des Rechts gefordert, wie auf Seiten eines verfehlten Essentialismus und Platonismus im Rechtsdenken angenommen wird. Das Wesen des Rechts ist – informations- und kommunikationstheoretisch gesehen, aber auch philosophisch gedeutet –, dass es keines hat.

[28] Ebd., S. 432.

[29] H. J. Berman (Fn. 18), S. 19 *ff.*, 65 *f.*, 73, 82. Vgl. ferner: G. H. von Wright. The Crisis of Social Science and the Withering Away of the Nation-State. – Associations 1 (1997), S. 49–51, 50 *f.*

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Zur Charakteristik führender juristischer Periodika im 19. Jahrhundert in Deutschland*

I. Eine Expedition

Mein Titel folgt einer freundlichen Anregung der Tagungsleitung.*[1] Er führt, wie es scheint, recht bieder in eine ziemlich bekannte Landschaft. AcP*[2] und Savigny-Zeitschrift, Jherings Jahrbücher und Zeitschrift für Strafrechtswissenschaft, Zeitschrift für Staatswissenschaften, Archiv für öffentliches Recht, Verwaltungsarchiv – alles wohlbekannte Namen. In der Tat wurden alle diese Zeitschriften bereits im 19. Jahrhundert begründet. „Zeitschrift" diente dabei seit Savignys „Zeitschrift" von 1815 als Kennwort einer wissenschaftlichen Ausrichtung, anders als der allgemeinere Name „Archiv".*[3] Dieser Nimbus von „Zeitschrift" klingt in der Vorliebe dafür bis heute nach. Die allgemeinere Bezeichnung Periodika erfasst aber neutraler die Gesamtheit der Annalen, Archive, Beiträge, Blätter, Jahrbücher, Magazine, Mitteilungen, Monatsschriften, Wochenblätter, Zeitschriften, Zeitungen – wie sie auch sich nennen mögen. Unberücksichtigt bleiben hier die Gesetz-, Verordnungs-, Ministerialblätter und sonstige „amtliche" Verlautbarungsorgane.*[4] Sie zeigen ein klar eigenes Profil im Rahmen des bekannten Verrechtlichungsprozesses im 19. Jahrhundert. Die Reise in die juristische Periodikawelt des 19. Jahrhunderts in Deutschland hat aber doch eher den Charakter einer Expedition, als den eines gemütlichen Erinnerungsausflugs. Die erste Etappe muss nämlich heißen: Im Dschungel – was tun? (II) Mit der Machete kommen wir nicht durch – durch, das hieße nämlich, durch die rund 550 juristischen Periodika seit ca. 1800 und die allein rund 270 seit 1871 bis 1900 oder rund 400 seit 1850 eine außerdem

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1 Zu „populäre" Zeitschriften und in IV 2 ergänzter, sonst leicht überarbeiteter Text meines Vortrags in Tartu vom 30. Nov. 2009.

2 Archiv für (die) civilistische Praxis, seit 1818, bis heute.

3 Zur Terminologie näher J. Rückert. Geschichtlich, praktisch, deutsch. Die „Zeitschrift für geschichtliche Rechtswissenschaft" (1815–1850), das „Archiv für die civilistische Praxis" (1818–1867) und die „Zeitschrift für deutsches Recht und deutsche Rechtswissenschaft" (1839–1861). – Juristische Zeitschriften. Die neuen Medien des 18. – 20. Jahrhunderts. M. Stolleis (Hrsg.). Frankfurt a.M.1999, S. 107–257, hier, S. 117 *f.* zu „Zeitschrift" und 154 zu „Archiv".

4 Dazu S. Ruppert. Die Entstehung der Gesetz- und Verordnungsblätter. – Zeitschriften (Fn. 3), S. 65–105; dort im Anhang auch Abdruck etlicher exemplarischer Gründungsvorworte; ergänzend der Band: Juristische Zeitschriften in Europa. M. Stolleis, T. Simon (Hrsg.). Frankfurt a. M. 2006, ebenfalls ein Pionierband. Der heterogene Reichtum des Bandes macht weiterführende Vergleiche freilich nicht leicht.

um mindestens 100 auf 500 zu ergänzende Zahl.[*5] Ähnlich gewaltige Dimensionen erreichte nur die ähnlich föderale Periodikawelt der italienischen Staaten mit rund 530 Einheiten von 1850–1900.[*6]

Die zweite Etappe kann daher nur als eine sogenannte Höhenkammwanderung (um das kritische literaturgeschichtliche Stichwort der 1970er Jahre zu verwenden) stattfinden (III). Es muss und kann dabei etwas genauer betrachtet werden, was sich generell heraushebt. Das ist jedenfalls der Fall, wenn eine Zeitschrift über 10 Jahre andauerte oder gar bis heute aushielt. Dieses Kriterium ist bewusst neutral gewählt, nur die Jahre zählen also zunächst. Denn was ist eigentlich eine „führende" Zeitschrift – eine offenbar abgründige Frage nach dem „Führenden". Wir verfügen für die Jurisprudenz leider nicht über eine so urteilsintensive Übersicht eines glänzend informierten Zeitgenossen, wie etwa die von Gustav Schmoller zu den ökonomischen und politischen Staatswissenschaften von 1885[*7], die uns zuverlässig zum zeitgenössisch Führenden führen könnte. Die Forschung bietet inzwischen einige Versuchsbohrungen, insbesondere in dem grundlegenden Medienband von 1999[*8], aber keinen Überblick zum „Führenden" in Deutschland. Wissenschaftsgeschichtlich hat Paolo Grossi 1982/83 die Thematik systematisch und für „tutti i giuristi" eröffnet.[*9] Der deutsche Reichtum war nur vereinzelt als erstrangige Quelle erkannt und genutzt worden.[*10]

In einem vierten und letzten Teil werde ich versuchen, einige allgemeinere Charakteristiken, Tendenzen und Bedingungen plausibel zu machen, sowie einige Vergleichspunkte heran zu ziehen (IV).

II. Im Dschungel also – was tun?

1. Die Dimensionen

Da die Machete immer nur ein gar zu kleines Stück klärt, muss die Vogelperspektive gewählt werden. Aus ihr sieht man allerdings sehr vieles einfach nur in Grün. Aber: Es gibt doch rettende Listen und Verzeichnisse. Sie erlauben auch einige Quantifizierungen. Als Verzeichnis maßgebend ist die dreibändige „Bibliographie der Zeitschriften des deutschen Sprachgebiets bis 1900" von Joachim Kirchner.[*11] Dort findet man zum *ganzen 19. Jahrhundert* ca. 575 juristische Periodika, darunter freilich auch viele Gesetzblätter und Amtsblätter, einige wenige Buchreihen und weniges Deutschsprachige aus Österreich und der Schweiz, die hier abzuziehen wären. Es kommen aber trotz aller bewundernswerten Akribie Kirchners relevante Ergänzungen aus anderen Quellen hinzu.[*12] Die rund 575 Einträge bei Kirchner erfassen eine Menge Amtsblätter u.ä., wie soeben erwähnt, von wissenschaftsgeschichtlich anderem Charakter und sind insoweit hier zu bereinigen um ca.

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5 Dazu sogleich bei und in Fn. 12.

6 Siehe das Pionier-Repertorium von C. Mansuino. Periodici giuridici italiani (1850–1900). Repertorio. Milano 1994 (= Per la storia del pensiero giuridico moderno, Biblioteca 43), mit 533 Nummern; Vgl. A.-J. Arnaud (Hrsg.). La culture des revues juridiques francaises (= Quad. fiorentini, Biblioteca 29). Milano 1988, empirisch leider ganz unergiebig und i.w. nur zum 20. Jahrhundert.

7 G. Schmoller. Übersicht über die wichtigere deutsche staatswissenschaftliche Zeitschriftenliteratur der letzten Jahrzehnte. – (Schmollers) Jahrbuch für Gesetzgebung u. Verwaltung 9 (1885), S. 1311–1327.

8 Siehe Fn. 3. Zum Sozialrecht wertvoll der Abschnitt „Zeitschriften und Aufsätze" bei I. Mikesic. Sozialrecht als wissenschaftliche Disziplin. Die Anfänge 1918–1933. Tübingen 2002, S. 25–29, aber fast nur zu nach 1918. Unergiebig O. Schatz. Das Fachzeitschriftenwesen des deutschen Sozialversicherung. Eine rechtliche und praktische Studie. Stuttgart 1931 – entgegen dem Titel nur eine Art Gutachten mit alleiniger Empfehlung des „Zentralblatt für Reichsversicherung und Reichsversorgung". Zum öffentlichen Recht ein Überblick bei M. Stolleis. Geschichte des öffentlichen Rechts. Bd. 2. München 1992, S. 378–380, auf der Basis von E. V. Heyen. Verwaltungsrechtswissenschaft in den Fachzeitschriften des Deutschen Reichs. – ders. (Hrsg.). Profile der deutschen und französischen Verwaltungsrechtswissenschaft 1880–1914. Frankfurt 1989, S. 55–113, ein methodisch, da er auch die Inhalte erschließt, und dank seiner empirischen Tiefe sehr wichtiger Beitrag. Daneben noch C. Doerfert. Die Zeitschriften des öffentlichen Rechts, 1848–1933. – Zeitschriften (Fn. 3), S. 421–448.

9 Siehe den Band zur Tagung von 1983: Quaderni fiorentini 16 (Milano 1987): Riviste giuridiche italiane (1865–1945). Grossi initiierte auch das Repertorium von Mansuino (Fn. 6) und die Untersuchung hg. von A.-J. Arnaud. La culture des revues juridiques francaises (= Biblioteca 29). Milano 1988.

10 Siehe vor allem die systematischen Auswertungen bei S. Gagnér. Die Wissenschaft des gemeinen Rechts und der Codex Maximilianeus Bavaricus Civilis (1974), jetzt in *ders*., Abhandlungen zur europäischen Rechtsgeschichte (= Biblioteca Eruditorum 29). Goldbach 2004, S. 213–346; aus seinem Seminar entstanden auch *meine* systematischen Auswertungen in: August Ludwig Reyschers Leben und Rechtstheorie. 1802–1880. Berlin 1974, durchweg, s. das Periodikaverzeichnis S. XXX *f*., die Anonyma S. XXXI *f.* und S. 398 für die „Hallischen Jahrbücher".

11 Band 1–3, Stuttgart 1969. 1974. 1977; dazu die Register von 1989; „Zeitschriften" ist hier zugunsten bibliographischer Vollständigkeit für alle Periodika sehr weit verstanden, also einschließlich Zeitungen, d.h. allgemeinerer und kurzperiodischer Organe. Wieder anders definiert „Zeitschrift" S. Vogenauer, „… to take up the ground hitherto unoccupied in the periodical literature" – Die ersten juristischen Fachzeitschriften Englands im 19. Jahrhundert. – Zeitschriften Europa (Fn. 4), S. 533–564, hier S. 542, für seine „englischen" Zwecke, aber nicht generell und hier passend.

12 Im wes. aus Mohnhaupts Verzeichnis und dem sehr reichen und genauen der Juristischen Fakultät München (ungedruckt vervielfältigt, M. Anders (Hrsg.). München 1981, III u. 261 S.); H. Mohnhaupt. Deutschland. – Gedruckte Quellen der Rechtssprechung in Europa (1800–1945). F. Ranieri (Hrsg.). Frankfurt a. M. 1992. Addiert man seine Nennungen in den Abschnitten „Zeitschriften", so ergeben sich ca. 260 Einträge. Grob geschätzt sind vielleicht ein Drittel davon zusätzlich zu Kirchner zu vermerken. Dagegen enthält das jährliche Verzeichnis von „Zeitschriften und Verwandtes" in Kürschner's (Allgemeiner, später Deutscher) „Literatur-Kalender" seit 1879 z. B. 1911/12 von Juristischem nur wenige populäre Organe wie „Gesetz und Recht" (s.u.bei Fn. 40).

65[*13] und weitere rund 20 für bloße Fortsetzungen mit geändertem Titel unter neuen Zählnummern, auf rund 490. Nimmt man die geschätzten Ergänzungen bei Mohnhaupt und im Münchener Verzeichnis wie erwähnt wieder dazu, so landet man wieder mit ca. zusätzlichen 80 Einträgen bei zusammen 570. Im Ergebnis handelt es sich um eine Dimension von ca. 570[*14] im 19. Jahrhundert existent gewesenen Zeitschriften, Zeitungen und Entscheidungssammlungen.

Statistisch haben das Material dieser Periodika allgemein aufbereitet Kootz 1908 und Lorenz 1937 nach dem Klassiker „Sperling" und einigen Zusatzquellen, sowie Arends/Klippel 1999 für den Bereich Recht nach Kirchner[*15]. Seit 1887 ist die verlässlichste und umfassendste Quelle das jährliche „Zeitschriften- und Zeitungsadreßbuch" für den Buchhandel von H.O. Sperling, kurz „Der Sperling".

Um die *Dimensionen* etwas abschätzbar zu machen ein Minimalvergleich: Allein 1997 gab es in Deutschland rund 500 laufende juristische Fachzeitschriften[*16], 1913 zählte man 627 als Höchststand seit 1887 mit 186; 1930 waren es ‚nur' 260 bzw. 298, 1938 155; aber dabei waren seit 1922 die „sozialwissenschaftlichen" Periodika abgetrennt, die 1930 allein 476 ausmachten – zusammen wie 1913 waren es also mit 627 zu 774 erneut mehr, freilich dies wieder nicht voll relevant.[*17] Statistika, sie werden schnell zu genau – jedenfalls lesen wir heute in einem einzigen Jahr mit rund 500 gewissermaßen ein ganzes 19. Jahrhundert, schaut man einmal nur auf je einen Band. Nach einem nur sehr allmählichen Anstieg im frühen 19. Jahrhundert nach 1815 (die Napoleonzeit hatte stark reduziert) fand eine erste Explosion dieser Periodikawelt statt seit 1871 im neuen Deutschen Reich. Es folgte ein Anstieg der Neuerscheinungen um rund 100% seit den 1850er und 1860er Jahren und ein erneuter Boom um rund 300% in den 1890er Jahren gegenüber den 1860ern. Die Zuwachsdimensionen an Neugründungen sind also gewaltig, nämlich[*18]: 1850er Jahre: 18, 1860er: 28, 1870er: 42, 1880er: 99, 1890er: 109 *neue* juristische Periodika.

Daneben steht übrigens die meist übergangene ebenfalls *gewaltige Umfangsvermehrung* der einzelnen Jahrgänge der meisten Langläufer. So wuchs das „Archiv für civilistische Praxis" von einem Anfangsdurchschnitt nach 1818 um 15 Seiten (pro Beitrag und Band) auf rund 26 Seiten nach 1822, rund 30 um 1867, aber dann bis zu 40 und deutlich mehr seit 1893; also verdoppelte, ja verdreifachte es sich. Das belegt eine Art zweite ‚Revolution des Geistes'. Nach 1789 meint dieses geflügelte Wort die deutsche Lösung des Denkens und Dichtens in die Zukunft, nach 1830 und deutlich nach ca. 1860 beginnt eine gewaltige, sozial viel allgemeinere Schreibproduktion, auch eine Revolution des Geistes.

2. Der Übergang zu "Deutsch"

Die Gründung des Deutschen Reichs 1871 bedeutete bekanntlich eine grundlegende Neuordnung und Zentralisierung der Justiz und der Gesetzgebungsinstitutionen und damit einen wesentlichen Verfassungswandel auch in den Ländern.[*19] Die bisherigen zahlreichen Entscheidungssammlungen partikularer Gerichte wurden konzentriert[*20] und ebenso die zahlreichen preußischen, bayrischen, sächsischen, mecklenburgischen, thüringischen, rheinischen u.a. Zeitschriften, z. B. die in mehreren Wellen verbreiteten Gerichtszeitungen[*21] mit ihren

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13 Amtsblätter u.ä. machen rund 40 Einträge aus, Buchreihen und nicht auf Deutschland Bezogenes rund 25.

14 Auf eine noch genauere Zahl 1800 bis 1900 wird verzichtet, da sie mangels Nummerierung der Nachweise aus anderen Quellen außerhalb von Kirchner und wegen mehrfacher sachlicher Überschneidungen nur aufwendig im Einzelvergleich an Kirchners Bibliographie feststellbar wäre.

15 R. Kootz. Zur Statistik der deutschen Zeitschriften. – ZsgesStaatswissenschaft 64 (1908), S. 526–560, auf der Basis damaliger Zeitschriftenadressbücher und Kataloge, s. S. 548 *ff.* für die Gruppe Recht-Politik-Statistik-Sozialpolitik-Volkswirtschaft, aber für Recht nur genauer für 1902: 595 Zeitschriften (S. 549); weiterführend E. Lorenz. Die Entwicklung des deutschen Zeitschriftenwesens. Eine statistische Untersuchung. Berlin 1937, hier S. 39 die Tabelle: 1887: 186 jur. Zeitschriften 1913 627. Zu Kirchner geben eine quantitative Auswertung G. Arends, D. Klippel. Die juristischen Zeitschriften im 19. Jahrhundert. Beobachtungen zu den juristischen Periodika in der Zeitschriftenbibliographie von Joachim Kirchner. – Zeitschriften (Fn. 3), S. 41–52, hier 530 für 1820–1900.

16 Siehe Frankfurter Allgemeine Zeitung vom 20. Oktober 1997, L. Becker. Die „Selbstgleichschaltung" juristischer Zeitschriften im Nationalsozialismus, in: Zeitschriften (Fn. 3), S. 481–500, hier 483, nach Sperling, aber minus 38 „ausländische Zeitschriften"; 298 nennt E. Lorenz (Fn. 15), S. 39, nach Sperling komplett; 1938 verzeichnet er nicht.

17 Siehe E. Lorenz (Fn. 15), S. 38 *f.* die Tabelle bis 1934. Der Unterschied 1913–1930 relativiert sich, da die 1922 *neu eingeführte* Rubrik „Sozialwissenschaften" bei Sperling offenbar weiter gefasst wurde als zuvor die sozialwissenschaftlichen Teile in der Rubrik „Recht".

18 So nach R. Kootz (Fn. 15), S. 548, danach auch C. Doerfert (Fn. 8), S. 421; etwas andere Zahlen bei G. Arends, D. Klippel (Fn. 15) – aber für die Steigerung nach 1871 ebenfalls deutlich. E. Lorenz (Fn. 15), S. 38 *f.* nennt absolute Jahreszahlen, aber erst ab 1887, nach Sperling (1887: 186, 1892: 255, 1897: 313, .1903: 418, 1909: 535, 1913: 627, 1914: 611 (Der 1.WK begann im August)).

19 Dazu weiter unentbehrlich E. Kern. Geschichte des Gerichtsverfassungsrechts. München 1954, S. 86 *ff.*, 124 *f.*: unter wesentlich süddeutschem Einfluß brachte das GVG „weitgehend inhaltlich Verfassungsrecht [so dass es] eines der wichtigsten, wenn nicht das wichtigste Gesetz nach der Reichsverfassung gewesen ist". Zu den Gesetzgebungsinstitutionen besonders prägnanter Überblick mit Nachweisen bei K. Kroeschell. Rechtsgeschichte Deutschlands im 20. Jahrhundert. Göttingen 1992, S. 1–10; daneben nun wichtig D. Willoweit. Deutsche Verfassungsgeschichte (1989), 6.A. München 2009, § 34 III u.ö.

20 Dazu wesentlich die kommentierte Bibliographie von H. Mohnhaupt. Deutschland. – Gedruckte Quellen der Rechtssprechung in Europa (1800–1945). F. Ranieri (Hrsg.). Frankfurt a. M. 1992, S. 95–325, hier 99. Erfasst sind hier auch Zeitschriften mit Urteilsabdrucken.

21 Generell R. Kootz (Fn. 15), S. 528; kurz mit einigen Beispielen J. Kirchner (Fn. 32), S. 182; siehe die meist kurzlebigen Titel in *ders*., Bibliographie (Fn. 11): 1849 Berlin, 1849 Leipzig, 1850 Hannover, 1850 Wien, 1853 Berlin, 1857 Leipzig, 1857 Coburg, Augsburg, 1861 Berlin, 1861

allgemein interessierenden Nachrichten. Sie wären wahrscheinlich ein Thema für sich. Die bis dahin herrschende Dominanz der partikularen Literatur und besonders ihrer Periodika trat zurück und wurde neu überlagert durch reichseinheitliche Periodika. Etliche sogenannte Central- oder Zentralblätter entstanden, etwa ein „Zentralblatt für Rechtswissenschaft" 1881, ein „Sozialpolitisches Zentralblatt" mit juristischer Perspektive 1892, auch ein „Zentralblatt für freiwillige Gerichtsbarkeit" 1890, für „Jugendrecht" 1908, für „Handelsrecht" 1897. Ältere Zeitschriften bemühten sich von nun an ein „Centralorgan" zu werden, so etwa der „Gerichtssaal" seit 1858.*[22]

Ebenso nahmen viele Periodika nun das Wort *„deutsch" in den Namen* auf, teils ganz neu oder in Umstellung ihres Titels, so etwa die „Zeitschrift für *Deutschen* Zivilprozess" 1880, die „Annalen des *Deutschen* Reiches" 1888, Die „*Deutsche* Zeitschrift für Kirchenrecht" 1892, die „*Deutsche* Juristenzeitung" 1896, die „*Deutsche* Notarzeitschrift" 1900 und die „*Deutsche* Richterzeitung" 1909. Gruchots „Preußische Beiträge" wurden zu „*Deutschen* Beiträgen" 1871 und ebenso Goldtammers „Archiv für Strafrecht" zu einem „*Deutschen* Archiv" 1871. Der politische Einigungsprozess schlägt somit unmittelbar durch auf die juristische Publizistik und verändert sie auch inhaltlich stark. Freilich erkennt man kaum methodische Änderungen. Sie sind offenbar von diesem Aspekt nicht abhängig. Der nationale Aspekt ist relativ leicht erkennbar. Was sieht man sonst?

3. Tabellarischer Überblick

Für einen besseren Überblick ebenso wie einige Anschauung habe ich vier alphabetische Tabellen erstellt (s.u. V.). Sie nennen für die Zeit vor 1830 nur weniges zur Erinnerung, werden aber für nach 1830 ziemlich genau. Sie enthalten nun *alle Langläufer*, d.h. Zeitschriften von mehr als zehn Jahren Laufzeit; nur bei den Entscheidungsammlungen wurde auf die annähernde Vollständigkeit von rund 40 Titeln allein bei Kirchner verzichtet und ein reduziertes Bild, möglichst ohne Verzerrung, gegeben. Damit neutralisiert sich zunächst das Problem genauerer Zahlen, da es im wesentlichen auf den Unklarheiten mit den vielen Kurzläufern beruht.*[23] Zugleich kann dieser Zugriff besser, aber auch nur, einige Tendenzen und Fakten veranschaulichen, die sich bei voller Durchsicht als auffallend erwiesen.

Die Tabellen bieten so rund 120 von 160 Langläufern insgesamt (also mit rund 30 Amtsblättern und 35 Entscheidungssammlungen) nach 1830. Einige Kurzläufer von besonderem sachlichen Interesse werde ich im Text einbeziehen.

4. Vier Gruppen

Man kann vier Gruppen erkennen, zwei größere und zwei kleinere. Sie sind so in den Tabellen zusammengestellt. Es handelt sich um die mehr praktisch orientierten, die mehr wissenschaftlich orientierten, die allgemein, d.h. in der Mediengeschichte populär, sein wollenden und die berufsständischen Zeitschriften. Die Zuordnung war meist nach Titel und weiteren Indizien klar. Nicht jede Zeitschrift konnte eigens durchgesehen werden. Die Zweifelsfälle dürften aber keine hier relevante Dimension erreichen. Nicht alle Schlußdaten nach 1900 wurden eigens ermittelt. Es gibt oft erhebliche Schwierigkeiten, da die aktuellen Verzeichnisse jede bloße Titeländerung als eigene Zeitschrift nennen und diese, anders als Kirchner, nur selten ausdrücklich verknüpfen. Es kann also immer noch eine ‚unbekannte' Fortsetzung geben.

(1) Die deutlich größte Gruppe bilden die *praktischen Zeitschriften* mit den *Entscheidungssammlungen* (s. Tabellen 3 und 1 in V.). Die Entscheidungssammlungen nehme ich hinzu, denn reine Entscheidungssammlungen sind selten und in der Sache stellen sie alle nur einen Ausschnitt aus der Summe derjenigen Periodika dar, die sich den konkreten Rechtsanwendungsproblemen widmen. Zusammen bilden sie eine wissenschaftsgeschichtlich relevante Gruppe. Schon die praktischen allein liegen knapp vor den wissenschaftlichen (37 zu 34 bei Kirchner). Es handelt sich auch in meiner Auswahl nach Langläufern um ca. 37 Zeitschriften und ca. 20 von ca. 40 Entscheidungssammlungen – eine vergleichsweise in Europa gewaltige Dimension. Sie hat natürlich zu tun mit der deutschen föderalen Vielfalt, die schon die Titel zeigen. Beispiele für Entscheidungssammlungen sind die Berliner „Annalen der Criminalrechtsprechung", später „der Strafrechtspflege", die „Annalen der Badischen Gerichte", die „Casseler" und „Kurhessischen Annalen", Seufferts bekanntes „Archiv", das sächsische „Archiv für Verwaltungsrecht", die „Hanseatische Gerichts-Zeitung" (entgegen dem Titel) usw.

Nicht hierher zählt das „Archiv für civilistische Praxis", denn dieses wurde bald sehr wissenschaftlich. Um 1900 standen darin lange Aufsätze von nicht selten an die 100 Seiten.*[24] In den wirklich ‚praktischen' Zeitschriften beherrschten inhaltlich Gerichtsnachrichten, Gesetzgebungsnachrichten und Fallerzählungen, Verwaltungs-

Hamburg, 1862 Leipzig, 1869 Hamburg, 1878 Hamburg, 1879 Breslau, 1880 Berlin, 1883 Berlin, 1883 Cöln, 1883 Leipzig, 1884 Nürnberg, 1884 Köln, 1886 Chemnitz, 1887 Berlin, 1887 Offenburg, 1889 Augsburg, 1890 Ratibor, 1893 Hamburg, 1892 Berlin, 1893 Hamburg, 1894 München, 1897 München.

[22] Siehe das „Vorwort", S. IV.

[23] Zum Problem oben bei und in Fn. 12.

[24] Dazu genauer *meine* Untersuchung und Statistik: Geschichtlich (Fn. 3), S. 241 die Zahlen, S. 177 *ff.* die Auswertung.

fragen, Personalfragen und kleinere dogmatische Fragen das Bild. Es sind die kleineren Fragen, von denen Jhering 1857 in seinen und Gerbers „Jahrbüchern" sich lösen will für die nötigen „prinzipiellen Analysen" bzw. für die Erfassung des „Einzelnen im Zusammenhang mit seinem *Prinzip*"[*25]. Ein Beispiel für die Inhalte gibt „Der Gerichtssaal. Zeitschrift für volkstümliches Recht". Der strafrechtlich engagierte Herausgeber Ludwig von Jagemann aus Karlsruhe[*26] erklärt 1849, seine Zeitschrift solle enthalten:

> *„I. Abhandlungen über Grund und Zweck der neuen deutschen Gesetzgebung, im Geiste der Vermittlung zwischen Volk und Gericht.*
>
> *II. Aufsätze über die Bedeutung und Entwicklung der rheinischen, französischen, schweizerischen und englischen Rechtsinstitute, soweit sie uns als Vorbilder dienen.*
>
> *III. Fingerzeige über die Pflichten und amtliche Tätigkeit aller Gerichtspersonen, insbesondere des Staatsanwalts, des Jugendrichters, Gerichtspräsidenten, Zivil- und Kriminalrechtlers, Geschworenen, Rechtsanwalts und Verteidigers im neuen Verfahren.*
>
> *IV. Erläuterungen über Genesis und … der einschlägigen Reichsgesetze und daraus abschließenden Particulargesetze, zum Berufe der praktischen Anwendung.*
>
> *V. Darstellungen anziehender, öffentlich-mündlich verhandelter Rechtsfälle, beschränkt auf die wesentlichsten Tatsachen, mit Kritik des Verfahrens und der Entscheidung.*
>
> *VI. Übersichten, Notizen, Anzeigen und Anfragen aus dem Gebiet der Rechtsstatistik, der Literatur, der Kammer- und Gerichtsverhandlungen."*

Es sind die Rubriken einer typischen Zeitschrift dieser praktischen Gruppe.

Ein anderes Beispiel gibt das „Archiv für das Civil- und Criminalrecht der königlich preußischen Rheinprovinzen". Im ersten Band, Köln 1820, erklärt der Herausgeber folgende Themen zum Programm:

> *„Eine getreue Darstellung aller interessanten Civil- und Criminalrechtsfälle, welche bei dem rheinischen Appellations-Gerichtshofe vorkommen werden nebst den in diesen Rechtsfällen erfolgenden Entscheidungen und Urteilssprüchen …*", dann in einer zweiten Abteilung *„a) die merkwürdigsten Entscheidungen der Tribunale erster Instanz … b) eine kurze Übersicht der Urtheilssprüche, welche bei dem Revisionshofe zu Berlin ergehen werden … c) Abhandlungen über einzelne Materien der in den Preuß. Rhein-Provinzen geltenden Gesetzgebung; d) Ministerielle Reskripte und Verfügungen, in so fern sie sich zur öffentlichen Bekanntmachung eignen; e) diejenigen Sendschreiben des General-Prokurators, welche ein allgemeines Interesse darbieten; f) Nachrichten und Bemerkungen über neue Gesetze, Einrichtungen und Schriften, welche die Gesetzgebung, Rechtswissenschaft und Rechtsverwaltung in den Rhein-Provinzen betreffen."*[*27]

Auch am Ende des Jahrhunderts findet man ein ähnliches Bild, in dem freilich die allgemeinen Nachrichten über die Gerichte, das Personal und Reskripte und dergleichen eher zurück getreten sind. So bringt etwa das „Sächsische Archiv für Bürgerliches Recht und Prozess" in seinem ersten Band 1891 eine Rubrik „Abhandlungen", und eine Rubrik „Verzeichnis der besprochenen Literatur". Die Abhandlungen stammen ausnahmslos von Praktikern: Reichsgerichtsräten, Amtsrichtern, Landgerichtsdirektoren, Appellationsgerichtsvizepräsidenten, Gerichtsassessoren usw. Sie widmen sich Einzelfragen der neuen Konkursordnung, des sächsischen BGB, des deutschen BGB, der Lehre vom Offenbarungseid, dem Entwurf eines Patentgesetzes, dem Immobiliarpfandrecht im BGB-Entwurf, den einstweiligen Verfügungen nach der sächsischen Gerichtsordnung, dem Vornamen und Familiennamen im BGB-Entwurf, den Mehrheiten von Versicherungen, der zweiten Lesung des BGB-Entwurfs, den Voraussetzungen einer Schadensersatzpflicht nach dem BGB-Entwurf, der Lehre von der Beweislast und einigen Fragen der Gewerbeordnung. Bei den Literaturbesprechungen findet sich auch ein Werk über die volkswirtschaftliche Bedeutung des Abzahlungsgeschäfts. Im Ganzen scheint der wissenschaftliche Charakter nun mehr hervorzutreten.

In diesen Zeitschriften schreiben also Richter, Anwälte, Assessoren, Staatsanwälte, Verwaltungsbeamte, auch Strafanstaltsbeamte, Gerichtsvollzieher und andere Praktiker. Getragen werden diese Zeitschriften weniger personell als institutionell, also von bestimmten Gerichten, Verwaltungsbehörden, Notarvereinen, Richtervereinen, Anwaltsvereinen und ähnlichen Institutionen. Das entspricht zum einen der erheblichen Ausdifferenzierung der Juristenprofession im nun intensiven Staatsbildungsprozess hin zum sog. Interventionsstaat. Zugleich passt es gegenläufig zur intensiven deutschen Vereinsbildung als nicht nur bürgerlichem, pluralistischem Organisationsprozeß seit ca. 1830 und besonders nach 1848.[*28] Die Veränderung der sozialen Organisation der Gesellschaft von ständischen Korporationen zu freieren Assoziationen ließe sich daran genauer ablesen.

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[25] Jhering. Unsere Aufgabe. – JheringsJbb 1 (1877) S. 1–52, hier S. 41 und 37.

[26] 1805–1858, Justizministerialrat im relativ liberalen Baden seit 1843. Das Folgende aus Gerichtssaal 1 (1849) S. 15, hier ohne einige Sperrungen im Original.

[27] Archiv 1 (1820) Prospectus.

[28] Dazu bes. prägnant T. Nipperdey. Deutsche Geschichte 1800–1866. München 1983, S. 267–271: „Jahrhundert der Vereine, jeder steht – oft mehrfach – in ihrem Netzwerk" (267). Allg. auch H.-U. Wehler, Deutsche Gesellschaftsgeschichte. Bd. 2. München 1995, S. 54 *f.*, 335 *f.*, 392 *f.*

(2) Die zweitgrößte Gruppe bilden die primär *wissenschaftlichen Periodika* (s. Tabelle 4 in zwei Teilen a–y und z in V.). In meiner Übersicht sind es rund 35. Vielleicht ist das sogar etwas überdimensioniert, aber es handelt sich doch klar um die zweitgrößte Gruppe. Hier schreiben Rechtsprofessoren und solche, die es werden wollen, daneben gelehrte, meist hochrangige Praktiker. Man schreibt recht ausführlich und grundsätzlich, zwischen dreißig und über hundert Seiten. Die Formate sind kleiner, die Erscheinungsweise zeitlich gestreckter – das ähnelt den Monographien als dem Muster der wissenschaftlichen Arbeit seit Savignys „Recht des Besitzes" von 1803.[*29] Im Ganzen wirkt das Bild grundsätzlicher als heute. Beispiel ist schon das „Archiv für civilistische Praxis" seit 1818. Es heißt zwar „praktisch", hat sich aber schnell, und im späten 19. Jahrhundert immer mehr, zu einer Professoren-Zeitschrift mit langen dogmatischen Aufsätzen entwickelt. Das zeigt eine genauere Statistik[*30]. Natürlich passen hierher auch späte Beispiele, wie das „Archiv für öffentliches Recht" 1889 ff., *Kohlers* „Archiv für Bürgerliches Recht" 1888 ff., aber auch frühere, wie *Goldtammers* Strafrechtsarchiv 1857 ff., *Gerbers* und *Jherings* „Jahrbücher" 1857 ff., auch *Schletters* „Jahrbücher" 1855 ff., *Rudorffs* u.a. „Zeitschrift für Rechtsgeschichte" 1860 ff und 1880 ff., *Goldschmidts* „Zeitschrift für Handelsrecht" 1858 ff, *Grünhuts* „Zeitschrift für Öffentliches Recht und Privatrecht der Gegenwart" 1874 ff., *von Liszts* „Zeitschrift für die gesamte Strafrechtswissenschaft" 1881 ff., *Doves* Kirchenrechtszeitschrift 1860 ff., *Bernhöfts* „Zeitschrift für vergleichende Rechtswissenschaft" 1880 ff. und auch schon die alte *Mohl'sche* „Zeitschrift für die gesamten Staatswissenschaften" 1844 ff., wie auch das späte „Jahrbuch des öffentlichen Rechts" von *Jellinek* 1907 ff.

Ich habe soeben die Herausgebernamen jeweils mitgenannt. Denn hier bilden bestimmte Professoren-Persönlichkeiten viel mehr die entscheidende Trägergruppe als bei den praktischen Zeitschriften. Auch das unterscheidet beide Gruppen deutlich. Man bemerkt zudem klar die zunehmende Spezialisierung und die häufige Alleinstellung einer Zeitschrift im Fach. Ebenfalls bemerkt man wieder eine zunehmende Verwissenschaftlichung seit der zweiten Hälfte des 19. Jahrhunderts.

(3) Die beiden letzten Gruppen sind sehr viel kleiner. Zunächst geht es um die *populären Rechtszeitschriften* und *-zeitungen* auch für juristische Laien (s. Tabelle 2 in V. – dort zusammengefasst mit der folgenden Gruppe). Sie haben kaum länger Erfolg gehabt. Ich fand insgesamt, also hier mit den Kurzläufern, etwa rund zwanzig seit 1789[*31], jedenfalls soweit die bloßen Titel eine Zuordnung ermöglichten: eine „Rechtslehre für das Volk" erschien nur 1796 als Wochenschrift durch J.V. Eybel in Linz, die „Blätter für Jurisprudenz, Polizei und Cultur in Detuschland" erschienen nur 1800 durch Chr. Assal und Chr. Oemler in Jena/Leipzig, die „Themis, eine juristische Wochenschrift zur Belehrung für diejenigen, welche die Rechte nicht studiert haben" nur 1813 in Leipzig, die „Rechtserforschungen für Juristen und Nichtjuristen" des Heidelberger Theologen H.E.G. Paulus nur 1824/25, die wöchentliche „Allgemeine juristische Zeitung" von Chr.F. Elvers und Bender in Rostock und Göttingen nur 1828–30 und die „Allgemeine Rechtszeitung für das deutsche Volk" desselben Elvers in Göttingen nur 1831, ein „Hand- und Taschenbuch für die Einwohner des Preußischen Staats …" nur 1840, ebenso „Der allgemeine Telegraph für die deutsche Gesetzeskunde" durch A. Müller aus Heilbronn, im lebhafteren Vormärz immerhin drei Jahre von 1843–46 die „Patriotische Blätter für Freunde gesetzlicher Ordnung" durch J.A.K. Schröter in Leipzig und ebenfalls drei Jahre die „Zeitschrift für volkstümliches Recht" dann als „Das Volk und sein Recht" und zuletzt als „Die Reform" durch G. Eberty in Halle und Berlin. Wieder nur ein Jahr erschien 1847 „Der Criminalist. Zeitschrift zur größeren Verbreitung praktischer Rechtskenntnisse im Volke …" in Berlin und 1848 der „Sprechsaal für das anhaltische Volk" durch Zeising in Bernburg, dann 1851 die „Volksthümliche Zeitschrift für deutsche Rechtspflege und Verwaltung. Ein gemeinverständlicher Rathgeber …" durch Karl in Leipzig, 1860/61 dann ein „Gerichtliches Unterhaltungsblatt für Stadt und Land" durch O.v. Kessel in Berlin, ähnlich in Berlin ein „Deutscher Gerichtssaal. Journal für Unterhaltung und Belehrung". 1874–76 halten sich in München und Augsburg die „Blätter für deutsche Politik und Recht" durch M. Huttler.

Diese Blätter sind im Format meist größer als Oktav und nennen sich häufig „Zeitung". Sie erscheinen kurzfristiger, meist wöchentlich, schon bedingt durch den entsprechenden Postlauf. Und sie sind thematisch universaler als Fachorgane. Damit fallen sie in die mediengeschichtlich gern diskutierte Kategorie *Zeitung* statt *Zeitschrift*.[*32] In der Tat trifft das ihren hier zusammenfassend *populär* genannten Charakter. Ihr Aufkommen und ihre Verbreitung haben viel zu tun mit den jeweiligen Zensurbestrebungen und -normen, die auf diese Organe besonders streng achteten. Am 20.9.1818 hatte der Deutsche Bund in seinem Pressgesetz alle Zeitschriften und Zeitungen der Vorzensur unterworfen. Das wurde sofort am 3. März 1848 vom Bund selbst suspendiert und Vorzensur auch nach 1850 nicht wieder eingeführt. Aber weiter und neu griffen nun die Regierungen zu Postzwang, Kautions- und Konzessionszwang, Stempelsteuer, Strafrechtsausbau usw. als Druckmittel. Nach

[29] Dazu jetzt genauer J. Rückert. Recht als Wissenschaft: Friedrich Carl von Savigny (1779–1861). Der Greifswalder Ruf von 1804 und Savignys neue Wissenschaft im Recht des Besitzes. – Greifswald im Spiegel der deutschen Rechtswissenschaft. J. Lege (Hrsg.). Tübingen 2009, S. 61–91.

[30] Siehe Rückert (Fn. 3), S. 214 (Tabelle) mit 178.

[31] Alles nach Kirchner, Bibliographie (Fn. 11), Nr. 2594 *ff.* Soweit ich keine Herausgeber nenne, fehlen sie bei Kirchner. Es handelt sich dann durchweg um Verlegerunternehmungen.

[32] Immer noch absolut grundlegend J. Kirchner. Das deutsche Zeitschriftenwesen. Seine Geschichte und seine Probleme. Teil 2: Vom Wiener Kongreß bis zum Ausgange des 19. Jahrhunderts. Wiesbaden 1962, hier S. 369 *ff.*, 374; daneben E. Lorenz (Fn. 15), S. 11 *ff.*; W. Haacke. Die politische Zeitschrift 1665–1965. Stuttgart 1968, hier S. 10 *ff.* 20 *ff.*; im auch allgemeinhistorischen aktuellen Überblick mit Nachweisen bei J. Wilke. Grundzüge der Medien- und Kommunikationsgeschichte. 2.Aufl. Köln u.a. 2008, siehe nur die Gliederung.

Praxislockerungen Ende der 1850er Jahre brachte erst das Reichspressegesetz vom 17.5.1874 eine liberalere Regelung ohne Präventionsrechte gegen inländische Organe, ja eine „neue Epoche" der Entfesselung der Massenkommunikation.[*33] Der Markt wuchs gewaltig dank einer „Leseexplosion" durch bessere allgemeine Bildung und Alphabetisierung; die Rate lag z. B. in Preußen um 1800 bei 60% der Bevölkerung, um 1850 80% und um 900 bei rund 100%, bei Verdoppelung der Bevölkerungszahl.[*34] Das Wachstum wurde zudem ermöglicht und beschleunigt durch die neuen Maschinenschnellpressen seit den 1820er Jahren und die Rotationsdruckmaschinen seit den 1880er Jahren.[*35]

Das alles wirkte auch auf die mehr „populären" juristischen Periodika. Zumal „volksthümliche" juristische Blätter wie Elvers 1828 und der „Gerichtssaal" 1849 (s. sogleich) standen der Politik und damit größeren Lesekreisen ja eher nahe. Den immer wieder angeschlagenen Ton setzte bereits der junge Göttinger Professor Elvers 1828 in seiner Einleitung „Über die HauptTendenz dieser Zeitung", d.h. der „Allgemeine juristische Zeitung":[*36]

> *„Die Zeit der todten Stubengelehrsamkeit ist, wie in der Wissenschaft überhaupt, so auch in unserer Jurisprudenz vorüber." Man müsse "aus dem Leben schöpfen" für eine den "Verhältnissen unseres Volkes und unserer Zeit entsprechende Rechts-Gesetzgebung und Rechtspflege", für "die wichtigsten juristischen Vorgänge des In- und Auslandes ein Sammelpunkt, ein Archiv der juristischen Zeitgeschichte", für „kürzere Mitteilungen in wöchentlichen Nummern".*

In diesem Sinne werden drei Abteilungen angekündigt:

> *„Die erste für die juristische* Praxis *... mit Kritiken neuer Gesetzgebungen, Erörterungen allgemein besprochener und interessanter Rechtsfälle, gedrängte Mittheilungen aus der Praxis der Gerichte und Anwalde, Anfragen über zweifelhafte Rechtsfälle nebst Versuchen einer befriedigenden Beantwortung derselben ... .*
>
> *Die zweite für die Theorie ... wird den Gang der juristischen Literatur ... zur Anschauung bringen, zugleich selbständig auf die wünschenswerthe Entwickelung der Theorie nach allen ihren Hauptseiten hin einzuwirken sich bemühen, und insbesondere auch durch Mittheilungen aus der statistischen, ethnographischen und historischen Jurisprudenz sowohl den Gesichtskreis der Theoretiker zu erweitern, als auch das theoretische Interesse der Praktiker zu beleben suchen.*
>
> *Die dritte für die Correspondenz- und Zeitungsnachrichten wird die wichtigsten und neuesten juristischen Vorgänge des In- und Auslandes mit Hilfe einer ausgebreiteten Corrrespondenz und mit Benutzung der vorzüglichsten Zeitschriften und Zeitungen ... berichten ... "*[*37]

Offenbar leiten hier ganz andere Absichten als beim „Archiv für die civilistische Praxis" oder gar der „Zeitschrift für geschichtliche Rechtswissenschaft", aber auch als bei der 10 Jahre jüngeren „Zeitschrift für deutsches Recht und deutsche Rechtswissenschaft". Dort wird überall die Wissenschaft betont, wenn auch in unterschiedlichem Zugriff. Aber nirgends findet man den betont aktuellen, ja „zeitgeschichtlichen" Akzent, die schnelle wöchentliche Folge und ein so breites, allgemein juristisch-politisches Zielpublikum. Elvers' „Zeitung" nannte sich bewusst und also mit Recht „Zeitung".[*38] Sie kann als Exempel stehen für eine populäre Variante im Rahmen der juristischen Organe, gekennzeichnet durch kurze Rezensionen, die Betonung von Übersicht, Berichten nur zu den zweifelhaften und erfahrungsträchtigen Punkten bei Rechtsfällen, usw. Die Politik war nahe – und so schließt Elvers, das Ganze diene nicht „politischen Discussionen", aber doch „ernster besonnener Freimüthigkeit".[*39]

Als ausnahmsweise langlebig erscheint hier nach dem Titel der „Gerichtssaal". Gegründet wurde er ausdrücklich als eine „Zeitschrift für volksthümliches Recht" seit 1849. Aber die Zeitschrift wird nach wenigen Jahren rechtspolitischer Prägung bald sehr praktisch-wissenschaftlich, siehe die Jahrgänge 1858 ff.[*40] Die Zeitschrift „Gesetz und Recht" bleibt wieder nur zwei Jahre populär, 1889/1890. Die Zeitschrift „Das Recht", gedacht als

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[33] Genauer Überblick bei W. Mallmann. Presserecht, in Handwörterbuch zur deutschen Rechtsgeschichte. Bd. 3. Berlin 1984, Sp. 1902–1923; für nach 1850 kurz E. Lorenz (Fn. 15), S. 32 *f.*; näher inzwischen J.-D. Kühne. Die Reichsverfassung der Paulskirche. Frankfurt/M. 1985 (2. insoweit unverä. Aufl. 1998), S. 397–405; daneben W. Siemann. Verbote, Normierung und Normierungsversuche. – Geschichte des deutschen Buchhandels, S. 87 95; allgemeiner auch J. Wilke (Fn. 32), S. 164–167, 215–222, 252 (neue Epoche) – 254.

[34] Siehe J. Wilke (Fn. 32), S. 156.

[35] J. Wilke (Fn. 32), S. 157 *f.*

[36] Elvers. – Allgemeine juristische Zeitung 1 (1828, 31.3.), S. 1 *f.* Christian Friederich Elvers (1797–1858) hatte 1819 in Göttingen romanistisch habilitiert, wurde 1823 ao. und 1828 o. Prof. in Rostock, 1841 OAppG-Richter in Kassel, gilt als eher konservativ, auch religiös engagiert, etwa für Mission (ADB 6 (1877) 75 *f.*). Deutlich konventioneller klingt sein erneuter Ruf nach „Leben" in der neuen Folge seiner „Themis. Zeitschrift für Doctrin und Praxis des Römischen Rechts". Göttingen 1838, S. V–XIV: Plan der neuen Folge. Zur Allgemeinformel „Leben" als beliebte, sehr variable Leerformel (schon) damals Rückert (Fn. 10), S. 247 *ff.*: Der Lebensbezug. Folgen. Ergebnisse.

[37] Elvers. Haupttendenz (Fn. 36), S. 2.

[38] Elvers. Haupttendenz (Fn. 36), S. 2: Er will den Zweck „einer *Zeitung* und damit den charakteristischen Unterscheid zu schon vorhandenen juristischen *Zeitschriften* fest ins Auge fassen.".

[39] Elvers. Haupttendenz (Fn. 36), S. 4.

[40] Dazu näher auch A. Roth. Strafrechtliche Zeitschriften im 19. Jahrhundert. Diskussionsforen oder Gesetzesinterpreten? – Zeitschriften (Fn. 3), S. 303–330, hier 311 *ff.*

allgemeine „Rundschau für den Juristenstand“ und zur Orientierung für eine juristische Hausbibliothek von Soergel seit 1897, wird bald immer juristischer. Populärer sind die sogenannten Gerichtszeitungen, die Wiener 1850–1931, die Berliner 1853–1867, die Preußische (1859) und dann Deutsche (1861). Trotz teilweise enormer Auflagen, wie die zuletzt 20.000 der Berliner[*41], sind sie eher kurzlebig. Eine populär gemeinte juristische Zeitschrift ging also nie in Führung, auch nicht etwa die „Blätter für populäre Rechtswissenschaft“ in Minden 1882/1883 von G. Freudenstein oder der „Deutsche Volks-Anwalt“, Leipzig 1880 von H. Schreps, oder auch die „Zeitschrift für populäre Rechtskunde für Männer und Frauen aller Stände“, Berlin 1900.[*42]

Eine echte Ausnahme bildet offenbar „Der Publicist. Eine Zeitschrift zur Besprechung gerichtlicher und polizeilicher Gegenstände, gesellschaftlicher und bürgerlicher Verhältnisse in Beziehung auf jene Gegenstände“, von A. F. Thiele in Berlin 1845–1872, sowie „Gesetz und Recht. Zeitschrift für allgemeine Rechtskunde“ von A. Langewort in Berlin 1900–1932. Vielleicht zählt hierher auch das Blatt „Rechtsschutz. Freisinniges Organ zur Belehrung und Aufklärung auf dem Gebiete des Rechtswesens“ durch J. Fränkel in Berlin 1879–1892. Nur drei Langläufer finden sich also seit 1789 – ein wahrhaft begrenztes Vorkommen.

Eine zusätzliche Erklärung außer den erwähnten rechtlichen, administrativen und ökonomischen Hindernissen auf diesem Felde findet sich zeitgenössisch angedeutet bei Kootz.[*43] Er meint, die allgemeinen Zeitungen, Zeitschriften und Unterhaltungsblätter hätten diesen Markt der allgemeinen Vermittlung von Juristischem bereits besetzt gehalten. Sie boten allgemeine Spalten mit Rechtsrat, dazu Juristensprechstunden, Personalia und merkwürdige Rechtsfälle und ähnlich allgemein Interessantes.[*44] Spezieller Juristisches war daneben offenbar nicht unterhaltend genug und allgemeine juristische Aufklärung oder Belehrung fand kein ausreichendes Publikum mit Dauerinteresse – dafür gibt es dann auch besondere Fibeln und Ratgeber. Dieses Phänomen dürfte bis heute anhaltend charakteristisch sein.

Immer wieder populär waren dagegen die *Merkwürdigen Rechtsfälle*, das meint fast ausschließlich Strafrechtsfälle. Das Genre begann bekanntlich mit den Fallsammlungen des französischen Juristen Pitaval seit 1734, wurde ins Deutsche übersetzt schon 1747, dann prominent von Schiller 1792, setzte sich fort in Feuerbachs Sammlung „Aktenmäßiger Darstellung merkwürdiger Verbrechen“ seit 1808 und in dritter Auflage durch Mittermaier 1849. 1841 bis 1873 existiert ein „Wochenblatt für merkwürdige Rechtsfälle in Sachsen“, 1842 beginnt Hitzig in Berlin den neuen Pitaval, 1883 haben wir eine „Deutsche Gerichtshalle. Chronik interessanter Rechtsfälle“ in Berlin, dann die „Deutsche Criminal- und Gerichtszeitung“, Berlin 1887/88, den „Criminalreporter“, Hamburg 1891 ff., fortgesetzt als „Hamburger Gerichtszeitung“ 1893 bis 1914, dann die „Illustrierte Berliner Gerichtshalle“ 1892, den „Deutschen Pitaval“ als „Vierteljahresschrift für merkwürdige Rechtsfälle“ 1896, einen „Pitaval der Gegenwart“, Tübingen 1907 bis 1914 – diese Tradition scheint nie abzureißen bis hin zu den modernen Presseberichten, die sich wiederum und immer noch fast nur den Strafrechtsfällen widmen[*45], wie übrigens auch die sog. schöne Literatur. Diese Seite der Jurisprudenz wird also auch in den Periodika durch allgemeiner menschliche Interessen erobert.

(4) Zuletzt bleiben die *primär berufsständischen Zeitschriften*, eine eher kleine aber doch auffallende Gruppe von ca. sechs Periodika seit 1850 (s. Tabelle 2 in V.). Es geht um die Zeitschriften nur der Richter, der Vollzugsbeamten, der Anwälte und Patentanwälte usw., die sich von den allgemeiner praktischen unterscheiden. Dazu gehört etwa eine „Zeitschrift des preußischen Amtsrichtervereins“ 1884 bis 1896, eine „Zeitschrift für Rheinisch-Deutsche Subalternbeamte“ 1890 bis 1900, oder die Zeitschrift „Erholungsstunden. Zeitschrift für preußische Justiz-Canzlei-Beamte“ 1895 bis 1902.

5. Brüche und Kontinuitäten

Was ergibt das Gesamtbild mit den vier Gruppen im Blick auf das Jahrhundert? Es stellt sich nun doch recht anders dar als vor 1850 und um 1820, dagegen sehr ähnlich dem Gesamtbild für nach 1900 bis heute. Es handelt sich also um einen Bruch zurück und eine Kontinuität nach vorn, den man epochal nennen kann nach den Dimensionen, dem Zuwachs an Praxisorganen und der starken Ausdifferenzierung. Denn vor 1850 gab es nicht nur viel weniger juristische Zeitschriften und Zeitungen überhaupt, sondern vor allen Dingen eine geringere Zahl von praktischen Zeitschriften und viel weniger Entscheidungssammlungen. Mehr Politisches ging damals mehr an die allgemeinen Zeitungen und Juristisches wurde auch noch sehr stark in den Allgemeinen Literaturzeitschriften abgehandelt[*46], also etwa in der Halleschen „Allgemeinen Literatur-Zeitung“ 1785 bis

41 Laut J. Kirchner (Fn. 32), S. 182.

42 Alle nach J. Kirchner (Fn. 11).

43 Siehe Kootz (Fn. 15), S. 529; analog für England Vogenauer (Fn. 11), S. 541.

44 Genaueres dazu lässt sich nicht leicht feststellen. So bietet Kirchner (Fn. 32) dazu keine Beschreibungen.

45 Siehe die aktuelle Presseuntersuchung von O. Castendyk. Rechtliche Begründungen in der Öffentlichkeit: Ein *Beitrag* zur Rechtskommunikation in Massenmedien, Opladen 1994, und die anschaulich historische von S. J. Loroch. Zeitungsrubrik Gerichtssaal. Strafprozessberichterstattung im Münster im 19. Jahrhundert (1848–1890). Frankfurt a.M. 2009.

46 Zahlreiche Beispiele bei J. Rückert (Fn. 10), S. XXVII *f.* und XXXI *f.*, B.-R. Kern. Georg Beseler. Leben und Werk. Berlin 1982, S. 567–569, oder H.-P. Haferkamp. Georg Friedrich Puchta und die „Begriffsjurisprudenz“. Frankfurt a.M. 2004, S. 480 *f.*

1849, in der „Jenaischen Allgemeinen Literatur-Zeitung“ 1804 bis 1849, in der „Leipziger Literatur-Zeitung“ 1800 bis 1834, den „Heidelbergischen Jahrbüchern“ seit 1808, den „Göttinger gelehrten Anzeigen“ seit 1753, den „Hallesche“ und „Deutsche Jahrbücher“ 1838 bis 1844, in denen bis 1842 Warnkönig, Bluntschli, Lorenz von Stein, R. Köstlin und andere Juristen auftraten[*47], den hegelianisch gegründeten Berliner „Jahrbücher für wissenschaftliche Kritik“ 1827 bis 1846[*48] oder der Berliner „Literarischen Zeitung“ 1834 bis 1849, in der etwa auch Puchta und Jhering schrieben. Dagegen kamen in den 1850er Jahren eine ganze Reihe von Rezensionsorganen auf, die dann 1859 in die Münchener „Kritische Vierteljahrschrift“ mündeten (bis 1944). Weitergreifend und ergänzend traten 1881–1913 A. von Kirchenheims „Centralblatt für Rechtswissenschaft“, 1889–1918, O. Loewensteins „Juristisches Literaturblatt“ und 1897–1944 das Münchener „Das Recht“ von Soergel hinzu. Alle zusammen versuchten, die literarische Explosion auch in der Jurisprudenz zu verarbeiten.

Ich breche die Vogelperspektive hier ab und wende mich der Frage zu, welche Zeitschriften nun die „führenden“ wären.

III. Die Höhenkammwanderung

1. Die Führungsfrage

Versprochen war auch eine Höhenkammwanderung. Leider lässt sich die „Höhe“ einer Zeitschrift nicht so leicht messen, wie die einer Landschaftserhebung. Das ist kein billiger Vergleich, sondern ein Hinweis auf einen sehr schwierigen Punkt. Denn wer soll hier wen eventuell führen? Und wohin? Was heute noch anhält als Periodikum, wie das „Archiv für civilistische Praxis“, das „Archiv für öffentliches Recht“ oder die „Zeitschrift für Strafrechtswissenschaft“, muss keineswegs damals führend gewesen sein. Das wäre eine naive unhistorische Projektion. Was damals führend war, ist schwer überprüfbar, abgesehen von der Tatsache der Kurzläufer. Denn man müsste um das Echo wissen und das Echo einer Zeitschrift im Ganzen – und darüber wird kaum berichtet.

Auch ökonomische Indikatoren, wie *Verkaufszahlen und Auflagen* sind nur verstreut konkret erforscht. Lorenz bietet dazu einen Abschnitt, der ganz allgemein für 1852 von grob um die 1000 als Hauptfall ausgeht, er nennt aber keine Spezifizierungen für Recht.[*49] Kirchner hat fallweise wertvolle Auflagenzahlen zusammengetragen, die ein Bild ergeben: so 2000 zum Heidelberger AcP und 1000 zur Gießener „Zeitschrift für Civilprozeß“ in 1850, nur 450 für die Münchener „Kritische Vierteljahrsschrift“ in 1859, 750 für Goldtammers Berliner „Archiv für Strafrecht“ und 1500 für das Darmstädter „Archiv für practische Rechtwissenschaft“ in 1867, dann 1000 für das „Archiv für … Allgemeines deutsches Handelsrecht“ von von Raule, Gerber und Busch in 1888, und schließlich, jeweils für 1889, 2900 für die anwaltliche „Juristische Wochenschrift“ seit 1872, 2200 für die ebenfalls wöchentlichen Wiener „Juristische Blätter“ auch von 1872, aber wieder nur 550 für das erwähnte „Centralblatt für Rechtswissenschaft“ seit 1881.[*50] Das hält sich also alles in einem recht kleinen Fachspektrum bis hin zu einem etwas größeren Juristen-allgemein-Publikum. Die wirklichen Unterschiede werden erst drastisch und signifikant bei einem Blick auf die echten Zeitungs-Organe, etwa die „Berliner Gerichts-Zeitung“, die 1867 20.000 Stück auflegte.[*51] Dieser Indikator lässt sich also nicht systematisch nutzen.

Und worin sollte eine solche Zeitschrift ‚führend‘ sein, in *welchem Bereich*? Womöglich ist es jede Zeitschrift in ihrem Fach – zumal, wenn es keine oder wenig Konkurrenz gab. Und Konkurrenzlosigkeit war sogar die Regel bei den Langläufern. Entscheidend war es also, sich für eine längere Phase in einem Bereich durchzusetzen. Damit wurde eine Zeitschrift offenbar führend. Dies gilt in der Tat für etliche Zeitschriften, die wir ohne Weiteres als wichtig verbuchen. Dazu gehört etwa die „Zeitschrift für Rechtsgeschichte“ bzw. „der Savigny-Stiftung für Rechtsgeschichte“. Sie war konkurrenzlos seit 1860 bis ca. 1980. Ebenfalls gehört hierher die „Zeitschrift für Bergrecht“ seit 1860; dann auch die „Zeitschrift für Handelsrecht“ unter Goldschmidt seit 1858, die jedenfalls für das allgemeine Handelsrecht auch gegen die erwähnte Konkurrenz von Raule/Gerber/Busch (1862–1888) führend wurde. Führend waren in diesem Sinne auch die „Zeitschrift für Kirchenrecht“ seit 1860, das „Archiv für Kriminalrecht“, dann „Goldtammers Archiv“ (1853–1933). Neben diesem etablierte sich allerdings seit 1881 die ‚modernere‘, d. h. sozialwissenschaftlich offenere „Zeitschrift für die gesamte Strafrechtswissenschaft“ Franz von Liszts.

Analog gibt es führende *partikularrechtliche Periodika*, so z. B. das „Rheinische Archiv“ seit 1820, das Darmstadt-Hessische „Practische Archiv“ seit 1852, die Bayrischen „Blätter für Rechtsanwendung“ seit 1836,

[47] Dazu die Liste bei J. Rückert (Fn. 10), S. 398.

[48] Dazu und zu ihrem erheblichen Wandel auch mit Anhängern der Historischen Schule: J. Rückert, Jurisprudenz und „wissenschaftliche Kritik“ in den „Jahrbüchern für wissenschaftliche Kritik“ (1827–1846). – Die „Jahrbücher für wissenschaftliche Kritik“. Hegels Berliner Gegenakademie. Chr. Jamme (Hrsg). Stuttgart 1994, S. 449–488.

[49] E. Lorenz (Fn. 15), S. 62–68.

[50] Siehe in der Folge im Text J. Kirchner (Fn. 32), S. 29, 30, 177, 181, 281, 281, 280.

[51] J. Kirchner (Fn. 32), S. 182; soweit ich sehe, gibt Kirchner leider keine weiteren Beispiele in seinen juristischen Abschnitten (s. S. 27 *ff.*, 101 *ff.*,176 *ff.*, 280 *ff.*), vgl. allgemein zum Problem S. 377 *f.*

die „Hanseatische Gerichtszeitung“ seit 1860, die „Mecklenburgische Zeitschrift für Rechtspflege und Verwaltung“ seit 1882, das „Preußische Handelsarchiv“ seit 1847, die „Schleswig-Holsteinischen Anzeigen“ seit 1888 ff. und anderes mehr. Sie alle sind auf ihrem, freilich bisweilen nicht sehr großen, Felde führend – als Könige in ihrem Reich.

Die Führungsfrage muss also sehr differenziert beantwortet werden. Immerhin lässt sich sagen: In fast allen diesen Fällen gab es nicht viel parallele Konkurrenz. D. h. also in der Tat: Schon die etwas *dauerhaftere Existenz* einer Zeitschrift kann sie daher als irgendwie im Fach oder Territorium führend ausweisen. Daher werden hier in den Tabellen die Langläufer über mindestens 10 Jahre als Indikatoren für Wichtiges genommen. Das lässt sich auch mit einem Blick auf die besonders nach 1871 relativ vielen Kurzläufer stützen, die den Reichsgründungsboom nicht überlebten[*52]. Wer überlebte, hatte sich also in Führung gearbeitet. Das wäre eine Antwort auf die Frage „führend“. Jede qualitative Wertung muss da zunächst beiseite bleiben. Denn auch ökonomisch erfolglose Kurzläufer können natürlich für die Rechtswissenschaft und -praxis, ja für die ganze Rechtskultur, sehr wichtig gewesen sein, so etwa die erwähnte „Zeitung“ von Elvers als erneutes Aufbruchsymptom in Richtung „Leben“, in einer sich 1828 wieder mehr öffnenden Diskussion, auch weitere der erwähnten „Zeitungen“ [*53] als Vorboten, Frühlingsschwalben, Krisenkünder, Schwanengesänge usw. Dies wäre ein schönes, eigenes Feld für spezielle Analysen.

Inwiefern auch eine *charakteristische Qualität* in einer Zeit oder übergreifend vorlag, muss eigens qualitativ untersucht werden. Natürlich gibt es schlicht oberflächliche oder bloß berichtende oder politisierende Organe – aber das ist nicht das Problem. Diese Fragen lassen sich relativ leicht klären. Das eigentliche Qualitätsproblem zeigt ein anderweit vertrautes Beispiel: Es wäre gewiss eine recht naive Projektion, wollte man etwa Jherings „Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts“ (1857–1942) für besonders qualitätsvoll und führend erklären, weil darin 1860 der berühmte Aufsatz Jherings über „Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen“ stand. Der Aufsatz war für einen Romanisten gewiss originell, aber er war keine juristische Entdeckung überhaupt – wie oft behauptet wird. Denn das Regelungsproblem war längst bekannt und erwogen, etwa im Preußischen Allgemeinen Landrecht von 1794 (in I 5 § 285) und im Naturrecht. Das Problem gewann auch Zukunft nicht wegen Jherings ‚genialer‘ Weitsicht, sondern wegen des gar nicht vorhersehbaren Aufstiegs des sogenannten Vertrauensschutzes (im weitesten Sinne), also einer mehr sozialen als liberalen Haftungsentwicklung über die ursprünglichen engeren Verschuldenshaftungen im BGB (einschließlich § 831) und die im BGB ja präzise geregelten Jhering-Fälle hinaus.[*54] Andererseits waren Jherings „Jahrbücher“ eine fast konkurrenzlos führende Zeitschrift für das geltende gemeine, besonders das römische Recht bis 1900. Also waren sie führend und nicht führend zugleich, je nachdem, wie man misst.

Ich lasse damit die Führungsfrage so stark differenziert im Raume stehen – sie erfordert sehr konkrete Kriterien und Maßstäbe und vor allem vergleichende Feststellungen. Dazu müssten Analysen im längeren Verlauf und vergleichend vorgenommen werden. Es müssten die Gründung, die Personen und Programme, die Durchführungen, die äußere Gestalt, das Methodenprofil, die Thementypik, das Berufsspektrum und die Erfüllung und der Erfolg des Programms geklärt werden.[*55] Dafür gibt es eindrucksvolle Muster. So hat Heyen so durchdacht wie minutiös empirisch eine volle Erfassung und Auswertung alle Aufsätze usw. geleistet. Das Ergebnis widerlegt die damals sehr und immer noch stark vorherrschende Vorstellung von einer Dominanz der sog. juristischen Methode im öffentlichen Recht nach 1871 Die Dominanzvorstellung beruht – sehr kurz gesagt – auf einer Blickverengung auf bestimmte Professorentexte, die die Realität der damaligen Jurisprudenz nicht kennt und daher übergeht.[*56] Der Methodengegensatz von juristisch versus staatswissenschaftlich erweist sich als stark überzeichnet und viel zu homogen gedacht. Eine klare Entwicklungstendenz dahin gibt es nach 1871 nicht. Geprägt wird das Methodenprofil vielmehr beruflich-institutionell unterschiedlich je nach Professoren, Richtern und Verwaltungsbeamten und dies sogar – aus heute gewohnter Zentralsicht – erheblich regional bedingt.[*57] Es gab ja auch im öffentlichen Recht keine einheitliche Juristenausbildung. Als gemeinsam

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[52] Siehe dazu G. Arends, D. Klippel (Fn. 15), S. 43 *f.*

[53] Vgl. für 1828 die Kontextbeschreibung in: Rückert (Fn. 10), S. 83 *f.*, 191 *f.*; weiter oben nach Fn. 32.

[54] Rudolph Jhering, Jbb. 4 (1861, aber Heft 1, 1860), S. 1–112; dazu knapp D. Medicus. Zur Entdeckungsgeschichte der culpa in contrahendo. – Festschrift für M. Kaser. Wien u. a. 1986, S. 168–181. erster Überblick europäisch jetzt bei J. von Hein, s.v. – Handwörterbuch des Europäischen Privatrechts. Bd. 1. Tübingen 2009, S. 290–294; knappe historische Klärungen bei M. Schermaier, vor § 275. Leistungsstörungen. – Historisch-kritischer Kommentar zum BGB. M. Schmoeckel, J. Rückert, R. Zimmermann (Hrsg.). Bd. II. 1. Tübingen 2007, etwa, Rn. 39 (Kodifikationen um 1800), 80 (‚Defizite‘ des Deliktsrechts im BGB), und ausf. J.-D. Harke. § 311 II, III. Rechtsgeschäftsähnliche Schuldverhältnisse. – Ebda, Rn. 2–10, 22 zur späteren Dogmatisierung als Vertrauenshaftung (RG 1928, Ballerstedt 1951, Canaris 1965: dritte Haftungsspur neben Vertrag und Delikt).

[55] Exemplarisch für die Zeitschriften des öffentlichen Rechts 1885–1914: E. V. Heyen (Fn. 8), zudem im Vergleich mit Frankreich; möglich war diese Forschung mit entsprechend großem Mittel- und Zeitaufwand über mehrere Jahre; daneben, für „Archiv für civilistische Praxis“, „Zeitschrift für geschichtliche Rechtswissenschaft“ und „Zeitschrift für Deutsches Recht“ *meinen,* im Zugriff recht ähnlichen, Beitrag von 1999 (wie Fn. 3), bei dem mir seinerzeit der Beitrag von Heyen leider entging. Heyens Buchtitel erschließt die Zeitschriften als Thema nicht.

[56] E. V. Heyen (Fn. 8), S. 47 u.ö., zusammenfassend 149.

[57] Siehe Heyen (Fn. 8), durchgehend zu diesen Fragen und zusammenfassend S. 147–152.

findet sich, dass alle Zeitschriften sowohl „wissenschaftlich wie handlungsanleitend" für die Zukunft (bis hin zu ‚politischen' Elementen, die keineswegs marginal sind) sein wollen.[*58]

Für die anderen Rechtsbereiche fehlen ähnliche Untersuchungen für die Zeit nach ca. 1860.

2. Qualitätsniveau, Methoden und Literaturtypik

Lässt sich trotzdem etwas zur Charakteristik dieser vielen offenbar führenden Langläufer-Periodika sagen, die man finden kann? Ich meine ja – für einen heutigen Leser, der auch einige Periodika des frühen 19. Jahrhunderts und der Weimarer Zeit einigermaßen überblickt, fällt in der Tat etwas *Gemeinsames* auf. Es ist die *hohe generelle Qualität*. Damit ist zweierlei gemeint:

Zum einen herrschen eine besondere Gründlichkeit am jeweiligen Problem, intensiv genaue Ausarbeitungen, eindringende Argumentationen, wissenschaftliches Niveau, großer literarischer Apparat – also eine *Verwissenschaftlichung*. Sie wird auch indiziert durch die Entstehung und Zunahme spezieller juristischer Rezensionszeitschriften: zuerst, noch schleppend, das Tübinger „Critische Archiv" 1801–1810, dann deutlich lebendiger Schuncks Erlanger „Jahrbücher" 1826–1836, die Tübinger „Kritische Zeitschrift" 1826–1829, Kinds Leipziger „Summarium" 1832–1835 und Richters Leipziger „Kritische Jahrbücher" 1837–1848. Dann mit vielfacher Kraft Arndts' u.a. Münchener „Kritische Überschau" 1853–1859, daneben die parallele Heidelberger „Kritische Zeitschrift", und beide vereinigt zur dauerhaften Münchener „Kritischen Vierteljahrschrift" 1860–1944.[*59] Und schließlich nach 1881 stark verlagsgestützte Blätter mit großem Mitarbeiterstab wie das erwähnte „Centralblatt", „Literaturblatt" usw.

Zum anderen bemerkt man eine viel engere *Verbindung bestimmter Methoden und Literaturtypen* als heute. Man schreibt im Bereich Zivilrecht, anders offenbar als im Verwaltungsrecht, strenger dogmatisch oder historisch oder rechtspolitisch oder rechtsökonomisch oder rechtsphilosophisch – immer eng im Literaturtyp. Auch dies wäre selbstverständlich empirisch verläßlich auszuarbeiten. Es wäre jedenfalls aber eine Täuschung, bei dem Eindruck solcher Enge stehen zu bleiben – so sehr es zu unseren Vorurteilen über die sog. Begriffsjurisprudenz, die vielmehr eine ausgeprägte Prinzipienjurisprudenz war, und dies in bestimmten Themen- und Berufssektoren, passen würde.[*60] Denn ein und dieselben Autoren arbeiten sehr oft in mehreren dieser methodisch getrennten Bereiche gleichzeitig. Zum Beispiel schrieb ein Savigny dogmatisch, historisch, rechtspolitisch, gutachtlich und richterlich (etwa in: Besitz, System, Geschichte im MA, Beruf, Städteordnung, Rheinisches Recht und ALR 1818, Staatsrat, Kassationshof), ein Jhering dogmatisch, rechtspolitisch und rechtsphilosophisch (in: Jahrbücher, Literarische Zeitung, Geist, Zweck), ein Dernburg dogmatisch und rechtspolitisch (in: Pandekten, Preußisches Privatrecht, BGB-Kritik), ein Windscheid dogmatisch, aber auch rechtspolitisch und grundsätzlich (in: Actio, Pandekten, Reden, BGB-Fragen), ein Gierke umfassend historisch, streng dogmatisch, energisch rechtspolitisch und grundsätzlich (in: Genossenschaftsrecht, Deutsches Privatrecht, BGB-Kritik, Laband-Kritik), oder ein Lotmar besonders streng dogmatisch, streng historisch und streng „legislativ" wie man es nannte (Arbeitsvertragsrecht, Error, BGB- und ZGB-Kritik). Für Richter und Anwälte dürfte Ähnliches gelten; mit regionalen Prägungen ist freilich wie zum Verwaltungsrecht zu rechnen.

Darin, in diesem Stil der Beiträge, hat sich inzwischen viel geändert – man mischt die Zugriffe viel mehr. Dieses Mischen begann konkret in Weimar, hatte Hochkonjunktur nach 1933 u.a. in einer zivilistischen und strafrechtlichen sog. „Wertungsjurisprudenz", wurde nach 1945 naturrechtlich und rechtsethisch fortgeführt und auch nach ca. 1960 keineswegs beiseite gelegt.[*61] Kelsen hatte 1934 vehement dagegen geschrieben[*62] – auch das machte ihn noch lange zur *persona ingrata* in Deutschland, Ost wie West. Das hat viel grundsätzlichen Kontext, etwa in Verfassung und Gesetzgebungspolitik, Philosophie und Wissenschaftstheorie, allgemeinen Ideologien und juristischen Standesideologien, und sehr viel methodische Bedeutung, etwa für Rechtsquellenlehre, Auslegungs- und Rechtsfortbildungslehre, Richterbindung, Rechtsstaatsverständnis, Gesetzgebungslehre usw. – auch dies kann hier aber nicht verfolgt werden.[*63]

Zurück vom Höhenkamm in die Ebene – welche Tendenzen, Bedingungen und Vergleichsaspekte lassen sich abschließend benennen?

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58 E. V. Heyen (Fn. 8), S. 148.

59 Siehe die Einträge, jeweils beim Gründungsdatum, bei J. Kirchner (Fn. 11); s. auch *J.* Rückert (Fn. 48), S. 450 *f.*

60 Siehe jetzt nur J. Rückert. Vom „Freirecht" zur freien „Wertungsjurisprudenz". – ZSGerm 125 (2008), S. 199–255, hier 207–210; auch ders., vor § 1. Das BGB und seine Prinzipien: Aufgabe, Lösung und Erfolg. – Historisch-kritischer Kommentar zum BGB. M. Schmoeckel, J. Rückert, R. Zimmermann (Hrsg.). Bd. I. Tübingen 2003, S. 34–122, hier Rn. 14–48.

61 Siehe J. Rückert (Fn. 60), S. 225 *ff.* für die methodische Ebene.

62 Siehe das berühmte Vorwort seiner Reinen Rechtslehre, 1. A. 1934. Es muß nicht zuletzt in diesem Kontext gelesen werden.

63 Siehe als Überblick, entgegen dem engeren Titel auch für Weimar und NS, J. Rückert. Zu Kontinuitäten und Diskontinuitäten in der juristischen Methodendiskussion nach 1945. – Erkenntnisgewinne, Erkenntnisverluste. Kontinuitäten und Diskontinuitäten in den Wirtschafts-, Rechts- und Sozialwissenschaften zwischen den 20er und 50er Jahren. K. Acham, K. W. Nörr, B. Schefold (Hrsg.). Stuttgart 1998, S. 113–165. Für nach 1945 jetzt wesentlich I. Kauhausen. Nach der ‚Stunde Null'. Prinzipiendiskussionen im Privatrecht nach 1945. Tübingen 2007; T. Hollstein. Die Verfassung als ‚Allgemeiner Teil'. Privatrechtsmethode und Privatrechtskonzeption bei Hans Carl Nipperdey (1895–1968); D. Herbe. Hermann Weinkauff (1894–1981). Der erste Präsident des Bundesgerichtshofs. Tübingen 2008.

IV. Einige allgemeinere Tendenzen, Bedingungen und Vergleichspunkte

1. Tendenzen

Zehn Tendenzen möchte ich zusammenfassend benennen:

(1) Die Periodika waren nach ca. 1820 generell die *neuen Medien* für die laufende wissenschaftliche Diskussion, nach den Dissertationen des 18. Jahrhunderts und neben den allgemeinen Literatur-Zeitungen wie der „Jenaischen" oder der „Hallischen" an der Wende um 1800 und bis in die 1840er Jahre.

(2) Die Periodika übernahmen eine starke *Kommunikationsfunktion,* immer deutlicher und geradezu explosionsartig nach 1871.

(3) Die auch und mehr *praktischen Periodika* und *Entscheidungssammlungen überflügelten* die enger wissenschaftlichen nach ca. 1850/60 quantitativ deutlich. Das war ein spezifisch neues Phänomen. Darin schlägt sich Mehreres nieder: zum *einen*, dass man sich dem *positiven Recht* und seiner neuen Fülle von Gesetzgebungsakten zuwenden musste und wollte. Zum *zweiten* wirkt die enorme *Vervielfältigung* der juristischen Berufe und Institutionen in Gerichten, Verwaltungen und Regierungen, aber auch in Vereinen der juristischen Berufsstände mit ihren berufsständischen Organen. Und *drittens* wirkt förderlich die allgemeine Verwissenschaftlichung auch der Praxis seit etwa den 1840er Jahren, wie erwähnt nach Qualitätsniveau, Methoden und Literaturtypik.[*64] Nicht nur die Historische Rechtsschule, sondern auch die weniger historischen oder philosophischen und mehr dogmatischen Autoritäten wie Thibaut, Wächter, Vangerow u. a. hatten eine neue Verwissenschaftlichung der Jurisprudenz durchgesetzt. Dies wirkte nun in die Breite.[*65] Die Praxis wurde *wissenschaftlicher*. So blieb es im Kern bis heute – dieser Trend ist also zukunftsweisend und epochal. Heute kann man dazu freilich erkennen, dass die selbständige wissenschaftliche Prägung eher zurückgeht.[*66] Für die Zeitschriften gilt das im übrigen analog. Ein kurzer Blick auch nur auf die äußere Entwicklung etwa des AcP seit 1900 im Vergleich mit dem Status um 1990[*67] genügt dafür. Die evidente Explosion der engeren Rechtsprechungs- und Praxisperiodika seit ca. 1990 gehört ebenso hierher wie die bemerkenswerte Verschulung in Ausbildungszeitschriften wie der ursprünglich, 1961, mit hohem Niveau gestarteten „Juristischen Schulung". Neueste Neugründungen wie die Zeitschrift „Rechtswissenschaft" (bei Nomos 2010) bestätigen diesen Wissenschaftsschwund, indem sie gegensteuern wollen. Grundsätzliches in und außer der Dogmatik, wissenschaftliche Prinzipienorientierung (wenn schon nicht -diskussion), Systemdurchdringung, methodisch haltbare Wertanalysen nach klar gesetzten Präferenzen statt Bekenntnissen, das scheint nicht die Signatur unseres juristischen Zeitalters. Die Zeitschriften waren und sind dafür die ergiebigsten Seismographen.

(4) Eine deutlich *politische Trennung der Periodika* lässt sich kaum feststellen – die vier erwähnten Gruppen (praktisch, wissenschaftlich, populär, berufsständisch) dominieren vor der Politik. Andere Gruppen sind nicht recht erkennbar, allenfalls noch die „amtlichen" Periodika. Anders war dies etwa bei den ökonomischen und staatswissenschaftlichen Zeitschriften nach 1850. Schmoller kann sie in seiner Übersicht von 1885 ohne Weiteres nach freihändlerisch-liberal, staatssozialistisch-konservativ, staatssozialistisch-radikal und allgemein konservativ einteilen und beschreiben. Immerhin im Strafrecht kann man sagen, dass die Zeitschrift von Liszts auch einen Neuansatz einer wissenschaftlichen Schule bedeutete. Die Periodika spiegeln damit die ruhigeren juristischen Zeiten einer langen Gesetzgebungsperiode. Ausgesprochene Richtungsorgane wie die „Zeitschrift für geschichtliche Rechtswissenschaft" von 1815 oder einige Zeit das AcP von 1818 oder der „Gerichtssaal" als „Zeitschrift für volkstümliches Recht" von 1849 finden sich nicht. Doch versuchte Grünhuts Wiener Zeitschrift 1874 mit dem Eröffnungsaufsatz von Adolf Merkel einen Neuansatz in Richtung allgemeine Rechtslehre[*68], von Liszt 1881 einen strafrechtlichen Neuansatz als sog. moderne Schule. Im Zivilrecht findet man erst 1914 die programmatische Zeitschrift „Recht und Wirtschaft"[*69]. Die Gründung der „Deutschen Richterzeitung" 1909 kann als eine durchaus politisch-parteiische Standesaktion angesehen werden und erst recht dann die Sezession und Standesspaltung mit der Zeitschrift „Die Justiz" in Weimar seit 1925. Besonders signifikant ist dann der politische Umschwung des Zeitschriftenwesens unter dem Primat

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[64] Dazu oben im Text nach Fn. 58; für das Verwaltungsrecht ebenso E. V. Heyen (Fn. 8), S. 147.

[65] Für den Zusammenhang mit Kant und Kantianismus im 19. Jahrhundert näher J. Rückert. Kant-Rezeption in juristischer und politischer Theorie (Naturrecht, Rechtsphilosophie, Staatslehre, Politik) des 19. Jahrhunderts. – John Locke und Immanuel Kant. Historische Rezeption und gegenwärtige Relevanz. M. P. Thompson (Hrsg.). Berlin 1991, S. 144–215, hier S. 198 *f.*

[66] Siehe dazu *meine* Untersuchung der Lehrbücher zum Allgemeinen Teil des BGB seit 1900. – J. Rückert. Das BGB (Fn. 60), hier Rn. 110, S. 115 *f.*

[67] Zum älteren AcP J. Rückert (Fn. 3), S. 146 *ff.*

[68] A. Merkel. Über das Verhältnis der Rechtsphilosophie zur „positiven" Rechtswissenschaft und zum allgemeinen Teil desselben. – ZsPrivÖffR 1 (1874), S. 1–10 u. 402–421.

[69] Dazu im Kontext A. Depping. Das BGB als Durchgangspunkt. Privatrechtsmethode und Privatrechtsleitbilder bei Heinrich Lehmann (1876–1913). Tübingen 2002, S. 24 *ff.*; ergänzend J. Rückert (Fn. 60), S. 206.

der Politik 1933/34[*70], der auch bisher ganz unbeachtete ökonomische Seiten hatte.[*71] Die „Zeitschrift für Rechtsgeschichte" war zu dieser Zeit längst kein Schulorgan mehr, ebensowenig das „Archiv für civilistische Praxis" trotz Philipp Heck als seinem Leiter, „Der Gerichtssaal" u. a.

(5) Die *Thementypik* lässt sich nicht wirklich überblicken – hunderte von Bänden wären daraufhin zu überprüfen, welche Themen (und Methoden dabei) herrschten, mehr praktische oder wissenschaftliche, wie praktisch und wie wissenschaftlich, welche Rechtsbereiche usw. Immerhin lässt sich zweierlei sagen: Zum einen war *Spezialisierung* angesagt, parallel zur aktiven und oft sehr speziellen Gesetzgebung, also vom Handelsrecht zum Bergrecht und zum Gewerberecht und (Sozial)Versicherungsrecht usw. Zum anderen tritt die *Grundlagendiskussion* merklich *zurück*. Rechtsphilosophie und grundsätzliche Rechtsgeschichte, also Rechtsgeschichte als große Entwicklungs- und Trendgeschichte, waren wenig verbreitet. Die Rechtsgeschichte bot kaum Zeitschriftenarbeit an ‚großen Erzählungen'. Diese steckten eher in den älteren Großwerken von Jhering über den „Geist des Römischen Rechts" (1858 *ff.*) oder von Gierke über die „Genossenschaft des Deutschen Rechts" (1868 *ff.*). Juristisch problemorientierte Rechtsvergleichung hatte sich zwar, nach einigen aufklärerisch-enzyklopädischen Anfängen, mit der legislativen Ausdifferenzierung abgeschlossener nationaler Rechtsysteme langsam seit den 1820er Jahren als „législation comparée" etabliert, aber als Grundlagenreflexion und -beitrag übten sie erst Post, Kohler u.a.[*72]

Die *Rechtsphilosophie* und *Rechtstheorie* verfügten überhaupt nicht über ein eigenes Periodikum – und dies schon seit den Jahren nach 1800. Erst 1907 wurde die Rechtsphilosophie neoidealistisch von Kohler und Berolzheimer neu aufgestellt mit dem „Archiv für Rechts- und Wirtschaftsphilosophie", dem Vorgänger des heutigen „Archiv für Rechts- und Sozialphilosophie". Die um 1870 bis 1917 wichtige „allgemeine Rechtslehre" Merkels, Bergbohms, Bierlings, Somlós u. a. hatte sich kein eigenes Periodikum geschaffen. Vielleicht setzte sie zu wenig auf publizistischen Kampf. Jedenfalls war mit der Übernahme der Holtzendorffschen „Enzyklopädie für Rechtswissenschaft" in der 5. Auflage 1907 durch Kohler ein allgemeiner neuer Akzent gesetzt. Kohler ersetzte dort den alten Einleitungsbeitrag von Merkel durch seine neohegelianischen Beiträge über Rechtsphilosophie und Universalgeschichte, das Thibaut-Gans'sche Programmwort von 1814 und 1824 aufgreifend:

> *„Zehn geistvolle Vorlesungen über die Rechtsverfassung der Perser und Chinesen würden in unseren Studierenden mehr wahren juristischen Sinn wecken, als hundert über die jämmerlichen Pfuschereyen, denen die Intestat-Erbfolge von Augustus bis Justinian unterlag."*[*73]

(6) *Methodische Neueinsätze* in der Jurisprudenz prägten die Zeitschriftenwelt nach 1850 nicht dominant, Vielfalt herrschte durchaus, anders als 1815 die „Zeitschrift für geschichtliche Rechtswissenschaft", 1818 das „Archiv für die civilistische Praxis" und 1829 die „Kritische Zeitschrift für die Rechtswissenschaft des Auslandes". Diese trugen ihr Programm schon im Titel. In letzterer wurde freilich keine problemgeschichtlich-funktionale Rechtsvergleichung im heutigen Sinne betrieben, sondern vor allen Dingen Berichtsarbeit über Gesetzgebung in Europa.[*74] Einen neuen Auftakt schienen die „Jahrbücher für Dogmatik" von Gerber und Jhering 1857 und Bekkers „Jahrbuch des gemeinen Rechts", ebenfalls 1857, zu bieten. Aber sie boten in Wahrheit recht orthodox gemeinrechtliche Abhandlungen, dogmatisch und historisch-dogmatisch. Die „Zeitschrift für Handelsrecht" (seit 1858) spezialisierte ihr Themenfeld in eine mehr allgemeine Richtung gegenüber sonstigen Handelsrechtsorganen, sie blieb aber methodisch zeitgemäß und insofern konventionell.[*75] Neues bringt die Rechtsvergleichung. Sie beginnt sich unter Bernhöft (seit 1878) neu zu etablieren als ausgesprochenes und empirisches Grundlagenfach. Kohler schreibt in diesem Sinne 1901 „Die vergleichende Rechtswissenschaft ist die Blüte der heutigen Jurisprudenz"[*76] – er meinte es anders als der mehr konkret-problemgeschichtlich

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[70] Dazu der wesentliche Überblick von B. Rüthers, M. Schmitt. Die juristische Fachpresse nach der Machtergreifung der Nationalsozialisten. – Juristenzeitung 43 (1988), S. 369–477, und die genaue Untersuchung der Umstände bei Partei, Verlagen und Redaktionen bei Becker (Fn. 16), einschließlich viel freiwilliger Mitwirkung.

[71] Siehe M. Knoche. Wissenschaftliche Zeitschriften im nationalsozialistischen Deutschland. – Beiträge zum Buch- und Bibliothekswesen 30 (1990), S. 260–281. Knoche zeigt u.a. bedeutsame ökonomische Faktoren, zunächst internationalen Druck aus den USA bis zu Boykottdrohungen wegen zu hoher Preise schon seit Mitte der 1920er Jahre und massiv seit 1932/33, mit der Folge von Umfangsreduktionen und deutschen Exportsubventionen seit Mai 1935–1945 (S. 260–264), dann Kriegsprobleme (267). Die juristischen Zeitschriften werden dort nicht näher behandelt, sie standen aber als meist nicht so international unter stärkerem internen Druck.

[72] Dazu wichtig F. Ranieri. Die Rechtsvergleichung und das deutsche Zivilrecht. Eine wissenschaftshistorische Skizze. – Vergleich und Transfer. Komparatistik in den Sozial-, Geschichts- und Kulturwissenschaften. H. Kaelble, J. Schriewer (Hrsg.). Frankfurt 2003, S. 221–250, 224 *f.* (auch in Festschrift für K.W. Nörr, 2003).

[73] A. Fr. J. Thibaut. Neunzehnte Abhandlung. Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland. – derselbe, Civilistische Abhandlungen. Heidelberg 1814, S. 433 – in einem (Nr. 7; S. 431–434) der sog. Zusätze zu seiner Schrift, die später auch öfters separat abgedruckt sind; auch schon in Thibaut's Selbstanzeige seiner Schrift in „Heidelberger Jahrbücher" 1814, Nr. 33. Als Motto bei E. Gans. Das Erbrecht in weltgeschichtlicher Entwicklung. Eine Abhandlung der Universalgeschichte. Bd. 1. Berlin 1824 (Neudr. Aalen 1963), S. IV.

[74] Dazu näher erklärend H. Mohnhaupt. Rechtsvergleichung in Mittermaiers „Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes" (1829–1856). – Zeitschriften (Fn. 3), S. 277–301, hier 295 *f.*

[75] Dazu J. Rückert. Handelsrechtsbildung und Modernisierung des Handelsrechts durch Wissenschaft zwischen ca. 1800 und 1900, in: Modernisierung des Handelsrechts im 19. Jahrhundert Heidelberg 1993 (= Beiheft ZHR 66) S. 19–66, hier S. 42 *ff.*, 47 *f.*, 60 *f.*

[76] So im ersten Satz seines Beitrags: Über die Methode der Rechtsvergleichung [Kongressbericht für Paris 1900]. – (Grünhuts) ZsPrivÖffR-Gegenwart 28 (Wien 1901), S. 273–284.

orientierte Ernst Rabel, den man heute mehr verehrt.*[77] Aber die Akten dazu können nicht geschlossen werden ohne empirische Untersuchung der Profile, für die die Muster ja bereit liegen.

Die Freirechtsbewegung um 1910 brachte es nicht zu einer eigenen Zeitschrift. Auch der sogenannte juristische Positivismus dieser Epoche schuf sich keine eigenen methodischen und Richtungsperiodika. Er hatte eher eine generelle, sensibilisierende Wirkung im Sinne einer konkreten, fachlichen Verwissenschaftlichung ohne Metaphysik und über die Dogmatik des geltenden Rechts hinaus. Sozialrecht, -politik und Arbeitsrecht hätten Anlass zu Neuansätzen geboten. Aber die ‚modernen' Seiten dieser Fächer, die immer auch das geltende Recht und seine Juristen provozieren konnten, wurden schnell eine Sache mehr der allgemeinen, dann sog. staatswissenschaftlichen, sozialwissenschaftlichen und sozialpolitischen Zeitschriften aus den Federn neuer Gruppen, zwar auch mit Juristen, aber keineswegs dominant von Juristen geprägt. Hierher gehören zwar nach ca. 1890 große, auch juristische, Autoren wie Max Weber, Otto Gierke, Philipp Lotmar, Heinrich Rosin*[78] u. a. Als Organe dafür entstanden aber vor allem der „Arbeiterfreund" Viktor Böhmerts (seit 1873) 1863–1914, Holtzendorffs „Jahrbuch" seit 1871, dann Gustav Schmollers dies weiterführendes „Jahrbuch für Gesetzgebung und Verwaltung" seit 1882, Georg Hirths „Annalen für die Gesetzgebung des Deutschen Reiches" 1868–1901, Heinrich Brauns „Archiv für soziale Gesetzgebung" bzw. „für Sozialwissenschaft und Sozialpolitik" 1888/1904–1933 oder auch die „Soziale Praxis. Centralblatt für Sozialpolitik" unter Ignaz Jastrow, Ernst Franke u.a. seit 1894/95.*[79] Nicht die Juristen spielten hier die erste Rolle, sondern die Matadore der neuen Leitwissenschaft Nationalökonomie.

(7) Die meisten *moderneren Themenbereiche und Zugriffe* sind damit bereits um 1914 etabliert. So verfügen wir über Spezialorgane zum öffentlichen Recht, zum Völkerrecht, zum internationalen Recht, zur Rechtsvergleichung und seit 1914 auch zum Arbeitsrecht, auch zum Sozial- und Versicherungsrecht und schließlich zum Industrierecht 1907. Nur Grundrechts-Zeitschriften findet man nicht – das war offenbar vor 1914 und noch lange kein Thema bis in die europäische Epoche unserer Gegenwart.

(8) Die Periodika zeigen darin auch eine deutliche Profillinie von *Rechtskulturphasen*. Einer mehr wissenschaftlichen Prägung, durch Universitätsprofessoren und ihre Schüler getragen, folgt eine stark juristisch-praktisch getragene Periodikakultur zum geltenden Recht vor allem. Sie mündet in eine mehr politisch-polemische Phase nach 1919 in der Weimarer Zeit und einen ausgesprochen ideologischen Primat der Politik in der NS-Zeit sofort nach 1933, auch und gerade in den Zeitschriften.

(9) Als konkret *tragende Faktoren* des Periodikawesens lassen sich zwei Großgruppen benennen: zum einen die *Professionen*, also die Richter, Anwälte, Professoren, die Verwaltungsbeamten, Rechtspolitiker usw.; zum zweiten die *Institutionen*, also die Gerichte, Universitäten, Behörden, offiziellen, öffiziösen und privaten Berufsstandsvereine und anderen Vereine. Diese Faktoren schaffen Dauerdiskurse in den Periodika für jeweils ihre Belange, also die wissenschaftlichen, praktischen, populären und berufsständischen in den vier Gruppen.

(10) Im Gesamtbild hier sollte es auch um *nationale, internationale* und *regionale Aspekte.* gehen. Das *nationale* Element kommt nun in der Tat in ganz neuer Intensität zum Tragen. Schon seit 1800 wurden die Zeitschriften mit dem Übergang zu den nationalen Sprachen und Gesetzgebungen deutlich nationaler. Jedoch kann man nicht von ‚nationalistisch' reden. National war noch emanzipatorisch gegenüber der monarchischen Welt des Ancien Regime, die ihre Völker als Untertanen zählte. Eine Betonung des Deutschen setzt, wie gezeigt, massiv um 1871 ein. Zeitschriften zu Rechtsvergleichung (1878 *ff.*) und Völkerrecht (1907 ff.) indizieren dann schon eine internationale Konkurrenzebene. Davor war man lange noch in einer mehr ideellen, weltbürgerlichen Art *international*, je nach Fach. Die enorme Verwissenschaftlichung und Niveauverbesserung der deutschen Rechtswissenschaft insbesondere in den letzten beiden Dritteln des 19. Jahrhunderts hatte ohnehin dazu geführt, dass die deutsche Jurisprudenz zu einer internationalen Leitwissenschaft wurde – ganz ohne imperialen Aspekt. Erobert worden war diese Position durch Savigny, Thibaut, Feuerbach, Zachariae und viele andere, durch die Philosophie und die Naturwissenschaft seit Kant und Liebig – alles zwei Generationen vor dem aggressiveren allgemeinen Nationalismus der 1870er Jahre. Nicht zufällig redete Puchta 1840 und 1841 vom Römischen Recht als „Weltrecht"*[80] und Gustav Hugo 1788 vom Römischen Recht als „unser Naturrecht", freilich ironisch gegen allgemeines Naturrecht, auch nicht national, sondern für vernünftiges positives Recht, wie er es im römischen Recht vorliegen sieht. Die alte *ratio scripta* war als allgemeine Vernunft verabschiedet, neue positivrechtliche Ansätze herrschten nun vor.

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[77] Siehe nur F. Ranieri (Fn. 72), S. 228f.. Die heute führende „Rabels Zeitschrift für ausländisches und internationales Privatrecht" existiert seit 1927.

[78] Siehe das Schriftenverzeichnis bei I. Mikesic (Fn. 8), S. 209–211.

[79] Die Daten schwanken, auch wegen der mehrfachen Titel- und Verlagswechsel, s. aber J. Kirchner (Fn. 11), Nr. 19813, 20010.

[80] Siehe für die verschiedenen Belege zu Puchta J. Rückert (Fn. 3), S. 202; jetzt näher H.-P. Haferkamp. Georg Friedrich Puchta und die „Begriffsjurisprudenz". Frankfurt a.M. 2004, S. 343–347, bes. zur grundsätzlichen Stütze in Schellings Weltalterphilosophie und zum Auftreten erst seit 1838. „Allgemeines" Recht versus Individuelles (und nationelles) war ein Topos von Savigny (System I § 15), den Puchta aus ihrer Korrespondenz zum „System" kannte, freilich dort philosophisch zurückhaltender formuliert.

Bei *Regional* geht es um engere, aber doch national übergreifende, nicht bürokratisch bestimmte Bereiche.[*81] Das bekannte Programm „Europa der Regionen" meint dagegen föderale, staatliche Zonen. Immer noch sehr lebendig sind die deutschen Partikularrechtsregionen, die deutsche Vielfalt, der wieder interessante Pluralismus. Allerdings muss man diese Vielfalt wohl mehr als lokal, denn als regional bezeichnen. Regional übergreifend über die Staaten hinweg, in einem ökonomischen, kulturellen, rechtswissenschaftlichen oder rechtspraktischen Sinne, zeigt die Periodikawelt kaum etwas. Hier liegt wohl eine große Zukunft, insbesondere für Anregungen aus der allgemeinen Geschichte, etwa mit den Handelsregionen Nordosteuropa oder auch Ostseeraum[*82], Mittelmeerraum[*83], oder den kulturellen und ökonomischen Verbindungen am Oberrhein[*84] und Niederrhein, zwischen Münsterland und Niederlanden[*85], oder vielleicht Finnland, Estland und Lettland – rechtlich verbindlich Übergreifendes kommt dabei freilich (noch?) kaum vor –, oder der rechtswissenschaftlichen Verbindung in einer gesamtskandinavischen Zeitschrift (seit 1888)[*86] oder in baltischen Periodika[*87], oder der rechtspraktischen Verknüpfung dreier Handelsstädte im berühmten Lübecker Oberappellationsgerichtshof des 19. Jahrhunderts, oder eben dem Luxemburger EuGH und dem Straßburger Menschenrechtsgerichtshof des Europarats. Das so beliebt gewordene Europa orientiert sich freilich an Staaten und Verwaltungsgebilden und nicht an Regionen unabhängig von diesen. Und für die Regionen hat diese Zukunft noch kaum begonnen, sich in Forschungsfragen zu zeigen[*88] und noch weniger in eigenen Periodika. Diese Seismographen schweigen dazu noch. Rechtlich dominieren die nationalen Grenzen. Instrumente wie freie Zweck- und/oder Planungsverbände wie im deutschen Kommunalrecht auch über Landesgrenzen hinweg wären übernational aufzusuchen – wenn es sie gibt. Treten aber die großen politischen Dissense und rechtlichen Abgrenzungen durch den Rahmen gemeinsamer Institutionen mehr und mehr zurück, so werden die Regionen und die sie bestimmenden, nicht mehr primär nationalen, Faktoren gewiß immer interessanter.

In Sachen *international* sind die ersten Forschungsschritte getan. Länderberichte wie in der Rechtsvergleichung liegen inzwischen etliche vor. Ein bewusstes und faktorenbewußtes Vergleichen wäre die nächste Ebene. Sie ist noch sehr wenig beschritten. Das führt auf die Frage von Bedingungen und Vergleichspunkten.

2. Einige Bedingungen und Vergleichspunkte

Bedingungen und Vergleichspunkte zu benennen fällt leicht und schwer zugleich. Einige wesentliche Faktoren erscheinen inzwischen recht bekannt und nahezu banal:[*89]

Natürlich muß für blühende Periodika eine kritische Masse an *Schreib- und Lesepublikum* für eine fachliche oder weitergreifende Kommunikation vorhanden sein – das war im bevölkerungsreichen, mit der allgemeinen Schulpflicht zunehmend alphabetisierten und ausbildungsdichten deutschen Raum schon seit dem frühen 19. Jahrhundert bis 1900 immer mehr der Fall.

Natürlich konnten wissenschaftliche Zeitschriften nur blühen bei einer Mehrzahl von eigenständigen, *konkurrierenden Rechtsfakultäten* an Universitäten, zudem möglichst ohne judizielle Spruchtätigkeit – das war im föderalen deutschen Raum nach 1804 (Heidelberg) und 1810 (Berlin) zunehmend der Fall.

Natürlich kann solche Blüte nur mit vielen *Vollzeitprofessoren* und *gelehrten Praktikern* gut gelingen – auch das zeigt der Fall Deutschland deutlich.

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81 Siehe G. Hugo. Rez. zu Bouhier, Oeuvres de Jurisprudence. – Gött.gel.Anzeigen 1789 [nicht 1788], S. 1541–1546, erneut in ders., Beyträge zur civilistischen Bücherkenntniß, Bd. 1, Berlin 1828, S. 147–152, hier 151, das volle Zitat des ironischen Hugo ist wichtig: „Das Römische Recht ist unser Naturrecht, wenn es gleich (…) eine sehr vergebliche Mühe ist, demonstrieren [sc. à la Wolff] zu wollen, daß es auch das ganz allgemeine Naturrecht aller Zeiten und Völker sey. Aber wenn eine Verordnung Justinians gegen alle Grundsätze des Römischen Rechts [sc. des klassischen] und gegen alle Analogie anstößt, muß doch nach ihr gesprochen werden solange keine *observantia contraria* bewiesen ist?".

82 Dazu A. Depping. Zur Bedeutung regionaler Rechtsgeschichte im Zeitalter der Europäisierung am Beispiel des Projektes „Niedersächsische Juristen". – Sachsen im Spiegel des Rechts. Ius Commune Propriumque. A. Schmidt-Recla, E. Schumann, F. Theisen (Hrsg.). Köln u.a. 2001, S. 293–307, mit guten Nachweisen auch zur europäischen Rechtsgeschichte; siehe für das Beispiel Niedersachsen auch die Einleitung in: Niedersächsische Juristen. Ein historisches Lexikon mit einer landesgeschichtlichen Einführung und Bibliographie. J. Rückert, J. Vortmann (Hrsg.). Göttingen 2003, S. XVII–LV.

83 Siehe etwa soeben den einfachen Überblick von J. M. Witt. Die Ostsee. Schauplatz der Geschichte, Darmstadt 2009. Dezidiert etwa schon D. Kirby. The Baltic World 1772–1993. London 1995; M. Klinge. Die Ostseewelt. Helsinki 1995,

84 Siehe vor allem, auf der Basis seiner mehrbändigen früheren Untersuchung F. Braudel u.a. Die Welt des Mittelmeeres. Zur Geschichte und Geographie kultureller Lebensformen, aus dem Frz. (La Méditerranée, Paris 1985/86). Frankfurt a.M. 1987; umfassend H.-G. Wagner. Mittelmeerraum. Geographie. Geschichte. Wirtschaft. Politik. Darmstadt 2001.

85 Die trinationale Region umfasst etwa Elsaß, Nordwestschweiz, Südbaden, Südpfalz.

86 Dazu etwa seit 1969 bis 2001 die Serie „Nachbarn" mit 44 Heften.

87 Dazu näher D. Michalsen. The Making of a Public Legal Sphere. – Zeitschriften Europa (Fn. 4), S. 29–54, bes. S. 46 *ff.*

88 Siehe M. Luts. Die juristischen Zeitschriften der baltischen Ostseeprovinzen Russlands im 19. Jahrhundert: Medien der Verwissenschaftlichung der lokalen deutschen Partikularrechte. – Zeitschriften Europa (Fn. 4), S. 67–116.

89 Vgl. etwa den doch ganz nationalen Ansatz zu Europa bei Stolleis, Simon 2006 (Fn. 4).

Natürlich müssen sich Periodika *ökonomisch tragen* mit einer kritischen Masse von Abonnements und sind als Serie in Gewinn und Verlust empfindlicher als Bücher – das zeigte sich positiv wie negativ besonders klar im ökonomischen Gesamtaufschwung im größeren Markt nach ca. 1870 bis 1914.

Natürlich behindern *konstitutionelle und politische Bedingungen* wie Zensur, Gewaltenzentralismus, verschlossene Justiz, Meinungsverfolgung u.ä. besonders die Kommunikation in Periodika. Umgekehrt wird sie beflügelt durch Pressefreiheit, Gewaltenteilung, unabhängigere Justiz, Freigabe der Entscheidungsgründe, bürokratische oder parlamentarische Reformoffenheit u.ä. – dies war im deutschen Raum nach ca. 1858 (Neue Ära in Preußen) zunehmend und nach 1871 mit einem rechtstaatlichen Schub erst recht der Fall (Reichsjustizgesetze: GVG, StGB, StP0; 1874 Reichspressegesetz). Ein guter realitätsnaher Indikator ist hier die Aktivität der politischen Polizeien.[*90]

Natürlich begünstigte im 19. Jahrhundert ein *allgemeines Reformklima* besonders die noch weniger eng ausgebildeten Juristen – die Reformbürokratie im Südwesten und anfangs in Preußen war eine Juristenbürokratie, die Paulskirche war ein Juristenparlament.[*91] Schon die Zeit nach 1859 (ADHGB 1861, Dresdener Schuldrechtsentwurf 1866, Gewerbeordnung 1869) war ein rechtspolitisch vielfach recht offenes Feld und erst recht die Reichsgründungszeit um 1870. Auch die Justiz war je nach Territorium und Personalpolitik lange ein keineswegs reaktionäres Feld.

Natürlich fördern *sozialökonomische* Faktoren wie eine starke *Ausdifferenzierung und Arbeitsteilung der juristischen Berufe* die Vielfalt und Spezialisierung der Periodikawelt – auch das war in Deutschland zunehmend der Fall. Das Theorie-Praxis-Problem hat hier die sehr reale Seite, ob überhaupt jeweils eigenständige Trägergruppen existieren – vor allem im deutschen Raum war das neben der Gruppe der wissenschaftlichen Praktiker, wie sie in der Ersten BGB-Kommission seit 1874 dominierten, durchaus auch der Fall; anders etwa lange Zeit in Skandinavien[*92] und England.

Natürlich musste es im Laufe der *Industrialisierung* zu speziellen Periodika für Marken- und Urheberrechtsfragen, für Bergrecht, Eisenbahnrecht, Gewerbe-, Fabrik- Arbeiterschutz- und Arbeitsrecht kommen – so im deutschen Raum.[*93]

Natürlich spielt, wie erwähnt, der Stand der *Druck-, Transport-*[*94] *und Verlagstechniken* eine große Rolle – im deutschen Raum war er durchweg relativ hoch.

Diese und gewiß noch andere Bedingungen und Faktoren verstehen sich. Schwieriger sind echte *europäische Vergleiche*. War Deutschland der Sonderfall, besser, der Fall[*95] besonderer Wissenschaftlichkeit? Heyens genauer Vergleich mit dem französischen Verwaltungsrecht zeigt eher Gemeinsamkeiten. Andererseits spricht manches für Sonderfall; so entstanden die mehr wissenschaftlichen Periodika in Skandinavien, England, Schottland und Frankreich nach deutschen Mustern.[*96] Es käme also auf genauere Vergleiche an. Sie müssten auf durchgehenden Kriterien, wie sie soeben genannt wurden, oder stets etwas riskanten Sekundärauswertungen beruhen. Die erste Voraussetzung fehlt, da die bisherigen Pionierforschungen freudig pluralistisch vorgehen und damit zu wenig homogen. Sekundärauswertungen würden lohnen. Das wäre dann die nächste Expedition in gleich mehrere Dschungel.

V. Tabellen 1800–1900 in vier Gruppen

Es folgen nun die vier Übersichtsgruppen, in fünf Tabellen gesammelt, wie oben unter II.3 erläutert und abgegrenzt. Der Aufwand erschien nicht zu hoch. Denn jede Synthese beruht auf Selektion und Konstruktion, erst recht so starke Synthesen wie hier. Wenn irgend möglich, müssen solche Selektionen abgefangen werden durch Anschauung – eine Frage des Respekts vor den Quellen und den mitdenkenden Lesern. Jedenfalls ein gutes Stück dieser Anschauung bieten die nachfolgenden Tabellen, die alle auffindbaren Langläufer mit mindestens 10 Jahren Erscheinen enthalten. Sie lassen sofort recht gut die Gründungswellen, die Quantitäten und die föderal geprägte Vielfalt erkennen. Nennungen mit Stern * sind nicht in Kirchners Bibliographie enthalten.

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90 Das zeigt eine vergleichende Lektüre der Beiträge in: Zeitschriften 1999 und 2006 (Fn. 3 und 4), und in einigen Punkten erstmals explizit die Einleitung von Stolleis und Th. Simon; genauer zu Faktoren auch Vogenauer (Fn. 11), S. 556 *ff.*: Er nennt als ökonomischen Faktor die Industrialisierung, als gesellschaftlichen die Professionalisierung, als rechtspolitischen das Reformklima, als wissenschaftsgeschichtlichen die starke Trennung positives Recht/Rechtshandwerk versus Besseres Recht/Rechtspolitik/Tagesperiodika.

91 Dazu grundlegend W. Siemann. „Deutschlands Ruhe, Sicherheit und Ordnung". Die Anfänge der politischen Polizei 1806–1866, Tübingen 1985.

92 Dazu präzise W. Siemann. Die Frankfurter Nationalversammlung 1848/49 zwischen demokratischem Liberalismus und konservativer Reform. Die Bedeutung der Juristendominanz in den Verfassungsverhandlungen des Paulskirchenparlaments. Frankfurt a.M. 1976; und *meine* Rez. in ZSGerm 96 (1979), S. 365–371.

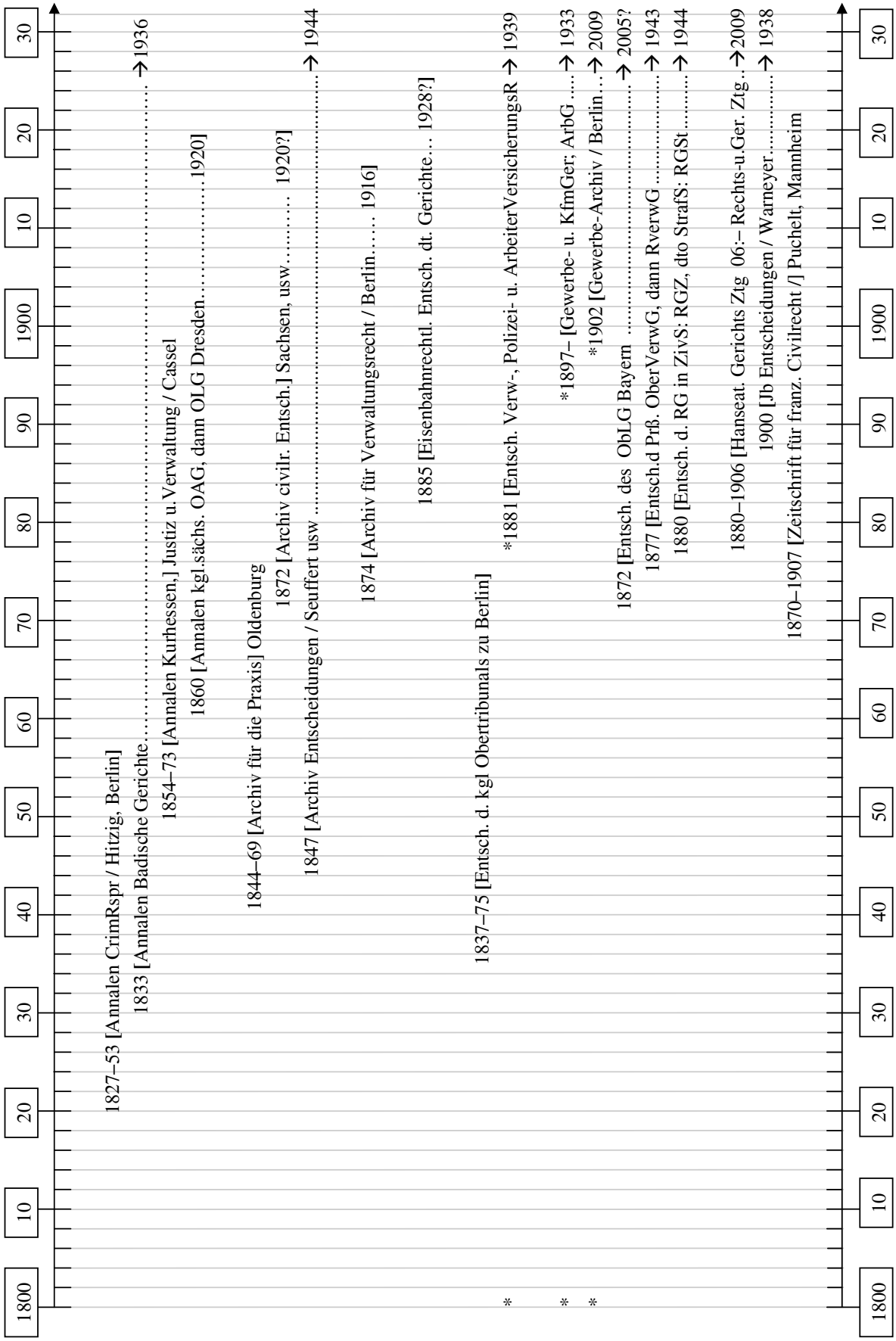
93 Dazu bes. Michalsen (Fn. 87).

94 Erwähnt bei Stolleis, Simon (Fn. 4), S. 8.

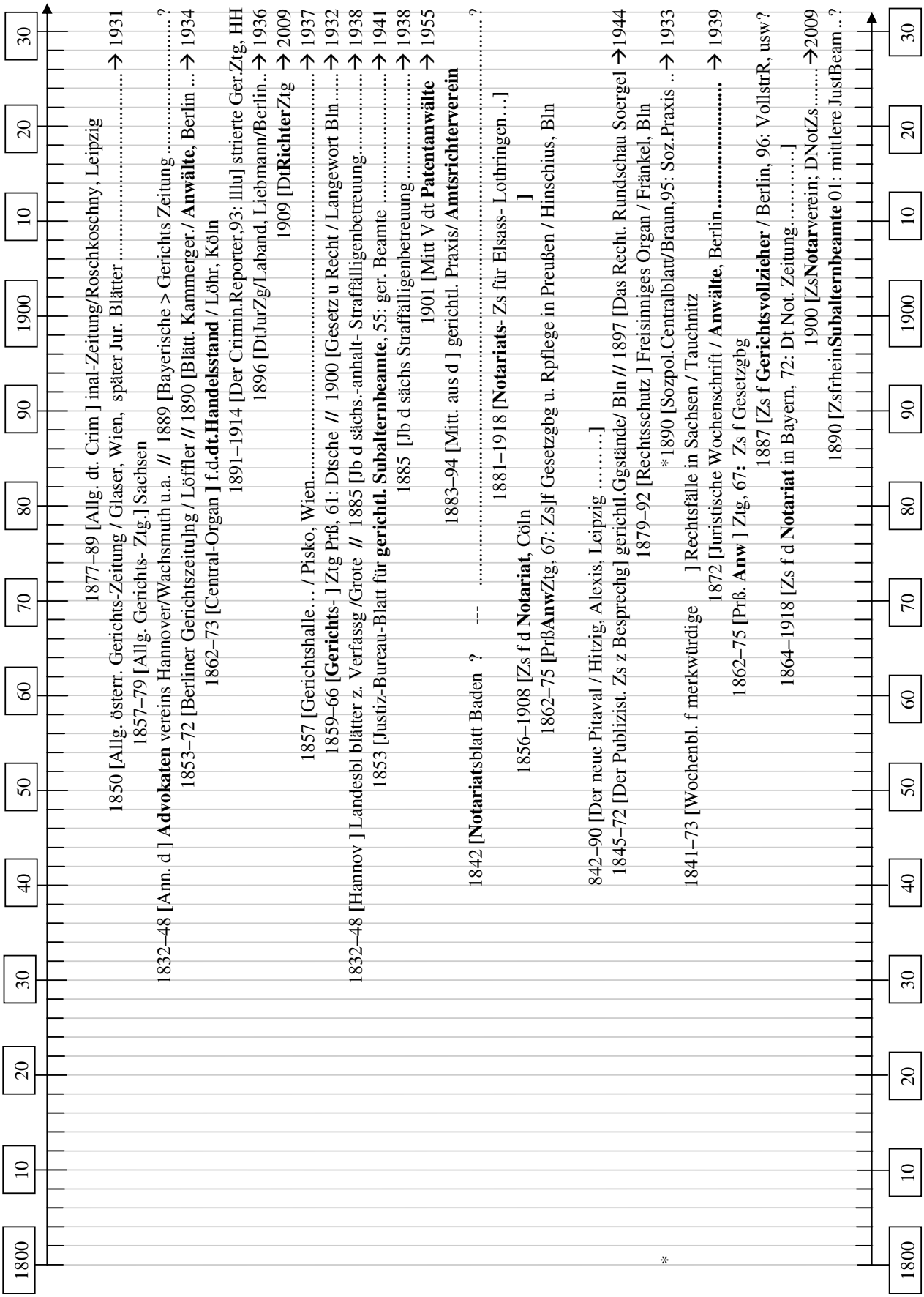
95 So erwogen von Vogenauer (Fn. 11), S. 563 *f.* Das sehr allgemeine historische Konzept dieses Namens („Sonderweg" Deutschlands in der Abwendung vom westlichen „Normalfall") klingt in Sonderfall mit, ist aber hier nicht gemeint.

96 Siehe die Beiträge von Björne, Michalsen, Vogenauer, Zimmermann und Halpérin. – Zeitschriften Europa (Fn. 4).

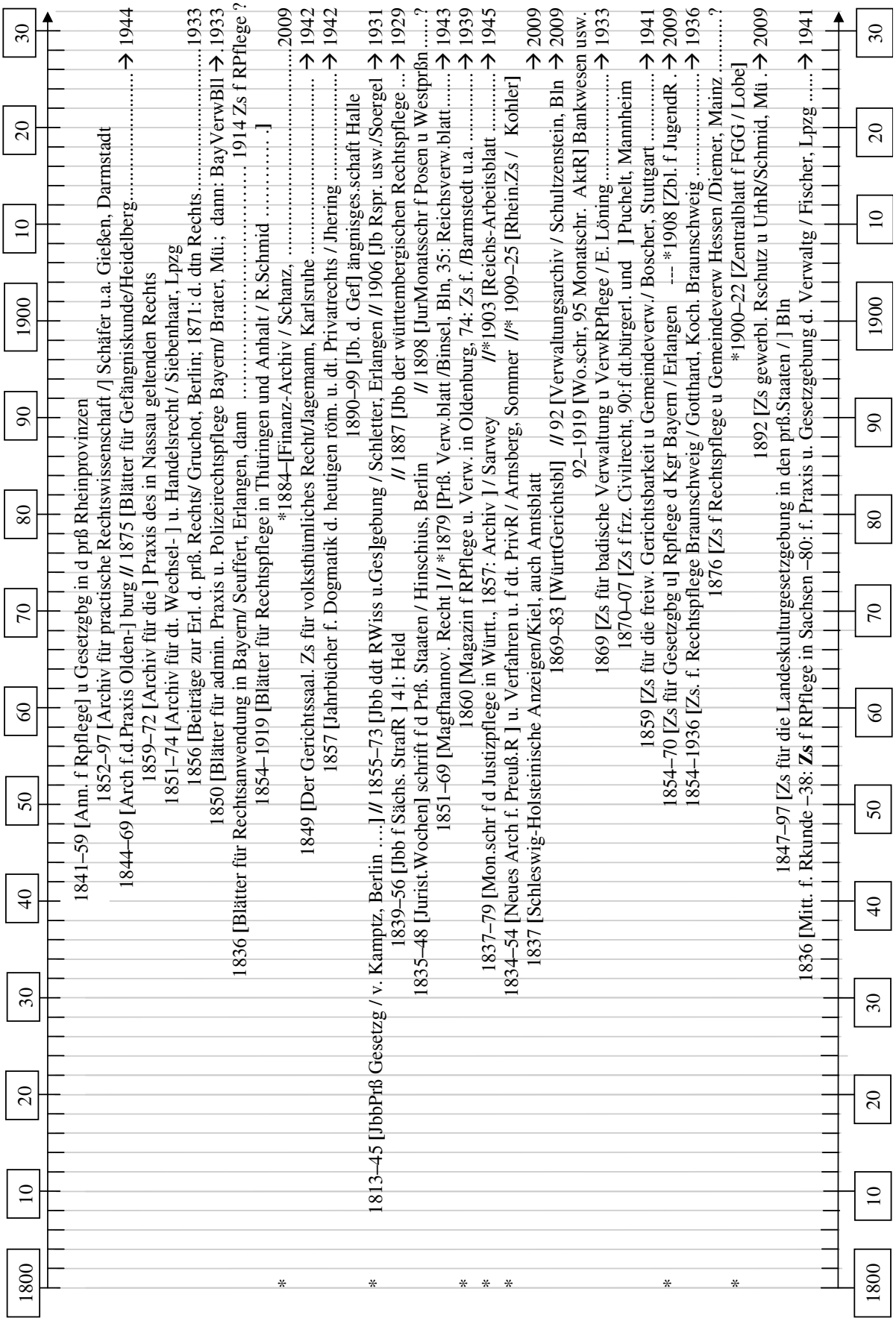
1. Rechtssprechungsperiodika



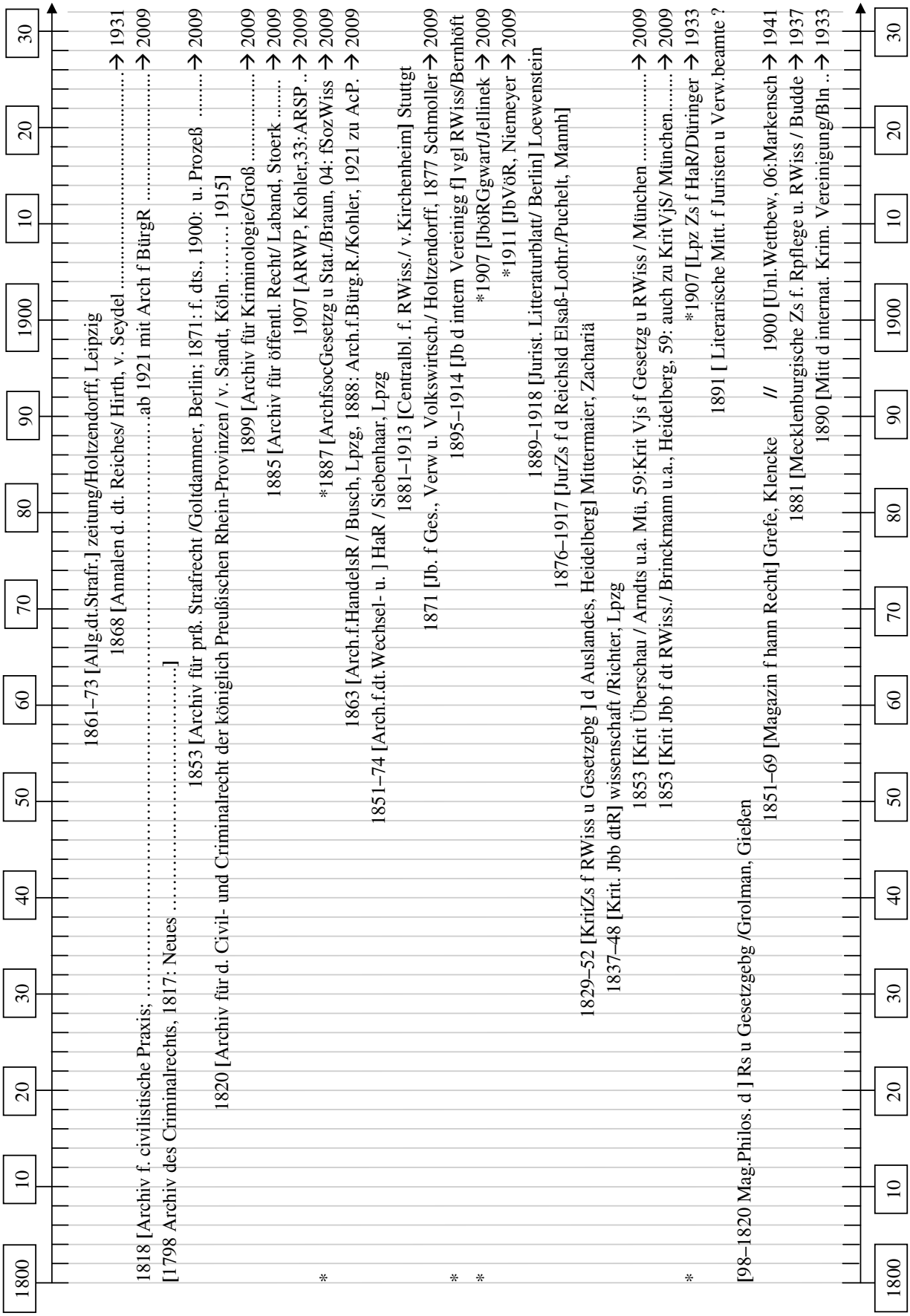
2. Populäre und ständische Periodika



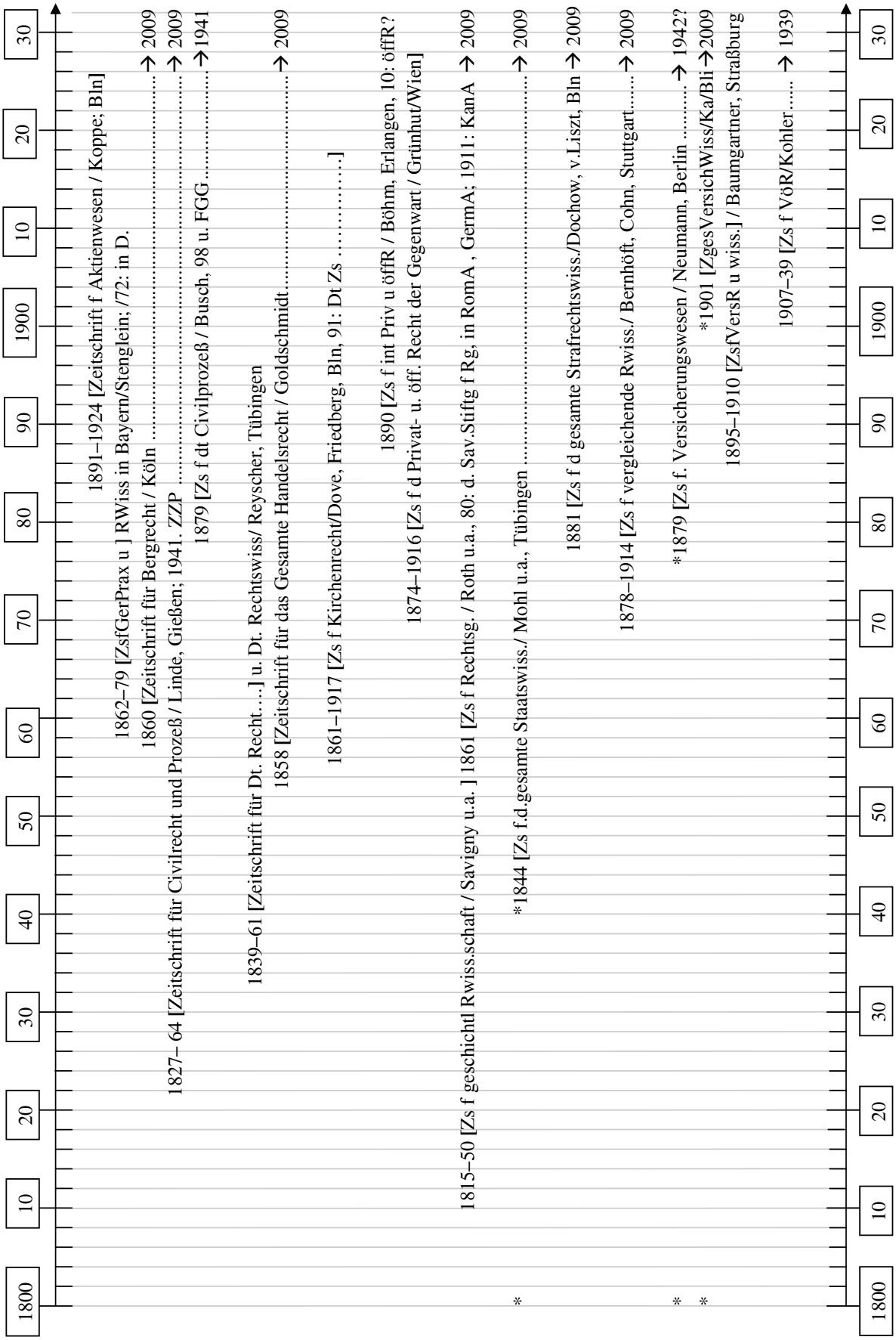
3. Praktische Periodika



4. Wissenschaftliche Periodika a-y



4. Wissenschaftliche Periodika z



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Carl Schmidt und die ersten juristischen Fachzeitschriften in Schweden:

Juridiskt Arkif und *Juridiska Föreningens Tidskrift* – Foren für die schwedischen rechtswissenschaftliche Diskurse des 19. Jahrhunderts*

I.

Bereits wenige Jahre nach Gründung der Historischen Rechtsschule und dem Erscheinen der von Friedrich Carl von Savigny u.a. herausgegebenen *Zeitschrift für geschichtliche Rechtswissenschaft* (1815–1850) wurde in Schweden das Bedürfnis nach einer Erhöhung des rechtswissenschaftlichen Standards immer dringlicher. Zwei junge schwedische Juristen, die Rechtshistoriker H. Samuel Collin und Carl Johan Schlyter (beide Schüler von Johan Holmbergson in Lund, Juraprofessor und Herausgeber der quellentreuen Edition der schwedischen Gesetze des Mittelalters) beschrieben im ersten Band der von Mittermaier und Zachariae veröffentlichten, international orientierten *Kritischen Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* (1829–1856) den schlechten, „beklagenswerten" Zustand der schwedischen Rechtswissenschaft. „Bei sehr vielen der practischen Beamten liegt eine Nichtachtung der Gelehrsamkeit und gründlichen Bildung vor, und bei den meisten Gerichtsbeschlüssen ein gänzlicher Mangel jeder tieferen juristischen Einsicht als der, die durch den Schlendrian zu erlangen ist. Das sind Früchte, an denen man die zuvor beschriebene vertrocknete Wurzel unfehlbar wieder erkennen muss."[*1]

Bereits im darauffolgenden Jahr (1830) kam es zur Gründung der ersten schwedischen Juristenzeitschrift, *Juridiskt Arkif*. Gründer der Zeitschrift war der am südschwedischen Hofgericht für Schonen und Blekinge (errichtet 1821) in Kristianstad tätige Hofgerichtsassessor Carl Schmidt. Mit Schmidt als Redakteur und

* Dieser Artikel wurde mit der Unterstützung des ESF Grant Nr. 7923 veröffentlicht. Zu diesem Thema siehe auch: K. Å Modéer. Carl und Gustavus Schmidt als Zeitschriftenherausgeber: Zwei schwedische Juristenbrüder als Pioniere juristischer Zeitschriften im 19. Jahrhundert. – Juristische Zeitschriften in Europa. M. Stolleis, T. Simon (Hrsg.). Frankfurt am Main 2006, S. 55 *ff.*

[1] H. S. Collin, C. J. Schlyter. Kurze Uebersicht über den gegenwärtigen Zustand der Gesetzgebung und Rechtswissenschaft in Schweden. (Aus dem Schwedischen einer brieflichen Mittheilung übersetzt und mit einigen Anmerkungen begleitet von Professor Schildener in Greifswalde). – Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes 1 (1829), S. 429.

Herausgeber erschien *Juridiskt Arkif* von 1830 bis 1862 in 34 Bänden. Schmidt, der dem einflussreichen Kreis liberaler und reformorientierter Juristen angehörte, war zweifellos einer der bedeutendsten schwedischen Juristen seiner Generation.

Aus Anlass seiner Berufung an den Obersten Gerichtshof ging Schmidt im Jahre 1845 nach Stockholm, wo er seine Tätigkeit als Redakteur fortsetzte. Er wurde noch im selben Jahr (1845) Mitglied der Gesetzgebungskommission, der es oblag, die neue schwedische Kodifikation auszuarbeiten.

Darüber hinaus war Schmidt auch an der Gründung des schwedischen Juristenvereins, *Juridiska Föreningen,* aktiv beteiligt. Dieser Verein ist ein gutes Beispiel für ein im Entstehen begriffenes, interaktives und dynamisches juristisches Milieu. Schmidt war Herausgeber der Zeitschrift dieses Vereins, *Juridiska Föreningens Tidskrift*, die von 1850 bis 1862 erschien.

Alles in allem war Carl Schmidt einer der bedeutendsten Vermittler juristischen Wissens im Schweden des 19. Jahrhunderts. Seine Tätigkeit mit den von ihm selbst herausgegebenen Zeitschriften bildete den Kernpunkt eines wichtigen Netzwerkes für die radikalen bzw. reformorientierten Juristen der damaligen Zeit.

II.

Carl Schmidt entstammte einer Juristenfamilie. Im Jahre 1792 als Sohn eines Richters am Göta Hofgericht (Appellationsgericht) in Jönköping geboren, studierte er an der Universität Lund und gehörte zur ersten Generation Studenten des bereits erwähnten Juraprofessors Johan Holmbergson.

Holmbergson verdient in diesem Zusammenhang ganz besonders hervorgehoben zu werden. 1764 geboren, studierte er Jura in Uppsala und war auch involviert in die rechtlichen Folgen des unblutigen Staatsstreichs von 1809 sowie in das Zustandekommen der schwedischen Verfassung in Stockholm. Nach der Verfassungsgründung war er als Sekretär der Gesetzgebungskommission des Reichstags tätig. Im Jahre 1811 wurde er dann Professor in Lund. In einem über ihn erschienenen Nekrolog (1842) wurde metaphorisch folgendes zum Ausdruck gebracht: „Als Holmbergson Uppsala verließ, erloschen die Leuchter der Rechtswissenschaft in Uppsala, um in Lund wieder entzündet zu werden." Holmbergsons Tätigkeit war ein wichtiger Katalysator für die moderne schwedische Rechtswissenschaft: viele seiner Studenten bezeugten seine charismatische Persönlichkeit und seine Rolle als Förderer einer jungen, rechtswissenschaftlich orientierten Studentengeneration.

Carl Schmidt gehörte zusammen mit Collin und Schlyter zu dieser ersten Generation rechtswissenschaftlich bewusster Jurastudenten. Seine Initiative zur Gründung einer juristischen Fachzeitschrift in Schweden hing offenbar mit dem von Collin und Schlyter veröffentlichten kritischen Artikel eng zusammen.

Nach Beendigung seiner juristischen Ausbildung begann Carl Schmidt seine Juristenkarriere am Göta-Hofgericht. Als 1821 in Kristianstad ein neues Hofgericht für Schonen und Blekinge (Südschweden) eingerichtet wurde, suchte und erhielt er dort eine Richterstelle und avancierte schließlich zum Hofgerichtsrat. Er blieb in Kristianstad bis 1845, also bis zu seiner Berufung zum Mitglied des Obersten Gerichtshofes in Stockholm.

In den ca. 25 Jahren, die er in Kristianstad verbrachte, gehörte Schmidt zur Gruppe reformliberaler Juristen. Neben seiner Tätigkeit als Richter fand er die Zeit, zusammen mit einigen Freunden einen Buchverlag und eine Buchdruckerei, C. Schmidt & Co., zu gründen (1830). Der Buchverlag spezialisierte sich auf sogenannte Bildungsromane – nicht nur in schwedischer Sprache, sondern auch in mehreren Fremdsprachen. Innerhalb dieses Verlages gründete Schmidt noch im selben Jahr (1830) seine juristische Fachzeitschrift, *Juridiskt Arkif*.

Carl Schmidt hatte offensichtlich hohe Ambitionen mit seiner Zeitschrift, und er fand seine Vorbilder in der Unmenge an deutschen Fachzeitschriften. Die Titelseite seiner Zeitschrift war mit einer Vignette geschmückt, die er vermutlich von der deutschen rechtswissenschaftlichen Zeitschrift *Juristische Zeitung für das Königreich Hannover* (erschienen ab 1826) übernommen hatte. Die Vignette zeigte das Auge des Gesetzes mit den Symbolen der Gerechtigkeit, der Waage und dem Schwert, verkreuzt mit Gesetzestafel und Olivenzweig.[*2] Diese deutsche Zeitschrift wurde auch in der von Schmidt im ersten Band publizierten Bibliographie juristischer Fachzeitschriften erwähnt. Eine international orientierte Jahresbibliographie erschien daraufhin in jedem Band der Zeitschrift.

[2] M. Stolleis. Das Auge des Gesetzes: Geschichte einer Metapher. München 2004, S. 10.

III.

Ein jüngerer Bruder von Carl Schmidt, Gustavus Schmidt, emigrierte um 1820 nach Nordamerika, wo er sich zunächst in Richmond, später jedoch in New Orleans, Louisiana, als Rechtsanwalt niederließ. Seine Verwandten in Schweden hatten keine Nachricht von ihm und betrachteten ihn folglich als verlorenen Sohn. Im Jahre 1830 kam es allerdings zu einem brieflichen Kontakt zwischen den zwei Brüdern[*3], und der darauffolgende, regelmäßige Briefwechsel führte nicht nur mit sich, dass mehrere Beiträge aus der Feder nordamerikanischer Juristen in *Juridiskt Arkif* publiziert wurden, sondern auch, dass Carl Schmidt aus den Vereinigten Staaten regelmäßig eine Anzahl von amerikanischen Kulturzeitschriften erhielt. So wurden beispielsweise schon im ersten Band seiner Zeitschrift Edvard Livingstones Kommentare zur Todesstrafe in Louisiana veröffentlicht, und einige Jahre später, in Band 8, erschien ein Artikel über das amerikanische Staatsrecht, verfasst von Joseph Story, dem Vorsitzenden des amerikanischen Obersten Gerichtshofes.[*4]

Die Zahl der aus deutschen Zeitschriften und anderen juristischen Werken übersetzten Artikel und Aufsätze in *Juridiskt Arkif* ist so groß, dass man eigentlich von einer international orientierten Zeitschrift sprechen kann. Jedes Heft der Zeitschrift erging auch an Schmidts Bruder in New Orleans. Die regelmäßigen Lieferungen inspirierten diesen offenbar dazu, eine ähnliche Zeitschrift auch in New Orleans herauszugeben. Im Jahre 1841 erschien nämlich das erste Heft des *Louisiana Law Journal,* herausgegeben von Gustavus Schmidt.[*5] Diese Zeitschrift stellte nicht nur auf die Darstellung des Rechts von Louisiana ab, sondern auch darauf, „die Analogien und Kontraste zwischen unserer Gesetzgebung und jener der anderen Staaten der Union" aufzuzeigen. Zudem hielt Gustavus Schmidt es für nützlich, die Rechtswissenschaft in Louisiana mit jenen anderer Länder zu vergleichen. Im *Louisiana Law Journal* sollte also das Recht sowohl aus theoretischer als auch praktischer Perspektive dargestellt werden. In Bezug auf Zwecke und Zielsetzungen war also das von Gustavus Schmidt herausgegebene *Louisiana Law Journal* identisch mit denen der Zeitschrift seines schwedischen Bruders, *Juridiskt Arkif*.

IV.

Im Jahre 1848 kam es in Stockholm zu einem Treffen der Mitglieder eines Unterstützungsvereins für die Witwen und Waisen der schwedischen Amtsrichter. Bei diesem Treffen diskutierte man die Frage der Gründung eines nationalen Juristenvereins. An der Juristischen Fakultät von Uppsala war ein solcher Verein bereits im Jahre 1844 gegründet worden, zur Förderung des Dialogs zwischen Professoren und Studenten der Fakultät.[*6] Im Hinblick auf den Zweck des nationalen Vereins sollten die praktisch tätigen Juristen „sich im Verein mitteilen" und mit den Repräsentanten der Rechtswissenschaft Gedanken und Erfahrungen hinsichtlich der verschiedenen Themata, mit denen sie arbeiteten, austauschen – „zum gegenseitigen Nutzen und Frommen, sowohl was sie selbst betrifft, als auch ein verschärftes Urteilsvermögen im Hinblick auf die Wissenschaft, die ein Teil von ihnen betreibt, sowie deren praktische Anwendung, die einem anderen Teil von ihnen obliegt".[*7]

Im August des darauffolgenden Jahres (1849) kam es in Stockholm tatsächlich zur Gründung dieses nationalen Juristenvereins. Gemäß den Statuten sollte der Verein in Stockholm seine Zentrale und in den Regierungsbezirken regionale Abteilungen haben und dabei auf die Förderung von sowohl Wissenschaftlichkeit als auch praktischer Tüchtigkeit abstellen. Bereits nach einem Jahr waren 400 Mitglieder registriert, davon 110 in der Stockholmer Zentrale. Im Jahre 1857 waren mehr als 800 Mitglieder in der Zentrale und den 23 Bezirksvereinen registriert. Carl Schmidt wurde schon bei der Vereinsgründung zum geschäftsführenden Beiratsmitglied ernannt und gleichzeitig zum Herausgeber der Zeitschrift des Vereins, *Juridiska Föreningens Tidskrift*, die ab sofort erschien. In den Jahren 1850 bis 1861 gab er 23 Hefte (von jeweils ca. 200 Seiten) heraus. Bei den Jahrestreffen des Vereins, die oft in den Hauptstädten der Regierungsbezirke stattfanden, wurden die für

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[3] Biographische und bibliographische Artikel betr. Carl und Gustavus Schmidt. K. Å. Modéer. Mittermaier och bröderna Schmidt: ett bidrag till 1800-talets interkulturella juristkommunikation [Mittermaier und die Gebrüder Schmidt: ein Beitrag zur interkulturellen Verständigung zwischen Juristen im 19. Jahrhundert]. – Festskrift till Hans Ragnemalm. G. Regner, M. Eliason, H.-H. Vogel (Hrsg.). Lund 2005, S. 233 *ff.*; K. Å. Modéer. Gustavus Schmidt's Library: The Swedish Connection. – M. Hoeflich, L. de la Vergne, K. Å. Modéer (Hrsg.). Catalogues of Early American Law Libraries: The 1877 Sale Catalogue of Gustavus Schmidt's Library, (Tarlton Law Library, Legal History Series, Nr. 6) Jamail Center for Legal Research, The University of Texas at Austin 2005, S. 95 *ff.*

[4] J. Story. Om den Amerikanska Statsrätten [Über das amerikanische Staatsrecht]. – Juridiskt Arkif 8 (1837–8), 277 *ff.*

[5] Seine Pläne für die Zeitschrift waren: "The Journal, as its title indicates, will be devoted exclusively to subjects connected with the science of jurisprudence, including every thing, which has a tendency to illustrate its progress; and to exhibit its present condition." S. Modéer (Fn. 3), S. 59 *f.*

[6] J. Christensen (Hrsg.). I tid och rum [Juridiska föreningen i Uppsala]. Jubileumsskrift vid Föreningens 150-årsjubileum 1994] [In Zeit und Raum [Juristenverein Uppsala]. Jubiläumsschrift aus Anlass des 150-jährigen Bestehens 1994]. Uppsala 1994.

[7] Auf Schwedisch: "till ömsesidig båtnad så väl för dem sjelfve som för utbildningen af omdömet i afseende på den vetenskap en del idkar, och den tillämpning, en annan del tillkommer".

das Jahr vorgesehenen Diskussionsthemen präsentiert und beschlossen, worauf die Diskussionsprotokolle der verschiedenen regionalen Abteilungen in einem Heft der Zeitschrift veröffentlicht wurden. Das Heft mit den Jahresverhandlungen wurde rechtzeitig gedruckt, damit es noch „vor der Einstellung des Schiffsverkehrs im Herbst in alle Bezirke des Landes expediert werden konnte". Es gab eben in Schweden damals noch keinen Eisenbahnverkehr.

Auch mit dieser Fachzeitschrift hatte Carl Schmidt hohe Ambitionen. Bereits das zweite Heft enthielt eine Reihe von wissenschaftlichen Aufsätzen, davon zwei aus der Feder des Juraprofessors Carl Olof Delldén (1800–1854) aus Uppsala.[*8] Sein Artikel mit dem Titel „Ein Blick auf die jüngsten Ergebnisse der Rechtsforschung" ist für unser Thema von besonderem Interesse. Delldén bezeichnete vor allem die deutsche Rechtsforschung als vorbildlich und konstatierte, dass die Rechtsforschung nicht nur zu einer qualitativ hochstehenden Gesetzgebung geführt, sondern auch – dank eines zunehmenden Rechtsbewusstseins der Bürger – ein Bedürfnis nach Gesetzesreformen zur Folge gehabt habe. Viele Rechtsgelehrte wetteiferten mit den praktizierenden Juristen darin, „durch die Verbindung von Theorie und Praxis beiden Teilen eine juristische Ausbildung und Vervollkommnung zukommen zu lassen." Vergleichendes Recht wurde zum Thema des Tages, Reisen in fremde Länder sowie eine große Anzahl von Zeitschriften „haben über diese Themata eine Ordnung und ein Licht verbreitet, an dem es noch vor einem halben Säkulum fast ganz mangelte. Am reichsten in dieser Hinsicht ist die juristische Literatur Deutschlands, wo solche Schriften hinsichtlich jedes Sachgebietes unter der Bezeichnung Journale, Archive u.s.w. entstanden sind, aber auch die französische und englische, sowie in letzter Zeit die nordamerikanische Literatur konkurrieren mit dem durch diese literarische Tätigkeit so nutzbringenden Deutschland".[*9] Delldén hob diesbezüglich die Beiträge des dänischen Rechtsgelehrten Anders Sandøe Ørsted besonders hervor.

Das qualitativ erhöhte juristische Wissen und die gegenseitigen Anknüpfungspunkte hatten allerdings auch dazu beigetragen, dass es immer schwieriger wurde, die Probleme im Zusammenhang mit den Gesetzgebungsreformen der Nationen zu lösen, schrieb Delldén. Seine Einstellung muss natürlich im Kontext des damals offenbar misslungenen schwedischen Kodifikationsprojekts gesehen werden. In einem der folgenden Hefte beschrieb er eingehend die Kodifikationsreform in Schweden[*10] (nebenbei bemerkt war Delldén einer der fleißigsten Artikelverfasser in dieser Zeitschrift).

Nach 40 Jahren Arbeit an einer Kodifikation nach kontinentaleuropäischem Muster hatte der schwedische Reichstag 1849 beschlossen, statt einer Kodifikation nur gewisse Teile des alten Reichsgesetzbuchs von 1734, die sog. Balken, sukzessiv zu reformieren.[*11] In diesem Zusammenhang war die Zeitschrift des juristischen Vereins ein wichtiges Instrument: einerseits ermöglichte sie einen öffentlichen Reformdiskurs, andererseits konnte der Herausgeber Carl Schmidt die rechtspolitische und reformorientierte Diskussion mit nationalen und internationalen rechtswissenschaftlichen Beiträgen kontinuierlich fortführen. Nachdem die Strafrechtsreform höchste Priorität hatte, wurden zu dieser Thematik mehrere Artikel veröffentlicht. Das nordamerikanische Gefängnissystem gehörte gleichfalls zu den in dieser Zeitschrift aktuellen Diskursen.[*12] Es handelte sich hier auch um Artikel, die aus der Zeitschrift *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* übersetzt worden waren.

Artikel zum Thema Gefängnissystem kamen in dieser auch praktisch orientierten Zeitschrift übrigens häufig vor. Damals wurde in Schweden eine Reihe von Zellengefängnissen gebaut. Die von Mittermaier verfassten und im *Archiv des Criminalrechts* veröffentlichten Übersichtsartikel mit aktuellen internationalen Notizen wurden gleichfalls regelmäßig in der schwedischen Zeitschrift publiziert.[*13] Darüber hinaus versah Carl Schmidt seine Zeitschrift mit einem eigenen Teil für Rezensionen und stellte jedes Jahr eine schwedische juristische Bibliographie zusammen.

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[8] Zu Delldén: L. Björne. Brytningstiden. Den nordiska rättsvetenskapens historia [Die Übergangszeit. Geschichte der nordischen Rechtswissenschaft] II. 1815–1870. Rättshistoriskt Bibliotek Bd 58. Lund 1998, S. 445 f.

[9] [Delldén], En blick på Rättsforskningens sednaste resultater [Ein Blick auf die jüngsten Ergebnisse der Rechtsforschung]. – Juridiska föreningens tidskrift, Heft 2, 1851. S. 9.

[10] [Delldén], Om Lagreformen i Sverige. Första Artikeln [Zur Gesetzesreform in Schweden. Erster Artikel]. – Juridiska Föreningens Tidskrift, Heft 4, 1852, S.12 *ff.*, Fortgesetzt in Heft 6, S. 1 *ff.*

[11] C. Peterson. Debatten om 1826 års förslag till en allmän civillag – en svensk kodifieringsstrid [Die Debatte anlässlich des Entwurfs vom Jahre 1826 zu einem allgemeinen Zivilgesetzbuch – ein schwedischer Kodifikationsstreit]. – J. Kekkonen, P. Letto-Vanamo, P. Paasto, H. Pihlajamäki (Hrsg.). Norden, rätten, historia. Festskrift till Lars Björne [Norden, Recht, Geschichte. Festschrift für Lars Björne]. Helsingfors 2004, S. 245 *ff.*

[12] [Theodore A.] Tellkampf. Nordamerikanska fängelsesystemet, enligt erfarenheternas resultat, med afseende på straffets ändamål pröfvadt [Das nordamerikanische Gefängnissystem, auf Erfahrungen basierend und erprobt im Hinblick auf den Strafzweck]. – Juridiska Föreningens Tidskrift, Heft 4, S. 81.

[13] [Carl Joseph Anton] Mittermaier. Kritisk öfversigt af straffrättens framsteg i afseende på lagstiftning, straffsystem, lagskipning, kriminalstatistik, domstolsmedicin, psychiatrie och straffrättsvetenskap [Kritische Übersicht über die Weiterentwicklung des Strafrechts im Hinblick auf Gesetzgebung, Strafsystem, Rechtsprechung, Kriminalstatistik, Gerichtsmedizin, Psychiatrie und Strafrechtswissenschaft]. – Juridiska Föreningens Tidskrift, Heft 15, 1857, S. 1 *ff.*, fortgesetzt in Heft 16, 1858, S. 163 *ff.*

Auch staatsrechtliche Diskurse fanden in der Zeitschrift ihren Niederschlag. So war z. B. das Thema Richtermacht vom Justizombudsman Theorell in seinem Amtsbericht 1849 tematisiert worden. Es ging damals um die Rezeption der von der nordamerikanischen (1803) sowie auch der norwegischen (1814) Verfassung akzeptierten Normenkontrolle, *judicial review*[*14] – eine Frage, die bei den Verhandlungen des Vereins im Jahre 1855 aufs Tapet kam. Noch im selben Jahr veröffentlichte Schmidt einen aktuellen Aufsatz zum Thema: „Darf der Richter ein Gesetz anwenden, das ohne die nach der Verfassung erforderliche Zustimmung der Stände erlassen worden war?" Dieser Aufsatz war im Jahr zuvor in der *Zeitschrift für die gesamte Staatswissenschaft* publiziert worden.[*15] Aus diesem Beispiel erhellt, dass Schmidt in der internationalen und vor allem der deutschen Fora an juristischen Fachzeitschriften durchaus bewandert war.

Immer häufiger erschienen in der Zeitschrift auch Referate zum Thema Rechtsanwendung. Als Mitglied des Obersten Gerichtshofes hatte Schmidt einen guten Überblick über die wichtigsten Rechtsfälle des Jahres. In dieser Hinsicht war seine Zeitschrift ein Vorläufer der immer mehr auf die Gerichte abgestellten juristischen Fachzeitschriften in Schweden, die auf Schmidts Zeitschriften folgten.[*16]

Carl Schmidts Zeitschrift reflektierte Ideen und Arbeit ihres Redakteurs sowie die Diskurse, an denen er teilnahm. Schmidt legte sein Amt als Mitglied des Obersten Gerichtshofes im Jahr 1858 nieder und einige Jahre später beendete er auch seine Tätigkeit als Redakteur der beiden juristischen Fachzeitschriften. Im Sommer 1861 teilte er den Teilnehmern am Jahrestreffen des Juristenvereins mit, dass er, nun bald 69 Jahre alt, nach zwölf Jahren als Redakteur und 31 Jahren als Herausgeber der Zeitschrift *Juridiskt Arkif* „bei einer Arbeit dieser Art mehr Erholung benötige".[*17] Jetzt musste er nur noch die Register anfertigen – nicht nur zu den 23 Heften der Zeitschrift, sondern auch zu den 34 Bänden von *Juridiskt Arkif*. Das Sachregister von *Juridiskt Arkif* umfasste 160 Seiten und wurde von Schmidt im Jahre 1863 angefertigt und gedruckt.[*18]

V.

Abschließend noch einige zusammenfassende Bemerkungen. Die ersten juristischen Fachzeitschriften in Schweden sind eng mit dem Namen Carl Schmidt verbunden. Der gesellschaftliche Kontext von Kristianstad um 1830 wurde für ihn ein wichtiger Katalysator für seine Rolle als liberaler Jurist und Herausgeber von juristischen Fachzeitschriften. Von besonderem Interesse sind die von ihm aufgenommenen Kontakte, nicht nur zu amerikanischen Juristen (wie z. B. seinem Bruder Gustav in New Orleans), sondern auch zu deutschen, international orientierten Rechtswissenschaftlern – vor allem zu Mittermaier und anderen deutschen Zeitschriftenredakteuren. Sein internationales Kontaktnetz war eine Voraussetzung für den Erfolg seiner Zeitschriften.

Wie Mittermaier, gehörte auch Schmidt zur Gruppe liberaler Juristen, d.h. er war reformorientiert und wusste theoretische Diskurse mit denen des praktischen Rechtslebens zu verbinden.

Besonders erwähnenswert ist im vorliegenden Zusammenhang das Zeitschriftenprojekt in Verbindung mit dem Konzept ‚Juristenverein', der auf Förderung der Zusammenarbeit von Rechtstheoretikern (d.h. den Juraprofessoren) und Praktikern (zu welchem Schmidt selbst gehörte) abzielte. Die Interaktion von Theorie und Praxis – ein Gedanke, der später (in Deutschland) von Rudolf von Jhering und (in Schweden) vom Zivilrechtler Alfred Winroth weiterentwickelt wurde[*19] – war schon für Carl Schmidt und seine Zeitgenossen eine wichtige Voraussetzung für ihre Tätigkeit als Herausgeber von juristischen Fachzeitschriften.

[14] M. Sunnqvist. Domaren, lagen och makten: Lagprövning och förmedlande lagtolkning i nordiska hierarkiska rättsordningar 1800–1940 [Richter, Gesetz und Macht: Normenkontrolle und systemkonforme Auslegung in den nordischen, hierarchisch strukturierten Rechtsordnungen 1800–1940], (Lic.Dissertation, Juristische Fakultät Lund, 9). Stencil 2009, S. 47 *ff.*

[15] A. Vollert. Må domaren tillämpa en lag, som blivit utfärdad utan ständernas enligt statsförfattningen erforderliga samtycke? [Darf der Richter ein Gesetz anwenden, das ohne die nach der Verfassung erforderliche Zustimmung der Stände erlassen worden war?]. – Juridiska Föreningens Tidskrift, Heft 11, 1855, S. 1 *ff.*

[16] Tidskrift för lagstiftning, lagskipning och förvaltning [Zeitschrift für Gesetzgebung, Rechtsprechung und Verwaltung] , die sog. "Naumanns tidskrift" 1864–1888; G. B. A. Holm. Nytt juridiskt Arkiv [Neues juristisches Archiv], I: Rättsfall från Högsta domstolen [Rechtsfälle vom Obersten Gerichtshof], ab 1874; Nytt juridiskt Arkiv, II: Tidskrift för lagstiftning [Zeitschrift für die Gesetzgebung], ab 1876.

[17] Auf Schwedisch: "Vid snart uppnådda 69 år fordras mera ledighet från arbete af dylik art." S. Juridiska Föreningens Tidskrift, Heft 23, 1861, S. 201.

[18] C. Schmidt. Sakregister till Juridiskt Arkif [Sachregister zu *Juridiskt Arkif*]. Bd I–XXXIV. Stockholm 1863.

[19] A. O. Winroth. Teori och Praktik. Installationsföreläsning [Theorie und Praxis. Akademische Antrittsrede]. Lund 1892.

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Juristische Zeitschriften in Russland im 19. Jahrhundert*

Die ersten Versuche, juristische Periodika zu den Fragen der Rechtslehre und Rechtspraxis in Russland zu veröffentlichen, wurden um 1800 unternommen.

1790 erscheint die erste juristische Zeitschrift, „Das Theater des Gerichtswesens, oder die Lektüre für Richter und alle Liebhaber der Jurisprudenz, das die bemerkenswerten und merkwürdigen Prozessbeispiele, die Forschungen berühmter Rechtskönner und andere derartige Ereignisse enthält, die bilden, begeistern, zu Tugend anregen und eine nützliche und angenehme Unterhaltung anbieten“ (*Театр судоведения, или Чтение для судей и всех любителей юриспруденции, содержащий достопримечательные и любопытные судебные примеры, исследования знаменитых правоискусников и прочия сего рода происшествия, удобные просвещать, трогать, возбуждать к добродетели и составлять полезное и приятное сопровождение*). Der Herausgeber Vasilij Novikov hoffte, dass die Veröffentlichung dieser Zeitschrift zum „Anlass zu den wichtigen Erörterungen und geschichtlichen Rechtsforschungen“ wird, die die einheitliche Interpretation und Anwendung der Gesetze und die Widersteuerung gegen die Missbräuche und gegen das Verdrehen ermögliche.*[1] Novikov's Meinung nach müsste der Richter die menschlichen Fehler ausgleichen können, damit Leute künftig weniger Straftaten begehen. So wurde diese Zeitschrift – das chronologisch erste Vorbild russischer juristischer Periodika – zum ersten Versuch in Russland, den Inhalt der Gerichtsverfahren in die Öffentlichkeit zu bringen. Hier wurden sowohl die Darlegungen der russischen und ausländischen „mitgeschwungenen“ Gerichtsfälle als auch ihre Erläuterungen veröffentlicht. Dieses Periodikum entsprach *en bloc* dem Typ des Almanachs, der kennzeichnend für die Literatur des 18. Jahrhunderts war.

Novikov hegte einen Wunsch, dass „das Lesen dieses Buches das Kartenspiel und andere leere Zeitvertreibe ersetzen“ wird. Neben den Erzählungen über die „berühmten und bemerkenswerten“ Prozesse erschienen in dieser Zeitschrift gelegentlich Auszüge aus ausländischen juristischen Werken über juristische Probleme, die in Russland diskutiert wurden. So wurden die Ideen vom englischen Reformator des Strafvollzugssystems John Howard durch diese Zeitschrift popularisiert, indem Zitate aus seiner Beschreibung der englischen Gefängnisse und seine Vorschläge über ihre Neugestaltung veröffentlicht wurden. Aus der inländischen Gerichtspraxis wurden nur jene Sachen beleuchtet, in denen es erforderlich war, vor der Weisheit der Richter niederzuknien. Auf die Seiten dieser Zeitschrift lobt man die Vorzüge der Öffentlichkeit des Gerichtsverfahrens. Die Zeitschrift glaubte, dass die habsüchtigen Richter bei der öffentlichen Rechtsprechung keine Chance haben, „ihre schändlichen Taten durch die Undurchdringlichkeit der Gerichtshöfe zu verdunkeln“. Die Zeitschrift war mit Gravüren illustriert. Ihre Veröffentlichung wurde beendet, nachdem der 6. Band erschienen war.*[2]

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1 Teatr sudovedenija. Bd. 1. Moskau 1790, S. 5.

2 Siehe näher: F. Livanov. Nachalo sudebnoj glasnosti v Rossii [Der Beginn der Gerichtsöffentlichekeit in Russland]. – Biblioteka dlja chtenija 1865 (2) 7–8. Abt. 3; V. Popov. Nachalo sudebnoj glasnosti [Der Beginn der Gerichtsöffentlichekeit]. – Drevnjaja i novaja Rossija 1876 (2) 8; A. V. Zapadov. V. V. Novikov i ego „Teatr sudovedenija“ [V. V. Novikov und sein „Theater des Gerichtswesens“]. – Uchenye zapiski Leningradskogo universiteta. Serie „Filologicheskie nauki“. Leningrad 1939 (47) 4, S. 77–87.

Nachdem Alexander I. den Thron besteigt, wächst in der russischen Gesellschaft das Interesse für Rechtswissenschaft, Gesetzkunde und für die Abhandlungen von in- und ausländischen Juristen. In Zeitungen und Zeitschriften wurden öfter Rezensionen juristischer Abhandlungen veröffentlicht. In allgemeinen Periodika entstanden besondere Abteilungen, die den Fragen der Rechtslehre und Rechtspolitik gewidmet waren. Gerade in diese Zeit gehören die ersten Versuche, eigentlich juristische Presse ins Leben zu rufen. 1800 und 1801 erschien in Moskau die „Zeitschrift für Rechtswissenschaft … oder der Inhalt der Höchsten Namenserlässe und der Erlässe des Dirigierenden Senats, die im Jahre 1796 (–1797) erschienen sind, mit der Angabe, wann sie stattgefunden, wo sie gedruckt oder welchen Behörden geschickt wurden" (*Журнал правоведения ... или содержание Именных Высочайших и Правительствующего Сената Указов в течение 1796 (–1797) года изданных с показанием, когда они состоялись, где напечатаны, или в какие места посланы*), deren Herausgeber A. A. Plavilshikov war. I. M. Naumov hat 1813 ein „Haus der praktischen Rechtswissenschaft" gegründet, das sowohl die außergerichtlichen Streitschlichtung als auch die Sachverwaltung angeboten hatte. Gleichzeitig wurde die „Zeitschrift des Hauses der praktischen Rechtswissenschaft über den Gegenstand der Rechtsbeistandsausbildung" (*Журнал Дома практического правоведения по предмету образования стряпчества*) veröffentlicht. Naumov meinte, öffentliche Erklärung der Rechtssprechungsgrundlagen helfe den Prozess von der Ungerechtigkeit und dem Missbrauch zu befreien. Den Ideen der aufgeklärten Absolutismus treu, die in der „Anweisung" (*Наказ*, 1767) von Katharina II. dargelegt wurden, propagierte diese Zeitschrift die Prinzipien der europäischen Rechtsprechung. Außerdem beleuchtete diese Zeitschrift (1813–1814, Th. 1–2) die Tätigkeit des „Hauses", hier wurden auch verschiedene Probleme juristischer Art besprochen. Von 1817 bis 1819 erschien in Petersburg die „Zeitschrift der Gesetzgebung", in der die Gesetze offiziell veröffentlicht wurden.

Verschiedene Publikationen des spezifisch juristischen Inhaltes erschienen in den behördlichen Zeitschriften. Als Beispiel sei die „St. Petersburgische Zeitschrift" genannt, die in St. Petersburg von 1804 bis 1809 vom Ministerium des Innern monatlich herausgegeben wurde. Im ersten Teil dieser Ausgabe wurden die Höchsten Erlässe und Vorträge des Innenministers gedruckt. Im zweiten Teil – „Abhandlungen und Übersetzungen, welche die Verwaltung betreffen" einschließlich der Übersetzungen der Werke der ausländischen Autoren – wurden gelegentlich die Fragen der Gesetzgebung und Verwaltung behandelt. In der ersten Hälfte des 19. Jahrhunderts wurden die juristischen Materialen systematisch in der „Zeitschrift des Ministeriums des Innern" (*Журнал Министерства внутренних дел*, 1829–1861), in der „Zeitschrift des Ministeriums für Volksaufklärung" (*Журнале Министерства народного просвещения* 1834–1917) und auch in der „Zeitschrift des Ministeriums für staatliches Vermögen" (*Журнал Министерства государственных имуществ*, 1841–1864) veröffentlicht.

Öffentliche Begeisterung, die mit der Gerichtsreform von 1864 verbunden war, förderte qualitative Veränderungen auf dem Gebiet der juristischen Periodika. Erstens erhöhte sich die Bedeutung der juristischen Rubriken in der allgemeinen Presse. Diese wurden in der Regel von den berühmten Juristen, häufig von den Universitätsprofessoren geleitet. An der Spitze der Abteilung „Juristische Chronik" der größten südrussischen Zeitung „Noworossijskischer Telegraph" (*Новороссийский телеграф*), die in Odessa gedruckt wurde, stand z. B. Prof. F. Leontovich.

Zweitens wurden die juristischen Gesellschaften nicht nur in der Hauptstadt, sondern auch in den Provinzen gegründet, die ihre eigenen Ausgaben hatten. Diese beleuchteten wissenschaftliche Diskussionen und Referate, die den Fragen des Staats und des Rechts gewidmet waren, ebenso wurde die juristische Praxis besprochen.[*3] Drittens war es eine Blütezeit für die spezifisch juristischen Periodika.

Die Gerichtsstatuten von 1864 enthielten den Satz, dass entweder beim Fehlen oder bei Widersprüchen oder Unklarheiten der Gesetzesvorschrift notwendig sei, die Gerichtssachen auf Grund des allgemeinen Sinnes der Gesetzgebung zu entscheiden. Das war ein Stimulus für die Studien über das geltende Recht. „Die besonderen Gegebenheiten, die in Russland für die Rechtslehre und Rechtspraxis bestehen, haben für uns zur wichtigen Frage die der Überlegenheit des wissenschaftlichen Wissens über das angewandtes gemacht", – hat darüber A. N. Stojanov 1879 geschrieben.[*4] Das Wachstum der Autorität der wissenschaftlichen Jurisprudenz unter den Juristen-Praktikern als Nebenergebnis der Gerichtsreform gab den fühlbaren Anstoß zum Anstieg der Nachfrage nach der juristischen Literatur. K. K. Dynovskij betonte, dass die Gerichtsstatuten diese gleichzeitig die Richterselbständigkeit und die Schaffenskraft der Jurisprudenz anerkennend ins Leben gerufen haben. Einen Anspruch auf theoretische Ausbildung der meisten Gerichtsbeamten erhebend, sei Gesetzgeber bewusst, dass solche Ausbildung in der Schulung bestehe, die für die erfolgreiche Ausübung von praktischen Aufgaben notwendig sei, und dass die juristische Ausbildung die beste Garantie der rationellen, methodischen, planmäßigen Arbeit sei, zu deren Grundlagen die festen Leitsätze, aber keine Starrheit, keine Irrfahrt, keine Zufälligkeit

[3] Siehe z. B.: Protokoly zasedanij Juridicheskogo obshchestva pri imp. Novorossijskom universitete [Protokolle der Sitzungen der juristischen Gesellschaft an der kaiserl. Universität zu Novorossijsk]. Odessa, 1879–1884; Protokoly zasedanij Odesskogo juridicheskogo obshchestva [Protokolle der Sitzungen der juristischen Gesellschaft zu Odessa]. Odessa, Seit 1885; Protokoly zasedanij Juridicheskogo obshchestva pri Kazanskom universitete [Protokolle der Sitzungen der juristischen Gesellschaft an der Universität zu Kasan]. Odessa, 1880–1900.

[4] A. N. Stojanov. Nauchnoe znachenie vseobshchej istorii zakonodatel'stv [Die wissenschaftliche Bedeutung der allgemeinen Gesetzgebungsgeschichte]. – Juridicheskij vestnik 1879 (2), S. 615.

gehören müssen. Der Rechtsunterricht und die juristische Literatur haben neue Aufgaben bekommen: die Theorie habe den Zweck, die Anweisungen auszuarbeiten und zur Leiterin der praktischen Jurisprudenz zu werden, dieser eine wissenschaftliche Methode zu übergeben, zu zeigen, auf welche Weise es in der Praxis notwendig ist, die wissenschaftlichen Aufgaben zu stellen und die Wege der Lösungen für diese zu finden.*[5]

Das war eine Ursache, warum die Anzahl der juristischen Zeitschriften abonnierenden Rechtspraktiker zugenommen hat. 1859 begann die „Zeitschrift des Justizministeriums" (*Журнал Министерства юстиции*) zu erscheinen, die im Zeitraum von 1859 bis 1868 in Petersburg regelmäßig herausgegeben wurde. Diese Zeitschrift, wie jede andere behördliche Zeitschrift, bestand aus zwei Teilen. Der Erste, „offizielle Teil", war ein Sprachrohr des Staates. Hier wurden Gesetze und Verordnungen veröffentlicht. Im zweiten, „nichtamtlichen Teil", wurden die Artikel über Rechtsfragen, Berichte über die ausländische Gesetzgebung, Gerichtspraxis, und auch die Bibliografie der juristischen Literatur publiziert. Monatlich ist das „Gefängnisinformationsblatt" (*Тюремный вестник*, 1893–1917) erschienen.

In den 1860-er Jahren begann man die juristischen Zeitschriften in Moskau, dann auch in Odessa, Nowgorod und Tiflis herauszugeben. In Petersburg erschien die „Zeitschrift für bürgerliches und Handelsrecht" (*Журнал гражданского и торгового права*, 1871–1872), die später zur „Zeitschrift für bürgerliches und Strafrecht" (*Журнал гражданского и уголовного права*, 1873–1894) umbenannt wurde. 1894 wurde diese Zeitschrift zur „Zeitschrift der Juristischen Gesellschaft an der Sankt-Petersburger Kaiserlichen Universität" (*Журнал Юридического общества при императорском Санкт-Петербургском университете*, 1894–1898) umbenannt. Im Jahre 1899 bekam diese Zeitschrift wieder einen neuen Namen: „Rechtsblatt" (*Вестник права*, 1899–1906).

1866–1877 wurde auch „Gerichtsinformationsblatt" (*Судебный Вестник*) herausgegeben. Das waren die Ausgaben, in denen zahlreiche Artikel über Gesetzgebung, Gerichtsverfassung und Rechtssprechung veröffentlicht wurden. Hier wurden auch die Meinungen und die Diskussionen über die durchzuführende Rechts- und Staatsreformen publiziert.

Von den Zeitschriften, die durch die Hochschulen veröffentlicht wurden, war die bekannteste „Zeitschrift des Demidovschen juristischen Lyzeums" in Jaroslawl (*Временник Демидовского юридического лицея*, 1872–1914).

Seit den 1880-er Jahren wurden die zivil- und strafrechtlichen Aufsätze von russischen und ausländischen Autoren in den Zeitschriften „Das Recht" (*Право*), „Polizeiinformationsblatt" (*Вестник полиции*), „Zeitschrift des Justizministeriums" (*Журнал министерства юстиции*), „Juristische Chronik" (*Юридическая летопись*), „Zeitschrift für bürgerliches und Strafrecht" (*Журнал гражданского и уголовного права*) und in den Zeitungen „Juristische Zeitung" (*Юридическая газета*) und „Gerichtszeitung" (*Судебная газета*) publiziert. Sie hatten der Verbreitung der fortschrittlichen zivil- und strafrechtlichen Ideen unter den Rechtspraktikern erfolgreich beigetragen.

Die mehrzahl der Zeitschriftentitel können doch einen Forscher desorientieren. In der Wahrheit war es so, dass die juristischen Periodika des Russischen Reichs erhebliche Schwierigkeiten erlebten. Das gleichzeitige Erscheinen einiger juristischer Zeitschriften im Zaren-Russland war vor allem mit dem Enthusiasmus der Professur und einiger Vertreter der Richterschaft verbunden, der von den Gerichtsreformen der 1860-er Jahre den Anstoß genommen hatte. Sie meinten, die juristische Aufklärung durch die Rechtszeitschriften hilft der Praxis, einen Rechtsstaat aufzubauen. Insbesondere die Professoren des Zivilrechts hegten große Hoffnungen auf den Erfolg der russischen juristischen Periodika. Die Ursache lag darin, dass der 10. Band der Gesetzessammlung des Russischen Reichs, der die Zivilgesetzgebung enthielt, zu kasuistisch und lückenreich war. Seine angemessene Interpretation war unmöglich, da die Hinweise auf die historischen Quellen der in der Gesetzessammlung kodifizierten Regelungen falsch waren. In der Wirklichkeit war es so, dass Speranskij, der Verfasser der Gesetzessammlung, das französische Zivilgesetzbuch *Code Civil*, nach Russland überführen wollte. Durch die Quellenverweise auf die ursprünglich russischen Gesetze wollte er einen Schein der Integration der nationalen Gesetzgebung schaffen.*[6] Er meinte, dass diese Gesetzessammlung in der absehbaren Zeit durch ein vollwertiges bürgerliches Gesetzbuch nach dem Vorbild der europäischen Rechtswissenschaft ersetzt wird. Die Übernahme des ausländischen Rechts wurde doch durch die russische Monarchie abgelehnt, und aus diesem Grund sollte das russische Zivilrecht den Weg der unabhängigen nationalen Entwicklung nehmen. Deshalb musste die Rechtspraxis alle Widersprüche selbständig überwinden und die Lücken der Gesetzgebung schließen. Die Rechtswissenschaftler wollten dabei mitwirken und mittels juristischer Zeitschriften die Praxis doktrinell richten und systematisieren. Sie waren der Meinung, dass die Praxis selbst die

[5] K. K. Dynovskij. Zadachi tsivilisticheskogo obrazovanija i znachenie ego dlja grazhdanskogo pravosudija [Aufgaben der zivilrechtlichen Ausbildung und ihre Bedeutung für die Zivilrechtsprechung]. Odessa 1896, S. 29.

[6] G. Barats. O chuzhezemnom proishozhdenii bol'shinstva russkih grazhdanskih zakonov [Über den ausländischen Ursprung der Mehrheit der russischen Zivilgesetze]. – Zhurnal grazhdanskogo i ugolovnogo prava 1884, Buch 8, S. 1–34; Buch 10, S. 109–146; 1885, Buch 5, S. 81–112; Buch 6, S. 67–81; A. N. Filippov. Uchebnik istorii russkogo prava (Posobie k lektsijam) [Lehrbuch der Geschichte des russischen Rechts (Ein Grundriss zu den Vorlesungen)]. Bd. 1. Aufl. 4. Jurjev 1912, S. 561–573.

Anlehnung an die Doktrin suchen wird und dadurch die Bezieher deren Quantität den finanziellen Wohlstand und die Entwicklung der juristischen Zeitschriften sicherstellt und heranzieht.

Die Wirklichkeit hat doch diese Erwartungen getäuscht. Im Jahre 1892 wurden zwei von drei wichtigsten juristischen Zeitschriften des Staates – Moskauer „Juristisches Informationsblatt" (*Юридический Вестник*) und Petersburger „Juristische Chronik" (*Юридическая летопись*) – aufgelöst. Im Jahre 1892 blieb in Russland nur eine einzige allgemeine juristische Zeitschrift – „Zeitschrift für bürgerliches und Strafrecht", ohne Berücksichtigung der amtlichen Veröffentlichungen, die von Zeit zu Zeit einige juristische Artikel publizierten, und auch der Zeitschriften, die von den Hochschulen veröffentlicht wurden und nicht zu Abonnementsausgaben gehörten.

„Juristisches Informationsblatt" (insgesamt 18 Bde.) wurde zuerst in Petersburg in den Jahren 1860/1861–1864 monatlich veröffentlicht. Der 6. Band war der Letzte. Die letzten Bände wurden mit Verspätung veröffentlicht: Bde. 4–5 im Jahre 1865, Bd. 6 im Jahre 1866. Der Herausgeber war N. V. Kalatschev. Im ersten Erscheinungsjahr trat diese Zeitschrift als Anhang vom „Archiv der Russland betreffenden historischen und praktischen Angaben" (*Архив исторических и практических сведений, относящихся до России*, 1859) auf, nachher wurde sie selbständig veröffentlicht. Die Beiträge, die in dieser Zeitschrift erschienen, waren den Problemen der zeitgenössischen russischen Gesetzgebung und Gerichtspraxis, auch den konkreten Fragen der kommenden Gerichtsreform gewidmet. Diese Zeitschrift hat auch die Vorschläge bezüglich der Verbesserung des Strafrechts und des Gefängnissystems in die Diskussion gebracht. Hier wurden auch Schriften zur russischen Rechtsdogmatik und Rechtsgeschichte sowie zur Gesetzgebung und Gerichtspraxis im Westeuropa veröffentlicht.

Später wurde eine Zeitschrift mit demselben Namen monatlich veröffentlicht. Diese monatliche Zeitschrift der Moskau Juristischen Gesellschaft wurde in Moskau in den Jahren 1867–1892 (mit den Pausen von Juli bis Dezember 1868 und von Januar 1870 bis März 1871) ohne Vorzensur veröffentlicht. Die Herausgeber waren N. V. Kalatschev, M. M. Kovalevskij, S. A. Muromtsev u.a. Diese Zeitschrift hat die Vertreter der liberalen Professur der Moskauer Universität vereinigt. Hier wurden Aufsätze zu den Fragen des Rechts, der Statistik, und der örtlichen Selbstverwaltung publiziert. Die Mitarbeiter des „Juristischen Informationsblatts" (N. I. Sieber, A. I. Chuprov, N. A. Kablukov u.a.) haben die gemäßigten politischen Reformen verfochten. Seit der Mitte der 1870er Jahre erweiterte das „Juristische Informationsblatt" seinen Problemkreis und veröffentlichte systematisch Schriften zu den Fragen der Rechtsgeschichte, Rechtsphilosophie, der politischen Ökonomie, der Finanzwissenschaft und des Völkerrechts.

„Juristisches Informationsblatt" propagierte liberale Reformen des Alexander II. In den Fragen des Zivilrechts und der Rechtsphilosophie nahm es die idealistische Stellung ein. Außer den Schriften von russischen Autoren wurden die Übersetzungen der Werke von europäischen Kriminalisten – Vertretern der idealistischen anthropologischen Theorie (Cesare Lombroso, Jules Ferry) – ebenfalls in dieser Zeitschrift in den 1880er Jahren veröffentlicht.

In den 1880er Jahren zeigte diese Zeitschrift ein Interesse für die Wirtschaftstheorie von Karl Marx. Im Jahre 1888 ist hier (Bd. 10) der Brief von Karl Marx an die Redaktion der Zeitung „Heimatskizzen" (*Отечественные записки*) zum Artikel von N. K. Mikhailovskij „Karl Marx vor dem Gericht des Herrn Zhukovskij" (*Карл Маркс перед судом г. Жуковского*) erschienen. Die Zeitschrift war doch weit vom Marxismus geblieben. Sie beschränkte sich auf die Verbreitung der Idee der friedlichen Umgestaltung der kapitalistischen Gesellschaft durch die Unterstützung der Vereine und Genossenschaften. Dieser Zeitschrift war eine starke Richtung zur Wirtschaftsstatistik charakteristisch. Die statistischen Materialien des „Juristischen Informationsblatts" hat Vladimir Lenin benutzt, während er das Buch „*Развитие капитализма в России*" (1886–1889)[*7] geschrieben hat.

Die finanzielle Lage der Zeitschrift war relativ günstig. Das „Juristische Informationsblatt" hat die Finanzhilfe von Mäzenen und der Moskauer Juristischer Gesellschaft bekommen. So hatte es von 800 bis 1100 Bezieher, die hauptsächlich Mitglieder dieser Gesellschaft waren. Die Herausgabe dieser Zeitschrift wurde auf Beschluss der Moskauer Juristischen Gesellschaft im Jahre 1892 eingestellt. Das war eine Reaktion auf die Einführung der Vorzensur dieser Zeitschrift.

Die „Juristische Chronik" war eine monatliche Zeitschrift, die in Petersburg im Zeitraum 1890–1892 von Professor N. D. Sergeevskij herausgegeben wurde. Die wichtigen Themen waren mit den Fragen des russischen Rechts verbunden. Hier waren folgende Teile: Gesetzgebungs- und Gerichtschronik, wissenschaftlich-literarischer Teil, Bibliografie. An der Zeitschrift waren berühmte russische Rechtswissenschaftler tätig: N. F. Derjuzhinskij, A. A. Isaev, A. F. Koni, N. M. Korkunov, N. V. Muravjev, V. K. Slutschevskij, N. S. Tagantsev u.a. Nach den Aussagen von Sergeevskij bildeten die finanziellen Schwierigkeiten den Hauptgrund der Schließung dieser Zeitschrift.

Die „Zeitschrift für bürgerliches und Strafrecht" erschien bis 1874 als „Zeitschrift für bürgerliches und Handelsrecht". Die Zeitschrift wurde in Petersburg seit 1871 herausgegeben. Zuerst waren es 6 Bände pro Jahr, dann 10 Bände. Die Herausgeber waren zuerst A. Knirim und N. Tur, später A. Knirim und N. Tagantsev, noch

[7] Auf Deutsch: V. I. Lenin. Werke. Bd. 3: Die Entwicklung Des Kapitalismus in Russland. Berlin 1975.

später die Juristische Gesellschaft von St. Petersburg und persönlich V. M. Volodimirov. Im Jahre 1894 wurde sie zur „Zeitschrift der Juristischen Gesellschaft an der Kaiserlichen Universität zu St. Petersburg“ (*Журнал Юридического общества при имп. СПб. Университете*) umbenannt. Professor V. N. Latkin ist zum neuen Herausgeber geworden. Im Zeitraum 1899–1906 erschien diese Zeitschrift unter dem Namen „Rechtsblatt“ (*Вестник права*). Die Zeitschrift hatte folgende Teile: Verordnungen und Erlasse der Regierung, allerhöchste Erlasse des Justizministeriums, (russische und ausländische) juristische Chronik, Kritiken und Bibliografien, Gerichtsteil, Teil für Zivilrecht u.a. Hier wurden auch Beiträge zu den verschiedenen Fragen der russischen und ausländischen Rechtstheorie und -praxis veröffentlicht. Obwohl diese Zeitschrift verschiedene Namen hatte, ist sie doch immer ein Sprachrohr der juristischen Öffentlichkeit der Reichshauptstadt Sankt-Petersburg geblieben.

Eine eigene Frage besteht darin, warum die juristischen Zeitschriften aufgelöst wurden. Die Hauptrolle spielten die finanziellen Schwierigkeiten. Das Beispiel der „Juristischen Chronik“ ist dabei kennzeichnend. Ursprünglich hatte die Redaktion dieser Zeitschrift ein Ziel gesetzt, die Kosten für die Zeitschrift zu decken. Dazu brauchte sie ca. 1200 Bezieher. Die Redaktion hat damit gerechnet, dass etwa 30 000 Richter und andere Gerichtsbeamten, auch zahlreiche Anwälte und Beamten und der günstige Preis (5 Rubel pro Jahr) bei der guten Qualität von Publikationen das Leben der Zeitschrift ohne Sponsoren ermöglichen können. Aber im Laufe von drei Jahren hat die Zeitschrift weniger als 700 Bezieher gehabt. Das hatte einen Verlust in Höhe von etwa 6500 Rubeln zur Folge.[*8]

Die Qualität der Materialen und die Werbung waren dabei aber sehr gut. Die Redaktion der „Zeitschrift für bürgerliches und Strafrecht“ hat betont, dass alle russischen juristischen Zeitschriften nur dank der Unterstützung der Staatskasse, der juristischen Gesellschaften oder der Moskauer Privatpersonenvereinen existierten, da alle drei Zeitschriften insgesamt weniger als 2500 Bezieher hatten.[*9] Dabei gab es unter den Abonnenten auch Ausländer. Die Redaktion der „Zeitschrift für bürgerliches Strafrecht“ betonte wiederum, dass im kleinen Bulgarien ein dritte nationale juristische Zeitschrift im Jahre 1892, nach Auflösung der zwei von den drei juristischen Zeitschriften in Russland, entstand. Außerdem ist es zu bemerken, dass die bulgarischen Bezieher alle drei allgemeinen juristischen Zeitschriften im größeren Umfang abonnierten, als einige russische Provinzen, deren Bevölkerung und Territorium diejenigen von Bulgarien überschritten. In Bulgarien wurden auch mehrere ausländische Zeitschriften abonniert, in Russland machten es praktisch nur einzelne russische Hochschulen.[*10] So, z. B. hatte die „Zeitschrift für bürgerliches und Strafrecht“ im Jahre 1877 nur 775 Bezieher. Dabei waren nur zwei Bezieher in der Novgorod-Provinz – in Tichwin und in Kirillow, wo sie wahrscheinlich vom gebildeten Friedensrichter oder Untersuchungsrichter abonniert wurden. Kein Gericht von drei Bezirksgerichten hat weder diese noch andere Zeitschriften abonniert.[*11] Das Fehlen der Bezieher wurde durch das fehlende Interesse am Lesen der juristischen Schriften und der Monographien bedingt. Es hatte mehrere Gründe.

Der erste Grund lag daran, dass es unmöglich war, die Fehler der Gesetzessammlung durch die Rechtsdoktrin praktisch zu ersetzen. Einer der anonymen Autoren der „Zeitschrift für bürgerliches und Strafrecht“, der sich als „P.S.“ bezeichnete, schrieb: „In der Gesetzessammlung selbst gibt es keine allgemeinen Rechtsbestimmungen, und es ist unmöglich, diese Bestimmungen aus der Rechtswissenschaft zu entlehnen und diese genauso wie die Regelungen der Gesetze anzuwenden, da es meistens Unsinn verursachen kann.“[*12]

Der zweite Grund lag an der Qualität der in den Zeitschriften veröffentlichten Publikationen, deren Themen der aktuellen Rechtspraxis nicht entsprachen. Dieses Argument verwendete man als Antwort auf die Trägheits-, Ignoranz- und Obskurantismusklagen an die potentiellen praktizierenden Leser von den Autoren juristischer Zeitschriften. Diese Remonstrationen waren natürlich teilweise berechtigt.[*13]

Die Rechtswissenschaftler hatten im Grunde genommen doch Recht – die meisten Richter, Staatsanwälte und Anwälte waren nicht genug juristisch ausgebildet, deshalb konnten sie die wissenschaftliche Rechtsliteratur mit dem Nutzen nicht lesen. Obwohl die Urheber der Gerichtsreform der Meinung waren, dass die juristische Ausbildung notwendige Bedingung für die erwähnten Posten wird, war die Realität sehr weit vom Ideal. Z.B. im Stadtgericht von Twer gab es im Jahre 1882 (d.h. etwa 20 Jahre nach dem Beginn der Gerichtsreformen!) keinen Richter mit der juristischen Ausbildung. Von 6 Richtern dieses Gerichtes hatte nur einer ein provinziales Gymnasium absolviert, der Zweite ein Priesterseminar, der Dritte eine Artillerieschule, der Vierte eine

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[8] Volodimirov V. Za mesjats (juridicheskaja hronika). Prekreshchenie izdanija zhurnalov „Juridicheskij Vestnik“ i „Juridicheskaja Letopis‘„ [Im Laufe des Monats (juristische Chronik). Einstellung der Herausgabe der Zeitschriften „Juristisches Informationsblatt“ und „Juristische Chronik“]. – Zhurnal grazhdanskogo i ugolovnogo prava 1892, Buch 10, S. 160.

[9] Ebd.

[10] Ebd., S. 162.

[11] P.S. (sic!). Chto sleduet chitat‘ nashim juristam-praktikam, i chto oni chitajut [Was sollten unsere Juristen-Praktiker lesen und was lesen sie]? – Zhurnal grazhdanskogo i ugolovnogo prava 1878, Buch 10, S. 202–203.

[12] Ebd., S. 201.

[13] Dazu: G. F. Shershenevich. Nauka grazhdanskogo prava v Rossii [Die Wissenschaft des bürgerlichen Rechts in Russland]. Moskau 2003, S. 239 *ff.*

Auditorschule, der Fünfte eine Agrarschule. Der Sechste hat die „Hausausbildung" bekommen.*[14] Selbst im Dirigierenden Senat, im höchsten Gerichtsorgan des Russischen Reichs, gab es einige Senatoren, die keine juristische Ausbildung hatten!

In Ausnahmefällen war die fehlende juristische Ausbildung kein Hindernis für die erfolgreiche praktische und theoretische Jurisprudenz. So wurde Isatschenko, der von Ausbildung her ein Mathematiker war, zum einen der größten Experten im Zivilverfahren des vorrevolutionären Russlands.*[15] In der Regel hatten die Personen auf den Posten, welche eine juristische Ausbildung forderten, keinen Ausbildungswillen. Einer der Vertreter der besten Gruppe der Richter schrieb dazu (unter dem Namen *Svoj* – der Eigene): „... für uns ist es genug, wenn ein Richter „ein guter Mensch" ist, es sei denn, er hat keine Ausbildung, keine Erfahrung, die er für seinen Posten braucht. Wir sind bereit, das Gericht, seine Unordnung, ungerechte Urteile zu beklagen, aber nur in Ausnahmefällen werden die notorische Ignoranz, die offensichtliche Unfähigkeit eines jeweiligen Richters gerügt… Der Manche beschäftigt sich speziell mit der Archäologie, Botanik, chemischen Versuchen, Landwirtschaft, Geschäftssachen, kriecht aber in den Richterstuhl, den er ohne Gehalt und Hochachtung nie anschauen würde."*[16]

In den ersten Jahren nach der Gerichtsreform hatte die fragwürdige Ernennung von Richtern ohne juristische Ausbildung objektive Gründe. Die Demiurgen der Gerichtsreform, die versprachen, dass die Anzahl der Absolventen der juristischen Fakultäten für die Bekleidung der Richterposten in den neuen Gerichten genügt, haben nicht berücksichtigt, dass nicht alle Juristen Richter werden. Sie haben einfach die Anzahl der Diplomjuristen mit der Anzahl von neuen Vakanzen mechanisch verglichen. In der Wirklichkeit war es ein großes Problem nach der Reform, alle freien Stellen zu bekleiden.*[17]

Andererseits, auch wenn die Anzahl der Juristen im Reich zunahm, wurden die Gerichtsposten bestenfalls durch die ehemaligen Staatsanwälte bekleidet, die sich in den Fragen des Zivilrechts nicht auskannten.*[18] In vielen ungünstigen Fällen sind die Gerichtsbeamten der Vorreformgerichte, die in der Regel Militärpersonen a.D. oder ehemalige Beamten waren, ohne juristische Ausbildung zu den Richtern geworden. Dabei entstand eine paradoxe Situation, indem die Absolventen juristischer Fakultäten etwa 10 Jahre die Stellung des Richters als Bewerber erwarteten, weil die Personen ohne juristische Ausbildung diese Posten bekleideten.*[19] Die Regierung kümmerte sich nicht um diese Umstände und um die fragwürdige Stellung der Universitätsabsolventen. Im Gerichtssystem herrschten außerdem der Protektionismus und die Vorabstimmung der Richterkandidaten (sogar Friedensrichter) mit der öffentlichen Administration.

Die ungebildeten Richter, die auf diese Weise ihre Posten bekommen hatten, verstanden die Rechtswissenschaft nicht und verachteten sie. Deshalb lasen sie auch keine juristischen Periodika. Für eine einzige Anleitung zum Verstehen des Gesetzes hielten sie die Urteile der höchsten Gerichtsinstanz – der Kassationsdepartements des Dirigierenden Senats. Als Folge davon wurde das russische Recht dieser Zeit größtenteils zum Präjudizienrecht. Die Verweise auf die Senatsentscheidungen wurden zum Hauptargument der Parteivorträge. Da die Senatspraxis auch sehr widersprechend und inkonsequent war, hat derjenige den Prozess gewonnen, der seine Behauptung auf den Hinweis der jüngeren Entscheidung unterstützte.*[20] Demgemäß war die englische Doktrin von *stare decisis* in Russland dieser Zeit latent in Kraft.*[21] Die Versuche, die Verweise auf die Rechtsdoktrin oder auf

[14] Za mesjats (juridicheskaja hronika). Neuspeh juridicheskih zhurnalov: v chem on lezhit [Im Laufe des Monats (juristische Chronik). Misserfolg der juristischen Zeitschriften: worin besteht der]. – Zhurnal grazhdanskogo i ugolovnogo prava 1886, Buch 9, S. 154–155.

[15] M. M. Vinaver. Vasilij Lavrent'evich Isachenko (k 75-letiju so dnja rozhdenija) [Vasilij Lavrent'evich Isachenko (zum 75-jährigen Geburtstag)]. – Vestnik grazhdanskogo prava 1914/5, S. 5–12; M. M. Vinaver. Pamjati Vasilija Lavrent'evicha Isachenko [Zum Gedächtnis Vasilij Lavrent'evich Isachenko]. – Vestnik grazhdanskogo prava 1915/6, S. 5–9.

[16] Svoj (sic!). Nashe grazhdanskoe pravosudie (okonchanie – nachalo v Juridicheskom Vestnike 1882 g.) [Unsere bürgerliche Rechtsprechung (Schluss – Anfang im „Juristischen Informationsblatt" d. J. 1882)]. – Juridicheskij Vestnik 1883, Buch 8, S. 583–584.

[17] A. N. Jarmysh. Sudebnye organy tsarskoj Rossii v period imperializma (1900–1917 gg.) [Gerichtsorgane des Zarenrusslands in der Periode des Imperialismus (1900–1917)]. Kiev 1900, S. 10 *ff.*

[18] V. L. Isachenko. Voprosy prava i protsessa (sbornik tsivilisticheskih statej) [Die Fragen des Rechts und des Prosesses (Sammlung der ziviliztischen Aufsätze)]. Bd. 1. Material'noe pravo. Petrograd 1917, S. 9–10.

[19] Svoj (Fn. 16), S. 584 *ff.*

[20] V. L. Isachenko. Grazhdanskij Kassatsionnyj Departament Pravitel'stvujushchego Senata [Bürgerliches Kassationsdepartement des Dirigierenden Senats]. – Voprosy prava i protsessa (sbornik tsivilisticheskih statej). Bd. 2. Stat'i po protsessual'nomu pravu. Petrograd 1917, S. 141; Svoj (Fn. 16), S. 627. Dazu: A. S. Kartsov. K voprosu o pravotvorcheskoj dejatel'nosti Pravitel'stvujushchego Senata: problema „prava uchastija chastnogo" [Zu der Frage über die rechtsfortbildende Tätigkeit des Dirigierenden Senats: das Problem „der Teilnahme der Privaten"]. – Tsivilisticheskie issledovanija: Ezhegodnik grazhdanskogo prava [Zivilistischen Untersuchungen: Jahrbuch des bürgerlichen Rechts]. Bd. 3. B. L. Khaskelberg, D. O. Tuzov (Hrsg.). Moskau 2007, S. 147–172.

[21] *Cf.*: W. G. Wagner. The Civil Cassation Department of the Senate as an Instrument of Progressive Reform in Post-Emancipation Russia. – Slavic Review 1983 (42), S. 45 *ff.*; W. E. Butler. The Role of Case-Law in the Russian Legal System. – Judicial Records, Law Reports and the Growth of Case Law. J. H. Baker (ed.). Berlin 1989, S. 337, 350 *ff.*; A. Silvestri. The Contrast between Modernization and Tradition: Landownership during the Last Decades of the Tsarist Empire. – Review of Central and East European Law 1993 (19), S. 8 *ff.*, 29.

die Meinungen von Rechtswissenschaftlern im Gericht anzuführen, wurden von Richtern abgelehnt.[*22] Aus diesem Grund hatte die juristische Öffentlichkeit kein Interesse an die Studien der Rechtsdoktrin.[*23]

Im Endeffekt hat die Lage der juristischen Ausbildung der Richter die Besorgnis der Reichsregierung erregt. Der Erlass des Staatsrats vom 24. Dezember 1891, der im Jahre 1892 veröffentlicht wurde, änderte die Gerichtsstatute des Alexander II. bezüglich der Richterkandidaten. Dieser Entscheidung lag das Streben zugrunde, die Berufsausbildung der jungen Juristen auf solche Weise zu organisieren, damit sie selbständig und unabhängig die Gerichtstätigkeit ausüben könnten.[*24] Es wurde entschieden, den Gerichtsvorsitzenden und den Staatsanwaltschaftsbeamten zu verpflichten, die Berufsausbildung der Kandidaten zu betreuen. Diese hatten sowohl die Gerichtspraxis als auch moderne Ideen der Rechtsdoktrin kennen zu lernen. Es war geboten, in den Gerichten die Bibliotheken zu errichten, in denen die russischen und ausländischen Monographien, Zeitschriften und Periodika, unter anderem „Zeitschrift für bürgerliches und Strafrecht", „Juristisches Informationsblatt" und „Juristische Chronik" zu beziehen waren. Die letzten zwei Zeitschriften wurden doch noch im selben Jahre aufgelöst. Bei der Mitwirkung der Regierung und bei der sukzessiven Steigerung des Bildungsniveaus im Russischen Reich ist die Situation am Anfang des 20. Jahrhunderts besser geworden.

Am Anfang des 20. Jahrhunderts wurden folgende Zeitschriften veröffentlicht: „Informationsblatt des Rechts und des Notariates" (*Вестник права и нотариата* (1908–1917; seit 1913 zum „Informationsblatt des Rechts" (*Вестник права*) umbenannt), „Die Rechtsfragen" (*Вопросы права*, 1910–1912), populäre Wochenschrift „Leben und Gericht" (*Жизнь и суд*, 1911–1917), „Informationsblatt des Bürgerrechts" (*Вестник гражданского права*, 1913–1917) u.a. Im Zeitraum 1898–1917 ist auch juristische Zeitung „Das Recht" (*Право*) erschienen.

Es ist auch das „Informationsblatt des bürgerlichen Rechts" (*Вестник гражданского права*) zu nennen, die in Petrograd von M. M. Vinaver „unter der unmittelbaren Mitwirkung" von Professoren D. D. Grimm, V. B. Eljaschewitsch, A. E. Nolde, M. J. Pergament und I. A. Pokrowski herausgegeben wurde. Diese Zeitschrift wurde im Laufe von etwa fünf Jahren herausgegeben – vom Januar 1913 bis Ende des Frühlings 1917. Dieses relativ kurze Leben des Informationsblattes war doch genug, um zu einer der maßgebendsten russischen juristischen Zeitschrift zu werden. Dieser Erfolg wurde größtenteils dadurch bedingt, dass der Herausgeber vom Anfang an mit bekannten Zivilisten, Prozessualisten und Spezialisten im Bereich des internationalen Privatrechts zusammengearbeitet hat und dass das professionelle Niveau der russischen Juristen und das Interesse der juristischen Öffentlichkeit an der Rechtswissenschaft in den ersten Dekaden des 20. Jahrhunderts zugenommen hat.

[22] V. L. Isachenko (Fn. 18), S. 6–7.

[23] Svoj (Fn. 16), S. 642–645.

[24] Za mesjats (juridicheskaja hronika). Po povodu tsyrkuljara Ministra justitsii ot 26 aprelja 1892 goda Nr. 12077 [Im Laufe des Monats (juristische Chronik). Aus dem Amlass des Rundschreibens Nr. 12077 des Justizministers vom 26. April 1892]. – Zhurnal grazhdanskogo i ugolovnogo prava 1892, Buch 6, S. 208–210.

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Die gesamtnordischen juristischen Zeitschriften*

Das juristische Zeitschriftenwesen im Norden ist in Dänemark und auch in Norwegen erheblich älter als das in Schweden und in Finnland.*[1] Einige juristische Periodika Dänemarks erschienen schon am Ende des 18. Jahrhunderts, während die frühesten Zeitschriften in Schweden und in Finnland 1830 bzw. 1861 gegründet worden sind. Für das frühere Erscheinen der Periodika war die Entstehung eines Berufsstandes ausgebildeter Juristen in den westnordischen Ländern wahrscheinlich von entscheidender Bedeutung.

Die Frühgeschichte der nordischen juristischen Periodika bis etwa 1850 wurde von Zeitschriften geprägt, die von einer oder einigen Personen herausgegeben wurden; die Zeitschriften waren von diesen Gründern völlig abhängig und gingen demzufolge auch sofort ein, wenn die Herausgeber nicht mehr fortsetzen konnten oder wollten. Am Ende der Gründungsperiode um 1850 war die Lage recht trist. Außer einigen Entscheidungssammlungen gab es weder in Dänemark noch in Norwegen juristische Periodika, während man in Schweden das von Kjell Åke Modéer in seinem Beitrag näher behandelte Schmidtsche *Juridiskt Arkif* hatte. Das Eingehen mancher Zeitschrift schon nach kurzer Zeit deutet darauf hin, dass die Herausgeber in der Gründungszeit mit mehreren Problemen zu kämpfen hatten. Mehrere kurzlebige Periodika gingen wegen Mangels an Material oder an Lesern ein. Ökonomische Schwierigkeiten waren ja natürlich ein Dauerproblem, womit auch die Zeitschriften im 20. Jahrhundert zu kämpfen hatten.

In der Mitte des 19. Jahrhunderts wurden dann die ersten nationalen juristischen Vereine gegründet, und diese Vereine haben bald eigene Zeitschriften veröffentlicht; später waren die nationalen Anwaltsvereine in dieser Hinsicht besonders aktiv. In einigen Jahrzehnten hatte sich die Lage völlig verändert, und die ersten noch heute existierenden Zeitschriften wurden gegründet. In der zweiten Hälfte des Jahrhunderts gab es in allen nordischen Ländern so viele Juristen, dass erfolgreiche Fachzeitschriften möglich geworden waren.

Es bleibt als allgemeiner Eindruck von den Zielsetzungen der frühen nordischen juristischen Zeitschriften, dass sie vor allem praktisch angelegt waren. Sie hatten oft die Hauptaufgabe, Auskunft über die Rechtsprechung zu vermitteln, obwohl es ihnen nicht an rechtswissenschaftlichen Artikeln fehlte. Die verhältnismäßig geringe Zahl ausgebildeter Juristen und der somit kleine Kreis möglicher Abonnenten hat eine überwiegend praktische Ausrichtung erzwungen. Eine Zeitschrift nur für das Publikum akademischer Lehrkräfte herauszugeben war ökonomisch nicht machbar; um so weniger Chancen hatte eine Zeitschrift mit einer bestimmten rechtswissenschaftlichen Position.

Ein neues politisches Klima war eine wichtige Voraussetzung für die Entstehung gesamtnordischer Zeitschriften. Nach 1814 ersetzte eine skandinavisch orientierte Gesinnung erstaunlich schnell die alte Erbfeindschaft zwischen den nordischen Völkern. Der Skandinavismus fing als Studentenbewegung an, wurde aber bald eine politische Realität, die freilich im Jahre 1864 versagte, als Dänemark allein den Krieg mit Preußen

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[1] Dieser Aufsatz basiert, wenn nicht anders erwähnt, auf meinem Aufsatz "Nordische juristische Zeitschriften im 18. und 19. Jahrhundert". – Juristische Zeitschriften in Europa. M. Stolleis, T. Simon (Hrsg.). Frankfurt am Main 2006, S. 15–28, und meiner Geschichte der nordischen Rechtswissenschaft; siehe "Den konstruktiva riktningen. III. 1871–1910" (Lund 2002) und "Realism och skandinavisk realism. IV: 1911–1950" (Stockholm 2007) mit Literaturhinweisen.

und Österreich führen musste. Trotz des Zusammenbruchs des sicherheitspolitischen Skandinavismus blieb die Annäherung der nordischen Staaten nicht ohne gesellschaftliche und kulturelle Folgen, insbesondere auf den Gebieten der Gesetsgebungszusammenarbeit und der Rechtswissenschaft.

Der Skandinavismus war insbesondere für die Dänen wichtig. Nach fast zwei Jahrzehnten gab es in Dänemark in den Jahren 1863–1867 wieder eine juristische Zeitschrift, *Tidsskrift for Retsvæsen* (Zeitschrift für das Rechtswesen); die erste mit einem klaren politischen und auch rechtspolitischen Profil; wahrscheinlich wegen dieses Profils haben die Professoren der Kopenhagener juristischen Fakultät keine Beiträge für die Zeitschrift geliefert. Die Zeitschrift vertrat eine deutlich nationalliberale Linie und den Skandinavismus, und die Bedeutung Schleswigs als eine dänische Provinz wurde kräftig hervorgehoben. Mit der Gründung der noch heute bestehenden *Ugeskrift for Retsvæsen* (Wochenschrift für das Rechtswesen) ging *Tidsskrift for Retsvæsen* ein, und das politische Profil wurde in der neuen Zeitschrift stillschweigend vergessen.

Verbesserte Verkehrsverbindungen waren auch eine notwendige Voraussetzung für die nordische Zusammenarbeit. Die Nordischen Juristentagungen seit 1872 hat eine gesamtnordische Literatur und auch das gesamtnordische Zeitschriftenwesen gefördert. Als erste gesamtnordische Zeitschrift, dabei auch als erste spezialisierte juristische Zeitschrift im Norden wurde 1878 in Kopenhagen *Nordisk Tidsskrift for Fængselsvæsen og penitentiære Institutioner* (Nordische Zeitschrift für das Gefängniswesen und sonstige Strafvollzugsanstalten) als Organ für den Verein „Den nordiska penitentiärföreningen" gegründet; ab 1890 mit dem Titel *Nordisk Tidsskrift for Fængselswesen og praktisk Strafferet* (Nordische Zeitschrift für das Gefängniswesen und praktisches Strafrecht). Als Mitarbeiter konnte die Zeitschrift die Strafrechtsprofessoren in Kopenhagen, Lund und Kristiania (Oslo) gewinnen. Weit wichtiger war jedoch die im Jahre 1888 in Kristiania gegründete, gleichfalls gesamtnordische *Tidsskrift for Retsvidenskab* (Zeitschrift für Rechtswissenschaft). Man hatte schon 1878 auf der dritten Juristentagung in Kristiania die Möglichkeit einer gesamtnordischen rechtswissenschaftlichen Zeitschrift erörtert; aber erst ungefähr zehn Jahre später wurde aber ökonomisch möglich.

Um die Bedeutung dieser neuen gesamtnordischen Zeitschrift darzulegen, möchte ich Dag Michalsen zitieren:

> „1888 is an important year in the history of legal journals, not only for Norway, but for other Nordic countries as well, as *Tidsskrift for Retsvidenskab* was launched that year. In a number of ways *Tidsskrift for Retsvidenskab* was a new kind of legal journal. Firstly, it was a Nordic legal journal, thus expressing the new level of Nordic legal cooperation that began in the 1860s. Secondly, excluding any traces of authentic reporting of court practices, *Tidsskrift for Retsvidenskab* was the first explicit 'modern' legal journal in Norway not responsible for the reporting of court cases. Thirdly, the journal exhibited a systematic high academic level with a strong sense of what internationalisation of law and legal science in practice involved. The leading man of this project was Francis Hagerup ...".*[2]

Dag Michalsen betont erstens, dass die Tidsskrift for Retsvidenskab eine *gesamtnordische* Zeitschrift war. Man muss sich aber fragen, wie ‚nordisch' denn eigentlich die Tidsskrift for Retsvidenskab früher war und heute ist, und dieses Problem ist auch später in den übrigen gesamtnordischen juristischen Zeitschriften bemerkbar. Jede Zeitschrift muss einen Verlagsort haben, und dieser beeinflusst leicht auch den Inhalt. Während ihrer ganzen Geschichte ist *Tidsskrift for Retsvidenskab* in Kristiania/Oslo erschienen; eine natürliche Lösung, weil die norwegische Stang'sche Gedächtnisstiftung die Kosten für die Zeitschrift trägt. Auch nach Hagerup ist der Chefredakteur immer ein Norweger gewesen. In den ersten Jahrzehnten der Zeitschrift wurde jedoch die Redaktion zeitweise in die anderen nordischen Hauptstädte verlegt: Hagerup, der die Redaktion personifizierte, wurde nach dem Scheitern seiner politischen Karriere im Jahre 1905 zuerst Botschafter in Kopenhagen und dann später 1916 in Stockholm. Schon von Anfang an hatte man eine gesamtnordische Redaktion mit sowohl dänischen als auch schwedischen Mitgliedern; in den 1920er Jahren wurde die Redaktion mit Vertretern Finnlands und Islands erweitert.

Zweitens sei die *Tidsskrift for Retsvidenskab* die erste moderne juristische Zeitschrift in Norwegen gewesen; eine Zeitschrift, die für die Veröffentlichung der Gerichtsentscheidungen nicht verantwortlich war. Diese Behauptung bedeutet aber, dass Michalsen, m. E. mit Recht, die *Tidsskrift for Retsvidenskab* auch als eine norwegische Zeitschrift betrachtet. Obwohl Rechtswissenschaftler von allen nordischen Ländern Beiträge schrieben, enthielten die Beilagen, die alle Abonnenten gratis bekamen, ausschließlich norwegische Abhandlungen, sogar eine Dissertation im Jahre 1907.

Drittens stelle nach Michalsen die *Tidsskrift for Retsvidenskab* den ersten Versuch dar, eine Zeitschrift mit einem klaren wissenschaftlichen Profil zu gründen, und gerade diese Zeitschrift fand in ihrer Anfangszeit keine uneingeschränkte Zustimmung. Der berühmte Einführungsaufsatz Hagerups in der *Tidsskrift for Retsvidenskab* von 1888, erschienen unter dem Titel „Nogle Ord om der nyere Retsvidenskabs Karakter" (Einige Worte über den Charakter der neueren Rechtswissenschaft), wurde von schwedischer Seite gerügt, weil er zu wissenschaftlich und daher nicht für die schwedische Leserschaft geeignet sei: Letzere kenne weder das römische Recht noch die deutsche Literatur und könne daher eine wissenschaftliche Abhandlung wie die von Hagerup nicht

[2] Zu *Tidsskrift for Retsvidenskab*, siehe den Aufsatz von Dag Michalsen "The making of a Public Legal Sphere. The Legal Journals of Norway in the 19th Century. – Juristische Zeitschriften in Europa (Fn. 1), S. 46–53.

recht verstehen. Trotz dieser, freilich nur privat dem Chefredakteur gegenüber geäußerten Kritik verblieb die redaktionelle Linie unverändert und der Inhalt streng wissenschaftlich. Alle Gebiete der Rechtswissenschaft wurden vertreten, und der Umfang der Zeitschrift ermöglichte auch die Veröffentlichung längerer Aufsätze. In seinem Einführungsaufsatz hatte Hagerup für die konstruktive Richtung, ‚die Begriffsjurisprudenz', plädiert; die Zeitschrift stand aber allen Richtungen offen. Allmählich wurden aber die Wünsche der Durchsnittsjuristen insoweit berücksichtigt, dass Übersichten der nationalen Rechtsprechung häufiger wurden. Hagerup musste auch selbst zugeben, dass gerade diese Übersichten den stärksten Beifall gefunden hatten.

Erst ab Ende des 19. Jahrhunderts kann man eine allmähliche Spezialisierung der juristischen Zeitschriften beobachten. Diese Spezializierung vollzog sich allerdings am Anfang sehr langsam; erst während des 20. Jahrhunderts ist ein reiches Florilegium solcher Zeitschriften entstanden. Diese Zeitschriften neuen Typs sind sehr oft gesamtnordisch und führen im Titel die Bezeichnung ‚nordisch': *Nordisk administrativt Tidsskrift*, *Nordisk Tidsskrift for international Ret*, *Nordiskt immateriellt rättsskydd*, *Nordisk tidsskrift for strafferet* usw. Diese nordischen Zeitschriften hatten meistens einen dänischen Chefredakteur, und sie wurden in Kopenhagen gedruckt.

Die schon erwähnte älteste gesamtnordische Zeitschrift *Nordisk Tidsskrift for Fængselswesen og praktisk Strafferet* wurde vom dänischen Staat unterstützt und musste im Jahre 1911 aufhören, als der Staat aus finanziellen Gründen mehrere Beiträge für kleinere Zeitschriften einstellte. Die Zeitschrift hatte bis zum Ende Mitarbeiter aus allen nordischen Ländern, auch aus Finnland. Schon 1913 wurde ihr Nachfolger *Nordisk Tidsskrift for Strafferet* (Nordische Zeitschrift für Strafrecht) gegründet. Auch diese Zeitschrift hatte einen Chefredakteur aus Dänemark, und im Vorwort wurde die Aufrechterhaltung der Vorgängerin als eine Ehrensache bezeichnet. In der Tat handelte es sich jedoch um eine völlig neue Zeitschrift, und die Redaktion versprach auch eine Kursänderung. In der alten Zeitschrift waren vor allem Strafvollzugsfragen behandelt worden, während man im neuen Periodikum insbesondere neue Vorstellungen von allgemeinen strafrechtlichen Fragen erörtern wollte. Die Bedeutung der neugegründeten nordischen Kriminalistenvereine wurde hervorgehoben, und die Zeitschrift war offenbar ein Organ der soziologischen Strafrechtsschule. Nach dem Zweiten Weltkrieg wurde der Titel der Zeitschrift zu *Nordisk tidsskrift for kriminalvidenskab* (Nordische Zeitschrift für Kriminalwissenschaft) geändert; man wollte damit ausdrücken, dass nicht nur das Strafrecht im traditionellen Sinne, sondern alle kriminalpolitischen Fragen, auch medizinische, psychiatrische und soziologische Gesichtspunkte zum Themenkreis der Zeitschrift gehörten.

Wie erwähnt konzentrieren sich die gesamtnordischen juristischen Zeitschriften meistens auf *ein* Rechtsgebiet; so wurde die *Nordisk Administrativt Tidsskrift* (Nordische administrative Zeitschrift) im Jahre 1920 gegründet, weil die in den nationalen Verwaltungen tätigen Juristen sich von den Nordischen Juristentagungen vernachlässigt fühlten und deshalb ein eigenes Organ für das praktische Verwaltungsrecht wünschten. Erst fast ein Jahrhundert nach der Gründung der *Tidsskrift for Retsvidenskab* wurde 1976 wieder eine allgemeine gesamtnordische Zeitschrift *Retfærd. Tidsskrift for marxistisk retsvidenskab* (Gerechtigkeit. Zeitschrift für marxistische Rechtswissenschaft) gegründet.

Auch die *Tidsskrift for Retsvidenskab* war allerdings als ein streng wissenschaftliches Periodikum eine Spezialzeitschrift, und *Retfærd* war nicht nur eine rechtswissenschaftliche, aber noch dazu eine marxistische Zeitschrift. Außerdem wurde Retfærd als eine dänische Zeitschrift gegründet, obwohl die Zeitschrift von Anfang an auch Vertreter aus den anderen nordischen Ländern hatte. Schon in der ersten Nummer äußerte die Redaktion den Wunsch, dass *Retfærd* in der Zukunft eine gesamtnordische Zeitschrift werden würde, und heutzutage hat die Zeitschrift eine nordische Redaktion; die einzelnen Nummern werden wechselweise von den nationalen Redaktionsgruppen zusammengestellt. *Retfærd* war schon von Anfang an für ‚kritische Juristen' gedacht. Obwohl die marxistische Prägung allmählich weniger geworden ist, kann *Retfærd* noch heute als eine ‚radikale', ‚progressive' oder ‚kritische' rechtswissenschaftliche Zeitschrift bezeichnet werden. Laut der gegenwärtigen Programmerklärung „wird das Recht in Retfærd aus einem theoretischen und praktischen Gesichtswinkel analysiert, mit einem Hintergrund nicht nur in Jura, sondern auch in der Soziologie, Kriminologie, Politologie, Geschichtsforschung, Wirtschaft, Ökologie, Anthropologie, dem Feminismus und anderen Wissenschaften um eine kritische Rechtswissenschaft weiterzuentwickeln".

Die Herausgeber der neugegründeten *Nordisk Tidsskrift for Strafferet* erwähnten 1913, dass das neue Periodikum auch deshalb ‚nordisch' war, „weil die nordischen Länder einzeln zu klein waren um so eine Zeitschrift aufrechtzuerhalten". Später wurde noch die Abonnentenzahl dadurch sichergestellt, dass die Zeitschrift in ein Mitgliedsblatt der Kriminalistenvereine umgewandelt wurde. Auch für die gesamtnordischen juristischen Zeitschriften war der schwache Absatz ein Dauerproblem. Etwa zwanzig Jahre nach ihrer Gründung hatte die *Tidsskrift for Retsvidenskab* ungefähr 190 Abonnenten in Norwegen und 120 in Dänemark, aber nur etwa 70 in Schweden. Die Herausgeber der *Nordisk Tidsskrift for Strafferet* waren Realisten: Für die juristischen Spezialzeitschriften ging es nicht in erster Linie um eine nordische Gesinnung, sondern ein nordisches Profil war auch eine wirtschaftliche Notwendigkeit.

Die nordischen Zeitschriften wurden auch dadurch ermöglicht, dass die in Schweden, Norwegen und Dänemark gesprochenen vier Sprachen für alle Skandinavier ohne größere Mühe verständlich sind; Beiträge auf Isländisch oder Finnisch wurden in eine der skandinavischen Hauptsprachen übersetzt. Diese Zeitschriften

waren allerdings, um die Terminologie von Werner Krawietz zu verwenden, ‚internordisch', nur für nordische Leser gedacht, während es lange keine ‚transnordische' Zeitschriften für ein internationales Publikum gab. Erst in den 1930er Jahren gab es einen ersten Versuch, da die schon erwähnte *Nordisk Tidsskrift for international Ret* auch eine Beilage für nicht-nordische Leser *Acta scandinavica juris gentium* mit Aufsätzen auf Deutsch und vor allem auf Französisch enthielt. Die erste eigentliche ‚transnordische' Zeitschrift *Scandinavian Studies in Law* wurde 1957 in Schweden gegründet. Im Vorwort des ersten Bandes betonte der Chefredakteur Folke Schmidt die Bedeutung der neuen Zeitschrift auch für die nordischen Rechtswissenschaftler:

> „Hitherto, however, the communication of Scandinavian lawyers with other legal systems has too often been of a one-way character, for very little Scandinavian legal writing has been published in any language but that of the author. The Scandiavian who writes in his own language remains perforce outside the general exchange of ideas, and any contribution which he may claim to have made will neither get the salutary testing which international scrutiny alone can give nor receive attention in subsequent international discussion."

Man war sich dieses Problems seit langem bewusst. Schon Hagerup behauptete, ein nordischer Rechtswissenschaftler, der in seinen Werken eine Diskussion mit deutschen Gelehrten begann, sei wie eine Person, die mit einem Schwerhörigen rede: man verstehe alles, was der andere sage, während die eigenen Worte völlig ohne Wirkung in der Luft verschwinden.

Man muss sich, wie erwähnt, schließlich fragen, wie ‚nordisch' die gesamtnordischen Zeitschriften inhaltlich betrachtet eigentlich waren, und auch wie man den Begriff ‚nordische Rechtswissenschaft' verstehen kann. Die *Tidsskrift for Retsvidenskab* kann wieder als ein gutes Beispiel dienen, weil in dieser Zeitschrift sowohl die Möglichkeiten als auch die Begrenzungen einer ‚nordischen' Rechtswissenschaft deutlich wurden. Hagerup war bis zu seinem Tode im Frühjahr 1921 Chefredakteur, und Sten Gagnér hat mit Recht die *Tidsskrift for Retsvidenskab* als ‚die Zeitschrift Hagerups' bezeichnet. Hagerup war nordisch gesinnt; die nordische Zusammenarbeit und auch die Union mit Schweden wurden von ihm befürwortet. Andererseits stand er der nordischen Rechtswissenschaft kritisch gegenüber. Schon in dem erwähnten Einleitungsaufsatz rügte er offen die dänische Rechtswissenschaft, und seine Einstellung zur schwedischen Rechtswissenschaft war eher geringschätzend. Als Chefredakteur der *Tidsskrift for Retsvidenskab* versuchte Hagerup gewissenhaft ein vielseitiges nordisches Material anzuschaffen, er schrieb aber selbst sehr wenig über nordisches Recht und nordische Rechtswissenschaft und zeigte offen, dass er viel mehr an der deutschen Doktrin interessiert war. Das Aufsatzangebot wurde somit allseitig nordisch, der Hauptteil der Aufsätze war aber national eingeschränkt zum Recht im Heimatland der Autoren. Dänische und norwegische Autoren konnten zwar auch das norwegische bzw. das dänische Recht behandeln, schwedische Autoren konnten auf die Rechtsentwicklung in Finnland hinweisen, die Barriere zwischen ‚westnordischem' und ‚ostnordischem' Recht schien aber unüberwindbar. Die Redaktion versuchte immer Besprechungen von einem anderen Land als demjenigen des Autors zu finden, manchmal allerdings mit bescheidenem Erfolg. Der norwegische Rechtshistoriker Ebbe Hertzberg sprach von einem ‚Separatismus', weil es am leichtesten war, einen Rezensenten im Heimatland des Autors zu finden. Hagerup schrieb selbst über 120 Besprechungen, davon behandelten aber nur ungefähr zwanzig Besprechungen dänische Werke, nur fünf schwedische Arbeiten und keine Besprechung in Finnland veröffentlichte Bücher, obwohl diese noch zu jener Zeit meistens auf Schwedisch geschrieben worden waren.

Die redaktionelle Linie und der Inhalt der *Tidsskrift for Retsvidenskab* verblieb auch nach dem Tode Hagerups unverändert, d. h. es entstand nie eine inhaltlich gesamtnordische, nicht einmal eine rechtsvergleichende Rechtswissenschaft, sondern der Inhalt bestand noch aus Aufsätzen über das eigene nationale Recht von Autoren der verschiedenen nordischen Länder. Trotzdem war und ist die *Tidsskrift for Retsvidenskab*, wie auch die anderen gesamtnordischen Zeitschriften, sehr wichtig für die nordische Zusammengehörigkeit, die heutzutage in zunehmendem Maße von der EU und der Globalisierung im Allgemeinen gefährdet ist. Ich möchte deshalb zum Schluss den ehemaligen dänischen Redakteur der *Tidsskrift for Retsvidenskab* Bernt Hjejle zitieren:

> „Man kann ruhig sagen, dass es in den nordischen Ländern keinen bedeutenden Rechtswissenschaftler gibt, der nicht einen oder mehrere Beiträge geliefert hat zu dieser Zeitschrift, deren Niveau hoch und deren Bedeutung deshalb groß ist. Wenn ein Aufsatz in die Zeitschrift aufgenommen wird, wird er gelesen und bewertet – und dabei auch dessen Autor – von Juristen überall im Norden."

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The Journal *Lakimies* in Finnish Legal History*

1. Introduction

Joachim Rückert has characterised legal journals as a seismography of legal history: they measure the legal pulse and note the legal *Zeitgeist*.*[1] From the history of legal journals, one can learn about changes in legal culture, changes in the history of legal science, and changes in the legal profession. This is especially true for a small country with a small number of legal journals, such as one of the Baltic or Nordic countries.

The following pages discuss the history of the Finnish legal journal *Lakimies*.*[2] The character of its 108-year history will be examined through a survey of the topics of articles published in the journal and of their authorship. At the same time, thematic changes and changes among contributors will be analysed in the context of the general history of the legal profession and development of legal scholarship in Finland.

2. *Lakimies*—journal of a modern profession

It is interesting to note that in 1903, when *Lakimies* was founded, the journal was named *lakimies* ('the jurist', in direct English translation 'law man')—not designated as a legal journal or review. Actually, the term 'journal', like German *Zeitschrift* or Swedish *tidskrift*, was quite new until the 1890s. Before this, it was commonplace to use titles such as *Acta*, *Archiv*, or *Blätter*. However, *Lakimies* was a publication by one jurist (*lakimies*) for other jurists. Because of the political and legal circumstances in the Grand Duchy of Finland (1809–1917 as an autonomous part of the Russian Empire), the only way to get a journal published was to categorise it as a publication by a private person. Thus, *Lakimies* became the journal of Allan Serlachius, professor of criminal law at the University of Helsinki, whose aim was to establish a juridical journal—practical, not academic.

In spite of its founding history, *Lakimies* represented a new type of publicity—as did many other journals founded in the late 19th century and the early 20th century. It was a link between a learned society and the public. The journal was also a symbol of general professionalisation, of the expansion of legal education, and of the increase in the number of jurists. In 1879, there were only 677 jurists in Finland, but by the 1910s their number had doubled. At the same time, the number of law professors increased, as did that of doctoral dissertations in law. However, *Lakimies* was still a journal for 'law-men': as late as 1932, only one per cent (16 individuals in total) of Finnish jurists were women. Thus, the history of *Lakimies* also reflects changes in the position and prestige of female (academic) jurists in the country.

* This article was published with support from ESF Grant No. 7923.

[1] J. Rückert. Geschichtlich, parktisch, deutsch. – Juristische Zeitschriften. Die neuen Medien des 18.–20. Jahrhunderts. M. Stolleis (ed.). Ius Commune Sonderhefte 128. Frankfurt am Main 1999, p. 107.

[2] The author was editor-in-chief of *Lakimies* in 2005–2009. On the history of the journal see further articles published in the issue "Lakimies 100 vuotta" (100 years of Lakimies), Lakimies 7–8/2002.

3. Practical journal in Finnish

In the second half of the 19th century, the university became socially more open. At the same time, it changed linguistically. In the 1870s, only 10 per cent of university students were Finnish-speaking, but by the first years of the 20th century some 60 per cent of students spoke Finnish as their first language. A similar trend could be seen among law students, which also had an impact among civil servants, most of whom were trained in law.

Texts in legal science were seldom written in Finnish, however. Finnish legal vocabulary was deficient, and future legal professionals, who should be able to, for example, write court records in Finnish, were trained in Swedish. It was language that also caused the institutional separation out of legal professionals. In 1862, the *Juridiska Föreningen* (Juridical Association) was founded. This association—functioning in Swedish—also had its own journal, *Tidskrift utgiven af juridiska föreningen i Finland* (JFT; 'Journal Published by the Juridical Association in Finland'), from 1865.

In 1898, though, 17 jurists, including future presidents of Finland K. J. Ståhlberg and Pehr Evind Svinhufvud, founded a 'club for Finnish minded jurists' that eight years later became *Suomalainen Lakimiesyhdistys* (the Finnish Association of Jurists), which has been publishing *Lakimies* since 1907. It was because the JFT did not publish articles written in Finnish that *Lakimies* was needed. Therefore, several articles in the early volumes of *Lakimies* discussed legal linguistic matters.

One of the central aims of the founding fathers of *Lakimies* was to further discussions of current domestic law. Additionally, court cases were to be reported and the latest Finnish legal literature reviewed. In the first issue (in 1903), F. O. Lilius, inheritance law scholar and the first editorial secretary of *Lakimies*, wrote a comparative article examining the inheritance systems among Finno-Ugrian peoples. Ståhlberg wrote on new tenancy legislation and Juho Kusti Paasikivi on the book *Das Parlamentarische Wahlrecht*, by Georg Meyer (1901).

The second issue included articles on the need for reform of regulation concerning commercial registers and on problems of alcohol legislation. At the end of the issue, the editor-in-chief wrote about the Young German School of Criminalistics. Moreover, the 1904 volume was quite a modest one—with articles written mostly by the chief editor and the editorial secretary.

At this point, the very founding idea of *Lakimies* came under question. The Finnish-speaking founders wanted to create both linguistic and substantive opposition to the JFT. All authors of the early volumes (beginning in 1865) of the JFT had been professors at the University of Helsinki writing 'academic' articles often based on historical analysis. The editorial policy did not change, even though many legislative reforms were discussed in the Diet (Parliament) at the end of the 19th century. Thus, *Lakimies*—according to the example of many other legal journals abroad—was to be a legal journal focusing on current practical legal problems. However, this seemed to be a difficult task, as was the case also in the following century.

4. Academic *Lakimies*

The 10-year-old Lakimies included articles on tenancy regulation, pieces on prisons and obligations of medical practitioners as witnesses, and two thorough articles by Ståhlberg on freedom of association and freedom of the press. But if we look more closely at the articles—for instance, that of O. A. Arho on the law of evidence in civil procedure—many features typical of their time can be recognised. This article was long and dominated by various conceptual definitions and references to German legal literature. In other words, articles were written in Finnish, but foreign—especially German—legal ideas were employed for renewal of domestic law.

It should be mentioned that the legal science of the 19th century performed a central function in legal development in Finland. In spite of the autonomous position of Finland within the Russian Empire (1809–1917), the role of Diet was either non-existent (1809–1863) or weak. Many legal reforms necessary for industrialisation were realised by the judiciary, through the legal practice of the courts of appeal. And because of lack of democracy and constitutional guarantees, legalistic thinking and constitutional dogmatics became important, too.[*3] The first professorship in the Nordic countries dedicated solely to administrative law was established at the University of Helsinki in 1907. The central topics addressed by the discipline were, and still are, the principle of the rule of law and its interpretation.

An important model for Finnish doctrine was the German literature discussing the concept of the *Rechtsstaat* and the principle of legality. In other fields of law, too, an orientation toward Germany was common. Early civil-law doctrine (e.g., that of Robert Montgomery) was influenced by the German pandect literature. The founding father of Finnish procedural law, Rabbe Axel Wrede, adopted ideas mainly from the Germans Oskar Bülow and Adolf Wach. However, interest in German legal science was not only a Finnish phenomenon. It is

[3] See further L. Björne. Den konstruktiva riktningen. Den nordiska rättsvetenskapens historia III. Rättshistoriskt bibliotek. Skrifter utgivna av institutet för rättshistorisk forskning. Stockholm 2002, p. 169.

well known that German legal literature inspired legal professionals in many other European countries as well. A distinctly Finnish phenomenon, however, is that this influence was both long-lasting and quite one-sided.

In the 1920s, many new authors contributed to *Lakimies*. On the 25th anniversary of the journal, it was possible to conclude that 500 articles, 450 court reports, and 80 book reviews had been published. The main focus of the articles had been on criminal law (explored by Serlachius) and on civil law (a key topic for Lilius), but articles on public law (by authors such as Ståhlberg) were published, too. At this time, articles on legal theory and legal history were still few.

The absence of a practical orientation seemed to be no longer a problem. In 1938, during the 40th-anniversary celebrations of *Suomalainen Lakimiesyhdistys*, the existence of its own journal qualified the association as a scientific society. Then years later, the editor-in-chief, procedural law professor Tauno Ellilä, wrote that 'men of practice' had not contributed to the journal: the contributors had (always) been legal scholars.

In 1957, 3,300 copies of *Lakimies* were published (today's equivalent circulation figure is 3,400), and in 1964 the number of pages was 1,155 (today it is around 1,200). At that time, problems of domestic positive law still formed the focus of the writing. During the decade that followed, however, an increasing number of theoretical articles were published. At the same time, *Lakimies* was a journal by law professors. For instance, Veli Merikoski, a professor of public law, wrote 16 articles for the journal in the 1950s; criminal-law professor Brynolf Honkasalo wrote 11; and Tauno Tirkkonen, a professor of procedural law, also wrote 11 articles. For a long time, the only actively contributing female author was Inkeri Anttila, a professor of criminal law. Her first article in *Lakimies* was published in 1944 and the last in 1982.

5. A journal of changes and tradition

The number of authors increased considerably during the 1970s. At the same time, the dominance of law professors among the authors declined. This tendency can still be seen. At the same time, the topics of articles changed. Problems other than those of legal dogmatics were discussed intensively. This can be seen as a reflection of debate on the reform (democratisation) of legal education and the court system in the late 1960s and early 1970s, and of—for the time typical—discussions on the 'scientific nature' of legal scholarship and its relationship to other disciplines in the social sciences.[*4]

In the 1980s, the profile of authors also changed quite dramatically. For instance, in 1983, the authors of the first three issues were one professor, one assistant professor, and one doctor of law, but all other contributors had only a licentiate or master's degree. The situation was similar at the end of the decade, and in the following decades, too. The system of funding for legal research was radically reformed (through restructuring of the Academy of Finland) during the 1980s, which opened many new opportunities for the younger generation of researchers. In the 1970s, the main fields of *Lakimies* articles were criminal law (13 articles), procedural law (8), constitutional law (5), legal theory (3), and legal history (3). In the next decade, however, articles on family and inheritance law matters—written mainly by Professor Aulis Aarnio and his students—became usual.

Toward the end of the millennium, the articles became less polemic, less eloquent, and less (legal) political than before. They were studies on systematisation of current law with *de lege ferenda* recommendations. Since the beginning of the 21st century, the authors have been growing (academically) younger. For 20 years, *Lakimies* has also been a journal with a referee system (peer review) in accordance with international models and standards for controlling the scientific quality of articles. Thus, articles have become quite long, detailed, and specialised. They reflect changes in legal education, the harsh competition for research funding, and modern (managerial) professional qualifications.

The decrease in the number of professors among the authors of pieces in *Lakimies* could be understood as a reflection of a weak(ening) scientific identity of law professors. However, legal scholarship always has 'dual citizenship', in that it forms part of science but also part of legal practice. In spite of this, it is the strong position of Finnish scholarship and its theoretical orientation that have helped *Lakimies* to survive, even to flourish. Professors with an interest in problems of legal theory[*5] are still the main (senior) contributors to the journal.

The focus of the articles remains the national legal system, and the main discussion partners of contributors are their domestic colleagues. The international dimension means largely international law or something to do with Europe. References to legal literature written in English have come to surpass those written in German. However, theoretical input is usually received from foreign authors.

This can at least partly be explained by the specific nature of legal scholarship, but also by the role of tradition. Legal or legal professional traditions change more slowly than the legal rules and institutions discussed in a legal journal.

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4 See further, e.g., P. Letto-Vanamo. – T. Honkanen: Lain nojalla ja kansan tuella. Moments of Finnish Justice in the 1970's. Helsinki 2005.

5 Such names as Kaarlo Tuori, Thomas Wilhelmsson, Juha (Pöyhönen) Karhu, and Heikki Mattila should be mentioned here.

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Estonia's First Law Journal in the Struggle for Law*

1. Introduction

On 1 December 2009, the Estonian-language university in Tartu celebrated its 90th anniversary. Estonian-language law journals, however, celebrated an anniversary of an even rounder number—a whole 100 years. Instead of festivities, a more practical approach was taken to celebrate the latter in the form of a scientific conference. A festive touch was nevertheless added by an exhibition on display at the university library.*[1] The dull appearance and brevity of the first publications is striking in comparison with the more recent journals boasting of dignified thickness and, as printing techniques have improved, also colourful designs. The first law journal in Estonian*[2] was in more or less DIN A5 format and contained 16 pages. It was titled *Seadus ja Kohus. Õigusteadline ajakiri* (in English, 'Statute and Court. A Legal Journal') and it appeared in January 1909. This journal was not even published in Estonia but issued in the capital of the Russian empire, St. Petersburg. It was only in its third year of publication that the executive editor of the journal moved to the capital of the Province Estland, Tallinn*[3], and so did the journal. Nevertheless, the Estonian-language newspaper *Peterburi Teataja* (in English 'St. Petersburg Gazette') continued to consider the journal its supplement as late as 1913.*[4] The fact that Estonian-language newspapers, books, and in this case a legal journal

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1 See photos taken of the exhibition and its opening ceremony at http://www.oi.ut.ee/konverents/et/684835 (13.03.2010).

2 Obviously because of its title, Andres Dido's (1855–1921) journal published in Paris in 1906–1908 under the title *Õigus*. *La Justice*: *journal esthonien* is sometimes considered to be a law journal. In reality, however, it was a political journal aiming to overthrow the Tsarist regime and implement a Socialist programme. The journal was not associated with any of the political parties. Rather, its aim was to be "a free organ of all of those who earnestly fight against the power of the wicked, backward autocracy, Baltic estate owners and other blood-suckers" (Õigus 1906/1 (3.06.1906), pp. 1–2). See about a similar problem with political journals in Croatia where titles such as 'Law' and 'Constitution' would have been also fitting for the political periodicals: Z. Pokrovac. Die lange Geburt der juristischen Periodika in Kroatien. Ein Genre zwischen dem Patriotischen und dem Fachlichen. – Juristische Zeitschriften in Europa. M. Stolleis, T. Simon (Hrsg.). Frankfurt am Main 2006, p. 195.

3 The borders of the provinces in the Russian empire at that time do not coincide with the current borders of the Baltic states. The Province Estland contained only the northern part of the Republic of Estonia. The southern part of present Estonia used to belong to the northern part of the Province Livland. The Province Livland was the largest of the three Baltic provinces in the empire, encompassing also the northern part of the present Republic of Latvia. The territory of the third Baltic province—Curland—forms at present a part of the Republic of Latvia as well. The borders of the current states, founded after WW I and restored in 1991 after the end of the Soviet occupation and annexation, follow the ethnic and linguistic borderlines between Estonians and Latvians. For a brief overview of the legal history of the Baltic states, selected bibliography included, see M. Luts-Sootak. Baltic Nations. – The Oxford International Encyclopedia of Legal History. Vol. 1. S. N. Katz (ed.). New York 2009, pp. 253–257.

4 Peterburi Teataja 1913/1 (3.01.1913). The mother publication *Peterburi Teataja*, was published from September 1908 until November 1914.

were published in St. Petersburg, the capital of the Tsarist Empire, is not as surprising as it may seem at first. "The City of Hopes"[*5], St. Petersburg, was the closest major city, attracting not only the working classes but also, and predominantly, the intellectuals, among whom lawyers were at the forefront.[*6] During the second half of the 18th century, the academic consolidation had led to the foundation of law journals in several legal cultures in Europe.[*7] Why shouldn't the case have been the same for Estonian lawyers? However, the beginnings of Estonian-language legal journalism are distinctive in its own right and as such worthy of a closer look beyond a mere mention of the anniversary. In the following I will discuss the programme of the journal, the theoretical backgrounds of that programme (in Section 2), and the people involved as well as its actual implementation (in Sections 3 and 4).

2. The programme: Groundwork on *the Struggle for Law*

The first issue of the journal opened with a 2.5-page address, which might also be taken to represent the programme of the journal.[*8] The need for such a journal was justified by evoking the spirit of the times. Law and the knowledge of it had become necessarily ineluctable. This, as elaborated upon in the address, was, among other things, supported by the fact that legal studies had been added to secondary-school curricula, not to mention those of the universities. However, it was not the intention of the journal to undertake a scientific study of law. Without questioning its study in the university as a rightful foundation on which to build "high and beautiful legal structures", the editor of the journal found it to have one great deficiency—namely that "theoretical knowledge of law" neglected the "sources of life".

Those very first keywords in the address of the editors seem to refer to a contemporary shift towards the arrival of a new kind of legal science that took its origins to stem from the 'life' itself.[*9] Although the publication of *Seadus ja Kohus* coincides with the peak of the activity of the so-called *Freirecht*-movement in Germany and among its foreign followers[*10], the goal of the first Estonian-language law journal was not one of legal science of a new kind. *Seadus ja Kohus* aimed to achieve the contrary—to take up the task of educating the public and disseminating information about current law to larger masses. Specially mentioned was the problem that the "practical" knowledge of law and legislation was in need of dissemination in order to "serve the demands of life". Surely that would have sufficed to justify the expressed need for a popular law journal: the educated sons of the people had decided to spread their knowledge on a broader scale and in the language of the country's inhabitants. However, rather than limiting himself to the need to disseminate practical law, the editor's train of thought took a loftier—in a sense, even a metaphysical—turn.

"Practical knowledge too" was to have "its higher and more beautiful purpose". The editor had to elaborate a bit on that idea. His concept was, namely, built on the notion that the "basic law" of social life "was the struggle for existence and the struggle for a better position". Though the laws of nature inevitably dictated the presence of an urge towards a better life in any given person, biological or physical laws of nature were not determinants of the social struggle. The rules of the struggle were instead determined by "the authorities on legal power—i.e., first and foremost, the government of the state—and also by miscellaneous other public authorities". In order for an individual to be successful in improving his position and situation, he had to know such rules that were forced upon him, as otherwise his "activities [...] turned null and void". Turning the legal opportunities to one's advantage was to serve the 'higher purpose' even if, in any particular case, the gain of one person damaged "another person or even a crowd of people". Thus, by taking advantage of the legal opportunities available to him, that one beneficiary served a high ideal—the sense of law:

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5 See R. Pullat. Lootuste linn Peterburi ja eesti haritlaskonna kujunemine kuni 1917 (The City of Hopes St. Peterburg and the Formation of Estonian Intellectual Circles until 1917). Tallinn 2004 (in Estonian).

6 Briefly in R. Pullat (Note 5), pp. 123–138; in German see R. Pullat. Estnische Juristen in St. Petersburg bis 1917. – Buch und Bildung im Baltikum. H. Bosse, O.-H. Elias, R. Schweitzer (Hrsg.). Münster 2005, pp. 555–579.

7 M. Stolleis. Juristische Zeitschriften: Die neuen Medien des 18.–20. Jahrhunderts. – M. Stolleis (Hrsg.). Juristische Zeitschriften: Die neuen Medien des 18.–20. Jahrhunderts. Frankfurt am Main 1999, pp. VII XIV.

8 Lugejale (To the Reader). – Seadus ja Kohus 1909/1, pp. 1–3 (in Estonian).

9 See about the attempts made already in the 19th century to bring law closer to 'life' and 'the needs of life' in Germany. H.-P. Haferkamp. Der Jurist, das Recht und das Leben. – Fakultätsspiegel. Verein zur Förderung der Rechtswissenschaft (Hrsg.). Sommersemester 2005, Köln 2005, pp. 83–98.

10 See in detail about *Freirechtbewegung* and its aftermath J. Rückert. Vom "Freirecht" zur freien "Wertungsjurisprudenz" – eine Geschichte voller Legenden. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung 2008, Bd. 125, pp. 199–255. According to Rückert, it was neither a movement nor a school of thought but rather a few groups whose time of conceptual activity occurred between 1903 and 1914, peaking in 1911 (p. 205).

> "As a legal measure exercised by someone for his own benefit might be useful also to the broad masses, then each individual member of the social collective is obliged not to have his rights trampled upon but, rather, to protect them in any way possible, thus preserving the *social sense of law*. Development of such a sense of law also belongs to the realm of disseminating practical knowledge of law, thereby rendering a huge value to practical knowledge of law."*[11]

The circle was complete: practical knowledge of law helps an individual to fulfil his life plans pursuant to the law but nevertheless selfishly. Protecting one's rights was to increase general benefit because the building up and development of a personal sense of law also allowed protection and preservation of a general, social sense of law.

Now indeed the editor's address spoke of the people for whom the law journal had been published. According to the editor, the nation—whether Estonians or the whole of Tsarist Russia, is not mentioned—was in precisely in that phase of its life where its people were actively pursuing a better standard of living and social position, and the editor was confident that this was possible only by masterfully taking advantage of legal opportunities, and not by opposing them. Better knowledge of available legal measures was supposed to improve not only the standard of living of an individual but, further, the whole nation:

> "*A nation may further its life only if it carries a firm sense of law*, as is the best witnessed by the flourishing of the Roman State."*[12]

Both the keyword 'sense of law' and the psychologisation of law as a whole were very much in fashion during the first decades of the 20th century. However, the programme in question demonstrated particular kinship with one particular theory in this area. What I refer to here is two significant elements: firstly, the obligation (!) of everyone to exert his rights and not have them "trampled upon" and, secondly, the teaching on how such a struggle of an individual for his subjective rights is automatically beneficial to the whole society as the individual contributes to preservation of the social sense of law.

The idea concerning everyone's obligation to stand up for his rights was associated, in suggestively powerful language, with nothing less than the moral existence of an individual:

> "/p. 31/ III. The struggle for his right is a duty of the person whose rights have been violated, to himself. […] In the law, man possesses and defends the moral condition of his existence—without law he sinks to the level of the beast […] /p. 32/ […] The assertion of one's legal rights is, therefore, a duty of moral self-preservation – the total surrender of those rights, now impossible, but once possible, is moral suicide."

Standing up for one's right was something even bigger—an obligation aimed toward the preservation of the society and law as such:

> "/p. 69/ VI. […] the assertion of one's legal rights is a duty which he owes to society. […] /p. 70/ Concrete law not only receives life and strength from abstract law, but gives it back, in turn, the life it has received. It is of the nature of the law to be realized in practice. […] /p. 71/ But while the realization in practice of public law and of criminal law is assured, because it is imposed as a duty on public officials, the realization in practice of private law is presented to individuals under the form of their legal rights; that is, it is left exclusively to them to take the initiative in its realization, left exclusively to their action. […] the reality, the practical force of the principles of private law, is proved by the assertion of concrete legal right. […] /p. 73/ But each of us, in his own place, is called upon to defend the law, to guard and enforce it in his own sphere. The concrete legal right which belongs to him is only his authorization by the state to enter the lists when his interests require it. […] /p. 74/ […] In defending his legal rights he asserts and defends the whole body of law, within the narrow space which his own legal rights occupy. Hence his interest, and this, his mode of action, extend far beyond his own person. The general good which results therefrom is not only the ideal interest, that the authority and majesty of the law are protected, but this other very real and eminently practical good which every one feels and understands, even the person who has no conception whatever of the former—that the established order of social relations is defended and assured."

The nation and its law stands to benefit from an individual's sense of law and the exercise of his rights because the nation is made up of individuals and every individual who has learned to successfully stand up for his rights in private-law relations is capable also of demanding political rights both for himself and his people:

> "V. /p. 97/ … But the interest of this struggle is not confined, by any means, to private life or private law. Rather does it extend far beyond them. A nation is, after all, only the sum of all the individuals who compose it, and the nation /p. 98/ thinks, feels, and acts as the individuals that make it up think, feel, and act. […] /p. 99/ The battler for constitutional law and the law of nations is none other than the battler for private law; the same qualities which distinguished him struggling for his rights as an

[11] Lugejale (Note 8), p. 2; emphasis in the original.

[12] *Ibid*., p. 3; emphasis in the original.

> individual accompany him in the battle for political liberty and against the external enemy. What is sowed in private law is reaped in public law and the law of nations. In the valleys of private law, in the very humblest relations of life, must be collected, drop by drop, so to speak, the forces, the moral capital, which the state needs to operate on a large scale, and to attain its end. Private law, not public law, /p. 100/ is the real school of the political education of the people, and if we would know how a people, in case of need, will defend their political rights and their place among the nations, let us examine how the separate members of the nation assert their own right in private life."

Such was the speech delivered by Professor Rudolph von Jhering on 11 March 1872 at the Vienna Law Society (*Juristische Gesellschaft*).*[13] The great German scholar, naturally, spoke in German, not English. The translation into English excerpted above: "The Struggle for Law" was published by John Joseph Lalor seven years later, in 1879.*[14] The translation was based on the fifth German-language edition*[15], in the preface of which, dating from 1877, Jhering counted 13 translations published to that date, two of them into Russian, which were both already from 1874. One of these translations, published in Moscow, was supposedly by Volkov; regarding the other, Jhering lists the translator as anonymous, specifying that it had been published "in a law journal" in Moscow. Consequently, the translation by Grachev, available at the Estonian National Library in Tallinn, must have been already the third Russian translation from 1874.*[16] In addition, there are the translations offered by Yershev and Loiko, published, respectively, in 1901 in Moscow and in 1912 in St. Petersburg. When this opening shot of Estonian legal periodicals in 1909 was fired, there must have existed three, or perhaps even four distinct Russian translations of this international best-seller.*[17] Although it can be assumed that educated Estonians at the beginning of the 20th century were well enough versed in German to read the original or at least its Russian translation, a translation into Estonian too was published, in Tallinn in 1913.*[18] However, it is a bit of a mystery how some years previous to that, *Peterburi Teataja* had already been able to offer an Estonian translation for 40 kopecks in its book listing.*[19] In any event, the programme of *Seadus ja Kohus* demonstrates that its author must have been familiar with Jhering's "struggle" even if he did not make direct reference to it. This provides all the more reason to take a closer look at who that very first author was and who were the others who came together in the columns of that law journal.

3. The people involved

The executive editor of the journal and the author of the address examined above was a lawyer, Mihkel Pung. In 1908, he was 32 years of age. A farmer's son, born in 1876, schooled in Tartu and later at the university there, Pung was in a certain sense a typical ambitious social climber of his day. The Russian Empire remained a class society until its end; however, education, especially university education, opened doors for young men also from the lower classes. Pung studied law in 1897–1900 in Tartu (after the era of Russification, both the town and its university were called Yuryev*[20]) and then between 1901 and 1902 at the university of St. Petersburg.

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[13] R. v. Jhering. Der Kampf um's Recht. Wien 1872. Digitalised at http://gdz.sub.uni-goettingen.de/dms/load/img/?IDDOC=293883 (18.02.2010).

[14] Digitalised at http://www.archive.org/details/struggleforlaw00jheruoft (18.02.2010). In 1915, its second edition with a preface by Albert Kocourek was published: http://en.wikisource.org/wiki/The_Struggle_for_Law (18.02.2010). The pages shown above between slashes correspond to the second edition, which was reprinted in 1997. In addition, in 1883 another English translation by Philip A. Asworth was published. He translated the title more narrowly, compared to the original and Jhering's initial concept, as "The Battle for Right".

[15] Encyclopaedia Britannica's assessment that its "success was extraordinary" undoubtedly holds true. However, the factual claim that "within two years it attained twelve editions" is untrue. Even the Jhering's best-seller was not so popular—just four editions came out in the first two years.

[16] Р. ф. Игеринг. Борьба за право. Москва 1874.

[17] One of today's most despised yet most used sources of reference, Wikipedia, starts its English article on Jhering by citing this very work already at the very top: "Rudolf von Jhering (also Ihering) (22 August 1818–17 September 1892) was a German jurist. He is known for his 1872 book *Der Kampf ums Recht*, as a legal scholar, and as the founder of a modern sociological and historical school of law". Available at http://en.wikipedia.org/wiki/Rudolf_von_Jhering (18.02.2010). Though perhaps Jhering himself enjoyed the international success of his little book, covering a mere 100 pages, his main contribution lies in two (unfinished) major projects whose first editions form a corpus covering about 2,400 pages: R. v. Jhering. Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung. Th. 1, 1852 (XII, 336 p.); Th. 2, Abt. 1, 1854 (VIII, 320 p.); Th. 2, Abt. 2, 1858 (XX p., p. [321] – 695) = 1071 pp.; *idem*, Der Zweck im Recht. Bd. 1, 1877 (XVI, 557 p.); Bd. 2, 1883 (XXX, 716 p.) = 1319 pp.

[18] R. v. Ihering. Võitlus õiguse eest. Saksa keelest E. Laaman (The Struggle for Law. From German E. Laaman). Tallinn 1913 (in Estonian). Unfortunately, no information is provided on which of the German editions served as the basis for this translation. The name of the author—Ihering—is here spelled according to this Estonian translation.

[19] An announcement by the publishing house *Ühiselu*. Peterburi Teataja 1911/76 (1.10.1911).

[20] An informative account correcting the negative image of the University of Tartu and its faculty of law in the final decades of the Tsarist era as has been disseminated in earlier literature is to be found in: T. Anepaio. Die russische Universität in Jur'jev (1889–1918). – Z. Pokrovac (Hrsg.). Juristenausbildung in Osteuropa bis zum ersten Weltkrieg. Frankfurt am Main 2007, pp. 391–425.

Many Estonians much preferred to study in either of the 'two capitals' of the empire—St. Petersburg and Moscow—as the career options were more lucrative in other provinces of the empire than at home, in the Baltic provinces. After finishing his studies, Pung worked in Tallinn for a couple of years and then proceeded to practise as a lawyer in St. Petersburg in 1906–1911. It was in that period that he started to publish the law journal *Seadus ja Kohus*, most of the articles in which he apparently personally collected and prepared for print. In the first year of issue, there is only one contribution, with the author acknowledged, from someone else: namely an article about the rights of the estate-owners in the Province Estland on the leasehold land of peasants, authored by Lui Olesk. Olesk was the same age as Pung and had the background of having studied law at the University of Tartu and then practised as a lawyer in Tartu; Olesk, however, had been banished to Vologda in 1908–1910. After his return from exile, he continued his practice as a lawyer.

In 1910, two young men were introduced as authors. The 26-year-old editor of the mother publication, *Peterburi Teataja*, Robert Berendsen was a non-matriculated attender of a trade course in St. Petersburg. In 1910, he published three articles: on church taxes, church wardens, and parish courts, and in 1911 one more article on the depositing of the capital of orphans. In 1910, Aleksander Kann, just 20 years old and studying law at the University of St. Petersburg, published an article on the passport system in the Russian Empire and a piece about the regulation of emigration or resettlement. After short stints of work in a statistics office, as a schoolmaster, and as a tax inspector, Kann first became an assistant to a sworn advocate in 1921 and then in 1926–1940 a sworn advocate himself.

In 1911, Pung moved from St. Petersburg to Tallinn and took the first Estonian law journal with him. In Tallinn too he made a living as a lawyer while continuing as the executive editor of the journal until 1912. In addition to him, in that year of issue, 29-year-old Ado Birk began to contribute actively. He had studied law in Tartu between 1907 and 1908, then somewhat longer in St. Petersburg between 1908 and 1911, and then had spent a year in Leipzig. He had also attended philosophy and psychology lectures. In 1912, Birk became an assistant to one of the most renowned sworn advocates of Estonia, Jaan Poska. In 1912, Birk contributed articles on the elections to the State *Duma* (the parliament of the Russian Empire), on the already familiar topic of passport law, and also on family law. In 1913, Birk took over the post of executive editor of *Seadus ja Kohus* and continued to contribute as an active author, with articles on the permitted size of farmsteads in the Province Estland, on state fee for tenancy contracts, and on parish taxes. The former executive editor Pung did not provide any articles during the final year of issue of the journal, which was discontinued in May 1913. This did not exclude him from providing announcements on case-law or government activity. However, the expansion of the body of authors in the second half of 1912 and the first half of 1913 is apparent. In addition to A. Birk, a couple of young lawyers stepped in. The 26-year-old Anton Palvadre wrote about the law on bills of exchange, on wills, and on one particular institute that was still valid in Baltic private law—heritable lease (in German *Erbpacht*). Rein Eliaser, a year younger than the former, wrote about fishing rights and preliminary contracts.

The authors' professions cannot be determined in cases where they used aliases (–xy., X., xy., Lex., and Sascha) or initials (K. P., and M. J.) and where the persons behind the names cannot be identified (G. J. Sack and A. Pallas). Save individual exceptions such as G. J. Sack[*21] or K. P.[*22], and, depending on the topic, M. J.[*23], these persons mostly authored only announcements a couple of pages long, in most cases informative in nature. An article by an identifiable person active in agriculture and politics, Mihkel Aitsam, on the prizes exhibitions of farmers' societies[*24] can be placed in the same category. Here it should be stated that although the Baltic provinces were indisputably at the forefront of industrialisation when compared with the rest of the Russian Empire[*25], in comparison with Western Europe they were still areas oriented toward an agricultural economy. Therefore, it is no wonder that farmers' societies played a significant role in the movement of societies that lay the foundations for modern society there and that agricultural exhibitions were events that initially brought together local German estate-holders but also, from the late 19th century onwards, increasingly also Estonian and Latvian farmers.[*26]

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[21] G. J. Sack. Idanewa elu häwitamine ja kriminal õigus (Destruction of Germinative Life and Criminal Law). – Seadus ja Kohus 1910, pp. 97–100, 121–124, 145–152 (in Estonian). It was the most theoretical treatment in the whole of the journal. The treatment of abortion under penal law was mostly comparative, with the main attention turned to the German and Russian scientific literature. This is one of the few articles that provides an impressive list of footnotes.

[22] K. P. authored some articles which posed intriguing questions: Kes walitseb Tallinna wanemate Ew.-Lutheri usu koguduste waranduste üle? (Who Manages the Assets of the Older Evangelist-Lutheran Congregations in Tallinn?). – Seadus ja Kohus, pp. 93–98; Unustusse jäetud õigus (Forgotten Law). – *Ibid.*, pp. 113–115, as well as a translation of the Mutual Fire Insurance Act (Seadus ja Kohus 1911, pp. 70–77, 81–93).

[23] In addition to an overview of the Congress of Joint Establishments (Seadus ja Kohus 1909, pp. 115–123), M. J. published a translation of the Act on Opening Postal Establishments in Railway Stations and Parish Centres (Seadus ja Kohus 1910, pp. 11–14).

[24] M. Aitsam. Põllumeesteseltside näituste aurahade kuju kinnitamine (Approving the Shape of Medals of the Exhibitions of the Farmers' Societies). – Õigus 1912, pp. 7–8 (in Estonian). About the change of the name of the journal, see Section 4 below.

[25] D. Kirby. The Baltic World 1772–1993: Europe's Nothern Periphery in an Age of Change. London, New York, 1995, p. 165.

[26] For an informative overview about the exhibitions held in South Estonia see T. Rosenberg. Deutsche und estnische Ausstellungen in Dorpat (Tartu) 1857–1913. – Steinbrücke. Estnische Historische Zeitschruft 1998 (1), pp. 171–197.

Unlike Estonian farmers themselves, their sons who had managed to gain an academic legal education had not yet come to form a professional association or society. Thus was the short-lived first Estonian-language journal throughout its whole existence (1909–1913) deprived of professional institutional support.[*27] It was shaped by lawyers in their early thirties or late twenties who provided its content as executive editors and authors. Almost all of them came from farm-owners' or farm-leasers' families.[*28] They had studied either in Tartu or in St. Petersburg, or both. We can only guess about the driving force behind these men in their efforts to support their nation 'in the struggle for its rights and law' by way of a wider dissemination of legal knowledge. It could not have been money, because practising law was surely more lucrative and, besides, that kind of practical advice could probably have been 'sold' at a higher profit from behind the lawyer's desk than on the pages of a journal. Our best guess is that they were rather driven by a feeling or sense of mission and a sincere desire to provide legal enlightenment to the people. Also, what must not be underestimated is the craving for self-fulfilment and the wish to reach out to a larger auditorium than their smallish offices could ever provide. The young lawyers—the editors and authors of *Seadus ja Kohus* before WWI—occupied eminent positions in the Republic of Estonia's state affairs after WWI: Pung was the first governor of the Bank of Estonia, a member of the parliament, and also for a short while Minister for Economic Affairs and Minister of Foreign Affairs; Olesk was involved with the Constituent Assembly and served as Attorney-General, Minister of Justice and Minister of Labour and Welfare; Birk too was in the Constituent Assembly, and later held the position of Minister of Foreign Affairs twice. He was also appointed Prime Minister, as well as being a member of the parliament and Estonian ambassador to the Soviet Union. Palvadre was Minister of Labour and Welfare, member of the parliament, judge of the Supreme Court of Estonia, and the first legal chancellor of Estonia; Eliaser acted as a secretary at the important (peace) negotiations in 1919 in Paris and in 1920 in Tartu and was also a member of the parliament and a judge of the Supreme Court. Their professional success and political activity aside, their biographies share a common dark side—almost all of them[*29] were imprisoned in 1940–1941 at the onset of the Soviet occupation and died within a couple of years in Russian prisons or prison camps. However, the years that this article concerns itself with fall in the time before the beginning of WW I when history still knew nothing of the Estonian nation-state or its occupation. The first law journal of the Estonians in their own language can be seen as one of the factors that paved the way for their first sovereign state in their entire history. Therefore there is all the more reason to have a closer look at the areas of knowledge and topics that were supposed, disseminated by law experts to wider masses, to contribute to the 'struggle for law' foreseen in the programme.

4. Implementation of the programme

Seadus ja Kohus was originally published as a monthly supplement to the newspaper *Peterburi Teataja*, and a yearly subscription was rather inexpensive—50 kopecks. Until the April edition, the law journal did indeed come out monthly. Between May 1909 and February 1910, however, there were only double volumes—either not enough material could be gathered during the month or the executive editor lacked the time and energy for a monthly effort. The spring of 1910 seemed to have provided fresh impetus, but from July until the end of the year, again, only double volumes were put out. The next year, 1911, opened with a couple of monthlies to be followed by doubles from March to August. Probably because of the move of the executive editor, just one further issue saw light before the end of the year, thus covering whole four months' worth of material. The page count in this rather chaotic publication year, however, remained more or less on par with the previous years of issue: the 152 pages of 1911 are comparable to the 168 and 172 pages, respectively, printed in 1909 and 1910. It was instead the year 1912 that eventually proved to be rather 'nervous'. For starters, five issues came out every month, but this happened under a new name, *Õigus. Õigusteadusline ajakiri* (in English, 'The Law. A Legal Journal'), while regular issues continued to appear from June onward under the old name, *Seadus ja Kohus. Õigusteadusline ajakiri*.[*30] In the current stage of research, it is impossible to say why, for the first five months of 1912, the journal bore the alternative title *Õigus*. Censorship is one of the possibilities. Name-changing was a widely employed strategy to respond to the censors of the Tsarist Empire. Similarly, the mother publication, *Peterburi Teataja*, was in 1910 published as *Pealinna Teataja* (in English, 'The Capital Gazette'). The page count of that year of issue, however, remained much lower in comparison with the St. Petersburg period, amounting only to 112 pages. Year 1913 started once more with a double volume and continued with monthlies until the May issue, which was to be the last issue of 1913. At the beginning of 1914, a January–

[27] For more on the role of vocational associations and professional institutions in the successful perserverance of legal journalism, see the article by Joachim Rückert in the same issue.

[28] Only A. Kann was the son of a sexton and schoolteacher, but his father too was active in agriculture.

[29] L. Olesk died already in 1932 in the Republic of Estonia, M. Aitsam died in 1953 in the Estonian Soviet Socialist Republic.

[30] Numbering reflected the fact that two issues, bearing different titles, belonged together by adding the total number in the brackets, although in June *Seadus ja Kohus* started its independent numeration both at the top of the journal and in the numbering of the pages.

February joint edition came out, again under the name *Õigus*, but this was followed up by nothing.[*31] All in all, the run of the first Estonian-language law journal amounted to about five years and exactly 699 pages.

The first year of issue covers 11 articles explaining current laws, 11 translations of current laws, three overviews or translations of draft law, a translation of one explanatory memorandum to a draft law, 11 excerpts from government regulations or from the judicial practice of the supreme court of the empire, four translations of statutes of associations or societies, five announcements from abroad, and 22 announcements regarding judicial practice or legal problems at home. This list follows the subdivisions of the year's cumulative table of contents. The relative proportions of the articles in each of these categories remained more or less the same in the next years of issue. The subdivision of 'Questions & Answers' promised at first was not developed further, save some exceptions. At any rate, it is clear that this was not a theoretical or a scientific journal.

Regarding the choice of topics, *Seadus ja Kohus* leaves no doubt that this was a journal for the people, the majority of whom resided in rural areas and at local government level belonged to parishes composed of farmers. Parish taxes; road-building; transport of prisoners as the duty of the parish; remuneration, responsibilities, rights, and benefits of parish clerks; credits and capital investments available to parishes; general welfare and welfare services for the poor; how to become a member in and withdraw membership from a parish; manning and competence of parish courts and their performance of their tasks; relations between a parish government and parish council—these topics pervade the entire existence of the journal. Regarding the ethnic and social structure of the population, such a choice is quite understandable for an Estonian law journal at the beginning of the 20th century. Estonians inhabited mostly the countryside and almost without exception belonged to the peasant class. After the peasantry were liberated from serfdom in the first half of the 19th century, it was exactly for this social class that the Parish Act of 1866, equally applicable to all of the Baltic provinces, provided a local government that, with a pinch of salt because of the class restriction, can be seen to have been the first modern self-government in the Baltic countries.The representatives of the nobility—the knighthood—were obviously an institution of the *ancien régime*, and in the towns the guildhood, which originated in mediaeval times and was modified during the 18th-century reforms and counter-reforms, was abolished only in 1877 with the establishment of general Russian Town Law.[*32] Although there were several Estonian translations of the Parish Act, *Seadus ja Kohus* published a new one.[*33] No translations of any law[*34] had in the journal been tagged as a "private publication", while this particular translation used that phrase right in the heading. So a special meaning was ascribed to this translation. However, one cannot claim that *Seadus ja Kohus* was predominantly a journal addressing parish matters.

Many articles, explanations of laws, overviews of government regulations, and Supreme Court cases concern farmlands and agriculture. Taxes and legal-technical requirements relevant to the sale of farm-holdings; sales restrictions dependent on the type of manor; rules governing the exchange of farmland for manor land; annexing of farmland to manor land; minimum size of farm-holdings; cutting rights; over and over again hunting rights; fishing rights: rights to use shores—the peasant—law regulations valid in the Province Livland since 1849/1860 and in the Province Estland since 1856/1859 gave rise to the selling of farmholds, and the related legal relations still remained a topical subject matter for a legal periodical even in the first and second decade of the 20th century. Articles on land improvement, credit institutions, and credit law as well as the translations of related acts also deal with agriculture. Indeed, it is obvious that *Seadus ja Kohus* took seriously its obligation to educate the peasant majority of the nation about their rights. That the Estonian peasants were not so restricted in their mobility any longer is demonstrated by the topics related to resettlement to which quite a lot of attention is paid: general rules, passport law (on several occasions), the procedure for leaving a parish, and acquisition of plots of land in Russia.

An option for individual peasants in order to better validate their rights and more successfully take advantage of economic opportunities was to assemble into voluntary associations and societies. The movement of societies was something that the executive editor of *Seadus ja Kohus* seemed to believe would efficiently improve the 'sense of law' of the people. Legal bases and rules applicable to the foundation and operation of societies were analysed in depth. Current announcements were made regarding various court disputes and decisions of the provincial government in this realm. A significant number (totalling nine) of the statutes of very different societies and associations were published. Quite understandably, the statutes of the Society of Farmers in Estland or the statutes of the publishing society *Ühiselu*, which were published by *Seadus ja Kohus* itself, were

[31] *Õigus* from 1914 can be viewed as continuation to *Seadus ja Kohus* for two reasons. First, the executive editor is still A. Birk who occupied the same post also in 1913. Second, *Peterburi Teataja* had announced that in 1914, its supplement was to be a journal named *Õigus.* Peterburi Teataja 1913/151 (24.12.1913); 1913/152 (28.12.1913).

[32] About the reforms in the Baltic provinces during the final third of the 19th century which marked pressure on the local special order but also brought about several modern reforms of the local order, see M. Luts. Modernisierung und deren Hemmnisse in den Ostseeprovinzen Est-, Liv- und Kurland im 19. Jahrhundert. – T. Giaro (Hrsg.). Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert. Frankfurt am Main 2006, pp. 196–200.

[33] Kõigekõrgemalt poolt 19. weebruaril 1866. a. kinnitatud Balti kubermangude Wallakogukonna seadus (The Parish Council Act of the Baltic Provinces approved on 19 February 1866 by the Highest Power). – Õigus 1912, pp. 49–58, 65–76 (in Estonian).

[34] All in all, partial or full translations of 36 acts and regulations were published.

among them. However, the palette of the statutes is much richer; from the Saving and Building Association of Hannover to the horse-shoeing courses in Tukkum.

Regarding the movement of societies, it is worthy of mention that *Seadus ja Kohus* was precisely that organ which for the first time, and already in its second issue, expressed the desire and need for a formation of an association of Estonian lawyers.[*35] This call was not signed—but most likely it was penned—by the executive editor Mihkel Pung. A "duty to oneself and to one's people" now demanded that the growing body of academically educated Estonian lawyers should assemble and thereby contribute to the improvement of the people's sense of law. The author even proclaimed that an association of specialists would be of greater use in explaining legal issues than any (legal?) periodicals would be. Obviously, the concept of a 'rule of law' was still unknown in the Estonian legal language and therefore the talk was simply about great changes in the structure of the state in the achievement of which the State *Duma* was to "march on the forefront". The march was to head towards a "legal order" that could be "implemented with legal measures only". The future Estonian lawyers' association was to carry a major role in this ambitious task. As customary, this all boiled down to the education of the people, that is, explaining the legal opportunities available to them. However, this call to action met no response and it was only in 1915 that an organisation was founded that was to remain active somewhat longer.[*36] Nonetheless, the journal announces that the first joint meeting of educated Estonian lawyers occurred in Tallinn, in summer 1909 during the Song Festival.[*37] The participants in meeting were said to have agreed upon the objectives of the association-to-be and Pung was tasked with preparing the statutes of association, modelling them upon the statutes of Russian counterparts.[*38] Unfortunately, no light has been shed on the follow-up action. It is safe to guess, though, that had the association been formed, the journal would have made an announcement to that effect.

As much as *Seadus ja Kohus* targeted the overwhelming majority of Estonians—the farmers—certain urbanisation tendencies can be noticed even in this short-lived journal. Workers' unions, health and old-age insurance for the workers, compensation for damage in cases of occupational accidents—these topics are self-explanatory. The more 'urban' topics also include those that were supposed to stimulate the enterpreneurial spirit: banking and credit; law on bills of exchange; copyright, patent and invention laws. Thus, the first Estonian-language law journal did a good job in reflecting contemporary social processes. Estonians were gradually settling in towns, and becoming not just workers but also house-owners or intellectuals. On the one hand, they were bound to be concerned about the local issues of the Baltic provinces, such as everything connected with the Evangelist Lutheran Church: church taxes, ownership of church property, the legal aspect of churchwardens, and certifications of conversion. On the other hand, the journal aspired to contribute to the 'civic' (in German *staatsbürgerlich*) enlightenment of Estonians—the matters pertaining to the State *Duma* and its elections are treated with great insight. Much attention was also paid to conscription. Another area that cannot be left without mention is social mobility within the hierarchical Russian Empire. Education, organisation of schools of different levels; adult education; public libraries; privileges of teachers and students, also women's access to teacher's posts—these topics were to serve as inspiration for the sons and daughters of the small nation whose legal enlightenment the authors of the first Estonian-language law journal had taken upon their shoulders as an obligation to themselves and to their people. Their own roots too were in the rural, peasant milieu, and it was through education that they were able to settle into their 'urban' profession of lawyer.

What *Seadus ja Kohus* does not offer is 'struggle for the right to law in the native language'.[*39] The programme in the address of the journal, for instance, does not even mention the fact that it is the first law journal in the Estonian language. Only a couple of years later, in the end of 1911, was the formula "the first Estonian-language law journal" introduced, in an advertisement of *Peterburi Teataja* for a yearly subscription to the newspaper and its supplements.[*40] A certain sensitivity in language matters may be noticed only in the November 1912 issue. The relevant article begins with a highly neutral and descriptive account of a protest action of one parish council in Curland which had been caused by the minutes of the parish government, which, under the law, had since 1911 been noted down in Russian.[*41] At the end of the year, the parish council was supposed to review and approve them. However, the Latvian members of the council claimed that they could not approve minutes taken in a language they did not understand. This account is followed by an article by A. Birk about state apartment fees, which begins, unusually for *Seadus ja Kohus*, with the note that "not everyone comprehends

[35] Eesti õigusteadlaste ühisus (Association of Estonian Lawyers). – Seadus ja Kohus 1909, pp. 17–19 (in Estonian).

[36] T. Anepaio. Eesti õigusteadlaste päevade algus (The Beginning of Estonian Lawyers' Days). – J. Erne (ed.). Eesti õigusteadlaste päevad 1922–1940. Protokollid (Estonian Lawyers' Days 1922–1940. Minutes). Tallinn 2008, p. XXIII (in Estonian).

[37] The tradition of song festivals, taken over from the German culture, played a very important role in the national consolidation of the Estonians and song festivals are still a top event of the national culture, both in Estonia and Latvia.

[38] Eesti õigusteadlaste ühisus (Association of Estonian Lawyers). – Seadus ja Kohus 1910, p. 63 (in Estonian).

[39] Such pathos is carried, for instance, by the first Croatian law journal *Pravdonoša* from 1851 and 1852. See Z. Pokrovac (Note 2), pp. 198–206.

[40] Peterburi Teataja 1911/113 (29.12.1911).

[41] Põhjusmõtteline küsimus meie wallawalitsuste keele asjus (The Principal Question about the Language of Own Parish Government). – Seadus ja Kohus 1912, pp. 88–89 (in Estonian).

Russian-language [tax] notices". However, this is immediately followed by a statement that mitigates the language issues: "the articles of law are often enough not clear even to one mastering in the language."[*42] Here too, the essentially legal problem prevailed and language was taken to be simply the tool for approaching it. Such disinterest in language matters seems slightly strange, as Estonian legal language was still badly needing development and the writings demonstrate how lacking it was in proper terminology. Above I mentioned that Jhering's *Kampf um's Recht* had also been translated into Estonian.[*43] The translator attached a list of the new terms he had been forced to devise. The list includes such words, among others, as *hädakaitse* (self-defence), *loobumine* (waiver), *omavoli* (arbitrary action), and *heausuline* (acting in good faith). Another 10 years later, now already in the Republic of Estonia, when one of the most scientific of Estonian journals and one among those with the greatest longevity, *Õigus* ('The Law', 1920–1940), had begun to be published, the linguistic issue had become the matter of the day. The very first issue of *Õigus* addressed the need to develop legal terminology[*44] and introduced its long-lived terminology subdivision.[*45]

In 1920, a start was made to tackle the penal law terminology, and, also in this respect, the approach is distinctly different from that of the journal some 10 years older. One might assume that a law journal targeting the broad masses would attempt to excite the people with thrilling stories—and where else to get the thrills than from the penal cases? *Seadus ja Kohus* did publish translations of more recent penal laws: stricter punishments for horse-stealing, release from prison on parole. The scarce case announcements focus rather on funny stories: about a penalty for misspelling *pravoslavnyj* (Russian for 'orthodox or right believer') such that the outcome was the concept of *krivoslavnyj* ('bent believer'); how farmers were punished for purposefully riding their horses at a snail's pace such that the manor-owner's carriage was not able to overtake, etc. It can be said with absolute certainty that *Seadus ja Kohus* did not try to attract attention by describing gory crimes or inciting to revenge. Serious case announcements are more of a warning in nature than anything else—for instance, drawing attention to the fact that late reporting for military service might result in being punished as a deserter. As far as scientific treatments of penal law are concerned, there was only one and even that concerned a rather peripheral subject.[*46]

At any rate, this article has already dedicated more space to penal law than the source of our research ever did. The rooting of *Seadus ja Kohus* in Jhering's *Kampf* is evidenced, *inter alia*, by the fact that much more attention is paid to private law. We have already mentioned the in-depth treatments of legal issues related to farmland. Law of immovable property in a broader sense is the subject of many other writings that attempt to explain current laws in more depth: about the requirement to register all property transactions; about the importance of requirements of form in general and, separately, the advantages of the written form over the oral one; state fees and taxes payable on various transactions; ownership of a house built on leased land; transfer of ownership upon the sale of a registered immovable and upon payment by instalments; about the legal meaning of earnest money; compensation for improvements made by the lessee, and cancellation of a lease contract; the regulation and legal nature of heritable lease. Of course, the law of succession is associated with property in a broader sense. Besides brief case announcements, the journal published a separate, systematic treatment of the right to a will in general and, in addition, of the related special rights under the peasant law regulations of Estland and Livland.[*47] Within the range of topics covered, it is noteworthy that the law of obligations has been relatively neglected. On the contrary, next to the already mentioned law of succession, family law stands out strongly. Both a longer systematic overview[*48] as well as shorter explanations of law or case announcements in relation to individual matters were published: about the rights and obligations of spouses after their separation, and separately also about the obligation to pay alimony and the liability of the wife for the husband's debts in cases involving joint property[*49], as well as about children born out of wedlock. *Seadus ja Kohus*, which targeted the people broadly, reinforces the fact that family and succession law are those realms of private law that must be 'popular' and must be made as understandable for the people as possible.

[42] A. Birk. Kroonu korterimaksust (About the State Apartment Fees). – Seadus ja Kohus 1912, p. 89 (in Estonian).

[43] R. von Ihering (Note 18).

[44] F. Karlsson. Õigusteaduse oskussõnad (Technical Terms of Jurisprudence). – Õigus 1920/1, pp. 6–7 (in Estonian).

[45] Nuhtlusseadustiku oskussõnad (Technical Terms of the Penal Law Act). – Õigus 1920/1, pp. 7–8 (in Estonian).

[46] G. J. Sack (Note 21).

[47] A. Palwadre. Testament (The Will). – Seadus ja Kohus 1913, pp. 69–73 (in Estonian).

[48] A. Birk. Perekonna õigusest (About the Family Law). – Seadus ja Kohus 1912, pp. 105–110 (in Estonian).

[49] This too is a so-called Estonian issue. For the high class, comprised mainly of German nobility and townspeople, this was relevant only on some territories and for single individuals. Joint property was in force in the Livland's town law, Narva town law and in Livland for rural clergy. In contrast, peasant laws proceeded from the principle of joint property both in Estland and Livland. About the diverse forms of matrimonial property in the Baltic provinces, see T. Anepaio. Varaühisus – kas nõukogulik igand? (Joint Property: A Remnant from the Soviet Past?). – Juridica 2002/3, pp. 193–201 (in Estonian).

5. Conclusions

Even if, after having been published for four and a half years, *Seadus ja Kohus* eventually disappeared for good from the landscape of Estonian legal periodicals, the journal may be seen as having been rather successful among those in its category. For instance, the Baltics' first German-language law journal had started to come out about 90 years earlier but managed to perdure just for two years in two issues (in 1822 and 1824).[*50] The same applies to the first Russian journal, although it was a contemporaneous one (from September 1913 until November 1914).[*51] Unlike these two, the first Estonian law journal didn not have any link to a university or any other academic institution. And this is not something that acts in a law journal's favour; rather, it does the opposite, as we can see by following the periodicals of several countries and nations. So in this context, *Seadus ja Kohus* was quite a persistent publication.

In this article, the efforts of the Estonians and Croatians in the realm of legal journalism have already been compared on a couple of occasions. The first Croatian legal journal, *Pravdonoša*, was published about 60 years earlier but limited itself to just two years of issue (from January 1851 to September 1852); the same was the case with *Pravnik* (1853–1854) and another *Pravnik* (1862–1863) and the even more short-lived *Novi pravnik* (1871).[*52] The first Croatian law journals differed from their Estonian counterpart in their attempts to consolidate lawyers and to step up specifically as their organ of communication. Even in Iceland, whose population is even less than that of Estonia, the first attempts were made with a journal among lawyers. Nonetheless, their *Lögfræðingur* too managed to survive for a whole five years of issue (1897–1901) although there were only about 50 trained lawyers at that time.[*53] There were twice as many Estonian lawyers, or more: by 1915, there are said to have been 123 university-trained lawyers and another 118 still completing their university studies. Legal studies were indeed most popular among Estonians, followed by medicine (in 1915, 98 had graduated with a degree in this field and 175 were still studying for one) and engineering (in 1915, there were 96 graduates and 112 students).[*54] It is difficult to say why those young men preferred this genre, enlightening journals addressed by lawyers to the broad masses, which in international comparison did not promise of much success. *Seadus ja Kohus* was not the last of its kind either. In January 1912, *Õigus ja Kohus*. *Õigusteadusline ajakiri* (English, 'Law and Court. A Legal Journal') began to be published in Tallinn and endured until WW I—its final issue saw light in July 1914. In the course of 1913, another six issues of *Õigus* ('The Law') were published in Tartu; its first issue in the winter of 1914 completed its run of publication. These publications too were intended to be from the lawyers to the people, and they likewise were mainly authored by young lawyers or assistants to lawyers.[*55]

For the time being, it is difficult to say what the specific examples that the first Estonian law journals followed were because not a great deal has been written about such journals that were addressed to a non-professional audience. It seems that a roughly comparable journal is one that had been also been published in St. Petersburg already since 1902, *Юридический Общедоступный еженедельный журнал* ('A Weekly Law Journal for Everybody'). This publication attempted likewise to disseminate legal knowledge throughout the population and give legal advice in response to the readers' questions.[*56] For further research, it is this Russian weekly that might offer a possibility of comparison—it might be interesting whether the knowledge disseminated to the non-legal population of the empire, or of its capital, differed from that information provided to the Estonians or was similar to it. Another point to observe is whether also the Russian lawyers were driven by the desire to lead individuals into legal armament so that they might stand up for their rights and contribute to the promotion of the sense of law within the whole of the nation.

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[50] Jahrbuch für Rechtsgelehrte in Russland. G. B. Erdmann (Hrsg.). 2 Bde. Dorpat und Riga. For a more comprehensive analysis of the journal and its authors, see M. Luts. Die juristischen Zeitschriften der baltischen Ostseeprovinzen Russlands im 19. Jahrhundert: Medien der Verwissenschaftlichung der lokalen deutschen Partikularrechte. – M. Stolleis, T. Simon (Note 2), pp. 75–84; M. Luts. Die "respublicae litterariae" um die juristischen Fachzeitschriften in den baltischen Ostseeprovinzen im 19. Jahrhundert. – J. Eckert, P. Letto-Vanamo, K. Å. Modéer (Hrsg.). Juristen im Ostseeraum. Frankfurt am Main *et al*. 2007, pp. 110–112. Both articles deal also with the rest of the Baltic-German law journals from the 19th century.

[51] Юридические Известия (Juridical News), под. ред. проф. А. С. Невзорова, Юрьев 1913–14.

[52] Z. Pokrovac (Note 2), pp. 198–217.

[53] See L. Björne. Nordische juristische Zeitschriften im 18. und 19. Jahrhundert. – M. Stolleis, T. Simon (Note 2), p. 26.

[54] K. Martinson. Teadustegevuse institutsionaliseerumine Eestis XVII sajandist 1917. aastani (Institutionalization of Scientific Activities in Estonia from the 17th Century until to 1917). Tallinn 1988, p. 359 (in Estonian).

[55] About all three Estonian journals from the time before WWI see M. Luts-Sootak. Aller Anfang ist gleich? Die estnischen Rechtszeitschriften vor dem ersten Weltkrieg. – M. Luts-Sootak, S. Osipova, F. L. Schäfer (Hrsg.). Einheit und Vielfalt in der Rechtsgeschichte im Ostseeraum/ Unity and Plurality in the Legal History in the Baltic Sea Area. 6th Conference in Legal History in the Baltic Sea Area, Tartu and Riga, 3–5 June 2010, outcoming in Rechtshistorische Reihe by Peter Lang.

[56] H. K. Litzinger. Russland vor der Oktoberrevolution: Jursitische Zeitschriften als Plattformen politischer Reformdebatten. – M. Stolleis, T. Simon (Note 2), p. 137. No mention is made of the person who was the driving force behind the journal or how long the journal perservered.

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Die Entwicklung der lettischen Rechtssprache nach der Gründung der Republik Lettland am Beispiel von juristischen Fachzeitschriften*

Die Jurisprudenz auf dem Gebiet des heutigen Lettland ist von ihren ersten Anfängen an multikulturell ausgerichtet gewesen. Unsere Rechtskultur wurde von deutschen, russischen, lettischen und hebräischen Juristen gemeinsam entwickelt. Leider ist diese Zusammenarbeit unterschiedlichen Nationen angehörender Juristen nicht immer harmonisch verlaufen. Es herrschte unter ihnen auch eine gewisse Konkurrenz, die sich auf nationale und andere Interessen stützte. Eine Erklärung hierfür liegt in der Rechtsgeschichte Lettlands.

1. Nationale Sprache, Staatssprache, Rechtssprache – Lettisch

Die deutschen Juristen haben in der Entwicklung in Lettland bis zum Ende des 19. Jahrhunderts, sogar bis zur Gründung der Lettischen Republik im Jahre 1918 dominiert. Ein Beweis dafür ist die bemerkenswerte Reihe hervorragender deutschbaltischer Juristen und Wissenschaftler, die in Lettland im Laufe des 19. Jahrhunderts und in der ersten Hälfte des 20. Jahrhunderts (bis zu der deutschen Repatriierung im Jahre 1939) gewirkt haben. Viele von ihnen haben später im Exil ihre in Lettland begonnene Tätigkeit fortgesetzt, das Recht der Republik Lettland und der Lettischen SSR erforscht und wissenschaftliche Aufsätze veröffentlicht.*[1] Diese

* Dieser Artikel wurde mit der Unterstützung des ESF Grant Nr. 7923 veröffentlicht.

[1] Beachtenswerte deutschbaltische Juristen, die ihre wissenschaftliche und berufliche Tätigkeit in der Republik Lettland angefangen und in Deutschland fortgesetzt haben, wobei sie dort wissenschaftliche Aufsätze ebenfalls über das lettische Recht veröffentlichten, waren, z. B. Lothar Schulz (L. Schulz. Die Entwicklung des Verfassungsrechts in den baltischen Staaten Estland, Lettland, Litauen seit 1940. – Jahrbuch des öffentliches Rechts der Gegenwart. Bd. 12. Tübingen 1963, S. 295–350), Dietrich Andre Loeber (D. A. Loeber Diktierte Option. Die Umsiedlung der Deutsch-Balten aus Estland und Lettland 1939–1941. Neumunster 1972) und Hermann Blaese (H. Blaese (Hrsg.). Baltisches Recht. Das Recht Estlands, Lettlands und Litauens in Vergangenheit und Gegenwart. Heft 1–14. München 1962–1974).

Juristen sind in der deutschen Rechtstradition weithin bekannt, denn ihre Aufsätze haben sie in der deutschen Sprache und in der deutschen Fachpresse veröffentlicht, ihre Bücher wurden teilweise von deutschen Verlagen herausgegeben. Bis zum Ende des 19. Jahrhunderts, als das russische Imperium mit der Verwirklichung der Russifizierungspolitik begann, war die deutsche Sprache auf dem Gebiet des heutigen Lettlands, ähnlich wie in Estland, die Sprache des Rechts und der juristischen Ausbildung, denn die Rechtswissenschaft konnten die Letten nur an der Universität Tartu (Dorpat) in der deutschen Sprache studieren.

Eine Änderung der Situation ergab sich Ende des 19. Jahrhunderts, als die deutsche Sprache zielstrebig dank einer bewussten Politik des russischen Imperiums, die von Alexander III. in den 80er Jahren des 19. Jahrhunderts initiiert wurde, einer Konkurrenz seitens der russischen Sprache ausgesetzt wurde. Diese Politik implizierte auch eine Stärkung des orthodoxen Glaubens und eine Eingrenzung der Rechte der ethnischen Minderheiten.[*2] So schreibt Michail Geller: „Durch den Grafen Tolstoi wird in den baltischen Provinzen das russische Gerichtssystem eingeführt, wobei die örtlichen Gerichte aufgehoben werden, wobei in der Verwaltung und den Schulen eine verstärkte Russifizierungspolitik betrieben wird, die sich zum Ziel gesetzt hat, alles ‚Deutsche', etwa die Privilegien des deutschen Adels und der baltischen Freiherren, zu bekämpfen."[*3]

In den letzten Jahrzehnten des 19. Jahrhunderts begaben sich die Letten zum Studium der Rechtswissenschaft nicht mehr nur nach Tartu, sondern in immer größerer Anzahl auch nach Moskau und St. Petersburg. Die russische Sprache wurde – parallel zum Deutschen – zur Sprache der gebildeten lettischen Intelligenz. Die Angehörigen der lettischen Intelligenz teilten sich je nach ihren politischen Ansichten in zwei Lager, die entweder die russische oder die deutsche Sprache und Kultur für wichtiger für die Letten hielten. Diese zur Zeit des Jahrhundertwechsels entstandene Situation blieb weitgehend auch nach der Gründung der Republik Lettland bestehen. Nach 1918, als sich die Republik Lettland als Nationalstaat gründete, wurde aber neben der deutschen und der russischen Sprache auch die lettische Sprache im juristischen Bereich angewandt. Als sich die nationale Staatlichkeit stärker durchsetzte und die juristische Ausbildung an der neugegründeten nationalen Universität – der Hochschule Lettlands (*Latvijas Augstskola*), die ab 1923 den Namen „Universität Lettlands" trägt, – eingeführt war, wurde die lettische Sprache bis zum Beginn des Zweiten Weltkriegs allmählich und zielorientiert zur führenden Rechtssprache fortentwickelt, auch wenn dazu ganz unterschiedliche Schwierigkeiten überwunden werden mussten.[*4] Einen Beitrag zur Entwicklung und Stärkung der lettischen Rechtssprache haben auch Juristen anderer Nationen und mit anderem sprachlichen Hintergrund geleistet.

Multikulturelle Nation ist ein Wert des heutigen Zeitalters – Ende des 20. und Anfang des 21. Jahrhunderts. Die Werte zu Beginn des 20. Jahrhunderts waren andere. Die Menschen waren stolz auf ihre nationale Zugehörigkeit. Bereits in der zweiten Hälfte des 19. Jahrhunderts wurden nationale Vereine gegründet, worauf Anfang des 20. Jahrhunderts die Gründung von Nationalstaaten folgte, in denen das Nationalbewusstsein, der Wert der Nationalkultur und die Bedeutung und Eigenart der nationalen Jurisprudenz betont wurden. Nach der Gründung von Nationalstaaten wurden in diesen Staaten nationale Hochschulen gegründet. So hat es beispielsweise in Lettland im Zeitraum zwischen den beiden Weltkriegen neben der ‚lettisch ausgerichteten' Universität Lettlands auch die in 1921 gegründete Russische Universität[*5] sowie das deutsche Herder-Institut[*6] gegeben.

Das Herzstück einer Nation ist ihre Sprache. Die lettische Sprache und der Status der lettischen Sprache waren Gegenstand der Sorge der lettischen Nation im Verlauf des gesamten 20. Jahrhunderts, bis an dessen Ende, nachdem der Republik Lettland wieder ihre Unabhängigkeit erlangt hatte und der Status des Lettischen als Staatssprache in der Verfassung verankert wurde.[*7] Doch ist die Lebensfähigkeit einer Sprache nicht durch ein konstitutionell garantiertes Recht oder Status gegeben. Eine Sprache muss benutzt werden, sie muss lebendig und umfassend einsetzbar sein, damit man mit ihr die bestehende Realität erfassen und wissenschaftliche Erkenntnisse formulieren kann. Die Entwicklung eines Staates und einer Nation hängt auch davon ab, ob ein voller Ausbildungszyklus in der Nationalsprache möglich ist und ob in Verwendung dieser Sprache die Entwicklung aller wissenschaftlichen Disziplinen möglich ist. Aus diesem Grund wurde der 1919 gegründeten Hochschule Lettlands (heute Universität Lettlands) seitens des Staates eine besondere

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[2] А. Гаврилин. Православная Церковь и русификаторская политика в Латгалии во второй половине XIX – начале XX века. Zugänglich unter: http://shh.neolain.lv/seminar23/alm7.gavrilin.htm (2.10.2009).

[3] „Сплелись вместе неприязненное отношение императора к нерусским народам, населявшим Россию, мессианитский национализм Победоносцева, рационализм Дмитрия Толстого, стремившегося сохранить нерушимость империи, быстрое развитие окраин, в особенности западных. Граф Толстой распространяет на прибалтийские провинции русскую судебную систему, ликвидируя местные суды, проводит усиленную политику русификации в администрации и школах, ставя своей целью борьбу с германизацией, с привилегиями, которыми пользовалось немецкое дворянство, балтийские бароны." М. Геллер. История Российской империи. Bd. III. Москва 1997, S. 176–177.

[4] Verfassung der Universität Lettlands. Rīga 1923, S. 3.

[5] A. Zigmunde. LU profesors Konstantins Arabažins (1965–1929). Zinātņu vēsture un muzejniecība. Latvijas Universitātes zinātniskie raksti. Rīga: LU 2008, S. 54.

[6] U. Krēsliņš. Latvija 1919–1928. Jurista Vārds. Zugänglich unter: http://www.lv.lv/index.php?menu=doc&id=175383 (17.10.2009).

[7] Der Wortlaut des Artikels 4: Die Staatssprache der Republik Lettland ist die lettische Sprache. Die lettische Fahne ist rot mit einem weißen Streifen. Gesetz v. 15.10.1998. „Änderungen der Verfassung der Republik Lettland" Latvijas Vēstnesis, Nr. 308/312 (1369/1373), 23.10.1998.

Bedeutung beigemessen und große Aufmerksamkeit gewidmet. Diese Einrichtung bot zum ersten Mal die Möglichkeit, akademische Ausbildung in der lettischen Sprache zu erwerben. Dies betont insbesondere die Verfassung der Universität Lettlands von 1923. In Artikel 3 wird festgelegt: „Die Unterrichtssprache der Universität Lettlands ist die lettische Sprache. In einzelnen Fällen kann das Dozieren auch in anderen Sprachen erfolgen, jedoch nur mit besonderer Genehmigung des Universitätsrats.“*[8] In der Praxis zeigte sich jedoch, dass im Verlauf der ersten Jahrzehnte solche „einzelnen Fälle“ in beinahe allen Fakultäten vorkamen, und in einigen Disziplinen (Ingenieurwissenschaften und Physik) überwiegen sie sogar. Das lag einerseits an den mangelnden Lettischkenntnissen bei einem Teil der Lehrkräfte, andererseits – und zwar nicht weniger – an der Unvollständigkeit der lettischen Wissenschaftssprache, einschließlich der Rechtssprache. Aus diesem Grund möchte ich die juristische Fachpresse der 20er und 30er Jahre des 20. Jahrhunderts insbesondere aus sprachlicher Perspektive beleuchten.

2. Fachzeitschriften der 1920er und 1930er Jahre

Der multinationale Charakter der damaligen Rechtskultur zeigt sich sehr eindrucksvoll an den Fachzeitschriften der 1920er und 1930er Jahre. Die juristische Fachpresse war in jener Zeit genauso multinational wie die Gemeinschaft der Juristen selbst. Die wichtigsten juristischen Zeitschriften waren in diesem Zeitraum das vom lettischen Staat herausgegebene *Amtsblatt des Justizministeriums der Republik Lettland* sowie eine Reihe von Zeitschriften, die von juristischen Vereinen herausgegeben wurden, nämlich die deutschsprachige *Rigasche Zeitschrift für Rechtswissenschaft* des Deutschen Juristenvereins in Riga, die russischsprachige *Zakon i sud* (Gesetz und Gericht)*[9] des Russischen Juristenvereins und lettische *Jurists* (Der Jurist) des Vereins für die Förderung der Zivilrechtswissenschaft *Aequitas*. Es ist bemerkenswert, dass die drei letzten Zeitschriften eine sehr ähnliche Lebensdauer gehabt haben. Die ersten Ausgaben sind zwischen 1926 und 1929 erschienen und das Ende des Erscheinens lag zwischen 1938 und 1940.

2.1. *Rigasche Zeitschrift für Rechtswissenschaft*

Am bekanntesten außerhalb der Grenzen Lettlands ist die von dem Deutschen Juristenverein in Riga im Zeitraum 1926 bis 1939 herausgegebene *Rigasche Zeitschrift für Rechtswissenschaft*. Dank der Initiative des deutschbaltischen Juristen Dr. iur. Dr. h.c. Dietrich André Loeber (1923–2004)*[10] ist im Jahre 2002 eine Faksimileausgabe dieser Zeitschrift erschienen.*[11] Professor Loeber hat damit einen unschätzbaren Beitrag zur Erforschung, Erschließung und Popularisierung des lettischen juristischen Erbes aus der Epoche zwischen der zwei Weltkriegen geleistet. Dank seiner Initiative und Unterstützung wurden nicht nur die bereits erwähnte Zeitschrift des Deutschen Juristenvereines in Riga, sondern auch das Amtsblatt des Justizministeriums der Republik Lettland sowie die russischsprachige Zeitschrift *Zakon i sud* im Faksimile herausgegeben.*[12]

Die deutschsprachige *Rigasche Zeitschrift für Rechtswissenschaft* gilt deshalb als bedeutsam, weil die Verfasser der hier veröffentlichten Aufsätze ihre Aufmerksamkeit vor allem auf die Vervollständigung der bestehenden Rechtsordnung, Änderungen und Ergänzungen bestehender Normen sowie auf Diskussionen über die Notwendigkeit der Erarbeitung neuer Gesetze gerichtet und die Notwendigkeit betont haben, die Verwandtschaft der lettischen und der estnischen Rechtsordnung weiterhin zu bewahren, die sich historisch im Laufe von mehreren Jahrhunderten gebildet hatte. Für einen die beiden Staaten verbindenden Faktor hielt die *Rigasche Zeitschrift für Rechtswissenschaft* das Erbe des römischen Rechts und die Notwendigkeit, es im Verlauf der Transformation des Rechtssystems zu bewahren. Beispielsweise wurde in der *Rigaschen Zeitschrift für Rechtswissenschaft* ein Aufsatz mit dem Titel „Die Gesetzgebung Estlands in den Jahren 1918–1926“ veröffentlicht, dessen Autor der in Tallinn wirkende Rechtsanwalt Gert Koch war.*[13] Ab 1930 galt das Interesse der Redaktion auch dem litauischen Recht.*[14] Die deutsche Sprache hat als gemeinsame Sprache der in der baltischen Region tätigen Juristen die Kommunikation und die Zusammenarbeit zwischen ihnen deutlich erleichtert.

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[8] Verfassung der Universität Lettlands. Rīga: J. Mitrevica drukatava 1923, S. 3.

[9] С. Ковальчук. Судьба журнала „Закон и Суд“ (1929–1938). Балтийский архив: Русская культура в Прибалтике. Bd. 4. Рига, Даугава 1999, S. 88.

[10] G. von Pistohlkors. Nekrolog. Dietrich André Loeber. Zugänglich unter: http://www.balt-hiko.de/dietrich_andry_loeber.php (2.10.2009.)

[11] Rigasche Zeitschrift für Rechtswissenschaft 1926–1939. Bd. I 1926/1927. Faksimileausgabe. Rīga: Latvijas Akadēmiskā bibliotēka 2002.

[12] Закон и суд. Вестник Русского юридического общества. Bd. 1–8 (1929–1938). Nr. 1–90. Факсимильное изд. Рига: Общество юристов Латвии и фонд сенатора Августа Лебера 2000, 1962 с.

[13] G. Koch. Die Gesetzgebung Estlands in den Jahren 1918–1926. – Rigasche Zeitschrift für Rechtswissenschaft 1926–1939. Bd. II Faksimileausgabe, S. 29–92.

[14] Rigasche Zeitschrift für Rechtswissenschaft 1926–1939. Bd. I. Faksimileausgabe, S.V *ff.*

Die in der *Rigischen Zeitschrift* veröffentlichten Beiträge stammten sowohl von Rechtswissenschaftlern als auch praktizierenden Juristen. Dadurch wurden sowohl die wissenschaftliche Qualität als auch der Praxisbezug gewährleistet. Besonders betonen möchte ich, dass zu den Autoren dieser Zeitschrift die führenden Professoren der Universität Lettlands wie Paul Mintz[*15], August Loeber[*16], Wladimir Bukowsky[*17] u. a. gehörten. Außerdem hat sich die Zeitschrift der Analyse der aktuellen Rechtsprechung, der juristischen Fachliteratur sowie einschlägiger Zeitschriften (beispielsweise der *Zeitschrift für osteuropäisches Recht*[*18]) gewidmet. Der Leserschaft der Zeitschrift wurden die bedeutendsten Veröffentlichungen in lettischer, russischer, französischer, deutscher und englischer Sprache vorgestellt. Auf die Bedeutung dieser Zeitschrift möchte ich nicht genauer eingehen. Die Zeitschrift ist den Deutsch lesenden Rechtshistorikern gut bekannt. Betont muss aber, welche Bedeutung diese Zeitschrift für Lettland hatte:

1. Die Redaktion der *Rigaschen Zeitschrift für Rechtswissenschaft* hat die wissenschaftliche Zusammenarbeit fortgesetzt, die sich zwischen den Juristen bereits zur Zeit des russischen Imperiums entwickelt hatte;
2. sie unterstützte gewisse Bestrebungen zur Harmonisierung der Rechtsvorschriften in den baltischen Staaten;
3. sie informierte die Gemeinschaft der Deutsch lesenden Juristen über die aktuellen Entwicklungen des Rechts Lettlands, der Rechtssprechung und Rechtsdogmatik sowohl in Lettland als auch weit über die Grenzen Lettlands hinaus;
4. die Veröffentlichungen konnten von den Studenten der Universität Lettlands als Studienmaterial verwendet werden;
5. die deutschsprachige Zeitschrift hat eine multikulturelle Juristengemeinschaft vereint, denn zu den Autoren der Aufsätze gehörten Juristen deutscher, russischer und hebräischer Abstammung.

2.2. Закон и Суд. Вестник русскаго юридическаго общества

Das Gesetz und das Gericht. Das Informationsblatt des russischen Juristenvereins

In den Russisch lesenden Juristenkreisen war hingegen in der Epoche zwischen den beiden Kriegen des 20. Jh. nur die Zeitschrift *Zakon i Sud. Vestnik russkogo juridicheskogo obschtschestva*, die in Riga von 1929 bis 1938 erschien und die einzige außerhalb Russlands auf Russisch herausgegebene juristische Zeitschrift war, weit über die Lettlands Grenzen bekannt.[*19] Im Vorwort zur Faksimileausgabe von *Zakon in Sud* erläutert Professor Loeber: „Die Zeitschrift zeichnete sich durch ihre Vielseitigkeit aus. Ein zentraler Stellenwert kam dem vergleichenden Recht zu. Der Redaktion stand ein umfangreicher Mitarbeiternetz zur Verfügung, den die russischen Emigranten bildeten, die über die ganze westliche Welt zerstreut waren.“[*20] Das vergleichende Recht wird von der Zeitschrift im weitesten Sinne vertreten, denn die Vergleiche werden auf verschiedenen Ebenen vorgenommen: sowohl rechtsgeschichtlich und geographisch als auch nach Rechtsgebieten – Grundrechtevergleich, Strafrechtsvergleich, Zivilrechtsvergleich usw. Die Zeitschrift informierte regelmäßig über den rechtlichen Status der russischen Emigranten in verschiedenen Ländern, über die Bestrebungen des Völkerbundes, das Schicksal der Flüchtlinge zu erleichtern, sowie über die juristischen Organisationen der russischen Emigranten.[*21] Ähnlich wie die *Rigasche Zeitschrift für Rechtswissenschaft* hat auch *Zakon i Sud* der Entwicklung der Rechtsordnungen und der Gerichtssysteme in den baltischen Staaten besondere Aufmerksamkeit gewidmet, die Gemeinsamkeiten und Unterschiede der Wege untersucht, die man für die Regulierung bestimmter Rechtsbeziehungen oder Rechtsinstitute gewählt hat. So ist beispielsweise in Heft 4 des Jahrgangs 1936 der Aufsatz „Die unterschiedlichen Grundansätze des estnischen und des lettischen Strafgesttzbuchs“ von I. Wolsky erschienen[*22] und in Heft 6/1936 der Artikel „Die Besonderheiten des besonderen Teils des

[15] P. Mintz. Das Einskammersystem in der lettländischen Verfassung. – Rigasche Zeitschrift für Rechtswissenschaft. Bd. I. Faksimileausgabe, S. 9 *ff.*

[16] A. Loeber. Fragen aus dem lettländischen Scheckrecht. – Rigasche Zeitschrift für Rechtswissenschaft 1926–1939. Bd. I. Faksimileausgabe, S. 210 *ff.*

[17] W. Bukowsky. Zur Frage des Systems des Ehelichen Güterrechts in Lettland. – Rigasche Zeitschrift für Rechtswissenschaft 1926/27, 4. Heft, S. 247 *ff.*

[18] Zeitschrift für osteuropäisches Recht. – Rigasche Zeitschrift für Rechtswissenschaft, 1926/27 3. Heft, S. 204 *ff.*

[19] D. A. Loeber. „Zakon i sud“. Vorwort zu der Faksimileausgabe. Rīga: Latvijas Juristu biedrība, Senatora Augusta Lēbera fonds 2000, S. V.

[20] Ebd.

[21] Ebd.

[22] И. Вольский. Отличие основных положений Эстонского уголовного кодекса оть Латвийского. – Закон и Суд. Вестник русскаго юридическаго общества 1936, H. 4 (64), Faksimileausgabe, S. 1339 *ff.*

estnischen Strafgesetzbuches“ von N. Grekow.[*23] Eine weitere Gemeinsamkeit der Organe der Rigaer deutschen und russischen Juristenvereine ist eine vertiefte Analyse des römischen Rechts unter der Annahme, dass eine weitere Entwicklung des Zivilrechts mit der weiteren Verwendung des römischen Zivilrechts als Entwicklungsgrundlage eng verbunden sei. In den Heften von *Zakon i Sud* wird diese Auffassung z. B. in einem Aufsatz von W. Friedstein mit dem Titel „Der Besitzklage in Theorie und Praxis“[*24] vertreten. Es ist übrigens erwähnenswert, dass Friedstein zu den vielen Autoren gehört, die zur Zeit des russischen Imperiums in der in Juristenkreisen populären Zeitschrift *Vestnik prava* (Rechtsblatt) publizierte[*25], während der Emigration aber für *Zakon i Sud* geschrieben hat. So kann man behaupten, dass *Zakon i Sud* gewissermaßen die Tradition von *Vestnik prava* in der Situation des Exils fortgesetzt hat.

Obwohl *Zakon i Sud* im großen Maße einen grenzübergreifenden Charakter aufweist, ist sie doch als juristische Zeitschrift Lettlands anzusehen. Dies liegt nicht nur an ihrem Erscheinungsort Riga, sondern vielmehr auch am Inhalt der Zeitschrift. Beinahe jede Ausgabe behandelt Neuigkeiten in der Gesetzgebung der Republik Lettland wie z. B. neue Gesetze bzw. Änderungen und Ergänzungen der bestehenden Gesetze, die entweder aus der lettischen oder aus der deutschen Sprache (weil die Übersetzer des Deutschen besser mächtig waren) ins Russische übersetzt wurden.[*26] Die Übersetzungen stammten größtenteils von Awgust Isaakowitsch Kaminka (1865 – um 1941)[*27] und Nikolai Grekow. Ebenso wurde in der Zeitschrift stets die Rechtsprechung der Gerichte der Republik Lettland analysiert. Besonders hervorzuheben ist an dieser Stelle die von dem Professor der Universität Lettlands Paul Mintz geleistete hervorragende Analyse der Urteile des Lettlands Senats in Strafsachen.[*28] Die bibliographischen Übersichten der Zeitschrift waren nicht auf russischsprachige juristische Literatur begrenzt. Es wurde vielmehr auch die in der deutschen und lettischen Sprache erschienene Literatur behandelt. Im Heft 4/1936 wird der Leserschaft das auf Lettisch erschienene Werk von Zallis Lēvenders „Die Besonderheiten des Strafverfahrens in Livland und Kurland im 15.–18. Jahrhundert“[*29] vorgestellt, und das Heft 1/1936 behandelt das in Weimar auf Deutsch erschienenen Buch von Gerhard Ledig über die „Philosophie der Strafe bei Dante und Dostojewski“.[*30]

Auch für heutige Forscher sind die in dieser Zeitschrift publizierten Artikel von Interesse; eine besondere Bedeutung ist jedoch meiner Auffassung nach der von der Zeitschrift betriebenen Analyse der Rechtsordnung von Sowjetrussland und der UdSSR beizumessen. Um meine Meinung zu begründen, möchte ich darauf hinweisen, dass die objektivste Analyse dieser Fragen von denjenigen Juristen geliefert werden konnte, die eine genaue Kenntnis des alten Rechtssystems hatten, welches entsprechend der sowjetischen Ideologie demontiert und neu gestaltet wurde (wenn auch oft alte Lösungen herangezogen wurden, soweit sie nicht im Gegensatz zur neuen Ideologie standen); von Juristen, die nicht nur die Begriffe verstanden, mit denen die Sowjetmacht eine neue Basis des Rechts durchsetzte, sondern denen auch die konkreten Maßnahmen bekannt waren, die im Rahmen der Gestaltung des sowjetischen Rechtswesens getroffen wurden, und die alle veröffentlichten neuen Gesetze und die entstehende Rechtsdogmatik in der Originalsprache lesen konnten; von Juristen schließlich, die in ihrer wissenschaftlichen Arbeit nicht der sowjetischen Zensur ausgesetzt waren. Es ist klar, dass diesen Kriterien die im Exil befindlichen russischen Juristen und insbesondere die Universitätsprofessoren entsprechen. Einer der zu dieser Gruppe gehörenden Aufsätze ist ein der sogenannten Stalinschen Konstitution gewidmete Aufsatz von Professor Nikolai Sergeewitsch Timaschew (1886–1970)[*31] mit dem Titel „Der Entwurf der neuen Konstitution der UdSSR“, in dem der Autor behauptet: „Die sowjetischen Völker werden auch in der Zukunft das Recht besitzen, ihre Sprachen zu sprechen. Allerdings werden sie auch weiterhin nur das sprechen dürfen, was ihnen vom Zentrum in Moskau vorgegeben wird.“[*32]

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[23] Н. Греков. Своеобразные черты особенной части Эстонского Уголовного кодекса. – Закон и Суд. Вестник русскаго юридического общества. 1936. Н. 6 (66), Faksimileausgabe, S. 1387 *ff.*

[24] В. С. Фридштейн. Владельческий иск в теории и на практике. – Закон и Суд. Вестник русскаго юридического общества 1936, Н. 6 (66), Faksimileausgabe.

[25] В. С. Фридштейн. О владельческом иске по действующему русскому праву. – Вестник права 1900, Nr. 7. Сентябрь. S. 43–86.

[26] Изменения и дополнения 12 марта 1936 года закона о городских сиротских судах. Перевод Н. Греков. – Закон и Суд. Вестник русскаго юридического общества 1936, Nr. 6 (66), Faksimileausgabe, S. 1389 *ff.*

[27] D. A. Loeber. „Zakon i sud“. Vorwort zu der Faksimileausgabe. Rīga: Latvijas Juristu biedrība, Senatora Augusta Lēbera fonds 2000, S. XIX.

[28] Тезисы, извлечённые из прежних решений уголовно кассационного департамента Латвийского Сената. – Закон и Суд. Вестник русскаго юридического общества 1936, Nr. 6 (66), Faksimileausgabe, S. 1392–1394.

[29] Библиография. Zallis Lēvenders Kriminālprocesa īpatnības Vidzemē un Kurzemē 15.–18. gs. – Закон и Суд. Вестник русскаго юридического общества 1936, Nr. 4 (64), Faksimileausgabe, S. 1354.

[30] Библиография. Gerhard Ledig Philosophie der Strafe bei Dante und Dostojewski. – Закон и Суд. Вестник русскаго юридического общества 1936, Nr. 1 (61), Faksimileausgabe, S. 1290 *ff.*

[31] Зарубежная Россия: Николай Сергеевич Тимашев / О.Л. Игнатюк / серия: Выдающиеся ученые спбгпу. спб, 2003, 169 с., илл. Zugänglich unter: http://russkayagazeta.com/rg/gazeta/fullstory/nikolay-sergeevich-timashev-07 (22.10.2009).

[32] „Советские народы и впредь будут иметь право говорить на своих языках. Но и впредь они будут говорить лишь то, что будет подсказано им из московского центра“. Н. Тимашёв. Проект новой конституции для СССР. – Закон и Суд. Вестник русскаго юридического общества 1936, Nr. 10 (70), Faksimileausgabe, S. 1461.

Die Autoren von *Zakon i Sud* lebten überall auf der Welt, denn russische Juristen in der Emigration haben über Gesetze und Rechtsdogmatik all der Länder geschrieben, die sie aufgenommen hatten; doch eine große Bedeutung für das Gesicht der Zeitschrift hatten insbesondere die in Riga lebenden und wirkenden russischen Juristen. Einer von denjenigen, die hier die Initiative ergriffen, und langjähriger geschäftsführender Redakteur der Zeitschrift war, war Pjotr Nikolajewitsch Jakobi (1877–1941), ein bekannter Strafrechtler und Mitverfasser des Strafgesetzbuches Lettlands von 1933.[*33] Ursprünglich gehörten zum Redaktionskollegium der Zeitschrift Paul Mintz, Josif Sigismundowitsch Schablowsky (1873–1934) und Oskar Osipowitsch Grusenberg (1866–1940).[*34] Oskar Grusenberg war eine besonders charismatische Persönlichkeit unter den emigrierten russischen Juristen. Er war im russischen Imperium ein berühmter Rechtsanwalt und Senator gewesen und am 1. April 1926 in Riga eingetroffen. Um seine Ankunft zu würdigen, wurden Empfänge organisiert, auf denen er Bekannten aus seiner Petersburger Zeit sowie Politikern, Abgeordneten des Parlaments Lettlands (Saeima) und Geistlichen aller Konfessionen begegnete.[*35] In Grusenbergs Rigaer Wohnung sind im Februar 1929 zum ersten Mal die Initiativegruppe zur Schaffung des Russischen Juristischen Vereins in Lettland und das Redaktionskollegium der künftigen Zeitschrift *Zakon i Sud* zusammengetroffen.[*36] Grusenberg wurde zum ersten Vorsitzenden des Vereins ernannt. Zu seinen Stellvertretern wählte man Jakobi und Schablowsky, zum Ehrenmitglied den angesehnen Petersburger Rechtswissenschaftler Leo Petrazhicky, der zu jener Zeit in der polnischen Emigration lebte. Das Motto der neuen Zeitschrift nennt Grusenberg im Heft 1/1929: „Die russische Intelligenz ist eine Brüderschaft, ein Ritterorden.“[*37] Zu den Autoren, deren Beiträge in dieser Zeitschrift veröffentlicht wurden, gehörten auch die Professoren der Universität Lettlands Sinaisky, Mintz und Loeber, die auch für die *Rigasche Zeitschrift für Rechstwissenschaft* schrieben.

2.3. *Latvijas Republikas Tieslietu Ministrijas Vēstnesis*

Das Amtsblatt des Justizministeriums der Republik Lettland

Das Amtsblatt des Justizministeriums der Republik Lettland erschien von 1920 bis 1940. Dies war die wichtigste juristische Fachzeitschrift aus der Epoche zwischen den zwei Weltkriegen und umfasste im Laufe seines zwanzigjährigen Erscheinens über 12300 Seiten. Die Redakteure des Amtsblatts des Justizministeriums der Republik Lettland waren die angesehnsten lettischen Juristen der damaligen Zeit: Miķelis Gobiņš (1868 – 1931), Senator des Senats Lettlands (Redakteur von 1920 bis 1921), Kārlis Dišlers (1878–1954), Professor an der Universität Lettlands und Dekan der dortigen Fakultät für Volkswirtschaft und Rechtswissenschaft (Redakteur von 1922 bis 1934 und von 1937 bis 1940) und Aleksandrs Būmanis (1881–1937), Professor an der Universität Lettlands und Vorsitzender des Rigaer Bezirksgerichts (Redakteur von 1935 bis 1937).[*38] In der ersten Ausgabe im Oktober 1920 macht den Anfang der Aufsatz: „Einige Worte zu der Anerkennung des Staates ‚de facto‘ und ‚de iure‘.“[*39] In der Zeitschrift wurden Aufsätze von allen Gebieten der Rechtswissenschaft, neue Gesetze und Verordnungen, Änderungen und Ergänzungen der bestehenden Gesetze sowie Gerichtsurteile, insbesondere die Erläuterungen des Senats, veröffentlicht. Der junge Staat Lettland entwickelte sein Gerichts- und Rechtssystem, und dieser Prozess spiegelte sich unmittelbar im Amtsblatt des Justizministeriums der Republik Lettland wider. Das Amtsblatt ist eine hervorragende Quelle sowohl für die historische Auslegung immer noch bestehender Normen als auch für das Studium der Geschichte des lettischen Rechts und der lettische Verfassungsgeschichte. Paul Mintz erläutert im Jahre 1920 die Grundlagen der Rechtsordnung der Republik Lettland, nämlich die Struktur und die Kompetenzen des Senats: „Der Senat Lettlands ist nach dem Muster des Höchsten Kassationsgerichts des ehemaligen russischen Kaiserreichs organisiert, doch der Unterschied besteht darin, dass der Senat Lettlands neben den zwei Departments für Zivilrecht und Strafrecht noch ein drittes Departament für Verwaltungsangelegenheiten umfasst.“[*40] Nicht nur die Redakteure, sondern auch die Autoren der Aufsätze dieser Zeitschrift waren führende Juristen ihrer Zeit. Hier haben Kārlis Dišlers, Paul Mintz, August Loeber, Wladimir Bukowsky, Alexander Ugrjumow, Wassily Sinaisky u. a. ihre Einsichten publik gemacht.

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[33] D. A. Loeber. „Zakon i sud“. Vorwort zu der Faksimileausgabe. Rīga: Latvijas Juristu biedrība, Senatora Augusta Lēbera fonds 2000, S. VII.

[34] Ebd., S. VIII.

[35] С. Ковальчук. Рига в эмигрантских скитаниях Оскара Грузенберга. – Евреи в меняющемся мире (материалы 3-й международной конференции). Рига Фонд „Шамир“ им. М. Дубина 2000, S. 486.

[36] Ebd., S. 489.

[37] „Русская интелигенция – это братство, рыцарский орден.“ Грузенберг О. Из дневника юриста. – Закон и Суд. Вестник русскаго юридического общества 1929, Nr. 1 (1). S. 1.

[38] D. A. Loeber. Vorwort zu der Faksimileausgabe. – Tieslietu Ministrijas Vēstnesis. Faksimilausgabe. Rīga 2003, S. XIII.

[39] Kāds vārds par valsts atzīšanu „de facto“ un „de jure“ (b.a.). – Tieslietu Ministrijas Vēstnesis 1920, Oktobris, Nr. 1, S. 3.

[40] P. Mincs. Senāta izskaidrojošā darbība. – Tieslietu Ministrijas Vēstnesis 1920, Nr. 2/3, Faksimileausgabe, S. 11 *ff.*

Selbstverständlich hat das Amtsblatt des Justizministeriums der Republik Lettland auch bei der Entwicklung der lettischen juristischen Terminologie eine wichtige Rolle gespielt. Auf seinen Seiten finden sich viele gelungene und weniger gelungene Versuche, die lettische Rechtssprache zu entwickeln, die entweder ihren Platz in unserer Sprache gefunden haben oder längst in Vergessenheit geraten sind. So wurde 1920 das Gesetz zur „Willensfähigkeit der juristischen Person" veröffentlicht. Schon der Begriff *gribas spēja* (Willensfähigkeit) hat sich im Lettischen nicht eingebürgert. Stattdessen verwenden wir den Begriff *rīcībspēja* (Handlungsfähigkeit). Die von August Loeber angefertigte Übersetzung des Gesetzestextes enthält auch Kommentare zu den Normen, und für die neuen lettischen Termini werden Erklärungen in russischer sowie deutscher Sprache gegeben. Ein Beispiel der Kommentare von Loeber: „Nun wird übersetzt *pilntiesīgs* (voll rechtsfähig), obwohl der Notar nicht „*tiesību spēja*" (‚die Rechtsfähigkeit') beglaubigen soll, sondern *gribas spēja* (die Handlungsfähigkeit, auf Russisch „*дееспособность*")".[*41] Roberts Mucenieks arbeitete im Jahre 1923 die lettische Terminologie im Bereich Seerecht aus und bot dabei Lösungen an, die für das lettische Ohr heutzutage äußerst merkwürdig klingen; allerdings würden die Beispiele, wenn man sie übersetzen würde, ihren „besonderen Geschmack" verlieren.[*42]

Die Lektüre dieser Zeitschrift lässt zwei Tendenzen erkennen, durch die sich die Entwicklung der lettischen Rechtsterminologie auszeichnet. Für die erste Tendenz stehen die eben erwähnten Beispiele. Es handelt sich um Versuche, juristische Termini ins Lettische zu übertragen. Die zweite Tendenz ist, die Termini als solche nicht zu übersetzen, sondern nur eine lettische Endung hinzuzufügen. So klingen Termini wie z. B. *kontrasignācijas institūts* un *koleģiāla uzbūve*, die im Artikel von Dišlers von 1923 vorkommen, vollkommen zeitgemäß. Dišlers bietet ebenfalls Terminerklärungen, indem er neben dem Fremdwort die lettische Übersetzung angibt (z. B. kontrasigniert – gegengezeichnet).[*43] Auf diese beiden Tendenzen trifft man auch in der gegenwärtigen lettischen Rechtssprache. Die lettischen Übersetzungen der Begriffe lassen die Rechtssprache nicht nur für Juristen, sondern auch für den Rest der Gesellschaft verständlich sein. Das Ziel von Rechtsnormen ist die Regulierung der Beziehungen in der Gesellschaft, daher müssen sie für das Volk hinreichend verständlich sein. Andererseits lässt der Gebrauch von Fremdwörtern Missverständnisse vermeiden, die durch die übersetzten Begriffe zustande kommen könnten, bevor die Übersetzungen allgemein akzeptiert worden sind. Bereits im Jahre 1923 ist die lettische Rechtsterminologie wesentlich einheitlicher und sie ist leichter verständlich. Die führenden Fachleute verwenden, so wie beispielsweise Kārlis Dišlers bei der Darstellung des Staatsrechts, Begriffe, die später zu den terminologischen Grundlagen dieses Fachgebiets geworden sind. Gewiss haben sich nicht alle sprachlichen Neuschöpfungen eingebürgert – selbst nicht die aus den Aufsätzen von Professor Dišlers; so wird beispielsweise die lettische Übersetzung des Terminus „Scheinrechte" (*māņu tiesības*) heute nicht verwendet.[*44] In Kenntnis der Tatsache, dass Professoren wie z. B. Sinaisky, Ugrjumow, Mintz und Bukowsky in den 1920er Jahren selbst der lettischen Sprache noch nicht mächtig waren, muss die Leistung der Übersetzer hervorgehoben werden, denn gerade in ihren Aufsätzen ist die Rechtssprache am elegantesten. Als ein sprachliches Musterexemplar aus jener Zeit möchte ich Bukowskys Artikel „Über das eheliche Erbrecht" anführen.[*45]

2.4. *Jurists*

Der Jurist. Eine Zeitschrift für Gesellschafts- und Rechtswissenschaften

Die Zeitschrift *Jurists* („Der Jurist") wurde im Jahre 1928 von einem Professor an der Juristischen Abteilung der Universität Lettlands, Wassily Sinaisky, gegründet. Einige Zeit später schließen sich der Redaktion auch Konstantīns Čakste, Kārlis Vikmanis und Andrejs Pavars an. Die Zeitschrift erschien einmal monatlich. Ihr voller Titel lautet: „Der Jurist. Eine Zeitschrift für Gesellschafts- und Rechtswissenschaften unter Leitung des Professors der Universität Lettlands Dr. jur. W. Sinaisky". Das Motto der Zeitschrift – „*Ohne Recht gibt es keine Kultur, ohne Kultur gibt es kein wahres Leben*" – demonstriert ganz deutlich, was Sinaisky selbst vom Recht hielt – er sah es als Teil dessen, wie sich die öffentliche Kultur äußert und bildet. Sinaisky hat gewissenhaft das Erscheinungsbild der Zeitschrift für die gesamte Dauer ihres Erscheinens geprägt. Er war ein tief gläubiger Mensch mit einem weiten Horizont.[*46] Sinaisky, der die humanistischen Werte hochhielt, betonte auch in seinen Aufsätzen die Bedeutung dieser Werte für das Leben der Gesellschaft und für das Recht. Nahezu jede Ausgabe der Zeitschrift beginnt mit einem Editorial von Sinaisky, in dem das Thema der jeweiligen Ausgabe umrissen und Schlaglichter auf die weiteren Beiträge gesetzt werden. So wird die Januarausgabe des Jahrgangs 1929 von Sinaiskys Aufsatz über „Die Rechte in ihren Beziehungen zu der Kultur und

[41] A. Lēbers. Juridiskas personas gribas spēja. – Tieslietu Ministrijas Vēstnesis 1920, Nr. 2/3, S. 81.

[42] Noteikumi par avārijām. Übersetzt von Rob. Mucenieks. – Tieslietu Ministrijas Vēstnesis 1923, Nr. 3/4, S. 174, 175.

[43] K. Dišlers. Ministru kontrasignācija monarhija un republikā. – Tieslietu Ministrijas Vēstnesis 1923, Nr. 3/4.271, S. 281.

[44] Ebd., S. 279.

[45] V. Bukovskis. Par laulātā drauga mantošanu. – Tieslietu Ministrijas Vēstnesis 1923, Nr. 37, S. 459.

[46] Ausführlichere Schilderung des Schaffens von Professor Sinaisky siehe: ovaļčuka S, K. Eļtazarova. Bez kultūras nav tiesību, bez tiesībām nav īstas dzīves. – Jurista Vārds, 29.09.2009, Nr. 39 (582), S. 12–17.

der Zivilisation“[*47] eingeleitet, die Novemberausgabe beinhaltet den Aufsatz „Die Rechte und die Familie“[*48], und in den Ausgaben des Jahrgangs 1935/36 werden in Fortsetzungen die Aufsätze „Der juristische Charakter des Schuldrechts“[*49], „Der Status des Schuldrechts“[*50] u. a. m. abgedruckt. Es ist bezeichnend, dass die erste nichtstaatliche lettischsprachige juristische Zeitschrift, die einen unschätzbaren Beitrag für die Entwicklung der lettischen Rechtswissenschaft und -praxis sowie für die weitere Entfaltung der lettischen Rechtssprache geleistet hat, von dem aus Russland stammenden Wassily Sinaisky gegründet wurde und gleichzeitig viele Aufsätze von deutschbaltischen Juristen, z. B. von dem Dozenten der Universität Lettlands August Loeber[*51], sowie von aus Russland emigrierenden Wissenschaftlern wie Alexander Kruglewski[*52], A. Ugrjumow[*53] u. a. veröffentlichte. Russische und deutsche Juristen haben also einen wesentlichen Beitrag zur Herausbildung und weiteren Fortentwicklung der lettischsprachigen Rechtsdogmatik geleistet. Von den lettischen Juristen, deren Aufsätze in der Zeitschrift *Jurists* veröffentlicht wurden, sind insbesondere Konstantīns Čakste, Roberts Akmentiņš, Kārlis Vikmanis, Alberts Kviesis, Hermanis Apsītis und Nikolajs Vīnzarājs zu erwähnen.[*54]

Den Inhalt der Zeitschrift bildeten wissenschaftliche Aufsätze auf verschiedenen Gebieten der Jurisprudenz wie Zivilrecht, Strafrecht, Staatsrecht, Rechtsphilosophie, ferner Diskussionen über Gesetzesentwürfe oder frisch verabschiedete Gesetze sowie zur Rechtsprechung, aktuelle Nachrichten der Richter- bzw. Juristenvereine, Übersichten zur neueren Fachliteratur und -presse, schließlich Übersichten zu den wichtigsten Änderungen ausländischer Gesetze (so wird beispielsweise in der Januarausgabe des Jahrgangs 1929 die Ehescheidungsreform in Deutschland behandelt).[*55] Die Tatsache, dass die Lettisch-, Deutsch- und Russischkenntnisse bei den kompetentesten lettischen Juristen auf dem gleichen Stand waren, lässt sich in der Zeitschrift *Jurists* schon daraus ableiten, dass beispielsweise bei einer Analyse der gesetzlichen Normen des Russischen Reiches die Gesetzestexte in der Originalsprache (Russisch) zitiert, aber auf Lettisch analysiert werden.[*56] Ähnlich werden deutschen Gesetze und deutschsprachige Autoren in der Originalsprache zitiert und in der lettischen Sprache kommentiert.[*57] Dasselbe Prinzip wird selbstverständlich auch bei der allen Juristen gemeinsamen Sprache – Latein – angewendet.[*58] Bei den in der Zeitschrift gelieferten Einblicken in die juristische Fachpresse Lettlands werden andere in Lettland erscheinende juristische Zeitschriften äußerst positiv beurteilt (was unter Juristen eher untypisch ist): Von der *Rigaschen Zeitschrift für Rechtswissenschaft* wird behauptet: „in beiden Heften finden wir sehr interessante Aufsätze“[*59], und das Amtsblatt des Justizministeriums der Republik Lettland erhält die folgende Bewertung: „der Inhalt des in diesem Jahr erschienenen Heftes Nr. 1/2 ist sehr vielseitig“.[*60] Da Sinaisky ein Angehöriger der Universität ist, zeichnet sich seine Zeitschrift *Jurists* mehr als andere juristischen Zeitschriften jener Epoche durch den akademischen Charakter und den Anteil der Aufsätze der Lehrkräfte der Universität Lettlands aus.

3. Zusammenfassung

Es muss betont werden, dass die besten russischen, lettischen, deutschen und hebräischen Juristen für mehrere, wenn nicht für alle der genannten juristischen Zeitschriften geschrieben haben. So ließen die Professoren Sinaisky, Loeber, Mintz sowie die Dozenten Ugrjumow und Kruglewsky und einige andere ihre Aufsätze in alle drei Sprachen erscheinen, indem sie diese in allen drei Zeitschriften veröffentlichten. Mit ihrem Wirken haben sie dazu beigetragen, die multikulturelle Rechtskultur Lettlands zusammenzuführen und eine einheitliche Rechtskultur zu bilden, die sich bereits in der zweiten Hälfte der 1930er Jahre stabilisiert hatte. Es muss betont werden, dass sich trotz der Tatsache, dass die juristischen Fachzeitschriften in drei verschiedenen Sprachen erschienen, die Rechtsdogmatik in der Republik Lettland in der Epoche zwischen den zwei Weltkriegen durch mehr Einheitlichkeit auszeichnete, als es zunächst erscheinen mag, und dass es insbesondere die Lehrkräfte der Universität Lettlands waren, die sie mit vereinten Kräften entwickelt haben.

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47 V. Sinaiskis. Tiesības viņu attiecībās pret kultūru un civilizāciju. – Jurists, Januar 1929, Nr. 1 (8), S. 2–3.

48 V. Sinaiskis. Tiesības un ģimene. Jurists. November 1929. Nr. 8 (15), Sp. 125–128.

49 V. Sinaiskis. Saistību tiesību juridiskais raksturs. – Jurists 1936, Nr. 1/2 (71/72), Sp. 1–12.

50 V. Sinaiskis. Saistību tiesību statusi. – Jurists 1936, Nr. 7/8 (77/78), Sp. 121–126.

51 A. Loeber. Jautājumā par līguma prefekciju. – Jurists, Januar 1929, Nr. 1 (8), Sp. 8.

52 A. Krugļevskis. Noziegumu legālā klasifikācija. – Jurists, April 1929, Nr. 4 (11), Sp. 103–112.

53 A. Ugŗjūmovs. Daži vārdi par 1922. gada 12. janvāra likumu. – Jurists, Januar 1929, Nr. 1 (8.), Sp. 7–14.

54 Der Zeitschrift „Jurists“ gewidmeter Aufsatz von Juris Jelāgins, Tiesiskās domas atspoguļojums sabiedrisko un tiesību zinātņu žurnālā „Jurists“ (1928–1940). – Likums un Tiesības 2007. Bd. 9. Nr. 11 (99), S. 326–329.

55 M. K. Laulību šķiršanas procesa reforma Vācijā. – Jurists, Januar 1929, Nr. 1 (8), Sp. 31–32.

56 A. Loeber. Jautājumā par līguma prefekciju. – Jurists, Januar 1929, Nr. 1 (8), Sp. 7.

57 J. Šmidts. Vai policija var patstāvīgi vajāt ārvalstim izdodamos noziedzniekus? – Jurists, Dezember 1929, Nr. 9 (16), Sp. 266.

58 A. Loeber. Jautājumā par līguma prefekciju. – Jurists, Januar 1929, Nr. 1 (8), Sp. 7.

59 Arm. Rs. Bibliografija. – Jurists, April 1929, Nr. 4 (11), Sp. 124.

60 Arm. Rs. Bibliografija. – Jurists, April 1929, Nr. 4 (11), Sp. 123.

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Belgian Legal Journals between 'Pragmatic Laziness' and Political Accommodation*

Introduction

That legal historians are few has quite naturally led to a limited number of views and even to virtual 'monopolies' on certain topics. Legal history differs in this respect from other legal disciplines, which tend to attract a larger number of authors and therefore generate a much larger number of conflicting views and opinions.

During my preparation of materials on the topic of Belgian legal reviews in the nineteenth and twentieth centuries, it struck me that the handful of internationally published authors had taken a rather dim view on the subject: Holthöfer had dismissed Belgian law reviews as mere 'practitioners magazines'*[1], whilst Heirbaut deplored the absence of academics in law journals, denounced 'pragmatic laziness' as a national characteristic*[2], and concluded that the law reviews' history was "an example of the failure of the legal scholarship in the country"*[3].

However, between 1 March 2008 and 1 March 2009, no fewer than 6,000 articles were published in 82 different listed*[4] Belgian law reviews, most of these journals having been established for several decades already. Also, most contributors hold academic positions. Surely not all of these articles could have been rubbish? Not even by the stringent standards of the German *Pandektenwissenschaft*.

Instead of accepting the wholesale dismissal, we propose to contextualise the Belgian law review scene against the backdrop of the intellectual and political eras in which the works were written: it will then become apparent that pragmatism and conformity play a much greater role in the perceived 'failure' than does suspected incompetence.

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1 E. Holthöfer. Beiträge zur Justizgeschichte der Niederlände, Belgiens und Luxemburgs im 19. und 20. Jahrhundert. Frankfurt/M 1993, pp. 150–189.

2 D. Heirbaut, M. E. Storme. De Belgische Rechtstraditie: Van een lang zoeken naar onafhankelijkheid naar een verlangen naar afhankelijkheid. Belgisch rapport voor het XVIIe Internationaal Congres voor rechtsvergelijking. – Tijdschrift voor privaatrecht 2008, pp. 979–1041 (page 26 of the PDF version).

3 D. Heirbaut. Law Reviews in Belgium (1763–2004): Instruments of legal practice and linguistic conflicts. – Juristische Zeitschriften in Europa. M. Stolleis, T. Simon (eds.). Frankfurt/M 2006, p. 367.

4 Recueil permanent des revues juridiques (R.P.RJ.) / Permanent overzicht van juridische tijdschriften (P.O.J.T.).

Within the constraints of this article, including an upper limit of 10 pages, my account cannot possibly hope to be complete, or even have the beginning of completeness to show for its efforts, which is why I have given ample attention to notes and suggestions for further reading.

The French and Dutch years

When the Southern Netherlands were transferred from the Spanish to the Austrian Habsburgs in 1714, the various towns and regions retained their various legal systems based on custom. The Austrian rule of the day meant modernisation in different fields—e.g., the abolishment of judicial torture—but it was not until 1787 that Emperor Joseph II decreed the replacement of the multitude of provincial councils and law courts by a centralised executive and new judicial institutions.[*5] This attack on old liberties led to a series of protests and uprisings[*6] that were barely contained by the time French revolutionaries invaded the country in 1792 and 1794, having it officially annexed on 1 October 1795.

Hegel famously described Napoleon as 'reason on horseback', and the newly incorporated departments of France indeed got a speedy introduction to the mixed blessings of the French occupation: the Code Merlin abolished all existing legislation and replaced it with the laws of the French Republic, characterised by economic liberalism[*7], secularism, centralisation, codification[*8], and—last but not least—the introduction of French as the judicial language.

The impact of the French period was to be profound and the reception of the new legal system thorough and permanent.[*9] The logical explanation seems to be that, a certain political opposition notwithstanding, a majority in the legal profession saw the French import as a suitable tool for modern times, far superior in this respect to the idiosyncrasies of the Old Patriotic Law.[*10] In addition, of course, the years 1795–1815 saw the emergence of a new legal elite who saw and seized new career opportunities in the unified empire.[*11]

The French years did not yield much legal literature, but as early as 1807, 'noteworthy' decisions of the Brussels Court of Appeal started to be published on a regular basis, followed the next year by a similar initiative regarding industrial Liège's important Court of Appeal.[*12]

Between 1815 and 1830, the Southern and Northern Netherlands were briefly reunited under King William I, but French legislation, centred on its five voluminous codes, remained in force.[*13]

Not unlike the French period, the Dutch period was characterised by an amazing amount of accommodation by the legal professions, who were all too happy to stay in office. In fact, much of the legislative work in the United Kingdom of the Netherlands was undertaken by jurisconsults from the South and the working language of the reform commission was French.

Nonetheless, the legal profession proved ready to switch loyalties again after the sudden Belgian independence had surprised everybody. Loyal magistrates appointed by the Dutch king turned into stern anti-Orangists

5 P. Arblaster. A History of the Low Countries. New York 2006, p. 171.

6 The States of Brabant proclaimed their independence on 31 December 1789. They were joined by all other provinces but one and formed the short-lived United States of Belgium.

7 The Law Le Chapelier of 14–17 June 1791 declared all corporations and guilds void and forbade any impediment to free entreprise. The *Décret d'Allarde* of 2–17 March 1791 had already introduced the principle of free choice of trade. Even today, this law is often invoked against bureaucratic interference.

8 These five are: *Code Civil* 1804, *Code de procédure civile* 1806, *Code du Commerce* 1807, *Code d'instruction criminelle* 1810 and *Code pénal* 1810.

9 P. Godding. De l'ancien droit Belgique' au Code civil de 1804: une rupture? – A. Wijffels (ed.). Le Code civil entre ius commune et droit privé européen. Brussel, Bruylant 2005, pp. 585–610; F. Stevens. Het Franse régime: oorsprong van onze democratische rechtsstaat? – Handelingen van het Genootschap voor geschiedenis, gesticht onder de benaming Société d'émulation te Brugge. Brugge 1998, pp. 135, 143–148.

10 In the words of Ernst Holthöfer: "Die Rationalisierung des Justizwesens durch Schaffung einer einheitlichen, in drei Instanzen gegliederten staatlichen Gerichtsbarkeit mit einer Rechtsbeschwerdeinstanz an der Spitze gehört zu den epochalen Leistungen der französischen Gesetzgebung im Gefolge der grossen Revolution" (E. Holthöfer (Note 1), p. 9).

11 Lawyers from the Southern Netherlands were not only appointed judges in their native country but often in Holland, France proper and the occupied Rhine Land as well. See P. Van Hille. Het Hof van beroep te Brussel en de Rechtbanken van Eerste Aanleg in Oost- en West-Vlaanderen onder het Nederlandse Bewind en sinds de Omwenteling van 1830 tot 4 oktober 1832. Tielt 1981, p. 7.

12 Décisions notables du Tribunal d'Appel/de la Cour d'Appel de Bruxelles (1807–1813); Recueil des Arrêts de la Cour d'Appel de Liège (1808–1839). As their titles indicate, these were simple listings of jurisprudence.

13 An odd exception being the metric system that was abolished in 1815 but re-introduced in 1821. In terms of new legislation the show-piece was the Law of 25 December 1825 on superficies and leasehold (*Loi sur la superficie et l'emphythèose*).

overnight, calling upon the new Provisional Government "to protect the fatherland against the vile agitators"*[14], by which not the insurgents but the Dutch were meant.

Van Hille recalls how only months before it turned pro-Belgian, the Court of Appeal in Liège had sent a slavish letter of adherence to the Dutch king and one absentee judge had made every effort to express his *post factum* agreement with the letter he had been unable to sign due to illness.*[15]

As might be expected, the appointment of 400 new judges by the Belgian Provisional Government did not harm that government's popularity amongst lawyers. Moreover, these nominations were entirely politicised and carefully reflected the bourgeois balance of power between catholics and liberals, thereby keeping everybody happy.*[16]

Independence and the question of a national legal system

With Belgian independence, the new state had three legislative options: to retain the existing Franco-Dutch legislation, to revert to the pre-revolutionary laws, and to draft entirely new legislation. Rhetoric notwithstanding*[17], the French system remained in place and no new legislation was introduced, with the exception of a much lauded, very liberal constitution in 1831.*[18]

Many explanations have been offered for this choice, but the most important one seems to have been pragmatism: since 1795, a whole generation of lawyers had been studying and practising the French laws that moreover seemed better suited to the needs of business and commerce.

From a doctrinal point of view as well, the decision was understandable: one simply had to 'get on with business' and easy access to the French original sources and commentaries was readily available.*[19] Moreover, the absence of copyright laws until 1852 allowed for inexpensive pirated editions.*[20]

As a result, in the first years of independence there were no Belgian publications to speak of and one relied on French commentaries and magazines instead.*[21] As for the overviews of jurisprudence, a few local judgements might sometimes be added as a supplement to the French-language main pages.

But even after the early years of independence, no national legal tradition was created, although, politically, Belgium lived up to its treaty promises of eternal neutrality*[22] and incessantly reiterated its sovereignty vis-à-vis a dominating southern neighbour.*[23]

Here again, the explanation might be pragmatic: society and business simply had no need for new codification, and the existing laws continued to serve their purpose well. The proof of this attitude lies in the fact that when an update was due, new laws were indeed passed (e.g., the Law on Mortgages and Securities 1857 and the Criminal Code 1867). However, François Laurent's 1885 project of revision of the civil code, encompassing 2,441 articles, was never enacted.

[14] Speech of First Advocate-General Petitjean at the opening session of the Brussels Court of Appeal on 25 October 1830 (quoted by Luc Burgelman. Geschiedenis van de Belgische Magistratuur (1830–2002). – D. Heirbaut, X. Rousseaux, K. Velle. Politieke en sociale geschiedenis van justitie in België van 1830 tot heden, Brugge 2004, pp. 187–216). In Ghent however, the attorney Hippolyte Metdepenningen (1799–1881) rallied a stong Orangist movement around him for several decades (!) to come.

[15] P. Van Hille (Note 11), p. 21.

[16] L. Burgelman (Note 14), p. 190.

[17] D. Heirbaut. Hadden/hebben de Belgische minsiters van justitie een civielrechtelijk beleid? Thorbecke Lezing Leiden. Mechelen 2005

[18] E. Holthöfer (Note 1), p. 147; J. Gilissen. Die belgische Verfassung von 1831. Ihr Ursprung und ihr Einfluss. – W. Conze (Hrsg.). Beiträge zur deutschen und belgischen Verfassungsgeschichte im 19. Jahrhundert. – Stuttgart 1967, pp. 38–69.

[19] Language was not a barrier either: until about a generation ago, an educated Fleming would be *ipso facto* fluent in French. Also, the upper-class and aristocracy (the traditional recruitment grounds for the legal profession) had been predominantly francophone since the late Middle Ages.

[20] D. Heirbaut (Note 3), p. 345.

[21] Popular French imports were Recueil Dalloz-Sirey, since 1845, and the Gazette des Tribunaux, 1826–1912. The Dutch counterpart, Rechtsgeleerd Magazijn Themis, since 1839 was never that popular.

[22] Article 5, Conference Protocol No. XVI of 20 January 1831: "La Belgique formera un état perpétuellement neutre." This paragraph was later enshrined in the London Treaties of 1831 and 1839 and complemented by a guarantee-clause by the five big powers. When the German Army marched into Belgium on 4 August 1914, Britain famously declared war over this breach of Belgium's neutrality.

[23] F. Stevens. Histoire du droit et nationalisme en Belgique au XIXe siècle. – J. Poumarède. Histoire de l'histoire du droit. Toulouse 2006, pp. 211–213.

According to Heirbaut and Storme, this absence of a more all-encompassing national project was essentially motivated by 'pragmatic laziness, possibly the typical feature of Belgian law'.*[24]

The nineteenth century nonetheless saw the creation of a large number of magazines, some of which have survived to this day.*[25] Virtually all of these were specialised on the basis of location or theme. These reviews concentrated heavily on jurisprudence and revealed a 'fetishism of the written law'*[26] that was typical of the predominant exegetical school of interpretation. The best-known was *La Belgique judicaire* (carrying the programmatic subtitle 'Gazette des tribunaux belges et étrangers'), published between 1842 and 1940.*[27]

In 1882, the prolific writer Edmond Picard and three befriended who were attorneys founded the *Journal des Tribunaux*, abbreviated 'JT'. At the outset, it was meant as a tool for dialogue with the public at large and therefore was published on four pages in newspaper format and sold at newspaper stalls throughout the city.

Whilst the JT and other francophone periodicals were often sympathetic to progressive causes such as legal aid; one man, one vote; and workers' emancipation*[28], there was less understanding of the Flemish demands for equality and the use of Dutch in judicial matters.*[29] The result of this lack of support would be that the JT and others eventually ended up being the magazines of francophone Belgium rather than of the entire country.

The JT and other reviews did not limit themselves to the publication of judgements and the announcements of forthcoming events but also provided scholarly articles, even if in smaller numbers. The reason for this is easy to see: 1830–1914 was a time of remarkable legislative stability and, at the same time, the medium of choice in the nineteenth century was the monograph or the encyclopaedia*[30] rather than the academic paper, not least because of the contemporary technology still necessitating intense interaction between publisher, printer, and author, as well as personal visits to libraries.

For the sake of completeness, it should also be mentioned that when Belgium took over the Congo Free State from King Leopold II in 1908, it installed a colonial administration and judiciary that, of course, needed its own law reviews: *La Revue Juridique du Congo belge* (1924–1960), *Le Bulletin des Juridictions Indigènes et du Droit Coutumier* (1933–1962), and *Le Journal des Tribunaux d'Outre-Mer* (1949–1961).

It need not be emphasised that these reviews were hardly a platform for militant reform or de-colonisation. They did, however, concern themselves with the subtleties of nationality and racial segregation in the Congo.*[31]

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[24] D. Heirbaut, M. E. Storme (Note 2), pp. 979–1041.

[25] *Inter alii*, Pasicrisie belge, 1832–; Bulletin des arrêts de la Cour de Cassation,1832–2000; Journal de Procédure, Bruxelles, 1848–1919; Journal des tribunaux, Bruxelles, 1881–1939, 1944–; Jurisprudence Commerciale de Belgique / Belgische Rechtspraak in Handelszaken, 1903–; Jurisprudence Commerciale des Flandres, 1886–1939; Pandectes périodiques, 1888–1939; Rechtskundig Tijdschrift voor België, 1898 –1946, 1949–1963; Rechtspraak van de Haven van Antwerpen/Jurisprudence du Port d'Anvers, 1856–; Recueil Général de l'Enregistrement et du Notariat, 1848–; Revue belge de la Police administrative et judiciaire, 1880–1939; Revue de Droit international et de Législation comparée, 1869–1939; Revue du Travail, Bruxelles, 1896–1980.

[26] F. Gény. Méthode d'Interprétation et sources en droit privé positif. Paris 1899; J. Bonnecase. L'école de l'exégèse en droit civil. Paris 1924. The standard work on the (Belgian) exegetical school is B. Bouckaert. De exegetische school. Een kritische studie van de rechtsbronnen- en interpretatieleer bij de 19e eeuwse commentatoren van de Code civil. Antwerpen 1981.

[27] An exhaustive survey can be found in Holthöfer (Note 1).

[28] B. Coppein. Edmond Picard, actor and witness of the socialization of law in Belgium at the end of the 19th century. – S. Hornyák, B. Juhász, K. Delacasse, Z. Peres (eds.). Turning Points and Breaklines. München 2009, pp. 151–166; B. Coppein. J'ai vu ce que vous n'avez pas vu. Droit et politique dans la pensée juridique d'Edmond Picard (1836–1924). Partie I. – Journal des tribunaux 2007, 126 (6250), pp. 21–23; B. Coppein. Le droit qu'une partie de la nation n'a pas. Edmond Picard en de vermaatschappelijking van het recht in België tijdens het fin de siècle. Belgisch tijdschrift voor filologie en geschiedenis 2008, 86 (2), pp. 375–409; L. Van Bunnen. Le Journal des Tribunaux 125 ans. – Conférence du Jeune Barreau de Bruxelles, nr. 4, 2007, p. 21, available at www.cjbb.be; B. Coppein. Un appareil concasseur et triturateur. De kritiek van Edmond Picard op de wetgevende macht in België tijdens de tweede helft van de 19de eeuw. – Pro memorie: bijdragen tot de rechtsgeschiedenis der Nederlanden 2007, 9 (1), pp. 91–110.

[29] Oddly enough, the JT did support the Boers' struggle against the British. L. Van Bunnen (Note 28), p. 22.

[30] The popular Pandectes belges aka the Répertoire général de législation, doctrine et jurisprudence belges were published in 151 volumes between 1878 and 1933 and comprised over 7,000 subjects. Its initiator and main author was the omnipresent Edmond Picard. The series was later continued by *Les Novelles*.

[31] T. De Meester. Nationaliteit in Belgisch Congo: Tussen constructie en verbeelding. – Afrika Focus, VoL; 14, No. 1, 1998, pp. 7–16; A. Sohier. La nationalité des Congolais. – Journal des tribunaux d' outre-mer 1950, p. 49.

The Flemish emancipation and the post-war period

The Flemish emancipation of the past century is nowhere more visible than in the legal profession. The *Bond der Vlaamsche Rechtsgeleerden* was founded in 1885, at a moment when administration, universities, and the judiciary all made virtually exclusive use of French, even in the Dutch-speaking areas.*32

As soon as the right to plead in Dutch was secured, the focus of the *Bond* shifted toward the promotion of science in Dutch through the organisation of conferences and the publishing of the *Rechtskundig Tijdschrift voor België* (1897–1946), whose main *raison d'être* was the *Bond*'s existence.

In 1931, the *Rechtskundig Weekblad* (or simply 'R.W.') achieved instant success due to the changing political climate and, according to Heirbaut, "a clever collaboration with the Flemish bar organisations and a good understanding of practitioners" needs.*33 The wartime tribulations of the Flemish movement and its periodicals have been addressed exhaustively elsewhere and are too extensive a subject to be treated here.

Over time, the Flemish periodicals multiplied to such a point that today they far outnumber their francophone counterparts, if only because of the larger number of Flemish attorneys (roughly 9,000 in contrast to 6,000), law professors, and judges. As acute language tensions eased over the years, these reviews have lost much of their former political drive and have started to focus instead on the same technical-legal matters that law journals worldwide are concerned with.*34

According to Heirbaut*35, the disappearance of a common law review for the entire country signifies that minds are drifting apart because lawyers are being increasingly locked up in publications in their own language. Also, he says, the Flemish part of the legal profession is starting to seek inspiration from the Netherlands and the francophone part from France.

We believe that the first assertion is too bold and the second unsubstantiated. It is, of course, correct that with universities, most ministries, and the bar organisations now operating monolingually, a great many occasions for meeting and exchanging views have disappeared. However, as long as Belgium has but one Ministry of Justice and a unitary judicial apparatus*36, there is little fear of discrepancies and insularity simply because one still has to take 'the other side' into account.

Though perhaps less than before, universities and bar organisations still organise joint conferences. The different senates of the *Cour de Cassation* / *Hof van Cassatie and Conseil d'État* / *Raad van State* still hold plenary sessions*37; the Constitutional Court has but one, mixed senate; all major law firms cover the entire country and attract talent from either language group; and, last but not least, a great many of the more prestigious magazines are bilingual and publish doctrine and cases in both languages.*38

The validity of the second allegation—the alleged inspiration from and collaboration with the Netherlands—should not be overestimated either. This pattern may indeed be found in meta-disciplines such as the philosophy of law or legal history, but only very few Dutch elements have been implemented in Belgian positive law (e.g., mediation and certification of shares). Given the divergence between the German and French civil-law traditions, this can hardly come as a surprise.

The main foreign influence is European Union law, which now accounts for 80% of all new legislation. A striking feature of Belgian politics and the legal world alike is the near-total europhilia of all legal actors, not in the least the *Cour de Cassation* / *Hof van Cassatie*, which conferred a radically supreme position to EEC law in 1971.*39 In the words of M. E. Storme and D. Heirbaut:

> "There are no constitutional barriers which prevent the country from bartering away its national sovereignty and democracy, and international law has been accepted not only as being an integral part of domestic law, but also—on the basis of false arguments—as being capable of overriding domestic

[32] The first language law in judicial matters dates from 1873. Full equality was achieved in 1898 and the language law of 15 June 1935 (still in force) stated that the local language determined the langage of the court procedures, with special provisions for bilingual areas. The Dutchification of Ghent University dates back to 1930, the constitution was not officially translated until 1967.

[33] D. Heirbaut (Note 3), p. 359.

[34] G. Van Overwalle. Het Nederlandstalig juridisch tijdschrift in België. – Vlaams jurist vandaag 1988/4, 20.

[35] D. Heirbaut (Note 3), p. 366; D. Heirbaut, M. E. Storme (Note 2), p. 20 (Note 120).

[36] Although the Ministry of Justice remains federal, a great many legislations are now entirely decided at the level of the regions and communities (e.g., the zoning law, environmental policy, education, etc.), which of course creates divergence over time: in terms of inheritance tax, it can make a serious difference where one dies.

[37] It is, however, correct that the different senats of the *Cour de Cassation*, *Conseil d'Etat* start to show minor divergencies, e.g., the legal standing of interest groups.

[38] E.g., Procesrecht & Bewijs/Droit judiciaire & Preuve; Tijdschrift voor Belgisch Burgerlijk Recht/Revue du droit civil belge; Tijdschrift voor Sociaal Recht/Revue de droit social; Droit des affaires/Ondernemingsrecht; Tijdschrift voor Handelsrecht/Revue de droit commercial.

[39] Cass., 27 May 1971, Fromagerie Franco-Suisse Le Ski, Arr. Cass. 1971, 959, concl. Procureur-Generaal W. Ganshof Van Der Meersch; Pas. 1971 I, 886.

> law. In addition, the Cour de Cassation/Hof van cassatie uses the supremacy of international law as a pretext for violating its statutory obligation to consult the Constitutional Court where statutes are alleged to be contrary to the constitution. International law has therefore served as an alibi for upholding political decisions and depriving citizens of constitutional guarantees which protect them against such decisions."*[40]

Indeed, the silence of Belgian jurisconsults vis-à-vis the unification process itself, the manifest shortcomings of the European Union decision-making process, and the numerous 'glitches' in legality (e.g., the implementation of policies prior to the ratification of the Lisbon Treaty, the questionable legal foundation of certain policies, and the European Court of Justice's so-called judicial activism (Rasmussen) is deafening. A lonely exception was the implementation of the European Arrest Warrant*[41], which drew much criticism, in more than 60 articles, both in Flemish and in francophone publications.*[42]

Conclusions

Our brief overview permits a number of observations:

By addressing recent legislation and noteworthy judgements, Belgian law reviews have been mainly concerned with the needs of the practitioner. This is not to say that there has been no doctrinal reflection, or attempts at theorising—giants such as De Page, Dekkers, and Picard probably could not have been superficial if they wanted to—but this was predominantly done in monographs rather than in reviews, which were more limited in scope. The shift in academic emphasis toward papers and articles is as recent as the ranking-mania of journals.

Secondly, the subject matter of law is intrinsically bound up with the practice of jurisprudence and legislation. It is therefore unavoidable that law reviews concern themselves with what is going on in these fields. Ideally of course, there are systematisation, exegesis, and reflection as well, but the prime task of a positive law review remains to inform the audience of what is going on. In conformity with the French adage that a great lawyer is a great *arrêtiste* or annotator of judgements, the Belgian law reviews have done splendidly over time: virtually every field of law is covered by at least one specialist review (usually one in either language).

Thirdly, it would be wrong to assume that there has never been a critical element in the law reviews. That would be totally unsubstantiated, in fact, as a great many themes in society (women's right to vote, anti-discrimination, the right to strike, Europeanisation or judicial reform, etc.) have found their first echoes in legal journals, and vice versa.

It is, however, correct to state that the legal profession is generally conformist to the prevailing ideology, and Belgium is no exception here.*[43] To a certain extent, conformism has been a hallmark of Belgian doctrine, even if only to a certain extent.

The element of conformism has been clear in its uncritical accommodation of the new regimes (French, Dutch, Belgian, Nazi, or European), but in this the legal profession and the legal journals have merely been a reflection of the population at large. A specific ground for conformity might have been the so-called *Gesetz des Wiedersehens* in a small, closed community*[44]. This condition might have been enhanced by the paucity and biographical intertwinement of the number of people involved in the process of judicial decision-making (it was not uncommon for a bourgeois or aristocratic family to turn out prominent judges, legislators, professors, and attorneys generation after generation). Yet another element is that many attorneys (and even judges in the early years of independence) were members of Parliament and therefore had other fora for discussion at their disposal.

Polarisation instead of conformism, on the other hand, has been obvious in the long struggle for Flemish emancipation, a struggle that has now become mainstream and innocent. One might say that nowadays the

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[40] D. Heirbaut, M. E. Storme (Note 2), pp. 979–1041 (page 3 of the PDF version) translated by M. E. Storme, D. Heirbaut. The Belgian legal tradition: from a long quest for legal independence to a longing for dependence? Belgian report for the XVII International Congress of comparative law, Topic 1A "National legal traditions and historical backgrounds". – European Review of Private Law 2006, pp. 645–683;

[41] Framework Decision of the European Council of 13 June 2002 on the European Arrest Warrant and the Surrender Process between Member States, 2002/584/JVV.

[42] Amongst many others G. Vermeulen. U vraagt, wij draaien.; Europees aanhoudingsbevel leidt tot blinde overlevering verdachten en veroordeelden. – Juristenkrant 2002, 57, pp. 2–3; P. Bekaert. Europees aanhoudingsbevel is knoeiwerk op alle niveau's. – Juristenkrant 2005, 117, p. 3; P. De Hert, J. Millen. Ontvankelijkheidstoetsing en onschuldverweer bij het Europees aanhoudingsbevel. – T. Strafrecht 2006, 6, pp. 347–348; I. Wattier. Une euromesure de contrainte: le mandat d'arrêt européen. – Journ. Jur. 2002, 8, p. 4; E. Barbé. Le mandat d'arrêt européen: en tirera-t'on toutes les conséquences? – X., L'espace pénal européen; enjeux et perspectives. Bruxelles 2003, pp. 113–117.

[43] L. Burgelman (Note 14), p. 196.

[44] N. Luhmann. Vertrauen. Ein Mechanismus der Reduktion sozialer Komplexität. Stuttgart 1973, p. 39.

brunt of polarisation and critique is borne by the judiciary through the active use of fundamental rights *juncto* constitutional review.

Indeed, Belgium is no exception to the universal phenomenon of shifting balance between basic rights and procedural democracy, caused by the reification process if not *autopoiesis* of fundamental and human rights. In this constellation, the legality of democratic legislation is being subordinated to a 'higher' type of legitimacy, leaving only very limited possibilities for changing the structure and outcome of policies.[*45] This year however saw the publication of a harsh critique of the European Court of Human Rights' activism in asylum matters by none less than the co-president of the Belgian Constitutional Court.[*46] It does remain rather uncommon for a Belgian jurisconsult to lament a supra-national institution's trangression of competence...

I would like to conclude by remarking that the similarities between the Flemish/Belgian and Estonian starting points (small language and national awakening, dominating presence of a foreign legal tradition, early industrialisation, legal class that is limited in size, etc.) offer ample scope for future comparative research.

[45] C. Gearty. Can Human Rights Survive? Cambridge 2005; R. Bellamy. Political Constitutionalism. A republican defence of the constitutionality of democracy. Cambridge 2007; R. Hirschl. Towards juristocracy. The origins and consequences of the new constitutionalism. Cambridge (Mass.) 2004; P. Praet. Politisierung des Rechts oder Verrechtlichung der Politik – Diskurs der Grundrechte. – Rechtstheorie 38 (2007), Heft 2/3, pp. 367–378.

[46] M. Bossuyt. Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant. Brusselsn 2010, 190 p.

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Über die Geschichte und Bedeutung von *Oikeus* als einer kritischen Zeitschrift**

1. Einleitung

Nach dem modernen Verständnis der Gesellschaft und des Rechts sind Recht und Gesetze die wichtigsten Mittel der Steuerung der gesellschaftlichen Entwicklung, wobei man für das Herausfinden der richtigen gesellschaftlichen Zielsetzungen und Steuerungsmethoden die offenen politischen Diskussionen und die entsprechenden Fora braucht. Die wichtigsten Fora sind Parlament und Medien, also vor allem die Presse, d. h. Tageszeitungen und Zeitschriften. So war es allerdings noch in der zweiten Hälfte des 20. Jahrhunderts. Heutzutage ist die Bedeutung des Fernsehens und des Internets erheblich gewachsen. Immerhin war es noch der allgemeine Hintergrund bei der Gründung der finnischen Rechtszeitschrift *Oikeus* (dt. „Das Recht") im Jahr 1972.

Oikeus war explizit als ein neues Forum für kritische rechtspolitische Diskussionen gedacht, die man für notwendig in der gesellschaftlichen Situation nach dem Ende der 1960er Jahre hielt, wofür aber die vorhandenen konservativen juristischen Zeitschriften nicht so geeignet waren. Die Situation hatte sich nach den Ereignissen von 1968 in vielen europäischen Ländern (und auch in den Vereinigten Staaten) sehr verändert. Es gab radikale politische Bewegungen auch in Finnland und in finnischen Universitäten, die alle Institutionen des bürgerlichen Staats kritisierten, die soziale Reformen oder gar eine sozialistische Gesellschaft bzw. „echte Demokratie" anstrebten. Die Modeideologien (also Marxismus und die Linken) sahen Recht und Rechtswissenschaft als Institutionen, die den altmodischen, bürgerlichen Staat repräsentierten und unterstützten und gerade deswegen als Institutionen ganz neu zu arrangieren waren. Allerdings waren die Motive für die Befürwortung der Neuerungen nicht nur parteipolitisch.

Ein weiteres wichtiges Element oder ein weiterer wichtiger Faktor neben dem Diskussionsbedarf waren die Veränderungen in der Wissenschafts- und Universitätspolitik. Seit dem 19. Jahrhundert war das Rechtsstudium in Finnland ein Monopol einer Fakultät, der in Helsinki gewesen. Während der 1960er und 1970er Jahre wurden aber als ein Teil der gesellschaftlichen Territorialpolitik viele neue Hochschulen in verschiedenen Städten des Landes gegründet, und so wurde nun auch die Juristenausbildung verbreitet. Man konnte seit den 1960er

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* Päivi Paasto ist kurz nach der Tartuer Zeitschriften-Tagung, am 22. Dezember 2009 an einem heftigen Krankheitsanfall gestorben und konnte ihren Beitrag für die Aufsatzfassung nicht überarbeiten. Marju Luts-Sootak aus Tartu und Lars Björne aus Turku haben das Vortragsmanuskript für die Publikation vorbereitet. Bestimmt ist der Text trotz aller Autentitätsbemühungen etwas anders geworden, als er in der Bearbeitung von der Verfasserin selbst gewesen wäre. Wir wollen den Beitrag trotzdem hiermit dem Publikum übergeben, als ein Vermächtnis und herzliches Andenken an die geschätzte Kollegin.

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Jahren Jurist auch an der Universität zu Turku werden. Darüber hinaus wurde es möglich, das öffentliche Recht als Hauptfach in den Verwaltungsstudien in Tampere zu studieren.

Der dritte Faktor nach dem Diskussionsbedarf und Verbreitung der Juristenausbildung war die innere Entwicklung der Rechtswissenschaft. Einige Rechtswissenschaftler haben die zeitgenössische Rechtswissenschaft für methodisch veraltet und zu eng gesetzesdogmatisch gehalten, dies gerade im Vergleich zu anderen Gesellschaftswissenschaften (z. B. Soziologie und Staatswissenschaft), die die empirischen Methoden aktiv benutzten. Dazu kam die unter den meisten Juristen verbreitete Überzeugung, dass die Rechtswissenschaft wertungsfrei sei und sein sollte. Die neuen Radikalen wollten es anders sehen.

Den konkreten Kontext bei der Gründung von *Oikeus* bildeten die Diskussionen über das Justizwesen im Allgemeinen und über die Unabhängigkeit der Richter insbesondere. Auch der Staatspräsident Kekkonen nahm an dieser Diskussion durch ein Interview von 1970 teil. Ein Vorschlag des Staatspräsidenten war, dass die Richter Beamte auf Widerruf werden sollten, also befristet eingesetzt und der politischen Verantwortung unterworfen. Es gab einige Juristen, für die gerade diese Diskussionen und Streitfragen klar zeigten, dass es zu wenig Raum oder Fora für wirklich lebendige und aktuelle rechtspolitische Diskussionen gab. In dieser Situation gründete der Demokratische Juristenverein die neue Zeitschrift *Oikeus*, die er nach wie vor zusammen mit dem Rechts- und Gesellschaftswissenschaftlichen Verein herausgibt. Die einzige Veränderung besteht darin, dass der Demokratische Juristenverein seit 2002 Rechtspolitischer Verein Demla heißt. Die Vereinsmitglieder bekommen *Oikeus* gegen den Mitgliedsbeitrag. Man kann die Zeitschrift auch in einigen Buchhandlungen kaufen, aber es gibt immer noch keinen wirklichen Markt für die speziellen fachwissenschaftlichen Zeitschriften in Finnland. So wird die Herausgabe von *Oikeus* durch den Staat über den Pressezuschuss von der Akademie Finnlands unterstützt.

2. Vier Stationen in der Geschichte der *Oikeus*

Die juristischen Zeitschriften geben zwar nur einen Aspekt der Rechtspolitik wieder. Dennoch bilden die Zeitschriftenaufsätze und -beiträge eine interessante Stoffsammlung, worüber es nicht viele genauere Forschungen in Finnland gibt. Ich selbst habe einen längeren Artikel publiziert[*1] über die Frauen als Rechtswissenschaftler und Autoren der vier bekanntesten finnischen juristischen Zeitschriften: *Juridiska föreningens tidskrift* (dt. „Zeitschrift des juristischen Vereins"; abgekürzt JFT, erscheint ab 1865), *Lakimies* (dt. „Der Jurist", erscheint ab 1903), *Defensor Legis* (erscheint ab 1920) und *Oikeus* (dt. „Das Recht", erscheint ab 1972). Hier geht es weiter nur um die jüngste Zeitschrift und diesmal etwas allgemeiner als nur um die Frauen. Es sei hier nur vermerkt, dass *Oikeus* zwar ein Organ war, in dem man die neuen Themen zunächst aufnahm, die dann aber nach einer Weile auch in den älteren Zeitschriften behandelt wurden. Allerdings war *Oikeus* gerade in der Geschlechtsperspektive den früheren Zeitschriften ganz ähnlich – auch hier dominierten in der Verfasserschaft lange die Männer.

Um hier ein Bild über die Geschichte von *Oikeus* zu skizzieren, nehme ich vier Jahrgänge unter näheren Betracht, die meiner Meinung nach kennzeichnend sind, um die wichtigsten wiederkehrenden und neuen Themen zu präsentieren, die *Oikeus* durch die Jahrzehnte behandelt hat. Beginnend mit dem ersten Heft vom 1972 über die Jahre 1982, 1992 bis 2007 hinaus ist es um die Rechtspolitik gegangen. Die Fragen bestehen aber darin, wie man die rechtspolitischen Diskussionen in diesen unterschiedlichen Zeiten verstanden hat, ob man da Unterschiede abzeichnen kann, welche Themen man für aktuell gehalten hat und wie man die Bedeutung von rechtspolitischen Beiträgen geschätzt hat.

2.1. *Oikeus* im Gründungsjahr 1972

In dem ersten Heft gibt es einen Einleitungsaufsatz von dem ersten Chefredakteur Aulis Aarnio – der damals 35-jährige Rechtstheoretiker war gerade im Jahre 1970 Professor für Zivilrecht an der Juristenfakultät in Helsinki geworden. Aarnio schrieb über die Motive der Gründung der neuen Zeitschrift. Diese seien vor allem die aktuellen Diskussionen über das Justizwesen und das Bedürfnis nach einem neuen Forum für die kritischen Debatten. Auch wollte man das allgemeine Publikum erreichen, um die Kenntnis über die rechtlichen und juristischen Fragen und Probleme zu verbreiten. Aarnio meinte, dass die rechtspolitischen Fragen kein Monopol der Juristen sein durften. Also sollten die Beiträge von *Oikeus* die juristischen Fragestellungen und die grundlegenden rechtlichen Zielsetzungen auch für die juristischen Laien, sogar den „gemeinen Mann" verständlich machen. Man wollte die Rechtskenntnis in der Gesellschaft verbreiten. Das Recht sollte „viel unparteiischer als früher für alle Klassen verwirklicht werden", schrieb Aarnio. Diese Versprechung ist freilich nicht eingelöst worden. *Oikeus* war und ist in der Wirklichkeit eine Zeitschrift von einer akademisch gebildeten

[1] P. Paasto. Frauen als Juristen in finnischen rechtswissenschaftlichen Zeitschriften. – J. Eckert, P. Letto-Vanamo, K. Å. Modéer (Hrsg.). Juristen im Ostseeraum. Frankfurt am Main *et al.* 2007, S. 269–285.

engen Gruppe – das Publikum besteht hauptsächlich aus den Mitgliedern der zwei herausgebenden Vereine, die entweder an den Universitäten wirken oder als Anwälte und Beamten sich für gesellschaftliche Fragen interessieren und einen mehr oder weniger entwickelten demokratischen Sinn haben wollen.

Trotzdem ist das Publikum von *Oikeus* nach wie vor heterogener als z. B. das Publikum von *Lakimies*. Von Anfang an gab es sowohl in der Redaktion als auch in der Mitgliedschaft der beiden Vereine auch Nichtjuristen, also Soziologen, Staatswissenschaftler und Historiker. Neben Aarnio und seinem Kreis der jüngeren akademischen Forscher haben in der Redaktion z. B. Lars D. Eriksson, Raimo Lahti, Risto Jaakkola, Antero Jyränki, Ilkka Saraviita und Pekka Koskinen mitgewirkt.

Der erste Jahrgang von *Oikeus* im Jahre 1972 besteht aus nur zwei Heften, die zusammen etwa 110 Seiten ausmachen. Die Beiträge dieser Anfangszeit waren meistens kurz (zwischen 3 und 10 Seiten) und eher Übersichten oder Diskussionsbeiträge als richtige, von der Forschung getragene wissenschaftliche Aufsätze. Auch solche fanden den Weg in *Oikeus*, allerdings erst in späteren Jahren.

Die Themen des ersten Jahrgangs variierten von Juristenausbildung bis zu überstaatlichen Gesetzesinitiativen in der Europäischen Gemeinschaft: die Freiheit der Wissenschaft und Wissenschaftspolitik, die Diskussionen zu der Gesetzgebung der Familienplanung (also die Abtreibungsfrage), die Kriminalpolitik als ein Teil der Sozialkontrolle, die strafrechtlichen Gesetzesentwürfe, die arbeitsrechtlichen Fragen (unter klar klassenpolitischer Perpektive), die sozialistische Rechtsidee. Von Anfang an und fast in jedem Heft hat *Oikeus* Übersichten über die neuen Gesetze und Gesetzesinitiativen in anderen Ländern geliefert. Die Redaktion wollte gerade solche Information an den Leser weitergeben und zeigen, welche Fragen rechtspolitisch aktuell waren und zur Diskussion anregen sollten. Die waren gleichfalls als kritische Hinweise für den Gesetzgeber gedacht. Hier gehörte vor allem die Behandlung des Rechts der Europäischen Gemeinschaft, aber auch der Aufsatz über die sozialistische Rechtsidee. Die kürzeren oder längeren, teilweise vergleichenden Übersichten über das Recht oder die Gesetzgebung der anderen Länder, meistens der sozialistischen (Ost-Deutschland, Polen, Ungarn, die Sowjetunion, auch sowjetisches Estland und Italien), sollten das nützliche Hintergrundwissen für die rechtspolitischen Zielsetzungen Finnlands geben.

Ein Kennzeichen von *Oikeus* war und ist, dass es eine spezielle thematische Nummer oder sogar mehrere im Jahr gibt. Ebenso von Anfang an werden in einem Heft die Vorträge oder mindestens eine Übersicht über die Vorträge und Diskussionen des Sommerseminars des Demokratischen Juristenvereins (das immer im August in Lahti stattfindet) veröffentlicht. Das Thema des Sommerseminars im Jahre 1972 war „Die Rechtspolitik und das gemeine Volk".

In dem ersten Heft gab es auch zwei Anzeigen, die ebenfalls charakteristisch sind. Die eine war nämlich von der Sparbank der Arbeiter in Finnland mit dem Titel „Dient Dein Geld den Interessen von Anderen?" und die zweite Anzeige von „Forum Oikeustiede" (dt. „Das Forum der Rechtswissenschaft"), einer rechtswissenschaftlichen Publikationsreihe.

Im Laufe der 1970er Jahre blieb *Oikeus* auf der eingeschlagenen Bahn. Es kommen Themen vor wie z. B. radikale und marxistische Kriminologie, rechtswissenschaftliche Forschungsumwelt und Juristenausbildung oder die Institution des Justizkanzlers. Auch viele strafrechtliche (speziell im Zusammenhang der Strafrechtsreform), beamtenrechtliche, arbeitsrechtliche (speziell über Arbeiterschutz) und verfassungsrechtliche Beiträge wurden veröffentlicht. Ende der 1970er Jahre beginnt man auch über die Menschenrechte zu schreiben. In den Sommerseminarien ging es um die Reform der Verfassung (1974) oder um die radikale Erneuerung des Handelsgesetzes. Obwohl *Oikeus* Beiträge von allen Rechtsgebieten veröffentlichte, liegt der Schwerpunkt in den 1970er Jahren eindeutig im öffentlichen Recht und im Strafrecht.

Die immer wieder vorkommende Gegenüberstellung, ebenso wie die sprachlichen und begrifflichen Auseinandersetzungen, die für die Beiträge der 1970er Jahre typisch waren, können auf den Gegensatz „demokratisch *versus* bürgerlich" zurückgeführt werden. Dieser Gegensatz war einerseits kulturell geprägt, aber in den 1970er Jahren bestimmt auch parteipolitisch. Die Trennlinie ging zwischen die Rechten und die Linken. So waren die Anhänger von *Oikeus* vor allem die Sozialdemokraten, Kommunisten und die Mitte (Parteilosen und Liberalen inbegriffen), ebenso wie die Mitglieder des Demokratischen Juristenvereins.

2.2. *Oikeus* im Jahre 1982

Im Jahre 1982 sind vier Hefte erschienen, die nun etwas umfangreicher waren und alle zusammen etwa 270 Seiten ausgemacht haben. Im Vergleich zu den Anfangszeiten ist die Zeitschrift mehr strukturiert. Auf der ersten Stelle stand die Rubrik des Chefredakteurs, danach kamen 3 oder 4 Aufsätze, dann Diskussionsbeiträge, und danach die Rubrik der Diskussionen und Meinungen. Seit dem Jahrgang 1978 gibt es am Ende noch einen speziellen Teil über das „Rechtsleben", wo ein anonymer Kommentator kurz und meistens kritisch über allerlei Ereignisse, problematische Fälle oder Streitigkeiten in der Justiz und der Verwaltung oder im akademischen Milieu meldete; man informierte hier auch über nationale und internationale Tagungen und Seminare, die etwas mit dem Recht zu tun hatten. In dieser Zeit begann man auch, Literaturkritik und Rezensionen zu veröffentlichen.

Im Jahre 1982 war der Chefredakteur Niklas Bruun, damals 32 Jahre alt und ein künftiger Professor für Handels-, später Arbeitsrecht an der Schwedischen Handelshochschule in Helsinki. Zur Redaktion gehörten auch z. B. Urpo Kangas, Matti Lahti, Olli Mäenpää, Allan Rosas. In dem Herausgeberkollegium waren Thomas Wilhelmsson, Eero Backman, Jukka Kekkonen, Teuvo Pohjolainen, Kaarlo Tuori. Sowohl die Redaktion als das Herausgeberkollegium waren damit sehr akademisch geprägt.

Das erste Heft im Jahre 1982 war eine thematische Nummer über Umweltschutzgesetzgebung. Die Umwelt war ein neues Thema und die Beiträge behandelten die Frage sehr kritisch als ein Problem, für das die Juristen keine guten Lösungen mit ihren veralteten Begriffen und Steuerungsmitteln finden können. Den Hauptgegensatz sah man zwischen den privaten Eigentumsrechten und den allgemeinen Schutzinteressen. Das zweite Heft von 1982 war eine thematische Nummer über die neuen Technologien und internationalen Beziehungen.

Die dritte Nummer des Jahres 1982 war eine Jubiläumsnummer, dem zehnten. Erscheinungsjahr von *Oikeus* gewidmet. In diesem Zusammenhang schrieb Chefredakteur Bruun über die Krise der Rechtspolitik. Die Redaktion hatte die ehemaligen Chefredakteure und einige andere rechtspolitisch aktive Personen um einen Beitrag gebeten, aber nur wenige waren bereit, sich über die aktuellen rechtspolitischen Fragestellungen zu äußern. Bruun meinte, dass dies kennzeichnend für diese Zeit war, in der man nach den 1970er Jahren das Vertrauen in die gesetzlich verwirklichten Neuerungen und die gesetzliche Steuerung der gesellschaftlichen Entwicklung verloren hatte. Bruun schrieb über Realismus, Pessimismus, Kritik und Verwirrung.

Die Redaktion selbst hat in diesem Zusammenhang einen kollektiven Beitrag unter dem Titel „Zehn Thesen über Rechtswissenschaft“ geliefert und dazu einige Kommentarbeiträge von anderen Rechtswissenschaftlern eingeholt. In den zehn Thesen der Redaktion wird behauptet, dass es eine Zweiteilung gibt zwischen den theoretisch orientierten Rechtswissenschaftlern, die die rechtswissenschaftliche Forschung zu erneuern oder modernisieren versuchen, und den rechtsdogmatisch orientierten Rechtswissenschaftlern, die die traditionellen Forschungsmethoden benutzen. Die Redaktion nennt auch drei Schulen, nämlich Analytiker, Hermeneutiker und Marxisten, meint aber, dass diese Teilung für Finnland nicht stimmt, weil hier die Unterschiede vielmehr zwischen Tampere, Turku und Helsinki zu verzeichnen sind und damit die wissenschaftliche Orientierung eher geographisch bestimmt sei. Die Redaktion äußert in seinen Thesen die Sorge um die ziemlich geringe Wirkungskraft und anspruchslose Position der rechtswissenschaftlichen Forschung in Beziehung zu der Gesetzgebung. Die Situation wurde ziemlich hoffnungslos eingeschätzt. Es gab keine gezielte Forscherausbildung und auch die Anzahl der Forschungsprojekte war gering.

Die eingeholten Kommentare sahen die Lage ziemlich ähnlich, doch nicht so pessimistisch. Man kann wohl sagen, dass diese Beiträge ein Verständnis der kritischen Rechtspolitik vermitteln, wonach die Rechtswissenschaftler mehr die Information und Methoden der Gesellschaftswissenschaften benutzen sollten, um dadurch gewonnene Ergebnisse und Information für den Gesetzgeber vorzubereiten. Durch den gezielten Methodenwandel sollte man neue Probleme besser identifizieren und lösen können. Die zeitgenössische Rechtswissenschaft sei aber zu eng juristisch oder zu konservativ und von der Außenwelt abgekapselt.

Die Diskussionsbeiträge der Jubiläumsnummer waren kürzere Aufsätze über die Nachrichtenübermittlung und Straßenverkehrsgesetz, die kollektiven Rechte und Umweltfragen, die Gesetzgebung über die Atomkraftabfälle, die Unabhängigkeit von Beamten, die rechtliche Position von Homosexuellen, die Gleichberechtigung und die Rechte der ethnischen Minderheit von Samen. Darüber hinaus ging es in *Oikeus* der 1980er Jahre etwa um den Richterstand, die Gerichte und den Rechtsschutz, um die Interventionsnormen, um den Arbeitsmarkt und Arbeitsgesetze, um das Polizeiwesen, um die Wirtschaftskriminalität, um Flüchtlinge und um die europäische Integration. In den Sommerseminarien ging es darüber hinaus noch um das Frauenrecht, um den Sozialstaat, Vormundschaftsstaat und Wohlfahrtstaat, um die Grenzen des Rechtsstaats, um die Menschenrechte und um die Umwelt.

Es kehrt die Frage nach der Gesetzgebung und Gesetzesinitiativen immer wieder. Im Vergleich zu den 1970er Jahren fehlen aber die umfassenderen Übersichten; die wissenschaftlichen Aufsätze und Beiträge beschäftigen sich mit aktuellen Vorbereitungen der Gesetzgebung, die teilweise auch spezielle Probleme und thematische Nummern hervorgebracht haben.

Im Vergleich zum vorigen Jahrzehnt war der herrschende Gegensatz nicht mehr zwischen den Rechten als konservativ-bürgerlich und den Linken als kritisch-demokratisch. Die Beiträge behandeln nun kritisch-demokratisch die Probleme der verschiedenen schwächer gestellten Gruppen und Minderheiten wie Homosexuelle, Samen, Frauen, Verbraucher, Patienten, Kriminelle, aber auch Lohnarbeiter. Es kommen auch spezielle neue allgemeine Probleme vor wie Atomkraft und Umweltschutz. Als rechtswissenschaftliche Erneuerungen kommen die alternativen wissenschaftlichen Richtungen zur Rede wie verschiedene Varianten des Strukturalismus, *Critical Legal Studies*, reflexives Recht und Dekonstruktion. Diese werden nun sowohl im Zivilrecht als auch kriminalpolitisch eingesetzt. Die Rechtssprache und die Begriffsbildung der Rechtswissenschaft finden mehr Aufmerksamkeit als die eigentlichen rechtlichen Probleme. Auf dieser Reflexionsebene sollte sich die kritische Richtung der Zeitschrift ausdrücken.

2.3. *Oikeus* im Jahre 1992

Auch im Jahre 1992 sind vier Hefte erschienen, der Umfang ist wieder etwas größer geworden – alle zusammen machen etwa 390 Seiten aus. Es gab zwei Chefredakteure: Juha Pöyhönen (geb. 1953, ab 1993 Professor an der Universität Lapplands zu Rovaniemi) und Kirsti Kurki-Suonio (geb. 1957, Dozentin für Familienrecht an der Universität zu Helsinki). Seit dem Jahr 1988 gab es immer zwei Chefredakteure, einen Mann und eine Frau. Dies ist zu den Gleichberechtigungsdiskussionen und entsprechenden Gesetze der 1980er Jahre zurückzuführen.

Die erste Nummer des Jahrgangs 1992 war eine thematische Nummer über Evaluation der rechtswissenschaftlichen Forschung. Den Hintergrund bildete ein Arbeitsgruppenbericht über diesen Bereich, und auch Diskussionsbeträge. In den wissenschaftlichen Aufsätzen ging es um die Umweltprobleme, wobei das Umweltrecht nun als ein neues Grundrecht behandelt wurde. Die zweite Nummer war ebenfalls eine thematische Nummer und es ging um die Familienrechtsgesetze, daneben auch um das Frauenrecht. Die dritte Nummer war eine thematische Nummer über Gerichte und Richter mit Berücksichtigung der Fragestellung, ob man in Finnland vom Richterstaat und Richterrecht sprechen sollte.

Die vierte Nummer des Jahres 1992 war wieder eine Jubiläumsnummer – man feierte 20 Jahre der Zeitschrift *Oikeus*. Die Chefredakteurin Kurki-Suonio präsentierte in ihrem Einleitungsaufsatz das erste frauenrechtliche Lehrbuch auf Finnisch. Das Buch war gerade erschienen und Kurki-Suonio hat viel auf den neuen Blickwinkel gesetzt, wovon auch *Oikeus* profitieren sollte. Die Beiträge der Jubiläumsnummer sind von ehemaligen Chefredakteuren und Redaktionsmitgliedern. Entsprechend den Forschungsinteressen der einzelnen Personen sind die Themen sehr unterschiedlich und lassen keinen gemeinsamen Nenner zu. Man schrieb über die europäische Integration, Kultur und Rechtswissenschaft (Aarnio), über die Ergebnisverantwortungsideologie (Eriksson), über die Gesamterneuerung des Strafgesetzbuchs (Koskinen), über Polyzentrismus (Bruun), über die Institution des Staatspräsidenten (Ylikangas), über den Wohlfahrtstaat und das soziale Zivilrecht (Wilhelmsson), über 666 und die Depression (Nousiainen), über die Forschung des Rechts in anderen europäischen Ländern (Kekkonen), über die Überverschuldung (Niemi-Kiesiläinen) und über das Recht als Stütze des Wohlfahrtstaats (Tuori). Dem Ton nach sind die Beiträge eher pessimistisch. Man sah den Untergang des Wohlfahrtstaats vor. Die wirtschaftliche Entwicklung hat sich als ein eigenständiger Faktor mit eigener Logik gezeigt und die Rechtswissenschaftler hatten kaum Instrumente für eine effektive Gegensteuerung.

Darüber hinaus sind in den 1990er Jahren noch folgende Themen behandelt worden: die Risikogesellschaft in ihrem Zusammenhang mit der Umweltproblematik und weniger mit den früher behandelten Problemen des Wohlfahrts- und Sozialstaats, die Rechtsprobleme mit den Flüchtlingen, die europäische Integration, die Reform des Justizwesens, die polyzentren Pluralismen und die symbolischen Funktionen des Rechts, *Law and Economics*, Grundrechtserneuerung, die Diskussion über die frauenrechtliche Forschung, die geschlechtsbezogenen Selbstbestimmungsrechte, das Geschlecht und die Märkte, die alternativen Konfliktslösungsmittel.

Neben den bekannten und wiederkehrenden Themen ist *Oikeus* durch ihre ganze Geschichte eine Zeitschrift gewesen, die das Forum für die jüngeren und auch für die schon etablierten Forscher und Forscherinnen geboten hat, die neuen Themen aufzunehmen oder neuen alternativen Perspektiven oder methodischen Programme zu präsentieren, die dann in der Tat auch umfangreichere Diskussionen hervorgerufen haben. Darunter gab es auch Themen, die sehr akademisch waren. So ist die Herausgabe der Zeitschrift in der Redaktion immer auch durch Diskussionen zwischen der mehr theoretisch und mehr praktisch orientierten Seite begleitet worden. Der Schwerpunkt ist dann je nach dem ausgefallen, ob in der Redaktion die Mitglieder von der Universität oder von den praktischen Berufen dominierten.

2.4. *Oikeus* im Jahre 2007

Oikeus war immer bei ihren vier Nummern im Jahr geblieben, der Umfang des Jahrgangs 2007 hat aber schon 500 Seiten ausgemacht. Wie auch früher, kommen neue Themen zur Rede wie etwa die Informationsgesellschaft, soziale Rechte als Menschenrechte, Multi- und Interdisziplinarität, Globalisierung, Wirtschaftskriminalität, die Reform der Juristenausbildung, die Gewalt gegen Frauen, vorgreifende Interventionen in das Vertragsrecht, die Gesetzgebungslehre, das Europarecht, die Umweltverbrechen, die neuen Aufgaben der Polizei, die Grund- und Menschenrechte der Kinder, das Menschenhandel mit Frauen und Kindern als ein Menschenrechtsproblem, die Gentechnologie und die Geschlechtsbezogenheit der Kriminalpolitik. Die Themen der Sommerseminarien der 2000er Jahre waren: das Kind in der Familie und im Prozess, die Gewalt, die Öffentlichkeit, die Sicherheit, das Recht und die Kultur.

Im Jahre 2002 hat man keine spezielle Jubiläumsnummer zu den 30 Jahren *Oikeus* gemacht. Dagegen hat man im Jahre 2007 die letzte Nummer als eine Jubiläumsnummer zu den 35 Jahren *Oikeus* herausgegeben. Die Chefredakteurinnen Päivi Paasto (1958–2009; Juris Doktor 1994; Assistentin, ab 2004 Oberassistentin für Rechtsgeschichte und allgemeine Rechtslehre an der Universität zu Turku) und Elina Pirjatanniemi (geb. 1966, ab 2009 Professorin für Verfassungs- und Völkerrecht an der Schwedischen Akademie zu Turku) hatten

sich für eine umfangreiche Fragestellung entschieden. Es ging um die Frage, was die Rechtswissenschaftler unter der Rechtspolitik verstehen und welche Probleme sie rechtspolitisch für aktuell halten. Im Unterschied zu den früheren Jubiläumsnummern wandte man sich eben nicht an die ehemaligen Chefredakteure oder Redaktionsmitglieder, sondern an sehr junge Rechtswissenschaftler, die erst seit 2000 disputiert hatten. Diese junge Generation sollte dann darlegen, was sie von der Rechtspolitik denkt und welche Position die rechtspolitischen Fragen in ihrer Arbeit und Forschung einnehmen. Das Echo war bemerkenswert – es wurden 30 Beiträge geliefert, wovon 12 von verschiedenen Rechtsfächern und Angehensperspektiven publiziert worden sind.

Im Vorwort zu der Jubiläumsnummer habe ich die rechtspolitischen Problemstellungen von *Oikeus* während ihrer ersten Jahrzehnte mit denjenigen der aktuellen Nummer verglichen. Wenn früher die rechtspolitischen Diskussionen sich hauptsächlich auf ganz konkrete Vorschläge *de lege ferenda* beschränkten, geht es heutzutage viel allgemeiner um die grundsätzliche Beziehung der Forschung und Wissenschaft einerseits und der Rechtspolitik andererseits. Man erörtert vielmehr die Probleme der Wirkung und Bedeutung der rechtlichen Regulierung überhaupt und insbesondere im Vergleich zu anderen Regulierungsmitteln. Die Überzeugung, dass die Juristen viel mehr Kenntnisse über die soziologischen und empirischen Forschungen brauchen, ist gleich den früheren Jahrzehnten geblieben. Nun aber geht es nicht nur sehr allgemein um Kenntnisse und Methoden, sondern es wird verlangt, dass die Juristen durch mehrere verschiedene methodische Mittel erworbene Informationen zusammenbringen sollen, um diese mit ihrer eigenen juristischen Sachkenntnis zu bereichern und damit ganz neue Vorschläge zu formulieren imstande sein sollen. Dies wäre ihr Beitrag zu den – wie man die heute gerne nennt – Diskursen, von denen nur ein Teil juristisch ist.

Zwar gab es auch im Jahre 2007 rechtspolitische Beiträge mit konkreten Vorschlägen für die Gesetzesänderungen, um eine bessere Wirkung zu erreichen. Daneben wird aber sehr viel über die Schranken der traditionellen normativen Regulierung nachgedacht. So schreibt man auch viel über die alternativen Steuerungsmittel oder alternativen Konfliktlösungsweisen, oder man sucht und plädiert für die Lösungen mittelst *soft law.*

Man kann sagen, dass gerade die immer wieder wiederkehrenden Diskussionen über bestimmte problematische Fragen und Themen an sich sogar wichtiger sind als konkrete Gesetzesvorschläge. Die Lösungen werden so nach langen und vielfältigen Diskussionswellen gefunden. Während dieser wiederkehrenden Diskussionen bildet sich die öffentliche Meinung, die so zu einer gewissen Akzeptanzbereitschaft erzogen wird. Als Beispiele kann man etwa das Gesetz über die künstliche Befruchtung oder die Regelung der Partnerschaft der gleichgeschlechtlichen Paare nennen.

Es ist klar, dass heutzutage viele konventionelle Schranken der frühen 1970er Jahre weggefallen sind, und man könnte jetzt viel mehr rechtspolitische Beiträge publizieren. Ohne gezielte Nachfrage der Redaktion wurden solche Beiträge aber kaum vorgeschlagen. Es fragt sich, ob dieser Mangel etwas damit zu tun hat, dass die Politik selbst wegen der sehr dominanten Grundrechtsdiskussion deutlich rechtlicher geworden ist. Man kann also heute über die Verrechtlichung oder Konstitutionalisierung der Politik sprechen, und da gibt es vielleicht immer weniger Raum für die rechtspolitischen Diskussionen, die sich eben nicht mit den Grundrechtsinterpretationen auseinandersetzen.

3. Zusammenfassung

Oikeus hat sich im Laufe von mehr als drei Jahrzehnten verändert. Diese Veränderungen sind aber nicht etwa dadurch zu erklären, dass die Gesellschaft sich verändert hatte. Vielmehr ist das Gesicht von *Oikeus* von der Weise und dem Rhythmus der akademischen Juristenkultur geprägt worden. Es ist nicht zu übersehen, dass die Redaktion während der ganzen Existenz von *Oikeus* akademisch dominiert und geprägt worden ist. Zwar hat man ab und zu versucht, auch solche Themen und Beiträge aufzunehmen, die für die Juristen außerhalb der Universitäten, etwa für Anwälte oder als Verwaltungsbeamte tätige Praktiker interessant sein sollten. Die akademische Dominanz ist jedoch geblieben. Auch die Aufmerksamkeit auf die soziologischen und empirischen Forschungen, die man den Juristen bekannt machen wollte, hat durch ihre methodische Seite die akademische Dimension. Es gibt zwar keine Angaben über den Leserkreis von *Oikeus* oder über die Abonnements. Trotzdem ist es klar, dass die Leser vor allem die Mitglieder des Demokratischen Juristenvereins, nach dem neuen Namen des Rechtspolitischen Vereins Demla sein sollen. Indem die Mitglieder dieses Vereins fast ausschließlich Juristen sind, beschränkt sich das Publikum im Gegensatz zu den Plänen des Jahres 1972 doch wohl nur auf die Juristen.

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Mirror of the European Legal Traditions:

Latin Terminology in the Estonian Law Journals *Õigus* and *Juridica*[*]

Introduction

This article analyses the usage of Latin legal terms in Estonian legal language, examining it primarily on the basis of the law journals *Õigus* ('Law', 1920–1940) and *Juridica* (editions from 1993 to 2008). In the historical and cultural framework, Estonian-language-based jurisprudence and its terms are relatively young phenomena, which for the most part developed at the beginning of the 20th century in connection with the founding of the nation-state (1918). Estonian-language jurisprudence developed with the establishment of sovereignty and the opening of the University of Tartu in 1919, with Estonian as the language of instruction for the first time in its history. Along with the establishment of national jurisprudence, the development of Estonian legal language was undertaken. In the 1920s, a wide-scale language reform and language planning movement took place in Estonia, bringing about a legal language reform and enrichment of vocabulary, among other things.[*1] This was conditioned by the development of society and the ensuing urgent need and desire to develop the everyday language of the peasants into a functioning cultural language. The language reform led by young intellectuals set as its objective that, by becoming European, the nation still remain Estonian.[*2] Considering the history of the Estonia of the beginning of the 20th century[*3] we realise that the notion of 'European' suggested turning away from the sphere of influence of Imperialist Russia towards Western culture with its historical traditions, which have, among other things, strong ties with the Latin language that has played an important role in development of the terminology.

In fact, two epochs can be identified in the history of Estonian law and legal language, both characterised by the desire to be 'Western' and the conscious attempt to be European. The present article focuses on these

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1 About the development of the Estonian legal language during the first half of the 20th century, see A. Vettik, R. Kull. Tagasivaade eesti õigussõnavara kujunemisloole (1920–1940) (Review of the Development of Estonian Legal Terminology (1920–1940)). Tallinn: Eesti Teaduste Akadeemia Emakeele Selts 2002 (in Estonian). In more detail about language planning in Estonia at the beginning of the 20th century see T. Erelt. Eesti keelekorraldus (Estonian Language Organisation). Tallinn: Eesti Keele Sihtasutus 2002, pp. 46–122 (in Estonian).

2 More about Noor-Eesti, the society of young Estonian intellectuals at the beginning of the 20th century and the language reform, see N. Andresen. Noor-Eesti ja keeleuuendus (*Noor-Eesti* and Language Innovation). – Looming 1970/9, pp. 1421–1429 (in Estonian).

3 Concisely but in detail about the history of Estonia and other Baltic states during that period see Z. Kiaupa, A. Mäesalu, A. Pajur, G. Straube. The History of the Baltic Countries. 3rd, revised ed. Tallinn: Avita 2002, in particular the chapter The Baltic States 1914–1939, pp. 129–164.

two consciously Western-oriented eras: from 1918 to 1940 and from 1991 to the present. The Soviet era, between them, was marked by turning away from the West. This period is excluded from the present study. The periods under observation are interesting primarily because of their cultural-political changes in law and legal language. The first period of independence in Estonia (1918–1940) was an era when sovereignty could be enjoyed for the first time; a parliamentary democracy was established; and the Estonian language began to be used for legal studies, legislation, and practice of law in general.[*4] The key elements that characterise this period are drafting of new legislation and development of the Estonian legal language, for until the adoption of new laws, the old laws imposed in tsarist times in the Estonian and Livonian provinces remained in force. Drafting legislation in the native language and preparing lawyers who would have a higher education required a properly functioning systematic legal vocabulary. Hence, the *Õigusteaduse sõnastik* (Dictionary of Law)[*5] was published in 1934 as a result of the work done in the field of Estonian legal terminology, which included also terms in Latin and their Estonian counterparts.

In the time of regained independence (beginning in 1991), the Soviet legal system has been replaced with an orientation toward the Western world. Therefore, also the conceptual systems and languages of influence have changed: the importance of Russian has vanished, and the major languages of influence are now English and German, as a result of European Union legislation and the rulings of the European Court of Justice. Through European law and languages of influence, the usage of Latin terms has increased and for the first time in the history of the Estonian legal language a Latin–Estonian legal dictionary has been compiled.[*6]

Legal journals as object of study

The research material for the article is the major legal journals published in Estonian in the 20th and 21st centuries. Periodicals have a special role among the media for law and jurisprudence. In comparison with other types of scholarly texts, such as course books, monographs, or dissertations on jurisprudence, as well as legislation and court rulings, the choice of journals for terminological analysis has a clear advantage with respect to the topicality of the subject matter. Formally, periodicals are the most dynamic medium of law, reflecting the daily life of a particular legal culture.[*7] Legal journals respond promptly to the changes in legal affairs, and it is here that pieces of new legislation and topical juridical issues are analysed and commented upon. As a result, juridical periodicals can be called 'a medial crossing-point' where jurisprudence, court and administrative practice, regulatory policies, and politics in general meet.[*8] In short, this is the everyday life of a particular legal culture. Presenting relevant legal information, a legal journal becomes the memory of the legal culture of a particular age. From the perspective of terminological studies, this enables us to draw conclusions concerning the subject matter and areas that jurists have discussed most in their writing, using Latin terms.

Publication of legal journals in Estonian began in the first decade of the 20th century, in 1909.[*9] In total, 16 periodicals have been published over the last hundred years. The 20th century was politically a very controversial time for Estonia, and the need for legal information produced a remarkable number of legal journals. Yet, in terms of substance and volume, all of these journals are very different. Several periodicals were released in only a few single volumes, while others have held considerable influence on jurisprudence and legal competence in Estonia for decades. The latter have been selected as the research material for this article.

The object of study in this article consists of the journals *Õigus* (as mentioned above, published in 1920–1940), the most influential legal journal prior to World War II (i.e., during the first period of independence in Estonia) and *Juridica* (issues from 1993 to 2008), the legal journal containing articles written since independence was regained. *Õigus* was published by the Association of Jurists, in Tartu. The authors and the editorial board

[4] In more detail about the development of Estonian legal order, see T. Anepaio. Die rechtliche Entwicklung der baltischen Staaten 1918–1940. – Modernisierung durch Transfer zwischen den Weltkriegen. T. Giaro (Hrsg.). Frankfurt am Main: Vittorio Klostermann 2007, pp. 7–30; M. Luts-Sootak. Estland. – Handwörterbuch zur deutschen Rechtsgeschichte. Lfg. 6. (Eid-Familienfideikommiss). 2. Aufl. Berlin: Erich Schmidt Verlag 2007, p. 1430; P. Järvelaid. The Development of the Estonian Legal System. – Zeitschrift für Europäisches Privatrecht 2000 (8), pp. 873–877.

[5] Compiled by F. Karlson, J. V. Veski, ed. E. Ilus. Tartu: Akadeemiline Kooperatiiv 1934.

[6] K. Adomeit, M. Ristikivi, H. Siimets-Gross. Ladina-eesti õigussõnastik (Latin–Estonian Dictionary of Law). Tallinn: Eesti Keele Sihtasutus 2005 (in Estonian).

[7] About legal journalism in Europe in the 18th–20th centuries, see M. Stolleis. Juristische Zeitschriften – die neuen Medien des 18.–20. Jahrhunderts. – Juristische Zeitschriften. Die neuen Medien des 18.–20. Jahrhunderts. Ius Commune Sonderhefte, Studien zur Europäischen Rechtsgeschichte, 128. M. Stolleis (Hrsg.). Frankfurt a.M.: Klostermann 1999, pp. XII–XIV.

[8] *Ibid.*, p. XII.

[9] About publication of juridical periodicals in the Baltic provinces of the Russian Empire in the 19th century, see M. Luts. Die juristischen Zeitschriften der baltischen Ostseeprovinzen Russlands im 19. Jahrhundert: Medien der Verwissenschaftlichung der lokalen deutschen Partikularrechte. – Juristische Zeitschriften in Europa. M. Stolleis, T. Simon (Hrsg.). Frankfurt am Main: Vittorio Klostermann 2006, pp. 67–116.

included professors at the University of Tartu, judges of the Supreme Court, prominent lawyers, the Chancellor of Justice—the most active and renowned figures in the field of law in Estonia at the beginning of the 20th century. *Õigus* mostly consists of articles and overviews of the activities of the Supreme Court. In addition, some issues contained reviews of new legal literature published in Estonia as well as in foreign countries, overviews of international congresses and conventions, advertisements, and practical legal information, as well as presentations and speeches for *Õigusteadlaste Päev* (Jurists' Day). Much space was dedicated to writings about legal matters and legislation in the neighbouring countries as well as other European countries.

Juridica is a periodical issued by the Faculty of Law at the University of Tartu, in which the majority of Estonian juridical publications appear. *Juridica* has a wide circle of authors, thus having become a representative object of linguistic study. Its tenure has seen, besides jurists and lawyers, specialists from other academic fields having had their articles published in it. By 2007 (i.e., in 15 years of publication), the number of authors of pieces in *Juridica* had increased to 540.[*10] The range of topics includes, in addition to public and private law in Estonia, also international law and EU law, as well as legal theory, legal history, and legal philosophy. However, articles written about legal history and Roman law, which on account of their subject matter include numerous Latin terms, are rather scarce. Issues of *Juridica* tend to be dedicated to specific themes, and frequently summaries of different areas of law are given: the current problems in legislation are discussed, and theoretical and practical commentaries are printed pertaining to the issues that have arisen in the process of implementing legislative acts.

This article focuses on the following questions: how the usage of Latin terms on sentence level in legal texts in Estonian differs in the above-described two eras—prior to World War II, from the example of the journal *Õigus*, and that of regained independence, on the basis of *Juridica*. From an intralinguistic viewpoint, the paper explores also the question of the role of Latin terms in legal language—i.e., to what extent, in the context of legal reforms and a new legal environment, Latin terms are, for authors of juridical articles, a means of signifying legal structures, relationships, values, and changes. In carrying out of the present survey, lexical-semantic analysis was used as the main research method, an approach that relies on statistical analysis for the quantitative breakdown of the research material. The method chosen enables researching the developments of legal language. Latin-based terms play a significant role in this. Not only do the quantitative data vary in the usage of Latin terms; also the contextual and semantic parameters differ. The ways in which the dynamics and the qualitative characteristics in the usage of Latin terms are connected with the process in the scholarly discourse in law reflect the development of legal language in general. Latin terms are not only an ornamentation and traditional device in the texts; they play an active role in explaining juridical issues. The sphere of legal language in which Latin terms and expressions are used has its roots in European legal culture.

Statistical data and the dynamics of the usage of terminology

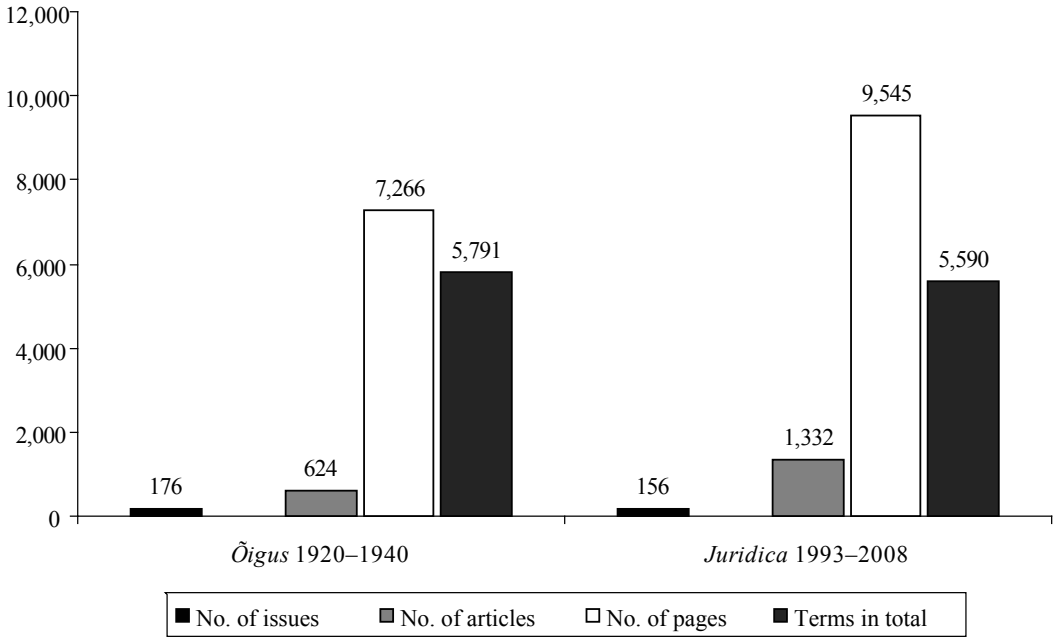
The comparison of the results from the analysis of the journals *Õigus* and *Juridica* is justified by the similarity of the cultural-political context: a few years before each of *Õigus* and *Juridica* began to be published, Estonia became an independent state, and in both periods there was a conscious attempt of orientation toward Western legal thinking. Both periodicals were the principal means of circulating juridical material in Estonian in their respective periods, and, additionally, the periods of publication of both are comparable: *Õigus* was published for 21 years, in 1920–1940, while *Juridica* has been issued since 1993. Accordingly, information regarding 16 years of publication of *Juridica* is included in this research. The general statistical data concerning the material in the corpus and the terms examined are summarised in Graph 1.

With regard to the breadth of the research material, it must be pointed out that, in total, 176 issues of *Õigus* were published, in 21 years. In both the first and the last year of the journal's publication, only three issues appeared. From 1921 to 1928, eight issues of *Õigus* were published per year, on average[*11], and from 1929 onwards, there were as many as 10 issues a year. In all, the research material consists of 624 articles and 7,266 pages. The 16 years of *Juridica* studied involve 156 issues, 1,332, articles, and 9,545 pages. In the first year, 1993, six issues were printed, but in each subsequent year there were 10 issues published.

[10] P. Pruks. Juridica 150 numbrit ja 15 aastat – kuidas edasi? (150 Issues of Juridica and 15 Years—What Next?) – Juridica 2008/4, p. 263 (in Estonian).

[11] In 1921 and 1928, several issues appeared as voluminous and thematically compiled editions containing for instance the presentations made at the conferences of the Association of Legal Scientists.

Graph 1: General statistical data: the periodicals *Õigus* and *Juridica*



In comparison of the two journals, it is noteworthy that, even though throughout the years of its publication *Õigus* had 20 issues more than *Juridica* has, the latter has had twice as many articles and about 2,300 more pages. This means that, while 35 articles per year appeared in *Õigus*, more than twice as many have appeared in *Juridica*, amounting to approximately 85 articles per year. As both were edited in times marked by influential changes and significant reforms in Estonian legal history, the differences in the scope of the materials cannot be explained by alterations in the legal order and the ensuing need for up-to-date juridical information. Rather, the differences can be explained, on the one hand, by the dissimilarities of the content—in *Juridica*, the main focus is on analytical articles, with little space being devoted to information about conferences and recent literature. *Õigus* contained, next to the articles on jurisprudence and commentaries on legislation, also information about legal practice: each issue ended with a summary of the decisions made by the Supreme Court (*Riigikohus*). Once a year, a statistical review of the activities of different court instances in various towns in Estonia was printed (listing the number of cases heard, the number of cases settled, and the number of pending cases). In addition, some issues included summaries of the activities of Parliament (*Riigikogu*), overviews of new literature on law in Estonia as well as abroad, reviews of international congresses and conventions, and summaries of the presentations of the speakers at the *Õigusteadlaste Päev* conferences.[*12]

On the other hand, the average number of articles in *Juridica* is greater because the pieces of writing printed in it are more exhaustive. In the earlier years of publication, the articles were relatively short, at only 2–3 pages, on average, and only a few more than a hundred articles were published in a year. The greatest qualitative change in this respect occurred in 2000, when the periodical had 687 pages all told and the number of articles decreased to 74, making the average length about nine pages.[*13] In the last five years, 2004–2008, the same volume-to-article-number ratio has been maintained—i.e., about 70 articles for every 734 pages published in a year, with the average length about 10 pages. Hence, the articles have become longer and more comprehensive over the years, and the brief reviews and commentaries of the early years have been replaced with more extensive and detailed analyses.

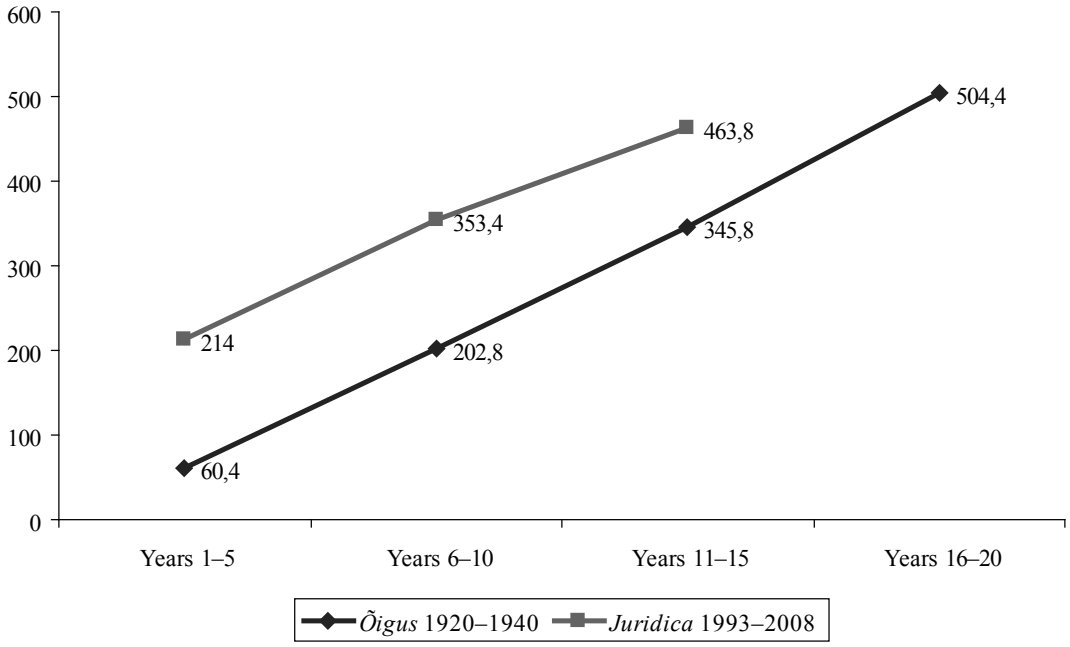
Comparison of the frequency of Latin terms in the two journals reveals that in *Õigus* Latin terms were used 5,791 times, with 32 Latin expressions per issue and nine Latin terms per article, on average. If we divide the number of pages by the number of terms, we can see that, on average, 0.8 expressions per page were used; i.e., the Latin language appears on almost every single page of *Õigus*. In *Juridica*, the number of Latin terms in the 16 years of publication is 5,590. In comparison with *Õigus*, there is a greater number of terms per issue—on average, 35 terms. However, calculating the frequency of occurrence per article and per page, we find that in comparison with *Õigus*, in *Juridica* only half as many Latin terms are used—four expressions per article and 0.5 per page; i.e., the Latin language appears on every second page of *Juridica*, on average.

[12] M. Ristikivi. Latin Terms in Estonian Legal Journalism in the Interwar Period: Practical Tools for a Young Legal Culture. – Juridica International 2009 (16), p. 234.

[13] M. Ristikivi. *Lexica iuridica* in *Juridica*: Latin Terms as a Reflection of Europanisation of Estonian Legal Culture. – Juridica International 2007 (12), p. 174.

The dynamics of the occurrence of Latin terms over the years (as shown in Graph 2) reveal that in the years of its publication, *Õigus* enjoyed a steady growth in the usage of Latin terminology. The graph shows us the average frequency by five-year period. The number of Latin terms used, around 60 terms per year in the initial years of publication, steadily rose to 300 and even more in later years, finally totalling 500.

Graph 2: Dynamics of terminology usage: the periodicals *Õigus* and *Juridica*



In *Juridica*, Latin terms have been used more frequently from the very beginning of the publication of the journal, at 200 instances per year, on average. In the middle years of publication, this number is *ca* 350, and in recent years the trend has continued, with a total of 464 Latin terms per year in 2003–2007. The average for 2008—at 434 instances of usage—indicates that the trend is continuing.

In both *Õigus* and *Juridica*, the dynamics of the usage of terminology reflect the situation of the Estonian legal order and its changes during the years of publication of the periodicals. *Õigus* appeared when legal science in the Estonian language was being established. A major task faced by the new legal culture was to draft new laws and develop terminology in the native language. The widespread usage of Latin terms in the writings of the jurists of the time did not reduce the importance of the efforts to introduce and popularise legal terminology in the native language, though. On the contrary, Latin terms supplemented and specified the new vocabulary and served as an intermediary when the German and the Russian legal language employed earlier were replaced by the Estonian legal language. Making use of the Latin terms that the jurists were already familiar with alongside the new Estonian terms made it easier to understand and explain the latter.

The use of Latin terms in *Õigus* was conditioned directly by the existing laws. Until the adoption of the new laws, the old ones remained in force, having been imposed in the Estonian and Livonian provinces during the tsarist regime. One example is the Baltic Private Law Act[*14], which relied heavily on Roman law[*15] and contained a large number of Latin terms. The Baltic Private Law Act, the basis for the new Estonian Civil Code, which was then being drafted, remained in force until the Soviet occupation in 1940 and formed one

[14] Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht. Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei 1864. The original version of the code was prepared in German, the Russian version was also compiled and published immediately: Svod mestnyh uzakonenij gubernij ostzejskih. Cast' tretja. Zakony grazdanskie. St. Petersburg 1864. About the different redactions of the Baltic Private Law Act, see T. Anepaio. Tuntud tundmatu seadustik. Baltieraseaduse väljaanded (Renowned Unknown Code. Issues of Baltic Private Law). – Õpetatud Eesti Seltsi Aastaraamat 1994–1999 (in Estonian). Tartu: Õpetatud Eesti Selts 2002, pp. 302–324. About compiling the Baltic Private Law Act and its importance, see M. Luts. Private Law of the Baltic Provinces as a Patriotic Act. – Juridica International 2000 (5), pp. 157–167; B. Dölemeyer. Das Privatrecht Liv-, Est- und Kurlands von 1864. – Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. H. Coing (Hrsg.). Bd. 3. Teilbd. 2. München: Beck 1982, pp. 2076–2090.

[15] About the role of Roman law in the Baltic Private Law Act, see H. Siimets-Gross. Roman Law in the Baltic Private Law Act—the Triumph of Roman Law in the Baltic Sea Provinces? – Juridica International 2007 (12), pp. 180–189.

of the central elements in the juridical discourse.*[16] The usage of Latin terms in the middle and at the end of the 1930s was influenced in an upward direction by the drafts of the new Civil Code prepared in those years, which naturally led to corresponding scholarly discussions.*[17] Thus, Latin terms had an intermediary role not only in the process of developing a new legal language but also in preparation and, above all, in expounding on new regulatory policies.

The substantial changes in the development of the law in Estonia have also had an effect on the usage of terminology in *Juridica*. After the Republic of Estonia regained independence in 1991, a radical legal reform followed, which can be characterised in brief as abandoning the former Soviet law and becoming part of the Western legal environment, which largely depends on the Latin language. In this era, also the accession of the Republic of Estonia to the European Union took place (on 1 May 2004). This, in turn, has brought about the application of European law and the rulings of the European Court of Justice within the context of the laws of the Estonian state. The integration into international trade and cross-border transactions additionally entails growing import of private international law.

The legal reform in Estonia has been accompanied by changes in the usage of terms by Estonian lawyers. In the periodical *Juridica*, the integration of the Estonian legal language into European legal culture is reflected by a relatively strong increase in the usage of terms in Latin, both in the sense of the general occurrence of terms and with regard to the adoption of numerous new Latin terms. The data on the dynamics of terminology usage in *Õigus* and *Juridica* show that in both journals there has been a steady increase in the usage of Latin terms over the years. The conscious desire to be European is mirrored in the language usage of the authors who are jurists, as well as in their vocabulary, which traditionally has relied heavily on the Latin language.

Terminological variety and Latin terms in context

In addition to the quantitative analysis of Latin terms, also a qualitative study of this material has been carried out, with a view to detecting terminological variety. Qualitative analysis makes it possible to compare and draw conclusions about the linguistic diversity employed by the jurists of the periods under observation: how many different terms are known and used in professional writing, which terms are the most numerous, and what major terminological changes have occurred. Table 1 summarises the years of publication of the journals studied, the total number of Latin terms, and the number of distinct terms.

Table 1: The total number of Latin terms and the number of different terms

Journal	Publication	Latin terms, in total	Different terms
Õigus	21 years	5,791	1,342
Juridica	16 years	5,590	807

The results reveal that the number of different terms in Latin is greater in *Õigus*—while the total number of terms is 5,791, the number of individual terms used is 1,342. Dividing the total number of terms by the number of different terms, we see that each term is found slightly more than four times per article, on average. In *Juridica*, the total number of terms used in the 16 years of publication is also huge—5,590 instances of occurrence of Latin phrases in all. If this frequency of usage continues, it is likely that in the next five years this number will exceed the total number of Latin terms found in *Õigus*. Simultaneously, the number of different terms in *Juridica*, at 807, is about a third smaller than that for *Õigus*, and calculations show that a given term occurs approximately seven times per article, on average. It must be noted, though, that the great number of different terms in both *Õigus* and *Juridica* is accounted for by a considerable variety of Latin expressions. This indicates that the authors of pieces in *Õigus* and *Juridica* have not limited themselves to merely a few practical legal terms. The willingness and readiness to rely in their work on vocabulary derived from Latin were remarkable in the periods studied.

The majority of terms in both periodicals have been used just once. About half of the terms in *Juridica* have been used at least twice, whereas in *Õigus* about a third of all terms are used twice. Terms that occur five

[16] The influence of the Baltic Private Law Act goes back further in time: for instance, in regulation of types of servitudes it was transmitted into the 1993 Law of Property Act through the 1940 draft Civil Code Act. More about that, see M. Luts. Textbook of Pandects or New Style of Legislation in Estonia. – Juridica International 2001 (6), pp. 152–158. In 2003, the corresponding sections in the Law of Property Act were repealed, see Asjaõigusseaduse, kinnistusraamatuseaduse ja nendega seonduvate seaduste muutmise seadus (Act to Amend Law of Property Act, Land Register Act and Related Acts). – RT I 2003, 13, 64 (in Estonian).

[17] In 1935 (No. 6) and 1936 (No. 7), special issues of *Õigus* were published, introducing the drafts of the Civil Code and its differences in comparison with the Baltic Private Law Act.

times or more are even less commonplace: only 12 to 15 per cent of all terms found in the journal *Õigus*. In *Juridica*, this figure is bigger: nearly 21 per cent of terms have been used five or more times. Considering the length of the period studied, we may infer from the results that the vocabulary used in the articles does not abound in repetition of the same terms and for the most part the authors have resorted to expressions not found in the texts by the other authors. In contrast, the terms that do recur throughout the articles become all the more prominent. Table 2 introduces the Latin terms employed most frequently in the periodicals. The 10 most common terms are given with the number of occurrences in brackets.

Table 2: The most frequent Latin terms

Journal No.	*Õigus*	*Juridica*
1	*laesio enormis* (197 times)	*versus* (478 times)
2	*expressis verbis* (118)	*corpus iuris* (248)
3	*ex officio* (72)	*expressis verbis* (233)
4	*de lege ferenda* (47)	*op. cit.* (*opus citatum* / *opere citato*) (156)
5	*contra legem* (35)	*lex mercatoria* (145)
6	*ipso iure* (34)	*ius cogens* (144)
7	*detentor* (32)	*de lege ferenda* (143)
8	*detentio* (31)	*culpa in contrahendo* (83)
9	*in solidum* (30)	*ad hoc* (78)
10	*praeter legem* (27)	*de facto* (71)

Table 2 shows the great variety of terms being used recurrently in the periodicals examined. Juxtaposing the results of the study, we realise that the term that occurs most commonly is *de lege ferenda* (meaning 'desirable to establish according to the law'). This term is used in discussions about laws that are being drafted as opposed to the legislation in force (*lex lata*). In fact, it is to be expected that such a term should be found so often in legal journals, as these constitute a forum for debates on current legislation and the laws being drafted. Both in *Õigus* and in *Juridica*, the term *expressis verbis* (explicitly) occurs frequently. This term semantically belongs to the general vocabulary of law and can be found equally in articles discussing all areas of law. In *Juridica*, the most frequently used term is *versus*, which is typically used to distinguish between the opposing parties in court cases.

The terms from professional vocabulary are among the 10 most common terms characteristically used in discussions about particular areas of law. These include the concepts of *laesio enormis* (gross disparity), *detentor* (detainer), *detentio* (detention), *in solidum* (for the whole), and *culpa in contrahendo* (pre-contractual liability) in the context of civil law, or, in the context of international law and international private law, *ius cogens* (peremptory norm) and *lex mercatoria* ((international) commercial law). Among the top 10 terms in *Õigus* and *Juridica*, there are also terms that do not belong to any particular field and that are used in the context of different topics; these concepts include *corpus iuris* (body of law), *ex officio* (by virtue of office or position), *contra legem* (contrary to the law), *praeter legem* (beyond the law), *ipso iure* (by the law itself), and *ad hoc* (that is, 'for this' or 'for this special purpose'). The abbreviation *op. cit.*, standing for *opus citatum* or *opere citato* (meaning 'the quoted book' or 'in the quoted book'), frequently used in *Juridica*, is fairly commonplace in scholarly writings for referring the reader to an earlier citation.

Functional usage of Latin terms

Analysing the research material from the standpoint of the meaning and function of the terms, we realise that professional juridical vocabulary is the most prominent. This category comprises the terms that, as normative arguments, precisely and fully convey the concepts they express; i.e., they carry specific juridical information.[*18]

A common feature in the periodicals examined is that the more frequently a term occurs, the broader the scope of topics it is used to discuss. For instance, the ideas of *de lege ferenda* (desirable to establish according to the law), *de lege lata* (according to the law in force), *contra legem* (contrary to the law), *praeter legem*

[18] E. A. Kramer. Lateinische Parömien zur Methode der Rechtsanwendung. – Steuerrecht. Ausgewählte Probleme am Ende des 20. Jahrhunderts. Festschrift zum 65. Geburtstag von Ernst Höhn. Bern: Verlag Paul Haupt 1995, p. 142.

(beyond the law), *intra legem* (within the law), *causa* (cause), *ex lege* (from the law), *sine lege* (without a law), *ipso iure* (by the law itself), *conditio* (condition), and *lex specialis* (special statute) cannot be identified as topic-specific. Such terms, applied in various areas of law, constitute basic juridical terminology and are part of the vocabulary of all lawyers.

It also appears that the less frequently a term occurs, the more specific it is and the more likely it is to be related to a specific area of law. For example, in *Õigus*, the term *mare clausum* (closed sea), used once, denotes in international law a sea under the jurisdiction of a particular country and not open to other nations[*19]; in *Juridica*, the expression *lex superior derogat legi inferiori* (superior law overrules inferior law) denotes the primacy of the Constitution in the hierarchy of legislation.

The greatest number of specific legal terms can be detected in articles about civil law, whose vocabulary is derived from Roman law. Field-specific legal terms can also be found in articles that discuss penal law, legal theory, and the philosophy of law. The terms in these areas originate from the sources compiled in modern times and the Middle Ages, rather than in antiquity. Typically, such terms are lengthy expressions, often consisting of more than one sentence. There is a clear link with the topic: the more general the issues the article discusses and the greater the number of lawyers and jurists dealing with these issues in practice, the more frequently the well-known terms are used. The opposite is true also: the more specific the content of the article, the more numerous are the foreign terms applied in that particular area only.

The frequent use of professional vocabulary in Latin in the articles about international law and EU law attests to the practical value of Latin terms in international exchange of information and multi-language communication. Using specific legal terms and even coining new terms in Latin in these areas is justified and indeed expected. In the context of the above-mentioned specialities, legislative drafting and legal practice operate across the boundaries of national languages, and foreign language units that can be considered neutral as to style and connotation enable us to ensure that the text is understood in the same way by everyone involved in the discourse.[*20] Hence, Latin terms are universal aids in international legal relationships and facilitate communication between other languages.

Historical conditions and changes in the usage of Latin terms

Both journals examined for the purposes of this article were published in periods marked by profound political changes and the ensuing reforms in the Estonian legal order. Legal reforms have also influenced the usage of Latin terminology. While *Õigus* was being published, the most extensive changes in the usage of terminology concerned the development of Estonian legal language and drafting of legislation in Estonian, with Latin having a specific function. Latin terms played an intermediary role in the communication between Estonian and two foreign languages (German and Russian) and provided the required specificity of concepts. From the very first issue up to 1922, lists of terms appear in *Õigus*, providing Estonian translations of the previously used Russian and German terms. In order to allow determining the semantic accuracy and meaning of the new words, also Latin versions were given in addition to Russian and German translations. The new Civil Code was being drafted throughout the inter-war period, and this topic was constantly under discussion on the pages of *Õigus*. Thus, the usage of language by the lawyers of that time was noticeably affected by the abundance of Latin terms occurring in the previous legislation, the Baltic Private Law Act. The topics written about in *Õigus* that required particularly frequent use of Latin included land ownership and the right of succession, which needed to be analysed in detail in the context of the new legal situation.[*21]

Subsequently, the usage of Latin terms was a reflection of the development of the contemporary legal order and accompanied it. However, when the legal situation changes, linguistic needs change too and terminology is adjusted. Accordingly, the recent reorganisation of the legal system has changed the vocabulary of the lawyers active at present and we detect in the pieces of writing in *Juridica* only a few Latin expressions commonly

[19] The term *mare clausum* has been taken from John Selden's 1635 book by the same title, written as a response to Hugo Grotius's 1609 work entitled "Mare liberum" which dealt with the principle of the freedom of the seas. More about this, see W. S. M. Knight. The Life and Works of Hugo Grotius. London: Sweet & Maxwell 1925, pp. 110–112.

[20] Naturally, even Latin legal terms cannot avoid polysemy completely. In different legal systems, or in the course of centuries, several terms have acquired new meanings which express similar as well as not so closely related notions. However, polysemous terms are not particularly numerous and they are not considered a difficulty in professional usage. More about this, see H. E. S. Mattila. De aequalitate Latinitatis jurisperitorum. – Revue internationale de droit compare 2002/3, pp. 717–758; M. Ristikivi. Ladina keelest pärit terminite polüseemia ja sünonüümia eesti õiguskeeles (Polysemy and Synonymy of Latin Terms in Estonian Legal Language). – Eesti Rakenduslingvistika Ühingu aastaraamat 3. Estonian Papers in Applied Linguistics 3. Tallinn: Eesti Keele Sihtasutus 2007, pp. 253–267 (in Estonian).

[21] In more detail about the usage of Latin terms in the context of the right of succession and ownership of land, see M. Ristikivi (Note 12), pp. 237–239.

found in *Õigus* in articles about the right of succession, such as *hereditas iacens* (resting inheritance), which denotes succession that has been opened where the inheritance has not been transferred to heirs. Also the ideas of *beneficium inventarii* (benefit of inventory), *beneficium separationis* (the right to have the goods of an heir separated from those of the testator in favour of creditors), *successio singularis* (singular succession), and *successio universalis* (universal succession) have been expressed in Latin once each in *Juridica* in an article about the draft Law of Succession Act. These are now both well-known institutes, as they were in the earlier period, so these Latin terms are part of the active vocabulary today.

By contrast, all of the important terms used in *Õigus* in writings about relations regarding land and ownership relations have failed to find their way into the vocabulary of today's jurists. Examples of these concepts are *dominium directum* (referring to strict ownership, or the right of a landlord), *dominium utile* (ownership of the soil itself, or the right of a tenant), *dominus directus* (direct owner), *dominus utilis* (tenant or person who uses the property), and *emphyteusis* (denoting a contract by which a landed estate was leased to a tenant, either in perpetuity or for a long term, of many years, upon the reservation of annual rent and upon the condition that the tenant improve the property, by building, cultivating, or otherwise, and with a right vested in the tenant to alienate the estate or pass it to his heirs). Such disappearance is not surprising, since the laws concerning ownership of land have changed completely. The divided property principle, created in the Middle Ages and discarded in the process of development of modern private law, was adhered to in Estonia between the World Wars.[*22] It was conditioned, on the one hand, by the existing legislation pertaining to private law inherited from the Russian tsarist regime.[*23] At the same time, it was used to solve the regulatory problems that came with the new social reforms.[*24] In *Juridica*, these terms do not occur because in the new legal environment there is no practical need for such terms. The divided property principle could be found in the Baltic Private Law Act, but current private law in Estonia recognises undivided or absolute property.

The periodical *Juridica* has been issued on a regular basis after the Republic of Estonia's accession to the European Union in 2004. The harmonisation of local legislation with EU law and the European Court of Justice rulings has introduced the terminology used in the EU, resulting in the appearance of quite a few new Latin terms in the articles in *Juridica*. However, it is important to note that the qualitative change in usage of Latin terms did not occur only after Estonia became a member of the EU. The most significant changes in terminology started years earlier when the readiness to try to again become part of the European legal environment surfaced.[*25] Thus, the rearrangements in the Estonian legal system have caused Estonian lawyers to include in their usage of legal language those Latin terms that have become rooted in the legal tradition of Europe.

Through the decisions of the European Court of Justice, such concepts as *fumus boni iuris* and *fumus non mali iuris* were adopted in Latin in 2007. Word-for-word translations of the terms would be 'an air of good law' and 'an air of the not-bad law'. In the European Court of Justice, these terms are used in application of interim measures, and in that context *fumus boni iuris* has the meaning 'probability of the alleged claim'[*26]—i.e., a strong presumption that the action is well founded or that it should at least be *prima facie* clearly well founded.[*27] *Fumus boni iuris* can be altered into the weaker requirement *fumus non mali iuris*; i.e., the applicant is under the latter not required to demonstrate that the allegations in the main action are *prima facie* well founded but merely must show that the case is not obviously unfounded.[*28] These are strictly professional terms whose direct meaning does not seem closely related to the concepts the words denote, and because they have limited application, they are not very common in legal texts yet. Therefore, before these become firmly rooted in our legal language, it would be practical to add translations or clarifying comments to them.

The term *fumus boni iuris* is also a good example of the spread of Latin legal terms in the European legal environment. A decade ago, when legal language was discussed, the prevailing view was that Europe's legal systems have developed in too different directions for detection of any common vocabulary and that Latin's role as a *lingua franca* in Europe is an illusion.[*29] This standpoint was exemplified by pointing out that the term *fumus boni iuris* is found in the writings of Italian lawyers but not in other legal orders. Nonetheless, the

[22] More detailed contemporary studies about the *obrok* in *Õigus*, see J. Tjutrjumov. Pärilikust obroki õigusest Balti õiguse järele (On the Hereditary Right of *Obrok* for Baltic Law). – Õigus 1929/7, pp. 209–216 (in Estonian); T. Grünthal. Otsese omaniku õigustest kruntrendile (obrokile) antud kinnisvara suhtes (On the Rights of the Direct Owner on Real Property Given in *Obrok*. – Õigus 1931/8, pp. 358–364 (in Estonian).

[23] Definition and general regulation of the divided property in the Baltic Private Law Act, see Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht. Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei 1864, Art. 942–952; about *obrok* see Art. 1324–1334.

[24] About the Land Reform, see A. Weller. The agrarian reform in Esthonia from the legal point of view. Berlin: Baltischer Verlag und Ostbuchhandlung 1922.

[25] M. Ristikivi (Note 13), pp. 175–176.

[26] W. A. Kennett. Enforcement of judgements in Europe. Oxford University Press 2000, p. 160.

[27] D. Sinaniotis. Interim Protection before the European and National Courts. Alphen aan den Rijn: Kluwer Law International 2006, p. 23; also W. Frenz. Handbuch Europarecht. Band 3: Beihilfe- und Vergaberecht. Berlin, Heidelberg: Springer 2007, p. 507.

[28] K. Lenaerts, D. Arts. Procedural Law of the European Union. London: Sweet and Maxwell 1999, p. 300.

[29] P. Berteloot. Der Rahmen juristischer Übersetzungen. – Recht und Übersetzen. G. R. de Groot, R. Schulze (Hrsg.). Baden-Baden: Nomos 1999, p. 101.

materials included in the current research indicate that now this term has entered the professional literature in Estonia as well as other countries through the decisions of the European Court of Justice. Thus it can be inferred that in the past 10 years Latin terminology has acquired greater significance and is the connecting link between the legal languages in Europe.

The rulings of the European Court of Justice and the European Court of Human Rights have altered the usage of the term *versus* in the Estonian legal language. Earlier, the term was relatively rare in the articles in *Juridica* and was primarily used for juxtaposition of two situations or circumstances: 'the meaning of law *versus* provision of law', 'personal interest *versus* public interest', 'minor infringements *versus* serious violations', 'guilt *versus* harmfulness', etc. In recent years, this term has become noticeably more frequent. It mostly occurs in the abbreviated form *ver*., *vs*., or *v*., referring to particular European court judgements, and denoting the parties to a court case (e.g. 'X *vs*. Y').

However, not all new terms appearing in *Juridica* lately are part of the terminology needed for discussing the topics related to the European Union. In 2008, *speculum practici* (mirror of practice) was referred to for the first time to name a new column in *Juridica*, in which commentaries mainly on the practice of the Supreme Court are presented. The word *speculum* (mirror) is a reference to a tradition dating back to the Middle Ages when the so-called Mirror of Wisdom, Mirror of Morality, and Mirror of Law were compiled.[*30] In legal history, the best-known mirror is 'Sachsenspiegel' (The Saxon Mirror), compiled by Eike von Repgow in the 13th century, on which was modelled also the 14th-century Law Mirror of Livonia.[*31]

In 2006, an article was printed in *Juridica* about the scholarly traditions of Roman law[*32], which added to the corpus several terms originating from Roman law. Among the concepts expressed in these are *accessio* (increase), *acquisitiones naturales* (natural acquisitions), *acquisitiones originariae* (original acquisitions), *animus rem sibi habendi* (intention to keep the thing in one's possession), *nova species* (new species, or a new shape or form given to materials), *res nullius* (property of nobody), and *usus modernus pandectarum* (new use of the Pandects). The article focuses on the institute of *specificatio* (specification)—i.e., giving of form to materials—and describes the basic features of the scientific methods of two different legal scholarly traditions: *usus modernus pandectarum* and the historical school, which came after it.

Thus, not only modern law and EU vocabulary are represented in the usage of terminology in *Juridica* as a result of socio-political changes. New terms derived from Latin have been appropriated in the articles in *Juridica* also through work with materials considering legal history. As we can see in the *speculum practici* example, the term from the Middle Ages has found new application, establishing a link with the historical tradition.

Conclusions

The analysis of the Latin vocabulary detected in the research material established that during the years of publishing of *Õigus* and *Juridica*—i.e., in the two periods of independence in Estonia, Latin terms have been used widely. In both periods, the Estonian legal order underwent reform, and in drafting of new legislation, European legal culture, which had developed on the basis of the Latin language, was looked upon as a good model. The total number of Latin terms used is great in those two periods, and also the number of different terms is significant.

The results of the research allow us to infer that language usage keeps up with the developments in society. When the legal environment changes, language usage in legal texts changes, too. The terminology used in *Õigus* was directly related to the regulations dating back to the tsarist period, resulting in the appearance of terms used in the Middle Ages and pertaining to the divided property institute as in effect in Estonia then. Such an institute is absent in modern law, so these terms are unnecessary from a practical point of view and do not occur in the articles of the later publications. Today's language is to a large extent influenced by the terms adopted through European law and the rulings of the European Court of Justice.

[30] More about on the way Roman and medieval authors used the mirror as both instrument and metaphor, see E. P. Nolan. Now through a glass darkly: specular images of being and knowing from Virgil to Chaucer. Michigan: University of Michigan Press 1990, pp. 290–291.

[31] J. Sootak. Uus rubriik – *Speculum practici* (New Heading—*Speculum practici*). – Juridica 2008/8, pp. 127–128 (in Estonian).

[32] H. Siimets-Gross. Rooma õiguse uurimistraditsioon Tartu Ülikoolis 19. sajandi keskel (Research Tradition of Roman Law in the University of Tartu in the Middle of the 19th Century). – Juridica 2006/10, pp. 720–729 (in Estonian).

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Positivism as a Concept of Legal Historians

Introduction

There is a tale about an emperor who, once upon a time, demanded of his most able cartographers to make him a precise map of his empire. But when they presented the fruits of their strivings to their master, he was not satisfied: "This map is not precise enough," he responded. Eventually, the royal cartographers drew a map as big as the empire itself. Still, His Majesty was not pleased: "Where are the flowers; where are the animals?" After that, cartography in his kingdom died out.

It is a simple truth: You just cannot map reality. Any researcher therefore will have to focus his spotlight, his mental search lamp, on things he deems important, leaving other things in the dark. As must everybody else, a legal historian must make a choice and decide upon the question he would like to ask.

It also is a simple truth, however, that these questions ultimately decide the so-called facts. And even if you disagree and accordingly believe in the existence of 'mere facts', you still would have to concede that, since the historian cannot ask everything, he will have to select certain facts he considers to be important for a valid response to the question asked. The facts become part of a story, and that story tells us what this fact is about. Question and fact cannot be separated. Now, if you believe in this standard of rationality, it follows that the results of any study are useless without access to its initial questions and the methods applied.

And, although it is such a simple truth, experience shows that, over time, research results will grow into truths so solid that they will eventually resemble facts. Usually, this happens because people forget to critically examine the original conditions, the questions that formed the basis of the research. What we see then is the formation of some so-called basic insights that dictate general knowledge about a subject; I believe recent American language coined the term 'factoid' for this.

In the discussion that follows, I would like to critically examine one of these so-called facts that is central for many German legal historians. It is the 'fact' that the history of private law is a story of the rise and fall of positivism. Its most influential narrator still is Franz Wieacker, whose learned book *Legal History of Private Law in Europe* was published first in 1952, then saw translation of its revised 1967 edition to many languages.[*1] Wieacker's book may still be the most influential book in contemporary Europe about the history of private law.

I will try to approach the topic in three steps. First, I would like to introduce the subject of positivism in brief by way of mentioning of a few seminal texts and a short philosophical analysis. Second, I will try to identify the historical eras built by the history of positivism. Third, I would like to use all of this to put a spotlight on a selected number of 'great legal minds' of the past and try to show that the way we understand their ideas today bears the heavy imprints of their late historiographers.

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[1] See T. Weir (Transl.), F. Wieacker. A History of Private Law in Europe—with particular reference to Germany. 1995.

Positivism as a concept of legal historians and philosophers

About half a century ago, positivism was quite big as a topic. In 1944, Georg Dahm decided to present his version of the history of private law as divided into chapters as follows: 'natural law—historical school—positivism—positivism overcome'. In 1951, Gustav Boehmer chose 'natural law—historical school—jurisprudence of concepts—positivism—renewal of a meta-positivist jurisprudence of values'.[*2] In 1952, F. Wieacker selected 'law of reason—historical school—reign of scientific positivism—passage from scientific positivism to statutory positivism—degeneration of statutory positivism—juridical naturalism'.[*3] Karl Larenz went for a rather small-footed 'historical school—jurisprudence of concepts—positivism—leaving positivism behind—present jurisprudence of values'.[*4]

For these writers, the idea of periodisation was particularly important—that is, a succession of distinct epochs, each dominated by a different Great Idea. For them, history came in the form of a huge struggle, a fight positivism at first fought successfully but ultimately lost. How was it that these histories of private law were all so similar, given that they all set out to scrutinise legal history for traces of 'positivism'?

The obvious answer is that the concept of positivism might be simply one of the best yardsticks available. If you take a closer look, however, it turns out that there is not one but rather are many yardsticks called positivism. Franz Wieacker discerned three different variants in 1967[*5]; H. L. A. Hart, in his famous 1961 book, distinguished five different forms[*6]; and in 1966, Robert S. Summers spoke of 10 variations,[*7] while Stig Strömholm spoke of six variants in 1985.[*8] If we focus our attention on the works of legal historians, the picture does not become any sharper. In the writings of nine authors only, I found a confusing number of different positivisms[*9]: speculative positivism; naïve positivism; factual positivism; prescriptive or normative positivism; formal, as opposed to material, positivism; genuine and erroneous positivism; ethical, historical, juridical, logical, and materialist positivism; statutory positivism; a naturalist-materialist approach as set against positivism of legal science; pragmatic positivism; scientific and sociological positivism; enlightened, empirical, objective or subjective deontological positivism, and finally psychological positivism.

Translating these positivisms already presents a problem. When I speak of 'scientific positivism', others say 'scholarly positivism'; likewise, 'statutory positivism' is the same as 'textual positivism'.

This variety of labels shows considerable confusion about the meaning of positivism. Already in 1943, Walter Schönfeld displayed his unnervedness in the face of the variety of mutually contradicting definitions.[*10] As the 'positive' in positivism he found norms; the material justice; the political, social, or economic reality behind the norms or a way of formal, logical, or psychological thinking. Neither was there any more agreement on what should be seen as non-positive. In 1944, Dahm stated that positivism would be unable to adequately take into consideration such things as 'material justice, practical reason, the intended purpose of a legal norm, real life, politics and economics, morals, and ethics'.[*11] What was 'positive' to one author was non-positive to others.

Even two pre-eminent luminaries of legal history, Ernst Landsberg and Franz Wieacker, each defined 'scientific legal positivism' in a way that ruled out the validity of the other's definition. To Landsberg, 'scientific legal positivism makes use of any scientific means available, be they statutory construction, historical analysis of a statue's origin, or systematic context, but also reasonings based on rationality, practicability, or ethics, adorned by comparisons to other legal systems past and present'.[*12] Much to the contrary, Wieacker defined the very same 'scientific legal positivism' as a 'concept of law that deduces all rules of law and the decisions based upon them out of the sum of legal notions and principles, without juridifying and therefore accepting into the discourse of law any kind of non-legal argument, be they religious, socio-ethical, or political'.[*13]

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2 G. Boehmer. Grundlagen der Bürgerlichen Rechtsordnung. Zweites Buch. Erste Abteilung: Dogmengeschichtliche Grundlagen des bürgerliches Rechts 1951.

3 F. Wieacker. Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung. 1. Ed. 1952.

4 K. Larenz. Methodenlehre der Rechtswissenschaft. 1960.

5 F. Wieacker.. Privatrechtsgeschichte der Neuzeit. 2. Ed. 1967, pp. 431 *ff.*

6 H. L. A. Hart. Der Positivismus und die Trennung von Recht und Moral. Translated and ed. by N. Hoerster. 1971, p. 23.

7 R. S. Summers. The New Analytical Jurists. – New York University Law Journal 1966 (41), pp. 889 *ff.*

8 S. Strömholm. Kurze Geschichte der abendländischen Rechtsphilosophie, 1991, pp. 226–227.

9 See H.-P. Haferkamp. Positivismen als Ordnungsbegriffe einer Privatrechtsgeschichte des 19. Jahrhunderts. – O. Behrends, E. Schumann (ed.). Franz Wieacker – Historiker des modernen Privatrechts. Symposion zu Ehren des 100. Geburtstags von Franz Wieacker, forthcoming.

10 W. Schönfeld. Die Geschichte der Rechtswissenschaften im Spiegel der Metaphysik, p. 52.

11 G. Dahm. Deutsches Recht. 1944, p. 73.

12 E. Landsberg. Geschichte der Deutschen Rechtswissenschaft. Volume 3.2., 1910, p. 75.

13 F. Wieacker (Note 3), p. 253.

Given all this, it is difficult to explain why so many writers still told their histories of law as the histories of their positivisms. Any use of the notion inexorably led to difficult discussions about its precise meaning[*14], and to this day, any reader is compelled to follow an author's individual understanding closely.[*15] For example, while some saw so-called conceptual jurisprudence as a variation of positivism[*16], other writers wanted to count as positivism only movements that tried to mimic the concept of cognition adopted by natural science[*17], which others separated from positivism as 'naturalism'.[*18]

Anti-positivist positivism

If you attempt to draw a provisional line here, you could say that, for historians, positivism is a rather troublesome concept. Its erstwhile and still continuing success may become a little clearer if we shift our attention toward the emotional images positivism usually brings to mind. For the most part, these images are not favourable; there is something inherently bad about them. In any case, the emotions evoked are strong. A positivist, it is alleged, somehow only thinks in ways of logic and form; as lawyers, such persons would erect a barrier between law and ethics that is too strict, and, equally, they are fixated on the distinction between the prescriptive and the descriptive, norms and facts, in a tradition following the German philosopher Kant.

You could say that it was this emotional potential of positivism that motivated legal historians throughout the 20th century. From around 1920 onwards and still of considerable influence today, there has been a broad alliance engaged in a polemical fight against positivism. In 1935, Hans Welzel wrote that the most distinct feature of positivism would be its inherent negativity: a strict denial of anything even remotely resembling metaphysics.[*19] In 1943, Schönfeld sharpened this to a short 'negativism'[*20], and a year later, Wieacker saw a 'common tendency to negate'.[*21]

As a result, positivism was habitually used to describe positions perceived as odd or even morally deviant. As Schönfeld put it, already the idea of justice was foreign to positivism.[*22] And, even more drastically, Coing wrote in his treatise on legal philosophy—and kept it there in every edition—that, to a positivist, the statement: "The killing of the Jews at Auschwitz was unjust" simply is irrational and unscientific.[*23] The complete bewilderment these words evoked in the reader was intended.

But, if legal positivism is really so profoundly evil, why not tell legal history as a warning of its wicked dangers? Indeed, this was the mission these tales of positivism had in mind. During the Third Reich, German universities started to offer a course on the 'newer legal history of private law'. According to Hans Thieme in 1935, its purpose was to make students 'discerning'[*24] by marrying practical usefulness with moral judgement; 'discerning' was defined as 'independent towards statutory norms'[*25]. Schönfeld gave lectures 'on the self-disintegration of positivism' in 1943[*26], something Georg Dahm called 'the overcoming of positivism' a year later.[*27] As it was with so many other things, 1945 was no turning point here either.[*28] In 1949, Erich Molitor

[14] F. Wieacker (Note 5), p. 432.

[15] For the "weitgehend fruchtlosen Begriffsstreitigkeiten", see M. Auer. Normativer Positivismus – Positivistisches Naturrecht – Zur Bedeutung von Rechtspositivismus und Naturrecht jenseits von Rechtsbegriff und Rechtsethik. – A. Heldrich/u.a. (Hrsg.). Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag. 2007, p. 933 *ff.*, 2007, p. 935 *ff.*

[16] See, e.g., G. Dahm (Note 11), p. 73; F. Wieacker (Note 5), pp. 431–432.

[17] See, e.g., Schönfeld (Note 10), p. 17; E. Wolf. Große Rechtsdenker der deutschen Geistesgeschichte. Ed. 4. 1963, p. 623; H. Welzel. Naturrecht und materielle Gerechtigkeit. Ed. 4. 1962, pp. 183 *ff.* For further information on Welzel see J. Rückert. 'Große' Erzählungen. Theorien und Fesseln in der Rechtsgeschichte. – T. J. Chiusi, T. Gergen, H. Jung (ed.). Das Recht und seine historischen Grundlagen. Festschrift für Elmar Wadle zum 70. Geburtstag. 2008, pp. 973–974. For this view on natural science see H.-P. Haferkamp. Neukantianismus und Rechtsnaturalismus. – M. Senn, D. Puskás (eds.). Rechtswissenschaft als Kulturwissenschaft? (ARSP Beiheft B 115). 2007, pp. 105 *ff.*

[18] F. Wieacker (Note 5), p. 536.

[19] H. Welzel. Naturalismus und Wertphilosophie, first published in 1935, reprinted in 1975 in H. Welzel. Abhandlungen zum Strafrecht und zur Rechtsphilosophie. 1975, p. 30.

[20] W. Schönfeld (Note 10), p. 535.

[21] F. Wieacker. Ratio scripta. Das römische Recht und die abendländische Rechtswissenschaft. – ders. (Hrsg.), Vom Römischen Recht. Wirklichkeit und Überlieferung. 1944, p. 278.

[22] W. Schönfeld (Note 10), p. 534.

[23] H. Coing. Grundzüge der Rechtsphilosophie. Ed. 5. 1993, p. 62.

[24] H. Thieme. Neuere deutsche Privatrechtsgeschichte. – DJZ 1935, p. 341.

[25] *Ibid*., p. 339 *ff.*

[26] W. Schönfeld (Note 10), pp. 72 *ff.*

[27] *Ibid*., pp. 76 *ff.*

[28] On these aspects, see R. Schröder (ed.). 8. Mai 1945 – Befreiung oder Kapitulation? 1997.

wished to 'liberate our students from positivism'.[*29] Gustav Boehmer warned in 1951 of the dangers incurred by a positivism that was 'blind to values'.[*30] The following year, Wieacker hoped that positivism could be left behind by way of some new paradigm in philosophy[*31]; in the meantime, his own account of the history of private law should prevent aspiring lawyers and legal academics from surrendering the 'living spirit of the law' to either a totalitarian state or the 'dead formulas of academic dogmatism'.[*32]

Just as his fellow narrators of positivism did, Wieacker wanted to learn from history. He accordingly structured his account of legal history in a teleological way, wherein every epoch would shape its successor. He described the history of positivism as a sequence of levels, one in which scientific legal positivism must pass each stage until it reaches a state where it rules the world as 'unchallenged and unsparing' statutory positivism.[*33] The goal-oriented nexus we can identify here shows that the fight was not only against legal positivism but against positivism as a historian's method as well. Wieacker demanded to 'overcome positivism, which suppresses the true idea, or nature, of historical events'.[*34]

In summary, the people who told the tale of the rise and fall of positivism were anti-positivists. The writings I am referring to date from between 1925 and 1989, a rather long period. Again, we must be careful and notice that, although the authors of these works stood united in their anti-positivism, their ideas as to what should replace positivism were quite different. In the Weimar Republic, the ill-fated German state between World War I and the Third Reich, many had become anti-positivists because, as conservatives, they did not feel represented well by a leftist parliament. During the era of national socialism, a racist law reform was pitched against the 'old law from before 1933' and therefore positivism was abandoned. After 1945, many former nationalist lawyers stated that positivism would have made them defenceless against national-socialistic law and they now hoped for salvation by re-emphasising Christian values against positivism. United only in their anti-positivist stance, they found no agreement on what should be adhered to instead.

Outline of the anti-positivist legal history of private law

The focus on positivism yielded an entirely new understanding of history:

a) Its foundation was a reinterpretation of the reception of Roman law.[*35] From the 1930s onward, there was intensive research on this, but under a different presumption than in the 19th century. Back then, lawyers in the pro-Germanic-law camp ('Germanists') had been up in arms against what they called a national disaster. Roman law had rendered the substance of German law alien, they argued; it was unfitting because its content was foreign. Quite in contrast to this, in 1942, Dahm[*36] saw the main problem as lying not in the substance of Roman law but in the methodical approach that had come along with its reception.[*37] Wieacker explained the phenomenon as a process of rationalising and scientifying legal thinking.[*38] This was to become the starting point of a new history of private law: It no longer would be an account of the development of doctrine and institutions but would be one chronicling the methods of legal thinking. The story of a private law that becomes a science, degenerates, and ultimately collapses.

b) One of the winners with this new mode of analysis was the epoch of legal humanism in early modern times. As recently as 1936, Kunkel had deprecated humanism as a side track of little impact, a 'missed chance for a better unification of German and foreign statutes'.[*39] Applying the new, methods-oriented understanding of reception, Wieacker arrived at a different conclusion and saw humanism as an

[29] E. Molitor. Grundzüge der Neueren Privatrechtsgeschichte. 1949, p. 5.

[30] G. Boehmer (Note 2), 1951, p. 131.

[31] F. Wieacker (Note 3), p. 354.

[32] *Ibid*., p. 3.

[33] *Ibid*., p. 327.

[34] F. Wieacker (Note 21), p 280.

[35] M. Stolleis. „Fortschritte der Rechtsgeschichte" in der Zeit des Nationalsozialismus? – M. Stolleis, D. Simon (eds.). Rechtsgeschichte im Nationalsozialismus. Beiträge zur Geschichte einer Disziplin 1989, p. 190; the interpretation of the Reception of Roman law always had political connotations, see H.-P. Haferkamp. Die Bedeutung von Rezeptionsdeutungen für die Rechtsquellenlehre zwischen 1800 und 1850. – H.-P. Haferkamp, T. Repgen (ed.). Usus modernus pandectarum. Römisches Recht. Deutsches Recht und Naturrecht in der Frühen Neuzeit. 2007, p. 25.

[36] G. Dahm. Zur Rezeption des römisch-italienischen Rechts. – Historische Zeitschrift 167, 1943, p. 35.

[37] *Ibid.*, p. 39.

[38] F. Wieacker (Note 21), p. 222.

[39] W. Kunkel. Vorwort, in id., Thieme u. Beyerle, Quellen zur Neueren Privatrechtsgeschichte Deutschlands. 1936, XI.

important forerunner to modern legal science; in their striving to reach the idea of legal rule, the gist of the source, the humanists had been able to overcome the old fixation on authorities, but in this, as well as in the importance they laid on a coherent system, they also prepared for the later evils that positivism would bring, in the form of the neo-humanism advocated by the 19th-century historical school.[*40] In the course of 16 years of research (1936–1952), humanism had risen from ashes to ruins of mighty importance.

c) Another winner was natural law. In 1936, Hans Thieme published his 'Habilitation'[*41] on 'the late period of natural law'[*42], a book that was intended to revive interest in the concept of natural law itself.[*43] There, the culprit was the historical school of law, which had unfairly deprecated natural law. What followed was a revisiting of natural law. It now appeared to have been a trade-off between a socio-ethical and a so-called mathematical perspective. Here, the good and the bad side of the whole process of scientification came up. A fight between ethics and logic started. The history of private law was characterised as the gradual removal of ethical aspects. This was also Wieacker's leitmotif. For him, the law of reason was a transformation process spanning the ample period between around 1600 and 1800, going from theological natural law to secular natural law.[*44] 'Mathematical' was another word for science and positivism.[*45] The socio-ethical component raised the question of justice. Natural law therefore came in two flavours, one seeking to establish material justice, the other aspiring to positive formal justice.

d) Thus, the foundations had been laid for a re-examination of the 19th century as the main culprit in the eventual loss of everything ethical. In 1943, Georg Dahm emphasised that the rightful exculpation of reception with respect to the alienation of true German law necessarily meant indicting the 19th century for the destruction of nativist law that had taken place during the 19th and early 20th century.[*46] Franz Beyerle lamented in 1939 that the previous century had showen a disquieting lack of legal culture: although thought out well, immensely sophisticated, and refined, the law of the time had been void of any ethical values.[*47] Put succinctly, 19th-century law was deemed bad because it was non-worldly and non-ethical.

This line of thought had been prepared earlier by Julius Binder, who published a book on legal philosophy in 1925.[*48] He argued that 19th-century private law had removed the connection between personal subjective rights and corresponding social obligations. Later on, Larenz expanded upon this idea in a journal article on law and ethics in 1943[*49], which prefigured his discussion of many of the central topics of his highly influential treatise on legal methods published in 1960, which is still the most influential book on legal methods in Germany.[*50]

The fulcrum of this argument was a revision of the role attributed to the historical school of law, whose proponents had claimed to have discarded natural law. Now, they were accused of having covertly picked up natural law instead and, of the two variants, having chosen the 'wrong' one—that is, the 'mathematical' kind. Consequently, what had been offered as modernised Roman law by von Savigny and his followers really was 'scientific positivism'. This claim was bolstered by a reference to humanism itself: Since the historical school had decried 'ad fontes', a call to go back to the pure and untarnished source of antique law, their intentions were branded as neo-humanist, because doing so was incompatible with respecting the moral standards that had been central to natural law.

As Franz Beyerle explained his view in 1939, it was an illusion that pandectist doctrines had replaced the forgotten doctrines of natural law. Instead of creating a legal order based on social values and human needs, the pandectists adhered to a cult of irrefutable, naked logic, thereby undoing the intellectual liberation that had been accomplished by natural law.[*51]

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40 F. Wieacker (Note 3), p. 44.

41 A. Laufs. Nachruf auf Hans Thieme. – ZRG GA 119, 2002, p. 16.

42 H. Thieme. Die Zeit des späten Naturrechts. Eine privatrechtshistorische Studie. – ZRG GA 56 (1936), S. 202 *ff.*; quoted according to the reprint in id., Ideengeschichte und Rechtsgeschichte. Gesammelte Schriften. Bd. II, 1986, pp. 633 *ff.*

43 H. Thieme (Note 42), p. 635.

44 V. Winkler. Moderne als Krise, Krise als Modernisierung: Franz Wieacker und die großen Besinnungs-Bücher nach 1945. Available at: http://www.forhistiur.de/zitat/0507winkler.htm, 2005: Notes 33 *ff.*

45 F. Wieacker (Note 3), p. 151.

46 G. Dahm (Note 36), p. 47.

47 F. Beyerle. Der andere Zugang zum Naturrecht. – Deutsche Rechtswissenschaft IV (1939), p. 13.

48 J. Binder. Philosophie des Rechts. Berlin 1925; see H.-P. Haferkamp. Georg Friedrich Puchta und die „Begriffsjurisprudenz". 2004, pp. 96 *ff.*

49 K. Larenz. Sittlichkeit und Recht. Untersuchungen zur Geschichte des Deutschen Rechtsdenkens und zur Sittenlehre. – id. (ed.). Reich und Recht in der Deutschen Philosophie, volume 1, 1943, pp. 169 *ff.*, especially pp. 202 *ff.* (Thomasius) and 250 *ff.* (Wolff).

50 K. Larenz (Note 4); on these contexts, see M. Frommel. Die Rezeption der Hermeneutik bei Karl Larenz und Josef Esser. 1981.

51 F. Beyerle (Note 47), p. 13.

There was more to this argument than just mourning the abolishment of material justice. The stress was placed on the 'social ethics' of natural law. The accusation was not restricted to that of being a stringently systematic legal order, with criticism of the unworldliness resulting from its strictly logical application. This also was an attack on the main doctrinal concept of the historical school, which stated that all binding law emanated from the free will formed by the individual. What was hidden between the lines here was the question of whether private law as such, on its basic level, should give preference to egotistical interests as opposed to a preponderance of community interests. The question really asked here was one of individualist vs. social private law. From Julius Binder's 1925 proposition onwards, the discussion focused on the question of whether the autonomy of the individual in private law is bound by socio-ethical rules or not. The general perspective of this discussion therefore was not only anti-positivist but anti-liberal as well. This was a fight not about justice as such but about a very particular kind of justice. Scientific positivism had created a positivist-liberal private law, brought to full reality by the 'late-born'*[52] German Civil Code of 1900, and therefore also had prepared the ensuing 'intellectual and moral breakdown'*[53].

'Great legal thinkers' and their role in anti-positivist legal history of private law

Wieacker and his contemporaries preferred to write history by illustrating it with the ideas of 'great men'. The central treatise at their disposal was a book by Erik Wolf, *Great Legal Thinkers in German Cultural History*, published in 1939*[54]. Wolf defined great legal thinkers as 'not ordinary people. […] They are witnesses to the acts of God on earth. This means: by studying their character and works we learn something about the meaning of history and therefore about the meaning of our own lives […] Insofar, great minds provide us with a measure.'*[55]

Accordingly, they were persons who both explicated epochs and also initiated them at the same time. Great minds were divided into categories such as founders, forerunners, finishing masters, or even vanquishers of epochs. Naturally, it was very important who was chosen. Erik Wolf chose Ulrich Zasius, Hugo Grotius, Samuel Pufendorf, Christian Thomasius, Friedrich Carl von Savigny, Bernhard Windscheid, Rudolf von Jhering, and Otto von Gierke. If you add Christian Wolff and Georg Friedrich Puchta, it is possible to tell the whole history of private law just by referring to this very select number of scholars.

Ulrich Zasius, to start with, was one of the humanists and thus exemplifies the benefits as well as the risks of a scientific approach in law, since, although he had advanced the serious examination of ancient law, he at the same time had lost track of contemporary problems. Hugo Grotius and Samuel Pufendorf, on the other hand, stood for an ideal wherein scientific and ethical concerns were treated in equal harmony, under the presumption that natural law had evolved from the standards of a secular social community. The dangers of rigorous scientific legal thinking then again were brought to the fore by Christian Thomasius and Christian Wolff. Thomasius was identified as a major malefactor, since he had drawn a sharp distinction between law and ethics and therefore destroyed the foundation for the kind of autonomous social ethics the older law of reason had created.*[56] Christian Wolff then brought this 'logical rationalism', as Wieacker called it in 1952, to unprecedented heights: Wolff had deduced all rules of natural law from a system of gapless axioms, down to the smallest details, leaving out both inductive reasoning and empirical arguments. In Wolff, Wieacker saw the founding father of 19th-century 'scientific positivism'. It was him who broke the ground for the coming generations of legal thinkers, who were overly fixated on formal, positivist methods, with little more than a faint remembering of ethical values. Wolff's gapless system of axioms and deduced rules was able to live because it secretly sapped the essence of the material ethics developed by Grotius and Pufendorf, Wieacker continued in his analysis.*[57] Immanuel Kant was named as another hidden source of ethical obligations. In 1951, Hans Welzel stated that Kant's ethics had required the premise of an objectively existing ethical order, and that his philosophy had been a far cry from purely subjective ethics.*[58] The latter were a misconception brought about by Neo-Kantianism and 'certain existentialist teachings', Welzel said. Von Savigny was read as a Kantian and therefore remained also between these two epochs, of good and bad positivism. In von Savigny, Wieacker saw 'ethical responsibility committed to the free autonomous will of the individual' that

[52] F. Wieacker (Note 5), p. 15.

[53] F. Wieacker (Note 3), p. 14.

[54] 4th ed. 1963.

[55] E. Wolf (Note 17), pp. III *ff.*

[56] F. Wieacker (Note 3), p. 190.

[57] *Ibid*., p. 193.

[58] H. Welzel. Naturrecht und materiale Gerechtigkeit. 1962, p. 169.

still steered clear of undermining the ethical doctrines of older natural law.*[59] The final demise, however, had begun with the rise of Georg Friedrich Puchta, classified as the main culprit ushering in a new level of 'conceptual formalism in legal science'.*[60] While Puchta was the founder of the classical jurisprudence of concepts, Bernhard Windscheid represented scientific positivism at its prime, in which purportedly all rules of law were deduced from a rigorous pyramid of concepts, with complete indifference to society, politics, economics, and ultimately justice. Now the rise of Rudolph von Jhering began. He saw his chance here and cunningly declared a fundamental change of his mind; from now on, he would fight against what he himself had adhered to before—against 'formalism of the will' and 'jurisprudence of concepts', following a realist, purpose-oriented approach instead. Wieacker elevated von Jhering's publicity stunt even further, to biblical dimensions, and explicitly referred to the conversion of Paul. The last great jurist in the developments of this long 19th century was found in Otto von Gierke, who famously had demanded that 'a drop of socialistic oil' be added to the Bürgerliches Gesetzbuch. He stood for the ideal of a non-positivist, social private law.

With Gierke, the history of the scientification of private law had found its end. From this point onward, the political and social dimensions of private law were moved to the foreground, while technicalities such as methods or logical reasoning were removed to a lower rung of the ladder, where they were deemed to really belong. Again, everything was connected teleologically and pivoted around the ominous great minds: The gaze would wander from Grotius on to Thomasius, Wolff, Kant, von Savigny, Puchta, Windscheid, von Jhering, and von Gierke.

Stringing persons together in a long line, however, does not work in the same way as a child's stringing of beads together on a cord to make a necklace. The legal order of the day to a great extent is reflected back onto the perceived character of the persons and changes them. I would like to illustrate this with the example of Bernhard Windscheid. In order to do so, I will establish a counter-image first. In 1910, Ernst Landsberg published his history of German legal science. As I have already pointed out, Landsberg not only had a completely different understanding of positivism but also was free of the anti-positivist bias that only started to emerge later, in the 1920s. His image of Windscheid therefore should show some interesting differences.

To be sure, Landsberg as well saw formalistic tendencies with Windscheid. His formalism, Landsberg wrote*[61], had originated from an ever stricter approach in the validation of contemporary legal doctrines against the sources of ancient law. Differently put, Windscheid had lost practical solutions to real-life problems in the inductive reasoning necessary when one works with ancient sources. Landsberg put the emphasis on concepts that were of practical help; sticking to the letters was dangerous.

Wieacker drew quite a different picture in 1942*[62]. For him, Windscheid had followed a purely deductive method, logically deducing all rules of law from accepted axioms down to the last detail and generating a seamless system of rules and institutions. Wieacker arrived at this conclusion because his own thinking proceeded from the idea of subjective rights, and from this vantage point he looked 'downward' onto Windscheid's system, arguing deductively. For Wieacker, Windscheid had applied his definition of law and from this had then deduced all of the other rules. Landsberg, on the other hand, had styled Windscheid as purely inductive, arriving at unworldly conclusions, while Wieacker's new Windscheid deduced unethical rules of law from higher principles.*[63]

Wieacker arrived at this conclusion because he believed Christian Wolff's 'demonstrative method', a system of natural law, to be the precursor. According to Wieacker, the historical school had simply transferred the system and method of the later law of reason to the content of the *ius commune*. Thereby, an inductive Windscheid became deductive. All of this essentially was argued in a deductive way, too: It was based on the premise that pandectism was the secret heir of natural law. Tellingly, those adopting this position never provided precise citations from the works of Windscheid. In any case, the first study of Windscheid that lived up to modern standards was published only in 1989 and promptly invalidated these claims.*[64]

Conclusions

Legal history and the history of private law, in particular, have been told as the history of positivism, and they continue to be told in this way. The impact of this narrative can hardly be exaggerated. It had far-reaching consequences, in that it was decisively at play in the structuring of time into supposed epochs, and also in its

[59] F. Wieacker (Note 3), pp. 229 *ff.*

[60] R. Schröder. Abschaffung oder Reform des Erbrechts. 1981, pp. 417 *ff.*

[61] E. Landsberg (Note 12), p. 861.

[62] F. Wieacker. Bernhard Windscheid. Zum 50. Todestag am 26. Oktober 1942. – Deutsches Recht 1942 (12), pp. 1140 *ff.*

[63] For more details on this aspect, see H.-P. Haferkamp (Note 9).

[64] U. Falk. Ein Gelehrter wie Windscheid. Erkundungen auf den Feldern der Begriffsjurisprudenz. 2. Aufl. 1999.

influence on the assessment of individual historical actors, down to the tiniest details. Anybody who likes to draw big lines in legal history needs to be aware of this.

One last question remains to be answered: Should one still make use of the positivist narrative?

Over the last couple of years, it has become increasingly clear that the list of casualties in the wake of anti-positivist legal history is not a short one. The positivism narrative not only left to the side the economic and political contexts. The substance of the law itself, concrete rules, judgements, and doctrine found little interest as well. What was told was a history of law without law. This, however, was not seen as a problem, because most people agreed on at least two central matters: First, positivism is unjust. Secondly, the autonomy of the subject in private law endangers public co-operation and community.

In Germany, the (hi)story of the fall and rise of positivism after 1918 catered to anti-democratic, from 1933 onward to nationalist-racist, and after 1945 to remorsefully Christian narratives, but in every instance, people had agreed on the same two basic assumptions. Whoever continues to tell history through the looking glass of positivism today, however, needs to be aware that such a consensus no longer exists. Equating positivism with peril and anti-positivism with salvation no longer stirs up emotions. Today, we know very well that it was not positivism that had left the lawyers of the Third Reich defenceless and, put more precisely, that the terror unleashed during the time of national socialism also resulted from the fact that lawyers did much more than just passively apply 'naked' statutes. Today, we both do of instances of inhuman natural law and have learned to appreciate what it means to be bound by even-handed legislation. In other words, the concepts of natural law and positivism are no longer of help when we argue about justness and equity. Equally, the earlier understanding of the 19th century as a hotbed of unrestricted hardcore liberalism, an age in which the law did not impede the strong or protect the weak, has been shown to be wrong. Morals surely do fluctuate over time, but nobody took to such an immoral stance back then, and the law had provided judges with ample possibilities to ameliorate inequity in a given case. Here as well, equating 'social' with 'good' and 'liberal' with 'egotistical' and 'dangerous' does not satisfy anymore. The history of national socialism and then socialism shows clearly that such an equation would be too simple.

What is the result? What we need today is a new story of the history of private law. At the moment, there is no authoritative book on this topic on the European market. What we need for such a book are new questions. Therefore, the first step is to reflect on the fact that our own thoughts as historians are attached to puppet-strings, played by historians such as Franz Wieacker. We have to become aware of this if we are to be free to find these new questions.

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Judicial Independence and/or(?) Efficient Judicial Administration

1. When did we start to think about judicial independence? Why should we care?

We are today so used to the rhetoric of judicial independence that we rarely think about the origins of the concept of judicial independence and whether and how we benefit from it. Although the idea of separation of powers has been discussed already from Aristotle and Polybius to Marsilius of Padua, John Fortescue, and Gasparo Contarini[*1], judicial independence is a comparatively modern invention.

There were for centuries and centuries only bodies having judicial functions without almost any independence. For example, in the times of the Norman monarchy, the king with his Curia Regis was in charge of judicial power in the Kingdom of England. Subsequently, however, more courts were formed and a judicial vocation developed. In the fifteenth century, the king's role in exercise of judicial power diminished substantially. Even so, kings could still influence courts and dismiss judges. The House of Stuart exercised this power recurrently in order to override Parliament.[*2]

The formerly unlimited royal privilege of instituting courts was curtailed when Parliament eliminated the courts of the Star Chamber and High Commission in 1641 and when by adopting the English Bill of Rights[*3] it declared illegal the establishment of ecclesiastical courts by James II.[*4] After the Stuarts were eradicated with the Revolution of 1688, the attitude toward the power of the king to overrule Parliament by dismissing disobedient judges and nominating new judges became more and more one of detestation. King William III at the end of the day approved the Act of Settlement 1701[*5], which instituted tenure for judges except where

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1 S. D. Gerber. The Court, the Constitution, and the History of Ideas. – Vanderbilt Law Review 2008 (61), pp. 1088 –1105.

2 R. J. McWhirter. Going Courting. Where We Got Courts and the Rule of Law. – Arizona Attorney, October 2008 (45), pp. 12–22.

3 English Bill of Rights. Available at http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&Year=1688&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=1518621&ActiveTextDocId=1518621&filesize=29720 (20.12.2009).

4 R. J. Reinstein. The Limits of Executive Power. – American University Law Review, December, 2009 (59), p. 282.

5 Act of Settlement. Available at http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&PageNumber=0&NavFrom=0&activeTextDocId=1565208&parentActiveTextDocId=0&showAllAttributes=0&showProsp=0&suppressWarning=0&hideCommentary=0 (20.12.2009).

Parliament relieves them of their duties.*[6] In the main, this resulted in a significant degree of independence from executive control for British judges in the eighteenth century and thereafter.*[7]

Since the time of Aristotle, the main rationale for advocating for judicial independence has been the objective to protect the people from tyranny.*[8] It has been asserted that judicial independence is most important in those cases where courts are called upon to resolve disputes between individuals and the state or between different branches of government. Judicial independence, at its base, means that judges are free to rule against the government, should the law so dictate, without fear of reprisal.*[9]

Later, judicial independence has been considered in a much broader context, including that of undue influences from all possible agents in society.

Although there is tension between independence and accountability, independence will be weak if corrupt behaviour is prevalent.*[10] The threat to judicial independence is not always governmental. The judiciary needs to be concerned about independence not only from the other branches of government but also from illegitimate sources of power. Judicial independence from other branches of government is crucial, but it is meaningless if judges are instead subjected to other improper influences. Consequently, governments seeking to establish an independent, autonomous judiciary having the respect and trust of the people must take steps to secure the independence of the judiciary from the influence of powerful non-government groups that have an incentive to influence the outcome of adjudications.*[11] In this sense, judicial independence has utilitarian reasons. Judges conceivably influenced by agents of undue pressure would render judgements not based exclusively on the law and facts of the case but may take into account the interests of the above-mentioned agents. Therefore, judgements rendered under undue influence would lead the society away from the models of behaviour upon which that society has decided through legislation*[12] to be those best serving the interests of the society.

Judicial independence signifies much more than a judge's freedom from political influence. Independence has a number of definitions and dimensions, including structural, organisational, and administrative aspects of a judicial system, which all play a role in judicial independence.

The International Association of Judges has declared that "[j]udicial independence is independence from any external influence on a judge's decisions in judicial matters, ensuring [for] the citizens impartial trial according to law. This means that the judge must be protected against the possibility of pressure and other influence by the executive and legislative powers of [the] state as well as by the media, business enterprises, passing popular opinion etc. But it also implies guarantees against influence from within the judiciary itself"*[13].

There are several, different types of independence:

1) substantive independence, which is functional (*sachliche Unabhängigkeit*) or decisional independence, in German and American law, respectively (making judicial decisions and exercising official duties subject to no other authority but the law);
2) personal independence (adequately secured judicial terms of office and tenure);
3) collective (institutional) independence (judicial participation in the central administration of courts); and
4) internal independence (independence from judicial superiors and colleagues).*[14]

In the discussion on the influence of the hunt for efficient court management, all of these types of independence should be kept in mind.

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[6] No judge in England has been removed from a high court since 1830. See M. Dakolias, K. Thachuk. Attacking Corruption in the Judiciary: a Critical Process in Judicial Reform. – Wisconsin International Law Journal, Spring, 2000 (18), p. 402. Nevertheless there have been very few lapses in propriety. One judge died in Nottingham, on 17 July 1884, in a house which was neither so sedate, nor so orderly, as the judge's lodgings. But so far as independence is concerned any examples of subservience to either executive or to the legislature in the last century in England are difficult, if not possible, to find. See Lord Lane. Judicial Independence and the Increasing Executive Role in Judicial Administration. – Judicial independence: the contemporary debate. S. Shetreet, J. Deschênes (eds.). Dordrecht: Kluwer Law International 1985, p. 525.

[7] S. Jay. Servants of Monarchs and Lords: the Advisory Role of Early English Judges. – American Journal of Legal History 1994 (38), p. 151.

[8] S. D. Gerber (Note 1), p. 1090.

[9] J. C. Wallace. An Essay on Independence of the Judiciary: Independence from what and why. – New York University Annual Survey of American Law 2001 (58), p. 242.

[10] M. Dakolias, K. Thachuk (Note 6), p. 354.

[11] J. C. Wallace (Note 9), pp. 245–246.

[12] Here we do not enter the discussion whether any society is able to find the best models of behaviour through legislation and just assume that we have not been able to find out any better sources.

[13] International Association of Judges. Meeting in Recife, 17–21 September 2000, Final Report. The Independence of the Individual Judge within his Own Organization. Available at: http://www.iaj-uim.org/site/modules/mastop_publish/?tac=41 (17.06.2010).

[14] See S. Shetreet. The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: the Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges. – Chicago Journal of International Law, Summer, 2009 (10), p. 281; M. Dakolias, K. Thachuk (Note 6), pp. 361–362.

Raul Narits and Uno Lõhmus have asserted in the commentaries to the Estonian Constitution that the constitutional provision for judicial independence should protect courts primarily from the executive power*[15] and that European countries have been at an increasing rate acknowledging judicial self-administration, denoting that judges should have substantial contribution in administration of courts.*[16]

The one caveat, sometimes offered, is that judicial independence should not come at undue cost in terms of judicial accountability. If, for example, a judge is afforded life tenure in an effort to insulate her from outside influences and then she demonstrates an invidious bias in her performance, the independence inherent in the life tenure makes it difficult, if not impossible, to hold her accountable for her unacceptable bias. Conversely, judicial accountability can undermine independence. For example, if a robust system of judicial discipline and removal is put in place to hold judges accountable for their biases, the judges' independence is inevitably infringed, as the disciplinary regime can always be used to intimidate judges from rendering unpopular decisions. This illustrates the problem as one of balancing two competing interests.*[17]

Judicial independence is often treated as if it were an unalloyed good, to be furthered insofar as practically possible. In the traditional telling, an independent judiciary is regarded as if it were the font of justice, the rule of law and individual rights, if not the font of all good things. Such worship of judicial independence is not sustainable, theoretically or empirically. Indeed, the concept of judicial independence potentially flies in the face of our fundamental constitutional concept of checks and balances. While there is no doubt that a measure of judicial independence is a good thing, such independence must be kept in balance with judicial accountability. Increased judicial independence is not always better.*[18]

Although the concept of judicial independence is at least in part based on the Aristotelian desire to keep away from the threat of tyranny, unlimited judicial independence, if not counterpoised by accountability as well as checks and balances between powers, could lead to tyranny itself: judicial tyranny.

2. Courts need administration, don't they?

The courts cannot function without administration. As Peter Ferdinand Drucker has already phrased it, "[w]ithout institution there is no management. But without management there is no institution".*[19]

Courts are highly complex institutions, which are difficult to manage on a number of levels and for a number of reasons.*[20] For decades, if not longer, legislators and many in the executive branch saw the judicial branch as unmanaged and the source of many fiscal and budgeting nightmares. They also often viewed judges and their managers as incapable of effective management.*[21]

The scant administrative capabilities demonstrated by courts for decades flowed in part from the prevailing view that courts were simple organisations that would work well as long as judges addressed their caseloads diligently. The modern concepts of case and caseload management—the idea that courts are responsible for the timely progress of cases and for the active management of judicial resources—had not yet been embraced. Rudimentary court and caseload management was supplied by clerks of the court in the form of handling court files and scheduling cases. Over time, however, growing communities yielded larger workloads, and growth became foremost among the several factors driving the necessity for rational court management. Additional compounding factors were increasing social and legal complexities of issues that come before the courts. Even as court systems simplified their jurisdictional structures through unification reforms, the communities they served became more complex and interdependent. As complexity and interdependence grew in social relationships and economic transactions, the laws that govern those relationships mirrored their complexities and interdependencies.*[22]

However, the controls necessary for judicial administration make judicial independence vulnerable to risk. There are five models of judicial administration. These are:

1) the exclusive executive model;
2) the joint executive–judicial and multi-branch responsibility model (e.g., judicial councils);

[15] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition). Tallinn: Juura 2002, p. 611 (in Estonian).

[16] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. 2., täiendatud trükk (The Constitution of the Republic of Estonia. Commented edition. Second, amended edition). Tallinn: Juura 2008, pp. 678 and 683 (in Estonian).

[17] D. Pimentel. Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity. – Cleveland State Law Review 2009 (57), p. 5.

[18] F. B. Cross. Thoughts on Goldilocks and Judicial Independence. – Ohio State Law Journal 2003 (64), p. 195.

[19] P. F. Drucker. Management: Tasks, Responsibilities, Practices. New York: Harper & Row 1973, p. 6.

[20] A. B. Aikman. The Art and Practice of Court Administration. Boca Raton, Florida: CRC Press 2007, p. 5.

[21] *Ibid*., p. 7.

[22] S. Henley, J. H. Suhr. The Role of Court Administration in the Management, Independence, and Accountability of the Courts. – Florida Bar Journal, March, 2004 (8), p. 29.

3) the exclusive judicial model;
4) the shared responsibility model; and
5) the model of separate independent organ of judicial administration.[*23]

The exclusive judicial model may be classified into two sub-models:

a) the individual model, vesting the responsibility in one individual judge, as in New York, and
b) the collective model, vesting the responsibility in a collegial judicial body, as in the federal judiciary of the United States, or as in Italy and Portugal.[*24]

The shared executive–judicial model too can be classified into sub-models:

a) vertical division of responsibility (i.e., certain matters are the responsibility of one branch throughout the whole court system while other matters are placed in the responsibility of another) and
b) horizontal division of responsibility—normally, the administration of the higher court will be the responsibility of the judiciary and the executive will be entrusted with the administration of the lower courts (as in Australia, Germany[*25], and Canada).[*26]

One model of shared judicial–executive responsibility is for the responsibility indeed to rest with the executive for the court system, in whole or in part, while the executive is under a duty to consult the judiciary in exercising its responsibility over the court system. A variation of the shared responsibility model may go beyond consultation with the judiciary and may provide for joint responsibility of the judiciary and the executive for court administration.[*27]

In conclusion, it can be asserted that the more involvement of executive and legislative powers in judicial administration the more potential threats exist to judicial independence.

3. Efficiency of judicial administration v. judicial independence—the case of Estonian judicial reforms

Since regaining independence in 1991, Estonia has tried out two different systems of judicial administration and is currently debating introduction of a third.

Right after recovery of independence in 1991, even before adoption of the Constitution, Estonia instituted the new court system. The Legal Status of Judges Act was adopted on 23 October 1991 and entered into force on 1 January 1992[*28], and the Courts Act had the same adoption date and entered into force a year later, on 1 January 1993.[*29] These acts created a system of courts having three links and three instances, special administrative courts were formed, and the judges were to be appointed for life.[*30]

Estonia adopted a shared responsibility model of judicial administration quite close to the German version. The responsibility was divided horizontally (leaving the Supreme Court outside the administration by the executive power) and vertically (leaving the majority of issues to be administered by the executive and only a few by the judicial power). The courts of first instance (the county court, or *maakohus*; city court, or *linnakohus*; and administrative court, or *halduskohus*) and courts of second instance (circuit court, *ringkonnakohus*) were administered by the Ministry of Justice. The Minister of Justice approved the budgets of courts of first instance and courts of appeal; determined the territorial jurisdiction and location of, and the number of, judges in these courts; appointed the chief judge of a county or city court; and approved the rules of these courts and the land registries and registration departments in the composition thereof. The initial selection of judges of courts of first instance and circuit courts was within the realm of judicial power—they were (and are) appointed to office by the President of the Republic, on the proposal of the Supreme Court.[*31]

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[23] S. Shetreet. Judicial Independence: New Conceptual Dimensions and Contemporary Challenges. – Judicial independence: the contemporary debate. S. Shetreet, J. Deschênes (eds.). Dordrecht: Kluwer Law International 1985, p. 644.

[24] *Ibid*.

[25] Constitutional Court (*Bundesverfassungsgericht*) has in Germany the benefit of a much wider administrative independence than other courts. The budget estimates of the Constitutional Court are prepared by the court and are presented to the Ministry of Finance directly as a separate plan, like the budget plan of a Federal Ministry.

[26] S. Shetreet (Note 23), p. 644.

[27] *Ibid*., p. 645.

[28] Eesti Vabariigi kohtuniku staatuse seadus, 1991. – RT 1991, 38, 473 (in Estonian).

[29] Kohtute seadus, 1991. – RT 1991, 38, 472 (in Estonian).

[30] The pros and contras regarding judicial independence guaranteed by the 1991 Acts were discussed in a paper: J. Ginter. Guarantees of Judicial Independence. – Juridica International 1996 (I), pp. 75–84.

[31] Eesti Vabariigi põhiseadus, § 150. – RT 1992, 26, 349; RT I 2007, 43, 311 (in Estonian). Translation into English available at http://www.president.ee/en/estonia/constitution.php (23.03.2010).

The Supreme Court (*Riigikohus*) was (and still is) administered by itself and financed directly from the state budget. The different model of administration for the Supreme Court was for the most part rationalised by the fact that in Estonia the Supreme Court has the authority of a constitutional court as well. According to the Constitution of the Republic of Estonia, the Chief Justice of the Supreme Court is appointed to office by the *Riigikogu*, Parliament, on the proposal of the President of the Republic. Justices of the Supreme Court are appointed to office by the *Riigikogu*, on the proposal of the Chief Justice of the Supreme Court.[*32]

For a decade, the Supreme Court and the Ministry of Justice were engaged in discussion as to whether the model of judicial administration guaranteed enough independence for the judiciary.

Then Chief Justice of the Supreme Court, Rait Maruste, proclaimed that it is necessary to bring the Courts Act, adopted before the Constitution, into accordance with the Constitution and generally recognised principles of democratic jurisprudence, and that in its essence and substance the Estonian judicial system is similar to the Anglo-American system and therefore the system of judicial administration should follow the American model in such a manner that all administrative matters would be decided by the Supreme Court and the Chief Justice.[*33]

Another proponent of greater involvement of the judiciary in judicial administration, Heinrich Schneider, suggested that the separation of the judicial power from the executive and the legislative power presupposes the organisational unity and integrity of the judicial power. Moreover, the judicial system should be independent in judicial administration, vesting the responsibility for judicial administration in a judicial body.[*34] The idea of more autonomy in administration was defended in a number of other papers. Chief Justice of the Supreme Court at the time, Uno Lõhmus asserted that the existing procedures for formation of court budgets created a risk that the judgements of the Supreme Court might find reflection in the next year's budget of the Supreme Court.[*35] First-instance-court judge Aase Sammelselg came to the conclusion that involvement of executive power in the judicial administration causes conflicts of interest between the administrator (executive power) and the judiciary.[*36]

Rait Maruste asserted in 1997 that in substance the Ministry of Justice was proposing a system of judicial administration that treats courts as adjudicative institutions of executive power that have the same autonomy in delivery of justice but that is subject to the control and supervision of the Minister of Justice in all its other activities.[*37]

The idea of greater judicial responsibility for judicial administration was countered by the Ministry of Justice. Then Minister of Justice Märt Rask asserted that the system of judicial administration should not be removed from the authority of the Ministry of Justice and that none of the many mandates of executive power in judicial administration hinder judicial independence.[*38]

The Ministry of Justice proposed a draft Courts Act that would leave courts of first and second instance under the administration of the Ministry of Justice. Notwithstanding that the Estonian Constitution, in § 146, declares that "[t]he courts shall be independent in their activities and shall administer justice in accordance with the Constitution and the laws"[*39], the stance of the ministry was that judicial independence should be guaranteed exclusively at the level of individual judges and it would mean only that no-one should be allowed to interfere in the matters of a concrete court case; i.e., for the most part, barely substantive (functional) independence of the judiciary was supposed to be appropriate. The only other aspect of independence deemed worthy of mention in the explanatory note to the draft was internal independence (independence from judicial superiors and colleagues).[*40]

At the first reading of the draft in the *Riigikogu*, then Minister of Justice Märt Rask insisted that no change in judicial administration is reasonable.[*41] Only on the second reading did the Ministry of Justice agree to the idea of creating a new institution of judicial administration—the Council for Administration of Courts.[*42]

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32 The Estonian Constitution, § 150.

33 R. Maruste. Eesti kohtusüsteemi juhtimise korrastamise kava (Project for Regulating the Management of the Court System). – Juridica 1995/5, pp. 199–203 (in Estonian).

34 H. Schneider. Kohus lahusvõimude süsteemis (Courts in the System of Separation of Powers). – Juridica 1999/9, p. 419 (in Estonian).

35 U. Lõhmus. Kohtuvõimu sõltumatus ja kohtuhaldus (Independence of Judiciary and Judicial Administration). – Riigikogu Toimetised 2001 (3). Available at http://www.riigikogu.ee/rito/index.php?id=11686&op=archive2 (17.01.2010) (in Estonian).

36 A. Sammelselg. Kohtukorralduse korraldamatus pärsib kohtusüsteemi arengut (Problems in Judicial Administration Hampers Development of the Judicial System). – Riigikogu Toimetised 2001 (3). Available at http://www.riigikogu.ee/rito/index.php?id=11686&op=archive2 (17.01.2010) (in Estonian).

37 R. Maruste. Kuidas korraldada kohtukorraldus? (How to Organise the Administration of Courts?) – Juridica 1997/10, pp. 501 (in Estonian).

38 M. Rask. Võimude tasakaalustatus kui põhiseadulik väärtus (Balance of Government Powers as a Constitutional Value). – Riigikogu Toimetised 2001 (3). Available at http://www.riigikogu.ee/rito/index.php?id=11686&op=archive2 (17.01.2010) (in Estonian).

39 The Estonian Constitution, § 146.

40 Kohtute seaduse eelnõu seletuskiri (Explanatory Memorandum to the Draft Courts Act), 2000. Available at http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003674649&login=proov&password=&system=ems&server=ragne11 (24.01.2010) (in Estonian).

41 The speech of then Minister of Justice, Märt Rask, at the first reading of the Courts Act in Riigikogu on 14 February 2001. Available at http://web.riigikogu.ee/ems/stenograms/2001/02/t01021405-15.html (25.01.2010) (in Estonian).

42 *Ibid*.

The new Courts Act was adopted on 19 February 2002 and entered into force on 29 July 2002. This act created the Council for Administration of Courts, and the system of judicial administration of courts of first and second instance shifted a little further from the executive responsibility model. From this point onward, the majority of the decisions of the Minister of Justice in judicial administration needed the consent of this council. The council's approval became necessary for:

1) determination of the territorial jurisdiction of courts;
2) determination of the structure of courts;
3) decision on the exact location of courts and courthouses;
4) the determination of the number of judges in the courts and judges in permanent service at a courthouse;
5) the appointment to office and any premature release of chairmen of courts;
6) determination of the number of lay judges;
7) determination of the internal rules of courts,
8) determination of the number of candidates for judicial office;
9) the appointment of candidates for judicial office;
10) decisions on any additional remuneration for a manager of a courthouse;
11) the establishment of the composition of register data for the courts' information system and the procedure concerning submission thereof; and
12) the conscription of judges into active service in the defence forces.

The council's approval is not necessary for budgetary decisions, but the council provides a preliminary opinion on the principles for the formation and amendment of annual budgets of courts.*[43]

Still the executive remained heavily involved in the administration of the first- and second-instance courts. And the judicial power continued to be unsatisfied with the situation.

The next momentous factor to be considered in the development of Estonia's courts is that the judges worked out the principles for development of the court system. The discussion about the development of the court system's self-organisation, its financing, and administration culminated in February 2007, when the *en banc* meeting comprising all Estonian judges approved certain principles for development of the court system. The document concerning these principles according to which the court system would be developed as an independent branch of power, for the first time in the history of the Republic of Estonia, set out the directions and objectives for that development.

The most important principles for the development of the court system were declared as being the following:

1. Estonia's court system is a Constitutional institution that, on the basis of the principle of separate and balanced powers, is independent in its activities.
2. The court system operates as an independent power, responsible for the functioning of the administration of justice on the basis, and pursuant to the procedure, established by laws.*44
3. To ensure development of the court system in observation of fundamental values and its functioning pursuant to established requirements, it is important to regulate the duties and structure of the court system, to develop the financing and administration of the court system, to deepen the self-managerial elements thereof, and to promote the personnel policy of the court system and training.

…

7. For further development in line with the principle of separation of powers, the administration of courts should be separated from the executive power. To guarantee the appropriate administration and development of courts, an independent administrative authority was to be established, to be part of the single court system in legal and organisational senses and subject to the management model of the court system as a whole.
8. The court system shall be managed on the basis of the principle of self-management, with that management exercised through the activities of the Court *en banc*, the Council for Administration of Courts, the Chief Justice of the Supreme Court, chairmen of courts, the full court, and the director general of the administrative authority of courts and directors of courts.

…

15. The budget of the court system, separated from the budget of the Ministry of Justice, must become a stable all-inclusive budget of the system of administration of justice, the development priorities of which are established for at least three years at a time*[45].*[46]

[43] Kohtute seadus (The Courts Act), § 41. – RT I 2002, 64, 390; 2009, 68, 463 (in Estonian).

[44] This principle involved other elements also.

[45] This principle involved other elements also.

[46] The principles of development of the court system. Resolution of the Court en banc of 9 February 2007. Available at http://www.nc.ee/?id=188 (26.03.2010).

In March 2008, the Minister of Justice established a working group to prepare the amendments to the legislation regulating judicial administration and organisation. Then, in 2009, a new draft Courts Act was submitted by the working group headed by Märt Rask, who was Minister of Justice at the time the Courts Act was adopted in 2002 and is now Chief Justice of the Supreme Court.*[47] The new draft suggests a complete change in the judicial administration; the administration of the first- and second-instance courts will be in the same system as the Supreme Court. The Ministry of Justice will have almost no functions in judicial administration. Judicial administration will be the mandate of the Council for Courts' Administration of Courts and the Centre for Courts' Administration.

At first glance, the draft appears to have the potential to be popular with the judiciary. However, in reality the overwhelming majority of the Supreme Court Justices and judges of the courts of first and second instance have opposed the draft.*[48]

The opposition to the draft has several, very different sets of roots.*[49] Nonetheless, almost all who oppose the 2009 draft are unsatisfied with the fact that it proposes to introduce to judicial administration many features that have long been employed exclusively in the sphere of administration of civil service.

The draft proposes that the Chief Justice of the Supreme Court may be, upon the proposal of the President, removed from office by the *Riigikogu* without the requirement of any reason being offered for this removal.*[50] This innovation has been explained as a means to guarantee more efficient management of the court system by the Chief Justice. Yet, while such measures are not unfamiliar in the administration of executive power, the introduction of such measures in judicial administration creates unnecessary potential opportunities for executive and legislative power to put pressure on the Chief Justice—the head of the Supreme Court. Such opportunities are extremely dangerous Estonia, because the Estonian Supreme Court exercises the judicial review and has to check the constitutionality of the legal acts of the executive and legislative power

The greatest challenge to judicial independence is the close relationship between the executive branch and the judiciary, resulting in a lack of sufficient judicial independence. This challenge can be seen in the pressures exerted on judges both by the executive branch and by higher-ranking judges.*[51]

The second most common criticism of the draft of 2009 is that it constructs excessively hierarchical relationships among the Chief Justice, the chairmen of the courts, the chairmen of the courts' chambers, and the justices and judges. The draft allows:

1) release of a chairman of a chamber of the Supreme Court due to failure of co-operation between the Chief Justice and the chairman of that chamber*[52]; and
2) release of a chairman of a court, a chairman of a chamber of a circuit, or a manager of a courthouse due to failure of co-operation with the chairman of the higher court or with the chairman of the court.*[53]

This concept is again not unfamiliar in relations between managers within the executive power. And, of course, rigid hierarchy makes management more efficient. But within the judicial power such grounds for release create unnecessary potential opportunities for higher-ranking judges to exert pressure on judges, which has been criticised by many analysts.*[54] Internal judicial independence requires that the judge be independent from directives or pressure from his fellow judges with regard to his adjudicative functions.*[55]

The 2009 draft introduces an opportunity for a judge to be transferred from one courthouse of a court to another by the chairman of the court without the consent of that judge.*[56] This would make it easier for judicial administration to equalise caseloads across the various courts, but it would create an additional opportunity for a higher-ranking judge to exert pressure on judges as well.

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47 Text of the Draft Courts Act (2009). Available at http://www.riigikogu.ee/?page=pub_file&op=emsplain&content_type=application/msword&file_id=868762&file_name=Kohtute%20seadus%20(652).doc&file_size=384000&mnsent=649+SE&fd=26.03.2010 (26.03.2010) (in Estonian); Explanatory memorandum to the Draft Courts Act (2009) (Note 40).

48 J. Filippov. Reformierakond valmistub kohtuid politiseerima (Reform Party Prepares to Politicise the Courts). – Eesti Ekspress, 10.12.2009. Available at http://www.ekspress.ee/news/paevauudised/eestiuudised/reformierakond-valmistub-kohtuid-politiseerima.d?id=27693755 (12.01.2010) (in Estonian).

49 U. Lõhmus. Kohtuhaldus kohtute seaduse eelnõu järgi (Administration of the Judiciary under the Courts Act Bill). – Juridica 2010/2, pp. 75–85 (in Estonian); P. Simson. Debatt: Kas kohtuid kummitab politiseerumisoht? (Debate: Is there a Threat of Politicisation of the Courts?). – Eesti Päevaleht, 3.02.2010. Available at http://www.epl.ee/artikkel/487310 (23.03.2010) (in Estonian).

50 Section 27 of the Draft Courts Act (2009).

51 S. Shetreet (Note 14), p. 296.

52 The Draft (2009), § 26.

53 The Draft (2009), § 19.

54 See, e.g., S. Shetreet (Note 14).

55 S. Shetreet (Note 23), p. 637.

56 The Draft (2009), § 52.

If the power of transfer were to be in the hands of the executive, it would constitute a very powerful deterrent and sanction against a judge who does not conform to what the authorities may desire. But even if such a power is in the hands of the judiciary, it should be vested in a collegial body—at any rate, in the hands of more than one person.*57

The issue of the scope of administrative supervision over a judge by his fellow judges is becoming increasingly present as a subject of debate. For example, unrestricted collective judicial control of the assignment of cases might lead to the undermining of a nonconformist judge's independence. This might have a chilling effect on judicial independence. On the other hand, absence of any control for fear of an adverse effect on judicial independence might militate against the efficiency of the justice system. Also, it might adversely affect public confidence in the courts. The legitimacy and validity of judicial interference with the administrative assignment of a judge was also subject to adjudication in Germany (in the case of Judge Dr V. H. de Somoskeoy).*58

Another problematic issue is that the 2009 draft authorises the Chief Justice of the Supreme Court to distribute by himself the budget allocated for courts among the various courts.*59 No doubt, the most functional scheme for distribution of the money is to offer the mandate to a single person. But this power would increase the dominance of the Chief Justice in the hierarchy of the judiciary. It is difficult to understand why the budget cannot be in the hands of the Council for Courts' Administration.*60

The draft introduces a novelty for the Estonian judicial system, substitute judges. According to the draft, the substitute judges should have the qualifications necessary for a person becoming a judge and would be appointed through the same procedure as the other judges. However, they would receive a salary only for the time for which they are appointed to serve as a substitute judge.

The use of substitute and part-time judges has been criticised widely. It is cost-effective, as it does not require long-term commitment of judges, accommodations, and support staff; these advantages, however, must be considered against the flaws of such a system. It has led to criticism that second-rate justice is disposed thereby. It has been asserted that use of predominantly part-time judges is incompatible with an orderly sequence of court sittings within an area and may impair the consistency of sentencing. It is conceivable that those part-time judges who fail to please the government may have their service terminated or may not be offered the opportunity to accept a full-time appointment. In the public perception, is that not a factor that could affect impartiality? In spite of these powerful objections to the institution of part-time judges, it is found in a number of countries. The 1983 Montreal Declaration did not state that the practice of employing part-time judges is inconsistent with judicial independence (§ 2.20 and explanatory note).*61 However, the declaration stated, the practice should not be resorted to, because the public perception concerning independence might cast doubt on the impartiality and independence of the judge.*62

For the Estonian judicial system, there is a further argument against introduction of substitute judges. The Estonian Constitution's § 147 states rigidly that 'judges shall be appointed for life'*63. And it is extremely questionable whether the substitute judge receiving a salary only for the brief period(s) for which she serves as a substitute judge can be regarded as a judge appointed for life. In any sense, the guarantees of independence would be substantially less for substitute judges than for 'full' judges appointed for life.

In conclusion, one may assert that the history of the development of the schemes for administration of the Estonian judicial system indicates that judicial administration may hinder judicial independence no matter what concrete model of judicial administration is employed.

57 S. Shetreet (Note 23), p. 630.

58 *Ibid*., pp. 638–639.

59 The Draft (2009), § 92.

60 The First Study Commission of the International Association of Judges has concluded in their (2003) study on "The Role and Function of the High Council of Justice or Analogous Bodies in the Organisation and Management of the National Judicial System" that "[t]he independence of the judiciary is also dependent on adequate budgetary allocations for the administration of justice and the proper use of those resources. This can be best achieved by an independent body which has responsibility for the allocation of those resources". Available at http://www.iaj-uim.org/site/modules/mastop_publish/?tac=43 (21.06.2010).

61 Universal Declaration on the Independence of Justice. – Judicial Independence. S. Shetreet, J. Deschênes (eds.). Dodrecht, Boston, Lancaster: Martinus Nijhoff Publishers 1985, p. 447.

62 S. Shetreet (Note 23), p. 626.

63 The Estonian Constitution, § 147.

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The Law Aids the Vigilant, Not the Negligent:

The Obligation to Use Primary Legal Remedies under Estonian State Liability Law

In many national legal orders, state liability law includes only claims for compensation and elimination of damage against public authorities.[*1] Similarly, in European Union law, only claim for damages is covered under the liability of an institution or a member state of the European Union. In the Estonian State Liability Act[*2] (hereinafter 'SLA'), on the other hand, the definition of state liability law is significantly broader. In addition to the claim for damage, state liability claims include numerous other claims, enabling the person to request the restoration of rights from a public authority.[*3] Such legal remedies include, *inter alia,* primary legal remedies—that is, claims against unlawful administrative action as stated in Chapter 2 of the State Liability Act, by which the person may request the termination of a violation of his rights.[*4]

Primary legal remedies have a substantial role in Estonian state liability law. According to § 7 (1) of the SLA, a person can claim for damages caused by unlawful administrative action only when the damage could not have been prevented by the obligatory primary legal remedies provided by law. Therefore, the obligation to use primary legal remedies is of importance in cases involving the claim for damages.

In Estonian court practice, the scope of application and content of the obligation to use primary legal remedies has been significantly broadened in relation to the provisions stipulated in the State Liability Act. In this article, the author analyses whether the purpose, content and scope of application of the obligation to use primary legal remedies attributed by the judiciary to this obligation are consistent with the constitutional requirements and the provisions of the State Liability Act.

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1 About English or French law, for example, see D. Fairgrieve. State Liability in Tort. A Comparative Law Study. Oxford 2003, pp. 16–19; on German law, F. Ossenbühl. Staatshaftungsrecht. 5. Aufl. München 1998, p. 1; on Italian law, P. Nacimiento. Gemeinschaftsrechtliche und nationale Staatshaftung in Deutschland, Italien und Frankreich. Baden-Baden 2006, p. 100 *ff.*

2 Riigivastutuse seadus. – RT I 2001, 47, 260; 2006, 48, 360 (in Estonian). The English version of the State Liability Act is available at www.legaltext.ee/et/andmebaas/ava.asp?m=022.

3 Claims that can be raised under state liability law are listed in § 2 (1) of the SLA. See an overview of Estonian State Liability Law in E. Andresen. The Claim for Elimination of Unlawful Consequences and the Claim for Compensation for Damage under Estonian State Liability Law. – Juridica International 2005 (X), pp. 169–170.

4 An exceptional primary legal remedy is the claim for refrainment from administrative act or measure provided by § 5 of the SLA, which, according to the conditions stipulated in the law, can be filed before the violation of person's rights. Since the purpose of this legal remedy is not requesting for the termination of a violation of rights, this claim does not belong to among the so-called obligatory primary legal remedies and is left out of this paper. Besides primary legal remedies and claim for damages, one more separate state liability claim is a claim arising from unjust enrichment under public law.

Although this article focuses on analysis of the Estonian national law, it needs to be considered that the obligation to use primary legal remedies has a direct relationship with the European Union law. In relation to this, also the European Court of Justice decision in the *Danske Slagterier* case from 2009, in which the Court passed judgement on the admissibility of applying the obligation to use primary legal remedies in cases of member state liability, is examined in this article.*[5]

1. The nature of the obligation to use primary legal remedies

The right to effective judicial protection provided in §§ 13–15 of the Constitution of the Republic of Estonia has to guarantee protection from unlawful actions of public authorities.

If a person finds that a public authority has violated his or her rights under a public-law relationship, he or she can decide whether to protect his or her rights. In the case of opting for protection of his or her rights, the person, under the principle of the freedom to choose the legal remedy, may also determine at his or her discretion what legal remedy he or she wishes to use to protect his or her rights.*[6] However, state liability law sets some limits to this freedom of decision. If the person wishes to claim for damages caused by unlawful administrative action, he or she cannot previously have chosen whether to protect his or her rights or not. That is to say that under Estonian state liability law, there is an obligation to use primary legal remedies. In accordance with this obligation, the person who wishes to file a claim for damages caused by unlawful administrative action against a public authority must try to prevent such damage or to eliminate the damage already caused through timely contesting of the action of the public authority. The obligation to use primary legal remedies is provided in § 7 (1) of the State Liability Act:

> A person whose rights are violated by the unlawful action of a public authority in a public-law relationship (hereinafter 'injured party') may claim for damages caused to this person if the damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in §§ 3, 4, and 6 of this Act.

The obligation to use primary legal remedies is not characteristic of Estonian state liability law only. For instance, a similar obligation is set forth in German and Austrian state liability law.*[7] However, the obligation to use primary legal remedies has some particular characteristics in Estonian law. Unlike the § 839 (3) of the German Civil Code (hereinafter 'BGB') and § 2 (2) of the Austrian Liability of Public Bodies' Act, which do not specify what kind of legal remedies should be applied to prevent damage, the Estonian State Liability Act specifically enumerates these primary legal remedies. From the obligatory primary legal remedies, a person can file a claim for annulment of an administrative act (under SLA § 3), claim for termination of a measure (SLA § 4), claim for issue of an administrative act (SLA § 6), or claim for taking of a measure (SLA § 6). These are the claims that enable to request the termination of a violation of rights by a public authority through elimination of unlawful administrative action.

2. The purpose of the obligation to use primary legal remedies under Estonian state liability law

The reason the above-mentioned primary legal remedies belong under state liability claims lies in the purpose of the obligation to use primary legal remedies. Explaining the purpose of this obligation is an inevitable precondition for determining the contents of the obligation.

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5 ECJ 24.03.2009, C-445/06: *Danske Slagterier*. – ECR 2009, p. I-2119.

6 SCALCd 29.10.2004, 3-3-1-35-04, paragraph 15. – RT III 2004, 28, 304; 9.03.2009, 3-3-1-94-08, paragraph 13. – RT III 2009, 13, 98 (in Estonian).

7 According to § 839 (3) of BGB, an official (and according to § 34 of the Constitution, the state as well) has no obligation to compensate for damages, if the injured party has intentionally or negligently failed to avert the damage by having recourse to appeal. According to § 2 (2) of the Austrian Liability of Public Bodies' Act (hereinafter 'AHG'), a claim for compensation does not arise if the injured party could have prevented the damage by any legal remedy (*Rechtsmittel*) or a complaint (*Beschwerde*) to the administrative court.

2.1. Guaranteeing the primacy of the primary legal remedies under administrative law, and effectiveness of the system of legal protection

One of the main purposes in the elaboration of Estonian modern state liability law was to assign to the primary administrative legal remedies the primary role in relation to the claim for damages caused by unlawful administrative action.*[8] By virtue of the state's obligation to ensure protection of the fundamental rights of persons, the legislator has created an extensive system of legal remedies, enabling persons to file claims for restoration of rights violated by unlawful administrative action. By establishing the obligation to use primary legal remedies, the legislator aimed for a situation in which, under administrative law, restoration of a person's violated rights would take place first by elimination of unlawful administrative action, with compensation for the damages caused by violation of such rights being the last resort.*[9] Primary legal remedies have unquestionable advantages over legal remedies enabling purely monetary compensation, helping to stop the violation and to prevent even wider violation of rights in the future through actions based on an unlawful act or measure. Primary legal remedies enable restoring legality and avoiding future legal disputes. Therefore, obligatory primary legal remedies serve in the interest of the effectiveness of the system of legal protection.

Although the obligation to use primary legal remedies is, in a wider meaning, an expression of the obligation to prevent damage, it carries, as mentioned above, a narrower role that is specific to and characteristic of administrative law.*[10] However, the obligation to prevent damage that is recognised as a general principle of law has the same meaning in Estonian state liability law and delict law.*[11]

Regardless of the fact that, through the obligation to use primary legal remedies, restoration of a person's violated rights is supported, this obligation still proves burdensome for a person. The person has to decide in quite a short period of time whether to protect his or her rights, and to choose the primary legal remedy, in order to request the termination of the violation of his or her rights, and thereby drawing the public authority's attention to that violation. If the person does not consider the violation to be serious enough to decide to protect his or her rights with an appropriate primary legal remedy, he or she generally forfeits a later opportunity to file a claim for damages caused by violation of rights by the public authority concerned.

On account of the burdensome nature of the obligation to use primary legal remedies, it is important to emphasise the impact of this obligation on the exercise of fundamental rights. Section 7 (1) of the SLA provides, besides the obligation to use primary legal remedies, also a right of claim for damages. The right to file a claim for damages caused in a public-law relationship by a public authority is aimed at realisation of the fundamental right to compensation for damage stated in § 25 of the Constitution of the Republic of Estonia.*[12] However, the obligation to use primary legal remedies constitutes a restriction of the right to compensation for damage. At that, this is an intensive restriction of a fundamental right, because in the case of unjustified disregard for the obligation to use primary legal remedies, the claim for damages shall be dismissed. Since § 25 of the Constitution guarantees a fundamental right without reservation of law*[13], restriction of such a fundamental right is allowed only when the restrictions are justified by other fundamental rights or constitutional

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[8] In the letter of explanation to the draft legislation of the State Liability Act, it was stated: "Until now, most of the attention when talking about public authority's liability has been turned to monetary compensation of the damage caused under public-law relationship. However, in the future, the centre of state liability law has to lie mostly in termination of a violation of rights by claim for issue of administrative act or termination of measure, that is, so-called primary claims that are provided in Chapter 2 of the draft legislation." The letter of explanation (Eelnõu 480 SE I, Riigivastutuse seadus) is available at web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003672916&login=proov&password=&system=ems&server=ragne11 (in Estonian).

[9] The claim for elimination of unlawful consequences also has a priority over the claim for damages. It enables to file a claim for elimination of the unlawful consequences of administrative action (§ 11 of the SLA). On the triple division of the state liability claims see E. Andresen. Riigivastutus (State Liability). Tartu: Supreme Court 2009, p. 15 (in Estonian).

[10] In private law, there is no such directory of primary legal remedies and setting of a similar target, wherefore the relations between the legal remedies and their influence on the claim for damages are different. See also H. Wißmann. Amtshaftung als Superrevision der Verwaltungsgerichtsbarkeit. – NJW 2003, p. 3457.

[11] The performance of the obligation to prevent damage is foreseen in § 13 (1) 4) of the SLA, according to which the restrictions provided in private law to the participation of the injured party in causing damage need to be taken into consideration when calculating the amount of compensation.

[12] Section 25 of the Constitution of the Republic of Estonia: "Everyone has the right to compensation for moral and material damage caused by the unlawful action of any person."

[13] The necessity of adding a clause of reservation of law to § 25 of the Constitution of the Republic of Estonia was emphasised by the Constitutional Expert Commission formed by the Government of the Republic of Estonia, in their report completed in 1998. See Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne. Põhiseaduse § 25 kommentaarid (The Final Report of the Constitutional Expert Commission. Commentaries to § 25 of the Constitution of the Republic of Estonia). Available at www.just.ee/10716 (in Estonian). The similar suggestion was made by Professor R. Alexy in the analysis of the Constitution of the Republic of Estonia. See R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in the Constitution of the Republic of Estonia). – Special publication on Juridica, 2001, pp. 28 and 92 (in Estonian).

values.*[14] Whereas an effective operation of the system of legal protection is a constitutional value*[15] in the Estonian legal order, it can be considered a legitimate purpose of the obligation to use primary legal remedies.

2.2. Reduction of expenses in the public sector?

The Administrative Law Chamber of the Supreme Court, the highest administrative court in Estonia, has not expressed a clear view in its practice on what the purpose is, in its view, of the obligation to use primary legal remedies. In one of the earlier decisions, the Administrative Law Chamber of the Supreme Court noted that § 7 (1) of the SLA provides for the obligation to prevent damage.*[16] However, in a recent decision, the Administrative Law Chamber of the Supreme Court stated, in definition of the scope of application of the obligation to use primary legal remedies, that the Administrative Law Chamber's interpretation is in conformity with the purpose of reducing the costs of the public sector while guaranteeing the protection of a person's rights, as stated in the explanatory letter accompanying the draft of the State Liability Act.*[17] The decision does not specify whether the Court thinks that this general purpose of the State Liability Act is also a purpose of the obligation to use primary legal remedies.

Without doubt, in state liability law—unlike delict law under the law of obligations—it has to be taken into consideration in implementation of the norms for the compensation of damage that public authorities, the state first and foremost among them, have to perform very different duties and often under very complicated conditions. In the case of satisfaction of a claim for damages caused under a public-law relationship, the compensation to the injured party has to be paid from the budget funds of the state, local government, or other public authority. Since creation of such monetary obligations is usually unpredictable and cannot be foreseen in establishing of the budget, recovery of extensive compensation may place the public authority in a complicated situation in which it will lack funds for performance of public duties. To take into consideration the risks related to performance of public duties and to distribute them fairly in the society, § 13 (1) of the SLA provides an extensive directory of the restrictions of liability of the public authorities. For example, in determining the amount of compensation, the unforeseeability of damages and the objective obstacles to prevention of damage have to be taken into consideration.*[18] The basis of restriction of liability justifiably lacks the possibility to reduce the liability of the public authority or to discharge that authority from liability merely in an attempt to keep down expenses in the public sector.*[19] Such a target would ignore the fact that the public authority is obliged to act lawfully in consequence of the principle of lawfulness, and, as any other person, it has to take responsibility for its unlawful actions. It would be equally inadmissible if a person would be required to use primary legal remedies only for relieving the public authority from liability by ignoring this obligation. It has been said quite aptly in the literature that the meaning of the primary legal remedies is to show a person the right way for protecting his or her rights, rather than to force him or her to sustain losses for the benefit of a public authority.*[20] Therefore, it would be erroneous to consider the reduction of expenses in the public sector to be a purpose of the obligation to use primary legal remedies.

3. The influence of the obligation to use primary legal remedies on the claim for damages

According to § 7 (1) of the SLA, the obligation to use primary legal remedies has a function of precluding liability, not only restricting it. Hence, § 7 (1) of the SLA does not make provisions for sharing liability or weighing the person's participation in the causing of the damage. However, a directory of exceptions has

[14] The lack of this reservation should be considered a shortcoming of § 25 of the Constitution; however, it has an explanation relating to how it came into being. Referring to the law regulating compensation for damage was abandoned on compiling the Constitution, because adding this reservation to the Constitution would have made satisfying claims for damages impossible for courts until the corresponding legislation has been passed. See Estonian Ministry of Justice (publisher). Põhiseadus ja Põhiseaduse Assamblee (Constitution and Constitutional Assembly). Tallinn 1997, p. 985 (in Estonian).

[15] SCALCr 28.04.2004, 3-3-1-69-03, paragraph 29. – RT III 2004, 12, 143 (in Estonian).

[16] SCALCd 18.11.2004, 3-3-1-33-04, paragraphs 15 and 16. – RT III 2004, 32, 335 (in Estonian).

[17] SCALCd 20.11.2008, 3-3-1-47-08, paragraph 22. – RT III 2008, 48, 336 (in Estonian). The explanatory letter of the draft of the State Liability Act (Note 8) states: "One of the purposes of this draft is to reduce the costs of the public sector for protecting the rights of individuals."

[18] In addition to that, a public authority shall be relieved of liability for damage caused in the course of performance of public duties if the damage could not have been prevented even if diligence necessary for the performance of public duties had been fully observed (§ 13 (3) of the SLA).

[19] For example, the argument of limited budget funds is not used in the German court practice as well. See J. Fedke. State Liability in Times of Budgetary Crisis. – H. Koziol, B. C. Steininger (eds.). European Tort Law 2005. Wien 2006, p. 47.

[20] H. Maurer. Allgemeines Verwaltungsrecht. 17. Aufl. München 2009, § 27, margin No. 99.

been developed in the case-law, enabling application of the so-called criterion of reproachability: the claim for damages shall lapse only when the injured party can be reproached for not using the obligatory primary legal remedies.*[21]

The Administrative Law Chamber of the Supreme Court also followed this concept of the obligation to use primary legal remedies in its initial case-law.*[22] On the other hand, in its last topical case, the decision on the *Mugra* case from November 2008, the same Chamber took the stance that § 7 (1) of the SLA can be interpreted in such a way that not using the primary legal remedies does not exclude ordering compensation completely but can be a basis for reduction of the compensation.*[23] Thereby, the Supreme Court gave a function of restricting liability to the obligation to use primary legal remedies. Leaving aside other important circumstances of this difficult case, it has to be asserted that by that decision, the Court attributed the same function to § 7 (1) of the SLA as in § 13 (1) 4) of the SLA. Naturally, the Court knew that there already was a normative restriction of liability: According to § 13 (1) 4) of the SLA, the injured party's role in causing of the damage has to be taken into consideration among other circumstances restricting liability when one is determining the amount of compensation.*[24] However, an important problem arises from this decision: by assigning § 7 (1) of the SLA a meaning that already exists in another provision, the Court renders § 7 (1) of the SLA meaningless. In that case, the purpose of the obligation in this provision would inevitably be unperformed as well.

This problem points up the need to differentiate between the obligation to use primary legal remedies and the injured party's obligation to prevent the damage. Both § 7 (1) and § 13 (1) 4) of the SLA provide for the injured party's obligation to prevent damage, but, as already mentioned, only the narrower purpose of § 7 (1) of the SLA has to be taken as guidance when § 7 (1) of the SLA is applied. Unlike § 13 (1) 4) of the SLA and all other provisions on restriction of liability, the purpose of the obligation to use primary legal remedies is not to assure the establishment of fair compensation. The absence of such a purpose also becomes evident by examining the legal consequence of violating this obligation. If the injured party has not used the obligatory primary legal remedies and it can be reproached, § 7 (1) of the SLA shall not acknowledge the claim for damages that is based on the same violation of law. Hereby, it is important to emphasise that the claim for damages will lapse only in the extent to which the non-use of the primary legal remedy is reproachable. Therefore, the criterion of reproachability enables reaching a fair decision also in cases in which the only problem is the non-use of the primary legal remedies and in which it would be unfair to leave the injured party without compensation or to order full compensation.

4. The scope of application of the obligation to use primary legal remedies

Since use of the primary legal remedies has a narrower purpose than do the provisions for restriction of liability, the scope of application of the obligation to use primary legal remedies is also narrower.

4.1. The range of obligatory primary legal remedies

It follows from the purpose of the obligation to use primary legal remedies that not all kinds of activities of an injured party to prevent the damage would be enough for performance of this obligation. At the same time, § 7 (1) of the SLA does not impose on the injured party an obligation to do everything in his or her power to prevent the damage.

In § 7 (1) of the SLA, the set of obligatory primary legal remedies has been defined unambiguously: a person whose rights are violated by the unlawful actions of a public authority under a public-law relationship may claim compensation for damages caused to him or her if that damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in §§ 3, 4, and 6 of this Act.

The Administrative Law Chamber of the Supreme Court also took guidance from the *numerus clausus* definition of the legal remedies stated in § 7 (1) of the SLA in its previous case-law. Thus, the Court stated in a decision from 2004 that § 7 (1) of the SLA 'enables to dismiss the claim for damages if the person could have

[21] See more in Chapter 5 of the article.

[22] For example, see SCALCd 19.03.2002, 3-3-1-11-02, paragraph 16. – RT III 2002, 12, 122; 3.04.2002, 3-3-1-14-02, paragraph 19. – RT III 2002, 12, 124; 11.03.2004, 3-3-1-8-04, paragraph 10. – RT III 2004, 9, 100 (in Estonian).

[23] SCALCd 20.11.2008, 3-3-1-47-08, paragraph 24 (Note 17).

[24] The Administrative Law Chamber of the Supreme Court has rightly considered in its practice to be admissible that if the injured party's participation in causing the damage is that extensive that the injured party has principally caused damage to him- or herself, the compensation may be reduced to zero. See SCALCd 15.04.2008, 3-3-1-6-08, paragraph 14. – RT III 2008, 18, 127 (in Estonian).

prevented the damage by filing a claim for annulment of an administrative act, termination of a measure, issuing of an administrative act, or taking of a measure.*[25] However, the Administrative Law Chamber of the Supreme Court changed its point of view later in the same year and took the view that the injured party can perform 'the requirement to prevent damage under § 7 (1) of the SLA' not only in challenge and judicial proceedings but also by using 'other appropriate legal measures'.*[26] In this case, the Administrative Law Chamber of the Supreme Court considered it to be enough for performance of the obligation arising from § 7 (1) of the SLA that the appellants had turned to the county governor with an application to initiate supervision proceedings, instead of contesting the decision of the administrative authority. In this case, no importance was attached to the fact that a person has no subjective right to request initiation of supervision proceedings in the public interest from a county governor and the county governor as a monitoring authority has no jurisdiction to declare the invalidity of administrative acts.*[27]

According to the above-mentioned information, it appears that the Supreme Court's practice indicates that a legal remedy does not necessarily have to be used to perform the obligation to use primary legal remedies, and any kind of 'appropriate legal measure' is enough to perform the requirements provided by § 7 (1) of the SLA.

So far, the decisions of the Supreme Court have looked with favour on the persons filing a complaint, since the Supreme Court has accepted that injured parties have used other legal measures than the ones provided in § 7 (1) of the SLA. Despite this, in the future, such practice may prove to be significantly more burdensome to an injured party than the one stated in § 7 (1) of the SLA. Namely, a question arises as to whether the injured party can be reproached if he or she did not exercise other legal measures, in addition to not using the ones stated in §§ 3, 4, and 6 of the SLA. Such a situation arising is inevitable when, for example, one of the two injured parties in the same case has turned to the county governor with an application to initiate supervision proceedings and the other injured party has not. That is why the legal measures allowed may also turn out to be requisite legal measures.

The legitimacy of the broad interpretation of § 7 (1) of the SLA depends largely on whether this is a way to broaden or restrict the person's right to file a claim for damages. Since the obligation to use primary legal remedies constitutes a restriction of the fundamental right to compensation for damage, this obligation has to be interpreted restrictively. Legal measures that do not give a person a right to request termination of a violation of rights do not facilitate the primacy of the primary legal remedies. That is why the above-mentioned broadening interpretation of § 7 (1) of the SLA is not in line with the purpose of the obligation to use primary legal remedies and would inadmissibly restrict the fundamental right to compensation for damages.

From the wording of § 7 (1) of the SLA it can be seen that the legislator aimed to determine both the minimum and maximum operational responsibilities of an injured party. Undoubtedly, various applications, petitions, inquiries, and other 'appropriate legal measures' or informal measures (for example, suggestions and negotiations) aid in preventing damage or its expansion, but they cannot be considered legal remedies in the meaning of § 7 (1) of the SLA. That is mostly because they do not constitute a claim under substantive law against the public authority, helping to achieve the purpose of primacy of primary legal remedies.*[28] The same applies for requests that can be presented in public-law proceedings that are meant not for the protection of the person's subjective rights but for serving public interests.

Only those legal remedies that give an injured party a subjective right to request the elimination or correction of the unlawful action by the public authority to prevent damage or extension of damage can fall under the obligatory primary legal remedies. For example, the claim for establishment of the unlawfulness of an administrative act or measure is not an obligatory primary legal remedy (see § 6 (3) (1) of the Code of Administrative Court Procedure), because this claim enables only establishing the unlawfulness of an administrative action, not eliminating it. A claim for refraining from issuing of an administrative act or taking of a measure as provided for in § 5 of the SLA does not belong among the obligatory primary legal remedies either, because during filing of this claim, there is not yet an unlawful action violating the rights of the injured party against

[25] SCALCd 11.03.2004, 3-3-1-8-04, paragraph 10 (Note 22).

[26] SCALCd 18.11.2004, 3-3-1-33-04, paragraph 15 (Note 16). It is remarkable that the Supreme Court does not use the term 'primary legal remedies' any more after this decision (still used in SCALCd 11.03.2004, 3-3-1-8-04, paragraph 11 (Note 22)), that would indicate the primacy of such legal remedies, but uses the terms 'appropriate legal measures' or 'appropriate legal remedies'.

[27] Subsection 85 (4) of the Government of the Republic Act gives a county governor only a jurisdiction to make a proposal to a subject to bring the legislation of specific application into conformity with the higher legislation. If the administrative authority does not follow the county governor's suggestion, the county governor may turn to administrative court with a protest.

[28] In Germany, where, according to the judicial practice, binding legal remedies include applications and inquiries in free form, this opinion has found increasing support in legal literature: F. Ossenbühl (Note 1), p. 95 with reference to low possibility of success of applications in free form; F. Schoch. Amtshaftung. – Jura 1988, p. 650; H.-J. Papier, comments to § 34 of the Constitution. – T. Maunz, G. Dürig. Grundgesetz. Kommentar. 55. Aufl. 2009, fn. 270; K. Windthorst. – S. Detterbeck, K. Windthorst, H.-D. Sproll. Staatshaftungsrecht. München 2000, § 10, margin No. 63. The German State Liability Act of 1981, which was not enacted due to problems of competence, also established merely an obligation to use 'formal legal remedies' (*förmliche Rechtsbehelfe*) (§ 6 of the German State Liability Act). See also A. Schäfer, H. J. Bonk. Staatshaftungsgesetz. Kommentar. München 1982, § 6, margin No. 13.

which the injured party can be requested to apply legal remedies. Even less do the private-law claims fit under the obligatory primary legal remedies, because they are not directed against issuing an administrative act or taking a measure under a public-law relationship. Claims under private law against private persons are also ruled out, because the obligatory primary legal remedies have to be directed against a person who can eliminate or correct an unlawful action.

4.2. The field-specific scope of application of the obligation to use primary legal remedies

Whereas the previously examined case was related to compensation of damage caused by administrative action, a few years later, the Administrative Law Chamber of the Supreme Court had to answer in the *Mugra* case, whether the obligation to use primary legal remedies applies only for a claim for damages caused by unlawful administrative action or this obligation pertains to all claims for damages filed against a public authority under the State Liability Act.

The first important message of the *Mugra* case was the Administrative Law Chamber of the Supreme Court's point of view that the State Liability Act is applicable to all cases of compensation for damages caused by a public authority under a public-law relationship, if there are no special rules.[*29] In this case, the court applied the State Liability Act in reviewing a claim for damages caused by a body conducting pre-trial proceedings for a criminal matter. In relation to the obligation to use primary legal remedies, the Administrative Law Chamber of the Supreme Court took the view that in a "teleological interpretation of § 7 (1) of the SLA a view can be taken that if the damage was caused not during administrative proceedings but nevertheless by a public authority and under a public-law relationship, one of the conditions of a claim for damages is also the use of appropriate legal remedies by an injured party to prevent damages"[*30]. The Supreme Court found that in such cases the appropriate legal remedies are, similarly to those set forth in §§ 3, 4, and 6 of the SLA, "requests and complaints that would help to prevent damage under such a legal relationship".[*31]

This decision by the Supreme Court can be accepted where it addresses the scope of application of the State Liability Act. Since the State Liability Act is a general law for the compensation for damages caused by violation of rights upon the exercise of powers of a public authority under a public-law relationship (§ 1 of the SLA), to guarantee the fundamental right to compensation for damages, that act has to be applied in reviewing all claims for damages caused by a public authority in a public-law relationship in cases where there are no special rules.

However, from this viewpoint it cannot be concluded that also the obligation to use primary legal remedies would be applicable to all claims for damages caused under a public-law relationship. The Supreme Court justified its approach by an argument that it can see no reason the prior use of legal remedies is a condition of claim for damages caused under administrative procedure but in the case of damages caused under other procedures of public authorities, the damage would be subject to compensation without regard for whether the person might have been able to prevent such damage with appropriate legal remedies.[*32] Again, we have to recognise that the Supreme Court's evaluation would have probably been different if the Court had been guided in interpreting § 7 (1) of the SLA from the fact that the purpose of the obligation to use primary legal remedies is to guarantee the primacy of the primary legal remedies under administrative law. In a case in which a claim for damages caused under criminal procedure has been filed, the injured party has no legal remedies under administrative law, from which it follows that this is not a case of obligation to use primary legal remedies in the meaning of § 7 (1) of the SLA. However, the function of the obligation to prevent damage on the part of the injured party in the case of claims for damages filed under the State Liability Act is fulfilled by § 13 (1) 4) of the SLA, according to which the injured party has to use all appropriate legal remedies.

Therefore, according to the current law, the injured party should not be requested to present any more or less claims than stipulated in §§ 3, 4, and 6 of the SLA, and the range of obligatory primary legal remedies could be broadened only by the claims that give a person a right to request restoration of rights violated by administrative action. The obligation to use primary legal remedies could be lawfully broadened to other domains

[29] SCALCd 20.11.2008, 3-3-1-47-08, paragraph 11 (Note 17). However, Tõnu Anton, justice of the Supreme Court who wrote a dissenting opinion, found that in adjudicating the claim for damages caused under criminal procedure it is not right to apply the State Liability Act, because this Act is not meant for regulating this area and compensation for damages caused under criminal procedure should be regulated by different laws.

[30] *Ibid.*, paragraph 22. Tõnu Anton, justice of the Supreme Court, remained of a different opinion also on this matter, stating that in his opinion, the obligation to prevent damage by using an appropriate legal remedy does not extend to criminal procedure without additional preconditions.

[31] *Ibid*.

[32] *Ibid*.

of public authority, if the injured party has clearly specified legal remedies that guarantee the primacy of the primary legal remedies at his or her disposal.

5. The principles of the implementation of the obligation to use primary legal remedies

The obligation to use primary legal remedies restricts the fundamental right to compensation for damages the more intensively the more inflexible are the principles of implementation of this obligation. Despite the legitimacy of the purpose of the obligation to use primary legal remedies, this obligation is materially constitutional only when the restrictions to the fundamental right to compensation for damages are proportional for achieving the purpose.

5.1. The scope of the obligation to use primary legal remedies

Firstly, it is worth examining whether the injured party has fulfilled the obligation to use primary legal remedies when he or she chooses an appropriate legal remedy to protect his or her rights—that is, a claim that enables him or her to protect his or her rights—or the injured party has to choose as effective a legal remedy as possible.

According to the administrative court procedure law of Estonia, a person has to choose a legal remedy that enables him or her to protect his or her rights violated by a public authority, but in other respects, the plaintiff has free hands in the choice of a legal remedy. Nevertheless, the administrative court has an obligation to draw the plaintiff's attention to the possibility of filing a more effective claim from the angle of achieving the purpose of the claim and to explain the consequences of leaving the claim unchanged or unspecified.[*33] However, the court may not arbitrarily choose to adjudicate a more effective claim in view of the plaintiff's rights instead of the legal remedy chosen by the plaintiff and has to accept the plaintiff's choice even if effective protection becomes impossible as a result of this.[*34] The Administrative Law Chamber of the Supreme Court, however, has proceeded in its practice from both criteria—that of appropriateness and that of effectiveness—in assessing the performance of the obligation to use primary legal remedies.[*35]

The rule of using an appropriate but not necessarily effective legal remedy in administrative law should apply for the obligation to use primary legal remedies. The purpose of the primary legal remedies is to request termination of a violation of a person's rights. Therefore, a legal remedy has to be first and foremost appropriate for protecting the person's rights. In consideration of the claim for damages, it is generally required that if a person can protect his or her rights with several legal remedies, he or she decide upon the claim that is also appropriate for preventing damage.[*36] However, the condition of appropriateness should apply only if the person has a reason to take account of the possibility of damage already when using the primary legal remedies. According to § 7 (1) of the SLA, it is not required that a person who can prevent damages by means of several appropriate legal remedies would choose the most effective legal remedy to prevent damage.

[33] According to § 11 (1) 3) of the Code of Administrative Court Procedure, during the preparation of a judicial review of the case the administrative court has to check whether all possible and relevant claims have been filed for achieving this purpose, and make a suggestion to change the complaint, if necessary.

[34] See SCALCd 17.11.2005, 3-3-1-54-05, paragraph 14. – RT III 2005, 41, 406; 14.12.2009, 3-3-1-77-09, paragraph 12. – RT III 2009, 60, 446 (in Estonian).

[35] While the Administrative Law Chamber of the Supreme Court used the term 'appropriate legal remedies' in a case in 2004 (SCALCd 18.11.2004, 3-3-1-33-04, paragraph 15 (Note 16)), then in a later decision made in the same month, the Chamber checked while adjudicating a complaint including a claim for damages, whether the plaintiff can use 'effective legal remedies' in order to prevent damage (SCALCd 30.11.2004, 3-3-1-56-04, paragraph 18. – RT III 2004, 35, 363; 30.11.2004, 3-3-1-64-04, paragraph 28. – RT III 2004, 36, 364 (in Estonian)). The Administrative Law Chamber of the Supreme Court has proceeded from the terms of using effective legal remedies in its later relevant decisions. See SCALCd 10.01.2007, 3-3-1-85-06, paragraph 12. – RT III 2007, 2, 18 (in Estonian). In the latest decision so far, the *Mugra* case, the Chamber found that according to § 7 (1) of the SLA, damage shall not be compensated if it could have been prevented by using the 'appropriate legal remedy'. See SCALCd 20.11.2008, 3-3-1-47-08, paragraph 22 (Note 17).

[36] It should also be noted in rendering opinion on the choice of claims that according to §§ 3 (1), 4 (1) and 6 (1) of the SLA, and § 7 (1) of the Code of Administrative Court Procedure a person can file a claim only when his or her rights have been allegedly violated.

5.2. The procedure of using obligatory primary legal remedies

The claims indicated in § 7 (1) of the SLA can be filed with both an administrative authority and a court.*[37] That raises the question of whether it suffices for fulfilment of the obligation to use primary legal remedies if the injured party has filed a claim listed in § 3, 4, or 6 of the SLA only with a competent administrative authority or, instead, that person has to turn to the courts after receiving an adverse reply from the administrative authority.

The extent of the injured party's obligation should not depend on whether the administrative authority will adjudicate his or her claim according to law or not and whether it will correct its mistakes or not. Therefore, the obligation to use primary legal remedies may be considered fulfilled if a person has tried to protect his or her rights by a legal remedy against an unlawful action of a public authority even just once and has not waived the claim in the course of the proceedings. The Administrative Law Chamber of the Supreme Court has also considered it to be sufficient if a person who filed claim had challenged the payment notice that caused him or her damage only under challenge proceedings.*[38] Similarly, a person who has filed a claim only with the administrative court does not have to use the channel of appeal to fulfil the obligation set forth in § 7 (1) of the SLA.

5.3. Directory of exceptions

As emphasised previously, the principles for the implementation of the obligation to use primary legal remedies have to be flexible enough to guarantee the proportionality of restriction of the fundamental right to compensation for damages, and the fair adjudication of individual cases. Implementing this obligation should not result in the persons having to use a legal remedy almost every time he or she has doubts about the legality of administrative action, in fear that the option to file claim for damages shall be lost otherwise. Filing too many claims would not be in the interests of effectiveness of the system of legal protection but would act against it.

Besides the conformity with the national Constitution, European Union law should also be taken into consideration in exercise of the primary legal remedies. If a claim for damages is filed against a state due to the violation of European Union law, the conditions determined in the case-law of the European Court of Justice have to be taken as a basis for the liability. The rest of the conditions, mostly the procedural matters, are decided by a national court on the basis of national provisions governing the state liability. Therefore, the obligation to use primary legal remedies is applicable also in the case of a claim for damage caused by violation of European Union law filed against a state. The procedural autonomy of a Member State is balanced by the principles of equivalence and effectiveness in European Union law.*[39] In the case of the obligation to use primary legal remedies, first and foremost a question arises as to the conformity of this obligation with the principle of effectiveness—that is, a question of whether the obligation to use primary legal remedies under § 7 (1) of the SLA would ensure the effective protection of the rights provided in European Union law.

In a recent case, *Danske Slagterier*, the European Court of Justice analysed the conformity of the obligation to use primary legal remedies under § 839 (3) of the German BGB with European Union law and took the view that such a national provision does not contradict European Union law, if the use of the legal provision can reasonably be required of the injured party.*[40] The Court of Justice emphasised that it would still be contrary to the principle of effectiveness to oblige the injured party to use all available legal remedies even if that

[37] According to § 3 (4) of the SLA, the annulment of an administrative act may be requested by a challenge in administrative proceedings or by a complaint in administrative court proceedings. A request to terminate the administrative measure may be filed to administrative authority or administrative court (§ 4 (3) of the SLA). A request to issue an administrative act or take a measure shall be submitted to a competent administrative authority. If a request is not granted or not reviewed on time, the person may file a challenge with an administrative authority or a complaint with an administrative court (§ 6 (3) of the SLA).

[38] SCALCd 16.06.2008, 3-3-1-21-08, paragraph 12. – RT III 2008, 31, 214 (in Estonian). The Administrative Law Chamber of the Supreme Court provided for the option between challenge proceedings and judicial proceedings also in one of the earlier decision: SCALCd 11.03.2004, 3-3-1-8-04, paragraph 10 (Note 22).

[39] According to the principle of equivalence, the rules established by the national law on liability in the case of violation of the European Union law may not be less favourable than those relating to similar domestic claims. The principle of effectiveness requires that applying national law would not make it in practice impossible or excessively difficult to obtain reparation. See, for example, ECJ 26.01.2010, C-118/08: *Transportes Urbanos*, paragraph 31 (not yet published in the ECR).

[40] SCALCd 24.03.2009, C-445/06: *Danske Slagterier*. – ECR 2009, p. I-2119, paragraph 64. It has was not clear on the basis of the former court practice whether the function excluding the liability of the obligation to use primary legal remedies is in correspondence with the European Union law, since the Court had treated the problems relating to restriction of liability, that is, determining the amount of compensation. For example, see ECJ 05.03.1996, C-46/93, C-48/93: *Brasserie du Pêcheur and Factortame*. – ECR 1996, p. I-1029, paragraph 84. However, this opinion has been supported in literature. See, for example, T. von Danwitz. Europäisches Verwaltungsrecht. Berlin, Heidelberg 2008, p. 604; M. Dougan. National Remedies Before the Court of Justice. Issues of Harmonisation and Differentiation. Oxford 2004, pp. 264–267.

would give rise to excessive difficulties or could not reasonably be required of the injured party.*[41] However, only the likelihood that a national court will make a reference for a preliminary ruling, or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that the use of a legal remedy cannot be reasonably required of a person.*[42]

The rule that using the primary legal remedy must be reasonably expected from the injured party has been applied in Estonian court practice as well. The fact that the claim for damages is not always precluded as a result of non-use of the primary legal remedies was already drawn attention to by the Administrative Law Chamber of the Supreme Court a few months after the State Liability Act entered into force in 2002, and also a directory was created of the exceptions to the obligation to use primary legal remedies: the non-use of obligatory primary legal remedies is not reproachable and the claim for damages would therefore not be rejected if the use of a primary legal remedy would not have prevented the damage, its use was not understandable for the injured party, or some other good reason was involved.*[43]

5.3.1. The causation between the non-use of a primary legal remedy and cause of damage

The first exception follows from the principle that the injured party cannot be reproached for non-use of legal remedies that would not have prevented the cause of damage. For that, the existence of causation between the non-use of a primary legal remedy and cause of damage has to be ascertained. For example, if filing a claim for annulment of an administrative act would not have prevented or eliminated the damage, the claim for damage does not fail merely because the injured party did not file a claim for annulment.

Separate from this, an answer is needed as to whether the non-use of a primary legal remedy is reprochable according to § 7 (1) of the SLA only if it would have prevented or eliminated the whole of the damage, or whether it is also reproachable that the injured party has not used a legal remedy that would have enabled merely reducing the damage.

The wording of § 7 (1) of the SLA implies that the primary legal remedy has to enable preventing or eliminating damage. This could be interpreted so as to say that to perform the obligation to use primary legal remedies, a person only has to file such claim as enables prevention or elimination of damages in full. In that case, the non-use of those legal remedies suitable for reducing damages should be taken as a circumstance restricting liability. According to the other interpretation, by contrast, § 7 (1) of the SLA would include the legal remedies that enable preventing damage to the full extent, as well as the remedies that enable merely reduction of damage.*[44] In that case, the claim for damages fails to the extent to which the primary legal remedy that had been unjustifiably left unused would have helped to reduce the damage. Both interpretations enable reaching the same end result. However, the second version should be preferred, because it helps to better ensure the attainment of a purpose behind the obligation to use primary legal remedies. A person may not know during presentation of a legal remedy whether using the primary legal remedy would help to completely prevent the damage or only to reduce it. Nevertheless, an appropriate legal remedy should not be left unused unjustifiably. There is also no need to bring part of the regulation of § 7 (1) of the SLA within the scope of application of § 13 (1) of the SLA.

5.3.2. The understandability of the necessity of using primary legal remedies

The non-use of a primary legal remedy may become reproachable if the injured party should have understood the necessity of using the primary legal remedy. For this, the injured party has to understand both that the administrative authority has violated his or her rights with an unlawful action and that by using the primary legal remedy, it would be possible to prevent damage or its expansion.

A person's obligation of diligence in relation to the use of primary legal remedies is similar to the personal obligation to form an opinion on the legality of the administrative acts and measures related to his or her rights, and to adhere to the deadlines provided by law when filing claims under administrative law. That is why the criteria for these obligations are similar.

The extent of a person's obligation of diligence depends on both objective and subjective circumstances. The objective circumstances include, for example, the complexity of the relevant legal regulation but also general criteria concerning the legal knowledge of different groups of persons, and the conduct expected from them.

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41 ECJ 24.03.2009, C-445/06: *Danske Slagterier*, paragraph 62.

42 *Ibid*., paragraph 65–68.

43 SCALCd 19.03.2002, 3-3-1-11-02, paragraph 16 (Note 22).

44 Of the same opinion, I. Pilving. § 25 commentaries, paragraph 3.1.3 (p. 277). – E.-J. Truuväli *et al*. (comp.). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 2., täiendatud trükk (Constitution of the Republic of Estonia. Commented edition). 2nd edition. Tallinn 2008 (in Estonian).

The subjective criteria include the specific person's evaluation of the administrative authority's action and his or her attempts to find out the necessity of contesting this action.

A person cannot be required to have greater competence than a competent administrative authority does. That is why a person does not have to doubt the legality of a public authority's actions without a reason. However, if a person knows the circumstances that point to the possible unlawfulness on the part of the public authority, he or she must show executable diligence, to form a legal opinion on the action of the public authority. The person's evaluation may be influenced by the prior conduct of the public authority.*[45] In determination of the scope of a person's obligation of diligence, one must proceed from consideration of the amount of information and court practice existing when the person should have used the primary legal remedy. In the case of legal disputes whose success prospects were difficult for the person to predict, there cannot be later reproach for his or her evaluation not corresponding to more recent administrative and court practice. The Administrative Law Chamber of the Supreme Court has rightly found in its case-law that a person cannot be expected to challenge the conformity with the Constitution of a piece of legislation of general application that is the basis of legislation of specific application. If a person understands the unconstitutionality of some legislation of specific application only after that legislation has been declared unconstitutional, the right to claim for damages does not fail.*[46] At the same time, a person lacking the legal knowledge necessary to evaluate the legal situation and the necessity of the use of primary legal remedies resulting from that legal situation has to turn to a qualified legal counsel within reasonable time.*[47]

5.3.3. Good reason for the non-use of a primary legal remedy

The exception of a 'good reason' assures that the obligation to use primary legal remedies can be implemented flexibly and in a manner taking the particularities of individual cases into account. The conduct of an injured party is reproachable only for the non-use of those legal remedies that would have helped to prevent the damage or its expansion and the use of which could be required from him or her in the case at hand. On their own, burdensome circumstances inevitably occurring with the use of the primary legal remedies, such as the duration of legislative proceedings and the procedure-related expenses, may not justify the non-performance of this obligation; rather, the risks and difficulties related to these still have to be evaluated separately for each case.

6. Summary assessment of the content of the obligation to use primary legal remedies in the current law of Estonia

Leges vigilantibus, non dormientibus, subveniunt. The law aids the vigilant, not the negligent. For a person not to transgress this maxim, he or she has to know what to do in order to be entitled to file a claim for damages caused by a public authority. That is why § 7 (1) of the SLA has to provide as clear directions as possible for an injured party on what kind of legal remedies should be used to protect his or her rights before filing of the claim for damages.

The legislator has determined the scope of application of the obligation to use primary legal remedies and the range of obligatory primary legal remedies explicitly and clearly in § 7 (1) of the SLA. Nevertheless, in court practice, both of these have been broadened. By the decisions of the Administrative Law Chamber of the Supreme Court, the obligation to use primary legal remedies has been extended to cover all cases of unlawful damage caused by a public authority under a public-law relationship, and, partially for that reason, the primary legal remedies are considered to be any kind of 'appropriate legal measures'—that is, requests and complaints that would help to prevent damage in the specific legal relationship in question. Thus the court has given a new meaning to the obligation to use primary legal remedies, wherefore we cannot speak of the interpretation of § 7 (1) of the SLA but must consider instead creation of a new regulation. These developments have probably been possible because of disregard for the purpose of the obligation to use primary legal remedies, which threatens the preservation of the obligation provided in § 7 (1) of the SLA and, consequently, the principle of primacy of the administrative primary legal remedies.

[45] For example, a person can generally rely upon the information provided by a public authority. The situation may prove opposite when the justifications, explanations and instructions provided by the public authority are contradictory, perfidious, or contrary to the established administrative or court practice, and the person has therefore reason to doubt in the legality of the actions of the administrative authority.

[46] SCALCd 11.03.2004, 3-3-1-56-04, paragraph 18 (Note 35).

[47] The Administrative Law Chamber of the Supreme Court has found the same in the cases of restoration of term for appeal. See SCALCd 16.01.2009, 3-3-1-75-08, paragraph 17. – RT III 2009, 4, 28 (in Estonian).

As a result of the current court practice, the boundaries between the condition excluding liability in § 7 (1) of the SLA and the condition restricting liability in § 13 (1) 4) of the SLA have faded. A person to whom damage has been caused under a public-law relationship cannot estimate with correct probability, even when relying on the help of a qualified legal counsel, whether filing an application or action not belonging to the claims provided for in § 7 (1) of the SLA would bring about only a restriction of liability or it instead would have an outcome that excludes liability. According to the principle of legal clarity guaranteed by §§ 10 and 13 of the Constitution of the Republic of Estonia, a person has to understand the meaning of legal provisions in order to reasonably predict the legal consequences of his or her activities. In this, the principle of legal clarity sets greater requirements in place for provisions that impose duties on a person and restrict his or her rights than it imposes on the other provisions.[*48] The obligation to preserve and assure the contents and understandability of the provisions on their interpretation is binding for the judicial power as well. Unfortunately, on the basis of the current court practice, persons cannot understand which primary legal remedies they should use and on what the legal consequence of the non-use of a legal provision depends, and, therefore, they cannot fully realise the right to compensation for damage stipulated in § 25 of the Constitution of the Republic of Estonia. A national law with unclear contents that is applied to adjudicate claims for damages caused by the violation of European Union law can neither guarantee effective protection of the rights provided by European Union law.

However, the directory of the exceptions to the obligation to use primary legal remedies that has been developed by the Estonian Supreme Court is urgently necessary. Since the claim for damages fails in the case of non-performance of this obligation, the directory of exceptions provides sufficient flexibility to achieve a fair result. Circumstances that excuse the non-use of the primary legal remedies can still be considered to be circumstances restricting liability with respect to implementation of § 13 (1) 4) of the SLA. Therefore, there is no need to replace the function of the obligation to use primary legal remedies that excludes liability with a function that restricts the liability.

The legislator can also help to improve the obligation to use primary legal remedies further. In § 7 (1) of the SLA, a specification is needed that using the primary legal remedies is obligatory only when, in addition to the possibility of preventing damage, the use of a legal remedy could be required of the injured party.

Understanding of the obligatory nature of the use of primary legal remedies has not yet had time to take root in Estonian society. This may be one of the reasons the content of the obligation to use primary legal remedies has been changed so extensively in court practice. To return the obligation to use primary legal remedies to its original meaning, a suggestion should be considered to set an obligation in place for an administrative authority, similarly to the reference to challenge of an administrative act[*49], to add to administrative act an explanation of the fact that by non-use of the primary legal remedies, one might find a later claim for damages dismissed according to § 7 (1) of the SLA.

[48] See SCALCd 20.03.2006, 3-4-1-33-05, paragraph 22. Available at www.nc.ee/?id=583.

[49] According to the § 57 (1) and (2) of the Administrative Procedure Act, an administrative act has to contain a reference to the possibilities, place, terms and procedure for the challenging of the administrative act. At the same time, the absence of the reference to challenge does not affect the validity of the administrative act, alter a term for challenging thereof, or bring about other legal consequences. The English version of the Administrative Procedure Act is available at www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40071K3&keel=en&pgg=1&ptyyp=RT&tyyp=X&query=haldusmene.

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Basic Structures of the Draft General Part of the Environmental Code Act

1. Introduction

Contemporary environmental law has a relatively short history.[*1] The development of this branch of law can be characterised by randomness and lack of a systematic approach. At times, fast reaction has been sought to problems under particular public attention (e.g., environmental disasters)[*2], while at other times the development has constituted following the periodically changing 'fashion trends' of environmental law. Of the latter, energy and climate policy has lately been especially dominant. M. Kloepfer has noted relevant examples from German environmental law. The large-scale accident in the Sandoz chemical plant served as impetus for the development of the German Environmental Liability Act, and even the creation of the German Ministry of the Environment was a reaction to the nuclear disaster of Chernobyl.[*3]

The incoherent development of environmental law has brought about a need for thorough reform of the current environmental law. Codification of environmental law constitutes a common characteristic of this renovation process. Attempts, with varying levels of success, to codify environmental law have been made in several countries—Sweden, the Flemish and Wallonian regions of Belgium, Germany, the Netherlands, Denmark, and France.[*4] The list could be continued with, for example, Poland, Hungary, Slovenia, and a number of other countries where environmental law reforms have taken place in different forms and with different objectives. As of 2007, codification of environmental law has also been in progress in Estonia.[*5] The author of this article has been the leader of the working group for the codification of environmental law since then.

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[1] At the same time, certain elements of environmental regulation can be found already in the more distant history. E.g., H. D. Jarass refers to the 1845 Prussian Economic Administration Act, which also contained provisions aiming to protect human health from the negative environmental impact (especially air pollution) issuing from dangerous industrial plants. See H. D. Jarass. Saksa immissioonikaitseõiguse põhistruktuurid (Basic Structures of German Immission Protection Law). – Juridica 2007/7, p. 465 (in Estonian).

[2] The press has had a very significant role in bringing out such problems.

[3] See M. Kloepfer. Saksamaa tulevase keskkonnaseadustiku mõte ja sisu (The Idea and Content of the Future German Environmental Code). – Juridica 2007/7, p. 503 (in Estonian).

[4] See The Codification of Environmental Law. Proceeding of the International Conference in Ghent, 21 and 22 February 1995. Kluwer Law International 1996.

[5] See Keskkonnaõiguse kodifitseerimine (Codification of Environmental Law). Available at https://ajaveeb.just.ee/keskkonnaoigus/kodifitseerimisest/ (14.06.2010) (in Estonian).

Nowhere has the codification process progressed without difficulties. In 2007, Kloepfer, a leading figure in the arena of codification of German environmental law, wrote the following: "According to the future plans of politicians as well as the coalition agreement between the Conservatives and the Socialist Democrats, at least the regulation of the General Part of the Environmental Code, if not more, will be adopted during this election cycle. It was about time; I'd like to cry!"*[6] Among other elements, Kloepfer also stressed that preparations for the codification of German environmental law had continued for over 30 years.*[7] Unfortunately, his optimism proved futile. The previous coalition failed to adopt the Environmental Code, and the new coalition (Christian Democrats and Free Democrats) are pessimistic with regard to codification. At best, the General Part of the Environmental Code will be adopted in Germany in the near future, with the specific laws amended proceeding from that.*[8] Even in Estonia, the codification of environmental law is progressing with problems. Within the codification process, numerous innovative ideas have been proposed, which will surely provoke debate. The first stage of the codification process constituted the preparation of the Draft General Part of the Environmental Code Act (the General Part of the Environmental Code), which is in its final stage at present. The purpose of this article is to analyse a selection of the more significant main structures of the Draft General Part of the Environmental Code. The selection of the questions to be discussed stemmed from the topics that the author of the article addressed in more detail during the preparation of the draft and the explanatory note.*[9] At the same time, it must be stressed that the draft was, naturally, prepared as a joint effort of all members of the working group.*[10] The first part of the article discusses the reasons for the codification of environmental law, the main objectives of codification, and briefly also the organisation of codification.

2. Reasons for the codification of environmental law

The reasons for the codification of environmental law are relatively similar across various legal orders. Kloepfer has outlined the following factors, which served as impetus for the codification of environmental law in Germany.

- External over-regulation: Legislation containing environmental regulation is too abundant. Also, there is an excess of procedures that are partially redundant and excessively increase administrative burden.
- Internal over-regulation: Legal regulation is too particular and detailed, and at times it is excessively burdening for entrepreneurs and other users of the environment.
- There is no systematic and harmonious concept of environmental law: The legislation has thus far been fragmentary and random.*[11]

The above-mentioned problems are also characteristic of Estonian environmental law. We, too, have too many pieces of environmental legislation. The large amount of legislation is mostly due to Estonian environmental law being dominated by an area-based approach to environmental protection. Water protection, ambient air protection, and other areas of environmental protection are regulated separately from each other. Nature, however, is not so divided and requires integrated measures of protection. The relationships among the various elements of the environment must not be ignored also upon the legal regulation thereof. The most remarkable example here is the existing system of environmental permits, which is almost completely area-based.*[12] There are many types of permits—the permit for the special use of water, the ambient air pollution permit, waste permits, radiation practice licences, authorisation for the release of genetically modified organisms into the environment, the extraction permit, etc. A person who simultaneously affects the environment in various ways (uses water, pollutes the air, produces waste, etc.) must at the same time have multiple permits, with all of them having been applied for and issued in different procedures. The requirements of these permit

6 See M. Kloepfer (Note 3), p. 502.

7 *Ibid*.

8 See G. Winter, B. Wegener. Recent Develoment in Germany. Avosetta meeting 02/03 October 2009 (Stockholm University) "Enforcement of EC Environmental Law: IPPC, EIA, Natura 2000, ET Allowances, and Water and Air Plans". Available at http://www.avosetta.org (2.04.2010).

9 The draft contains an abundance of questions that deserve closer attention, especially the basic environmental obligations, environmental rights, and the integrated environmental permit procedure, which do not fit in the framework of this article.

10 In addition to the author of this article, the working group also comprised E. Saunanen, K. Relve, M. Triipan, K. Vaarmari, M. Viisimaa, A. Männik and O. Kask.

11 See M. Kloepfer (Note 3), pp. 503, 508.

12 The only exceptions are integrated permits, which are issued pursuant to the Integrated Pollution Prevention and Control Act (Saastuse kompleksse vältimise ja kontrollimise seadus). – RT I 2001, 85, 512; 2009, 39, 262 (in Estonian).

procedures are often also differently regulated. Such an area-based system creates a need for a very large amount of legislation, causing external over-regulation. The problems are compounded by variations between regulations of different types.

Internal over-regulation is also inherent to Estonian environmental law. There are too many specific and very detailed regulations. There is a clear lack of provisions with a greater level of abstraction. Particular regulation entails an incessant need for amendment of the acts adopted, because in the case of overly detailed regulation it is impossible to foresee all of the details in the original redaction of the act. For example, the Water Act*[13] has been amended 31 times, twice this year already. The Nature Conservation Act*[14], adopted only in 2004, has already been amended 16 times.

Estonian environmental law also contains regulations that are clearly unjustified and excessively burdensome. An apt example would be the obligation to hold an ambient air pollution permit. The existence of an ambient air pollution permit is often required also for activities that probably do not have the least impact in reality on the state of the environment. The threshold quantities have been laid down by the Regulation of the Minister of the Environment of 2 August 2004. *[15] The concept of the Special Part of the Environmental Code cites as an example a boiler plant with a capacity of 0.3 MW—this is the threshold at which the possession of an ambient air pollution permit becomes required. Boiler plants with such capacity do not have a significant impact on the quality of the ambient air, and, for the purpose of collection of statistical data, such plants could be burdened only with a reporting obligation. Another example is fuel filling stations with a throughput (loaded) of 2,000 m^3, which in their essence also do not constitute significant affecters of the quality of ambient air. According to this logic, an ambient air pollution permit would also be requisite for a medium-sized private residence that uses logs for heating, a household with two dairy cows, or a house-owner who is covering a larger surface with solvent-based paint, as the pollutant emission thresholds applied are unreasonably low.*[16] Environmental regulation must be justified and proportional, in order not to burden the users of the environment excessively and unreasonably.

Estonian environmental law also lacks a systematic and harmonious concept binding it together. Estonian environmental law consists of a large number of acts and other pieces of legislation of general application adopted at different times and often also proceeding from different underlying principles. Our environmental law has lacked a scientific foundation and thus also predictability and transparency in its regulation. Examples are abundant. Ranking first, however, would be the terminological chaos. Let us look at the term 'hazard'. The concept is used in very different environmental legislation, but it is difficult to understand what precisely is meant by 'hazard'. Is a hazard a situation in which it is likely enough that negative environmental impact might ensue, or does a hazard also involve the possibility of the occurrence of negative environmental impact? It is thus unclear what the likelihood of the occurrence of negative consequence must be in order to qualify a situation as a hazard. Neither is it clear what legal reaction must follow the situation of a hazard. Should hazards be averted (e.g., through prohibition or suspension of an activity), or should hazards be endured to a certain extent? An example can be found in the Deliberate Release into the Environment of Genetically Modified Organisms Act*[17] (hereinafter, 'the GMO Act'). Section 1 of the act establishes the objective of this piece of law: to protect humans and the environment against the potential negative effect of the release into the environment of genetically modified organisms—indeed, 'potential', and not merely the consequences that are completely obvious. The act (as should the relevant EU directive) should thus be supported on the precautionary principle, and take into consideration also the environmental impact concealed by scientific uncertainty. Contemporary scientific research cannot yet definitively answer the question of whether GMOs entail potential negative effect or not. Researchers have long argued about it and will probably continue to do so. Section 12 of the GMO Act regulates the granting of a GMO authorisation, and § 12 (4) 1) lays down that the Minister of the Environment shall not grant authorisation if 'the genetically modified organisms pose a risk to human health or the environment'. It is unclear what exactly is meant by 'risk' in this case and whether, if studies show that a GMO can entail negative effect, authorisation should be granted or not, as well as whether 'risk' also includes potential, not only sufficiently proven, negative effect. Similar terminological misunderstandings and lack of a coherent system are still abundant in our environmental law.

All of the above-mentioned means that the environmental law applied in Estonia has turned out to be relatively implementer-unfriendly, unclear, and inconsistent.

[13] Veeseadus. – RT I 1994, 40, 655; 2010, 8, 37 (in Estonian).

[14] Looduskaitseseadus. – RT I 2004, 38, 258; 2010, 29, 151 (in Estonian).

[15] Keskkonnaministri 2. augusti 2004. a määrus nr 101 "Saasteainete heitkogused ja kasutatavate seadmete võimsused, millest alates on nõutav välisõhu saasteluba ja erisaasteluba" (Minister of the Environment 2 August 2004 Decree No. 101 'Emissions of Pollutants and Capacities of the Equipment for which Pollution Permits and Special Pollution Permits are Required'). – RTL 2004, 108, 1726 (in Estonian).

[16] See Keskkonnaseadustiku eriosa kontseptsioon (Concept of the Special Part of the Environmental Code), p. 150. Available at http://www.just.ee/orb.aw/class=file/action=preview/id=50045/KSES_010210.pdf (14.06.2010) (in Estonian).

[17] Geneetiliselt muundatud organismide keskkonda viimise seadus. – RT I 2004, 30, 209; 2009, 34, 224 (in Estonian).

3. The main objectives of the codification of environmental law

The objectives of the codification of environmental law in Estonia are ambitious. In addition to the systematisation of the existing law, the goal includes the proposal of significant amendments and additions. The main objectives of the codification may be outlined in summary as follows.

The objective is the approximation of the hitherto fragmentary environmental regulation. The existing environmental law contains numerous discrepancies, especially with regard to the terminological corpus. Neither has the existing law been developed in a manner proceeding from definite conceptual foundations. The purpose of codification is to eliminate these discrepancies. Accordingly, gaining an overview of environmental law will become easier for the implementers and addressees thereof. Harmonisation of the regulation therefore entails greater legal clarity and transparency of the regulation.

Objectives of the codification of environmental law also include decreasing external and internal over-regulation. The existing environmental law lays down several clumsy and parallel procedures (especially with regard to environmental permits and environmental impact assessment); therefore, unifying and co-ordinating the procedures should render it possible to decrease the administrative burden significantly. This will simplify and cheapen the implementation of existing law, both for the users of the environment (e.g., applicants for an environmental permit) and for administrative bodies.

Objectives of the codification of environmental law also include filling the gaps. Our law still lacks several of the structures necessary in contemporary environmental law—i.e., regulations concerning environmental rights, the principles and main obligations of environmental protection, a integrated permit procedure, and the basic obligations of operators. Codification should place our environmental law on a systematised and harmonious scientific foundation.

The Draft General Part of the Environmental Code Act[*18], as developed in Estonia so far, lays down the principal concepts of environmental law, the principles of environmental protection, the obligations of everyone, obligations of operators, environmental rights, and a new and integrated environmental permit procedure. These parts of the draft form the General Part of the Environmental Code in a narrower sense, thus far absent in our law.

The success of such an ambitious project—codification of an area of law—largely depends on the organising foundations thereof. The codification of environmental law started with the preparation of the General Part of the Environmental Code. The process was divided into two stages. First, the concept of the General Part was developed. The concept comprised a critical analysis of existing legal regulation, comparison with the regulations of other countries[*19], and an analysis of the effect of EU law. On the basis of this work, regulation proposals were drafted, with the future draft in mind. The approval of the concept was followed by the preparation of the draft and its explanatory note. As of the time of preparation of this article, the General Part of the Environmental Code and the explanatory note thereto have been prepared and have also passed the first round for approval among ministries. Within the latter, most viewpoints expressed in the draft received fundamental approval. Preparation of the General Part of the Environmental Code will be followed by the preparation of the Special Part, which will be under way presently.

The General Part and Special Part of the Environmental Code must form a uniform whole. It has therefore been planned that upon adoption of the General Part of the Environmental Code by the *Riigikogu*, it will nevertheless become effective only alongside the Special Part, not before. Earlier entry into force of the General Part of the Environmental Code is simply impossible, as this matching the existing law is not feasible. The General Part contains too many innovative elements. The General Part and the Special Part are interconnected by many associations, some of which are obvious and others more concealed. The development of the General Part and of the Special Part are not processes that strictly follow each other, as the case usually is upon codification of a certain area of law, but to a certain extent these processes act in parallel. The task of the Special Part will be the further development and specification of the regulation of the General Part—e.g., regarding the content of basic environmental right, the characteristics of a significant environmental nuisance, the differences of permit proceedings in different areas of environmental protection, and specification of the general duty of care and the obligations of the operator. It is absolutely clear that the completion of the Special Part will entail certain corrections and additions to the regulation in the General Part. The larger the amount of legal structure uniting the various areas of environmental protection, discovered upon the preparation of the Special Part, and the more they can be harmonised, the more valuable the result of the codification.

[18] Keskkonnaseadustiku üldosa seaduse eelnõu. Available at http://www.just.ee/orb.aw/class=file/action=preview/id=44240/kys_eelnou.pdf (14.06.2010).

[19] Preparation of the concept included analysis of the environmental laws of several countries, especially those where codification has been implemented already in the last decade: the Swedish Environmental Code (1999), the German Environmental Code (2007); the Finnish Environmental Code (2000); the French Environmental Code (2002); the Hungarian Environmental Code (1995).

4. Basic structures of the Draft General Part of the Environmental Code

4.1. Determination of the objective of the Environmental Code and the scope of application in the draft[*20]

A central problem in the development of the Environmental Code is the establishment of that code's objectives. Contemporary environmental policy has a dual objective, balancing between two approaches—the anthropocentric and the eco-centred. Environmental values are usually distributed into three sorts: direct instrumental value or usage value, indirect value, and value for their own sake or inherent value.[*21] The direct instrumental value of the environment is usually related to the material benefit that a person obtains from nature by interference therein or by consumption thereof. This also includes the release into the environment of pollutants, as the environment is used as means for assimilating pollutants. The indirect value of the environment refers to the environment being considered valuable for humans without direct interference therewith or usage thereof. The recognition of the inherent value of the environment proceeds from the principle that the environment is a value in itself, notwithstanding its material-instrumental or nonmaterial usefulness for humans.

Preparation of the draft also included analysis of how the objective of environmental law has been established in the laws of other countries. The conclusion was that the human is at the core of most environmental legislation, in one way or another. The anthropocentricity of the Environmental Code has been especially emphasised in German law.[*22] Such an approach was also taken as the basis for the Estonian Draft General Part of the Environmental Code. The Estonian Environmental Code will predominantly be anthropocentric.

The expression of the objectives of environmental protection in the draft has proceeded from the fact that environmental protection largely coincides with the protection of fundamental human rights. Many of these fundamental rights are dependent upon the state of the environment—for example, the quality of air and water. This approach influences the entirety of contemporary environmental law, in almost all of its institutes.[*23] The European Convention for the Protection of Human Rights and Fundamental Freedoms[*24] includes several human rights that can be associated with the quality of the environment. These are, in particular, the right to respect for private and family life (Art. 8), the right to peaceful enjoyment of one's possessions (Art. 1 of Protocol 1), and the right to life (Art. 2).[*25] In addition, associations between environmental protection and human rights can also be found in Article 10, which establishes the right to receive and impart information.[*26] Since the *López Ostra* case[*27], it has been especially the respect for personal and private life that the filers of complaints and the European Court of Human Rights associate with the pollution of the environment. In the *López Ostra* case, the Court ruled that "severe environmental pollution may affect individuals' well-being and prevent them from using (enjoying) their homes, in such a way as to affect their private and family life adversely"[*28].

Contemporary environmental law also stresses the need to incorporate civil society into environmental protection, to give the persons concerned (also including environmental organisations) legally guaranteed rights—to receive public environmental information, participate in the legal decision proceedings regarding the environment, and have an opportunity to protect their violated rights through law enforcement authorities. This approach, based on human rights, is prevalent today, and it has also been adopted in EU law. This area is, however, most directly addressed in the 1998 Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[*29]

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[20] See Keskkonnaseadustiku üldosa seaduse seletuskiri (Explanatory Memorandum to the General Part of the Environmental Code Act). Available at http://www.just.ee/orb.aw/class=file/action=preview/id=44241/kys_seletuskiri.pdf (14.06.2010) (in Estonian).

[21] K. Relve. Kas loodusel võib olla iseväärtus (Can Nature have Self Value). – Keskkonnaeetikast säästva ühiskonna eetikani (From Environmental Ethics to Ethics of the society). A. Oja (ed.). Tallinn: Säästva Eesti Instituut (Institute for Sustainable Estonia; SEI Tallinn) 2003, pp. 30–37 (in Estonian).

[22] See German Environmental Law for Practitioners. C.H. Beck & Kluwer Law International 1996, p. 56.

[23] See R. Desgagne. Integrating Environmental Values into the European Convention on Human rights. – American Journal of International Law 1995 (89) 2, p. 267; J. Lee. The Underlying Legal Theory to Support a Well-defined Human Right to a Healthy Environment as a Principle of Customary International Law. – Columbia Journal of Environmental Law 2000 (25), pp. 283–340.

[24] RT II 1996, 11/12, 34.

[25] More or less the same associations also appear in the International Covenant on Civil and Political Rights (RT II 1993, 10/11, 11), and regional human rights instruments.

[26] See P. Sands. Human Rights, Environment and the Lopez-Ostra case: Context and Consequences. – European Human Rights Law Review 1996/6, pp. 597–618.

[27] *López Ostra v. Spain* (1995). – 20 E.H.R.R. 277.

[28] *Ibid*., paragraph 51.

[29] Available at http://www.unece.org/env/pp/EU%20texts/conventioninestonian.pdf (1.04.2010).

The anthropocentricity of the Environmental Code is, among other factors, also due to very practical considerations. Anthropocentric values are *prima facie* always accorded great legal weight, unlike the intrinsic value of nature, which is not obvious. On the contrary, protection of the intrinsic value of nature often directly violates the interests of humans, especially land-owners. Justification concerning the necessity of protecting nature *per se* is thus always problematic and often not easily assimilated into the generally recognised anthropocentric legal framework. In the end, it may be said that the association of environmental protection with the well-being of people gives it significantly greater 'breakthrough power' and legal weight.

The above notwithstanding, the Environmental Code nevertheless protects the environment also outside the anthropocentric dimension. Such an approach is particularly prevalent in so-called classical environmental protection—i.e., conservation of habitats and species (biological diversity) wherein the protection status is really based on the intrinsic value of the environment. This echoes the viewpoint dominant in contemporary environmental policy that it is necessary not to protect only those species and habitats already endangered but to preserve the diversity of living organisms from all sources, including, *inter alia*, terrestrial, marine, and other aquatic ecosystems, and the ecological complexes of which they are part. This objective has also been established in the Convention on Biological Diversity.[*30]

As another objective the draft establishes sustainable use of natural resources. This objective directly proceeds from §§ 5 and 53 of the Constitution of the Republic of Estonia. The ensuring of sustainable development is important because without achieving such development, we not only jeopardise our own well-being but also condemn our children and grandchildren to an even more hopeless future. If this is not about the preservation of humankind, then at least it is about worthy living conditions for future generations. The achieving of sustainable development presumes very significant changes in the way we think and consume, how and what we produce, and how we manage our economy.

Damage caused to the environment must be compensated for, which is also among the objectives of the code. Compensation for damage is actually a secondary objective, as causing damage should primarily be avoided altogether. These objectives, too, proceed from the general environment-related duty of care, established in § 53 of the Constitution.

In sum, it may be said that the Draft General Part of the Environmental Code attempts to proceed from a combined approach, and besides an anthropocentric environmental protection also to remember the ensuring of the implementation of an environmental policy that is not directly linked to human health and well-being.

4.2. The core of the body of terminology of the draft

In Estonia's existing environmental law, the usage of terms is inconsistent and irregular. This article does not discuss all questions related to the body of terminology used in environmental law, being confined to the analysis of two basic concepts: hazard and risk.

At the moment, unfavourable environmental impact is referred to with terms such as 'environmental impact', 'negative environmental impact', 'significant environmental impact', 'environmental damage', 'pollution of the environment', etc., with these terms often carrying the most different content. In the existing law, it is impossible to grasp the relationships among these concepts. In the design of the terminological corpus for environmental law, the example to be followed should instead be that of law enforcement, proceeding from the understanding that human activity affects the quality of the environment with varying intensity. There are situations wherein this impact is obvious and connected to such negative consequences that they should be avoided at all costs. There are, however, also circumstances in which the nature of the unfavourable environmental impact is unclear: there may be negative consequences, but these also might not occur—the impact is here concealed by scientific uncertainty. Such environmental impact with different intensity must also bring about a different legal reaction—more resolute or more flexible, respectively. In the Draft General Part of the Environmental Code Act, the core of the body of terminology for the Environmental Code is determined in a manner proceeding from the above-mentioned platform.

Estonian law needed a term to cover any kind of negative environmental impact in the most general sense. In the draft, this term is 'environmental nuisance'. The notion of environmental nuisance is developing into the broadest concept as regards the signification of unfavourable environmental impact. Although the concept refers to unfavourable (negative) environmental impact, it must still be stressed that not every environmental nuisance requires prevention or reduction. An environmental nuisance must often be endured if the reduction thereof is not feasible by reasonable means and if the impact of the nuisance on the environment and people is insignificant. The threshold for the prevention or reduction of an environmental nuisance usually is the causing of an environmental hazard or environmental risk. The part of the draft that discusses everybody's obligations, however, establishes everyone's general obligation to reduce the environmental nuisance he or she has caused, whenever reasonably possible. The main sources of the obligation of reduction of environmental

[30] RT II 1994, 13, 41.

nuisance also include the environmental protection permits, which lay down specific requirements concerning the admissibility of activity that affects the environment.*[31]

The terms 'environmental hazard' and 'environmental risk' are used in Estonian law, but these, too, thus far lack a singularly understandable content. An objective set during the preparation of the draft was to define the concept of the environmental hazard and to differentiate it from the 'environmental risk' concept. Although distinguishing of the concepts of the environmental hazard and risk is particularly important in relation to applicability of the prevention principle and the precautionary principle, it has precurrent importance in the context of the entire draft, and such differentiation should also be a starting point in the preparation of the Special Part of the code.

The definition of the 'hazard' concept has proceeded from the Draft Law Enforcement Act*[32], § 4 of which establishes a hazard as a situation wherein, on the basis of objective evaluation of the circumstances that have occurred and on the basis of social experience, it may be considered sufficiently likely that a breach of order is going to take place in the near future. Definitions are also provided for 'serious hazard'*[33] (*inter alia*, the danger of the creation of large-scale environmental damage), 'significant hazard'*[34] (including danger to the environment), 'immediate hazard'*[35], and 'suspicion of hazard'*[36].

For the purposes of the Draft General Part of the Environmental Code Act, an environmental hazard constitutes sufficient probability of the occurrence of a significant environmental nuisance. The concept of the environmental hazard thus has two components, which characterise the probability of the occurrence of a negative consequence and the significance thereof. With respect to hazards, scientific uncertainty regarding the occurrence of negative consequence is either absent or minimal. A negative consequence of a hazard constitutes not simply an environmental nuisance but a significant environmental nuisance, one that need not—and must not—be endured, as a rule. The occurrence of a significant environmental nuisance must, as a rule, be prevented. Environmental hazard is a basis for refraining from activity, for prohibition of an activity or product (or establishment of restrictions thereon), or for imposition of an activity in order to prevent such nuisance.

The Draft General Part of the Environmental Code Act fails to provide an exhaustive definition for a significant environmental nuisance. The characteristics of a significant environmental nuisance should be specified in the Special Part of the Environmental Code. The draft presupposes that the occurrence of a significant environmental nuisance should primarily be associated with a situation that involves the exceeding of environmental quality limit values or the causing of pollution, environmental damage, significant environmental impact, or unfavourable impact within the territory of the Natura 2000 framework.*[37] This prerequisite is nevertheless not absolute. For example, insignificant or temporary exceeding of an environmental quality limit value may not be regarded as a significant environmental nuisance that should be avoided at all costs. Also, the obligation of prevention of significant environmental impact, and even of unfavourable impact on the Natura 2000 territory, is not always absolute; such impact, too, must in certain circumstances be endured.

Environmental risk differs from the concept of hazard mostly in the fact that, unlike environmental hazard, which is often obvious, environmental risk is concealed by scientific uncertainty. The probability of the occurrence of a negative consequence is not precisely known, but that consequence is still possible. This constitutes a typical situation arising in the case of several activities that affect the environment. Scientific and technological development have significantly increased mankind's possibilities of interfering with natural processes, and this, in turn, has increased the number of situations in which it is impossible to foretell the long-term consequences of such interference with any exactitude. The threshold for preventing environmental risk is lower than that for environmental hazard; accordingly, the measures for preventing environmental risk should be less burdensome. In the implementation of precautionary measures, the share of the proportionality principle is significantly greater than the share of the prevention of hazards.

In summary, in the case of environmental hazard the prevention principle is implemented, and in the case of environmental risk the precautionary principle is implemented. These principles are further addressed in the next part of the article.

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[31] See Explanatory Note to the General Part of the Environmental Code Act (Note 20), p. 11.

[32] Korrakaitseseaduse eelnõu seletuskiri (Explanatory Memorandum to the Draft Law Enforcement Act). Available at http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=93502&u=20100405165619 (1.04.2010) (in Estonian).

[33] In Estonian: *oluline oht*, respectively.

[34] In Estonian: *kõrgendatud oht*, respectively.

[35] In Estonian: *vahetu oht*, respectively.

[36] In Estonian: *ohukahtlus*, respectively.

[37] Explanatory Note to the General Part of the Environmental Code Act (Note 20), p. 12.

4.3. The reflection of the more significant principles of environmental law in the draft

The addressees of the principles laid down in the draft are the legislator and the administrative bodies that implement the law, along with the courts. The legislator will consider the principles when issuing legislation, especially in the preparation of the Special Part of the Environmental Code. For the administrative bodies that implement legislation, and for the court, these principles serve as interpretation guidelines. Persons using the environment are not the direct addressees of the principles established for environmental law. The effect of the principles upon them is indirect. These principles reach environment-users by having been considered in the establishment and implementation of specific norms. For example, the precautionary principle served as a direct basis for the establishing of universal environmental obligations and operator's obligations (which are not discussed in this article).[*38]

The draft establishes several principles for environmental law. Only some of them are discussed in this article.

The content of the **principle of high-level and comprehensive protection of the environment** is that the measures for protecting people and the environment must provide effective protection against environmental nuisance, and it is not allowed to automatically favour economic considerations over the necessity of protecting the environment and human health and well-being. Comprehensive environmental protection must also be ensured and must take into consideration the possibility of environmental impact carrying over from one element of the environment to another. An example for the realisation of this principle is the integrated environmental permit procedure, established in the draft. Pursuant to Article 3 (3) of the Treaty on European Union[*39], achieving a high level of environmental protection is among the main objectives of EU law. In the *Artegodan* case, the European Court of Justice has stressed that the implementation of the precautionary principle in the case of environmental risks concealed by uncertainty is among the main indicators of a high level of environmental protection.[*40] A high level of protection accordingly also means that the protection of the environment proceeds from the precautionary principle and provides legal reaction also to environmental risks concealed by scientific uncertainty. The European Court of Justice believes that one of the more significant indicators of a high level of environmental protection is effective protection of the fundamental rights of persons who depend on the environment.

The **integration principle** also proceeds from EU law and has been laid down in Article 11 of the Treaty on the Functioning of the European Union, which specifies that 'environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, particularly with a view to promoting sustainable development'. This means that there is no area of life affecting the environment in which environmental requirements should not be taken into consideration. For all such areas, environmental protection becomes a 'personal matter', unlike before, when caring for the environment was considered the responsibility of only the organisations directly responsible for the environment. With the aid of the integration principle, environmental considerations are being introduced to almost all areas of human activity. This tendency has sometimes been called ecological modernisation, proceeding from the idea that economic and social development must not and need not be the reason for environmental harm. Economic and social development may under certain conditions instead entail an improvement of the quality of the environment. The integration principle requires that high-quality environmental protection be ensured through incorporation of environmental requirements into determination of the development of all areas of life, legal regulation, and the implementation thereof. As EU environmental law is implemented by the Member States, the effect of the principle is also transposed to Estonian national law. The mandatory nature of the integration principle has also been pointed out by the Tallinn Circuit Court in the so-called *Koidu Park* case.[*41]

The most important innovative effect on Estonian environmental law, however, is the **sufficiently strict distinguishing of the prevention principle and the precautionary principle** in the draft. Distinguishing the prevention principle and the precautionary principle is important because the implementation of these principles proceeds from different considerations. The implementation of the prevention principle in the case of environmental hazard is more straightforward than the implementation of the precautionary principle. The latter must take place flexibly. Various viewpoints have been presented in the literature concerning the relationship between the precautionary principle and the avoidance principle. L. Krämer makes no distinction between them, believing them to be dove-tailing concepts.[*42] E. Rehbinder and N. Sadeleer, however, see clear differences in these principles and claim that such differentiation is especially characteristic of German law.

[38] *Ibid*., p. 15.

[39] Available at http://www.ecb.int/ecb/legal/pdf/fxac08115enc_002.pdf.

[40] *Artegodan GmbH v. Council*, Case T-74/00, para. 183. Available at http://curia.europa.eu/jcms/jcms/j_6/ (19.06.2010).

[41] Tallinn Circuit Court 18.04.2008, 3-06-1136. Available at http://www.kohus.ee/kohtulahendid/index.aspx (20.06.2010) (in Estonian).

[42] See L. Krämer. EC Environmental Law. London: Sweet and Maxwell 2003, p. 23.

In German law, the prevention principle (*Prävention*) is applied in the case of a known hazard (*Gefahr*), while the precautionary principle (*Vorsorge*) is applied in the case of risk concealed by uncertainty (*Risiko*).*[43] In addition, German law distinguishes between risks that must be endured (*Restrisiko*) and those against which measures are not justified. An example of the latter in our Draft General Part of the Environmental Code would be insignificant environmental nuisances that must be endured.

If the occurrence of a significant environmental nuisance is obvious or sufficiently probable, the realisation of such hazard must be averted (prevented). The prevention obligation is not absolute, however. In certain cases and to a certain extent, environmental hazards must be endured. The endurance obligation applies on three conditions. An environmental hazard must be endured if so required by a superior interest. Such an interest primarily is the public interest, but the consideration of private interests cannot be completely precluded either. Strict differentiation between private and public interests is generally problematic in the area of the environment. For example, for the production of energy or the managing of dangerous waste, the project may be implemented by a private person with the purpose of making a profit, yet it is without doubt that such an endeavour also serves very significant public interests. Such a project, implemented in the public interest, also has to lack alternatives. When one is considering alternatives, the principle of reasonability is nevertheless considered instead of all potentially possible alternatives being examined. Another condition of the endurance obligation is the taking of measures for the purpose of reducing the danger or significant environmental nuisance to the greatest extent possible.

For the reduction of environmental risks, the precautionary principle is implemented. In the selection of precautionary measures, the consideration of the principle of proportionality is of decisive importance. The purpose of application of the precautionary principle is reduction of environmental risks to as great an extent as possible while the measures are still reasonable. Environmental risks too must be endured, but the extent of said endurance obligation is greater than that in the case of hazards. Environmental risks must be endured if all appropriate (i.e., reasonable) precautionary measures have been taken to reduce them. Determination of what constitutes appropriate precautionary measures is a task involving great responsibility. Precautionary measures are abundant in contemporary environmental law. Precautionary measures include prohibitions and restrictions, measures for the general reduction of environmental impact, environmental quality limit values, volumetric restrictions on use of the environment, and the requirement to use the best possible technology or equipment. Precautionary measures can also have a procedural nature, as with environmental impact assessment, other environmental assessments, and measures for pre-market information and classification.

The differentiation of the prevention principle and the precautionary principle is among the conceptual foundations of environmental law, yet it is natural that in certain practical situations it is not always easy to draw a line between these two principles. The question of where scientific uncertainty ends and certainty begins is not a simple one. The answer is provided through consideration of the particulars of each specific case.

5. Conclusions

The establishment of the General Part of the Environmental Code as a first step creates a conceptual foundation for the entire Environmental Code. Setting of the objectives for the Environmental Code has therefore proceeded from a predominantly anthropocentric position and has interconnected fundamental human rights and environmental protection. At the same time, the conservation of habitats and species remaining outside the anthropocentric dimension has not been forgotten either.

The General Part of the Environmental Code Act defines the central concepts of the Environmental Code. In the existing Estonian environmental law, the usage of terminology is inconsistent and irregular. Clarity and better understanding of the legal order are enabled by the adoption of the following new concepts: environmental nuisance, significant environmental nuisance, environmental hazard, and environmental risk. The definition of concepts results in a shared, coherent understanding of the possible effects (of varying intensity) of human activity on the environment, and of the respectively differentiated legal reaction thereto.

The portion of the General Part of the Environmental Code addressing the basic principles contributes to uniform interpretation of the code and serves as a guide for the implementer, especially an administrative body, upon the entry into application of the code. A particularly innovative element in Estonian environmental law is the differentiation between the prevention principle and the precautionary principle, which requires a different legal reaction to an obvious environmental hazard and uncertain environmental risks.

[43] See E. Rehbinder. The Precautionary Principle in an Environmental Perspective. – Miljorettens grundsporgsmal 1994, pp. 91–105; N. de Sadeleer. Environmental Principles. From Political Slogans to Legal Rules. Oxford University Press 2002, p. 125; K. Pape, K. Schillhorn. Environmental Law in the Federal Republic of Germany. – Environmental Law in Europe. N. Koeman (ed.). Kluwer Law International 1999, p. 275.

The General Part of the Environmental Code has several other innovative elements, which deserve a more detailed, separate discussion. Among these are the regulation of environmental rights, which aims to provide everyone with an environment suitable for health and well-being, as well as to enable people to protect themselves sufficiently against negative environmental impact, and the integrated permit procedure. The purpose of the regulation concerning the environmental permit procedure is to simplify the procedure for the acquisition of environmental permits both for the applicant for a permit and for other interested persons. In the stead of the hitherto area-based permit procedure, the draft proposes a single environmental permit. Submission of a single permit application is thus sufficient, and hearing of the public will also take place in the context of a single procedure. The integrated permit procedure is a good example illustrating how it is possible to decrease the internal and external over-regulation characteristic of Estonia's existing environmental law and to reduce the administrative burden.

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Environmental Exploitation Plan as Administrative Form of Action

1. Subject

In addition to legislation of general application and individual decisions of the state as well as self-regulation of exploiters of the environment, strategic instruments of executive power, such as management plans, action plans, programmes, etc., are increasingly implemented in environmental law. The objective of this analysis is to explain, in the course of preparing the draft Environmental Code[*1], the possibilities of using the environmental law plans in the Estonian legal order. There is a particular need to examine whether and under what conditions the rights of an individual can be restricted on the basis of such plans. More specifically, the working group of the Ministry of Justice raised the following question: 'Can the plans used in environmental law (including, but not restricted to the water management plan in the Water Act, waste management plan in the Waste Act, plans in the area of ambient air) according to the Constitution contain (*inter alia*) regulation that

1) impose immediately on people obligations (e.g., the duty of the owner of a dwelling to direct waste water into the public sewerage system or local container, the duty to use only central heating or gas heating, the prohibition to drive vehicles older than ten years in the city centre) and/or
2) serve as the basis for providing the conditions of an environmental permit or other administrative act or for refusal to issue a permit (e.g., the detailed plan is not adopted or the building permit is not issued if the heating solution is in conflict with the air protection plan or other plan)?'

Answering these questions firstly presumes that the nature of these plans be defined from the point of view of the general part of administrative law, more precisely the study of the administrative forms of action. Thereafter, it is possible to explain on that basis what general requirements of constitutional and administrative law must be taken into account when adopting these plans and what kind of legal effects they have. It must be emphasised that here it is possible to address only environmental law plans as a type of administrative action. Each plan relating to the special part of environmental law or even each particular provision of a plan may have a specific nature, which may justify a different approach than the one presented here.[*2]

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[1] For this, see H. Veinla, E. Saunanen. Keskkonnaseadustiku üldosa seaduse eelnõu põhialused (Fundamentals of the General Part of the Environmental Code Act). – Juridica 2008/9, p. 598 (in Estonian); H. Veinla. Keskkonnaõiguse kodifitseerimisest Eestis: põhjused, eesmärgid ja valikud (Codification of environmental law in Estonia: reasons, goals and choices). – Juridica 2007/7, p. 495 (in Estonian). Completed documents: http://www.just.ee/41314 (in Estonian).

[2] For this in relation to the implementation of the European Union law, see K. Faßbender. Gemeinschaftsrechtliche Anforderungen an die normative Umsetzung der neuen EG-Wasserrahmenrichtlinie. – Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2001, p. 247.

2. Overview of situation

2.1. Notion of environmental plans and their delimitation

Applicable Estonian law recognises, for example, the following environmental law plans that can be adopted by administrative bodies:

- air pollution action plan (plan of action for reducing emission levels of pollutants released into the ambient air in the area—AAPA[*3] § 50);
- plan of action for reduction of ambient noise (AAPA § 132 (1));
- water management plan (WA[*4] § 38 (1)), including an action plan for keeping the water status as pure as possible (water status action plan – WA § 38 (8) 4));
- waste management plan (WasteA[*5] § 39 (1));
- a management plan for organising the protection of limited-conservation areas or protected areas (NCA[*6] § 25 (1));
- an action plan for conservation and management of species (NCA § 49).

Introduction of the term 'environmental exploitation plan' could be considered as a general term that would encompass all the administrative law plans coordinating the use of the environmental resources provided for in the special part of environmental law. Such plans should include, in broad terms, the description of the present status of the environment, development scenarios, objectives for maintaining or improving the status of the environment and a list of measures that agencies or individuals must take to achieve the objectives.

The plans examined here should, ideally, be more specific and binding than the strategic and political plans outlining the environmental policy activities of the state, including the development plans[*7] set out in § 12 of the SDA.[*8] The latter are not, in principle, directly applicable, but rather prescribe the adoption of legislation of general application in the future; however, because of special provisions, a document of this type can partially serve as the basis for limiting the rights of an individual (e.g., Land Improvement Act[*9] § 34 (1) 17)). Similarly, this paper will not tackle the environmental policy plans and programmes adopted by the European Union bodies.[*10] In addition to the plans adopted by agencies, environmental law also recognises action plans prepared either voluntarily or on an obligatory basis by the person exploiting an environmental resource (forest management plan—FA[*11] § 11 (4^3), plan of action of possessor of source of pollution—AAPA § 51). These may require the approval of a competent body (AAPA § 51 (3)); yet do not qualify as an administrative act but (nationally governed) self-regulation of the operator or developer. The latter also plays an important part in the environmental management system of the European Union.

2.2. Objective

The objective of environmental exploitation plans is the systematisation and documentation of environmental information in a specific region and field of the environment, development of specific goals and, above all, harmonisation of activities that have an environmental impact. The environmental law of the European Union does not govern the limits of the activities of individual polluters, but rather requires that an appropriate status be achieved or maintained in environmental activities. To that end, numerical limit values have been established in several fields of the environment (e.g., ambient air protection). However, they have not entered

3 Välisõhu kaitse seadus (Ambient Air Protection Act). – RT I 2004, 43, 298; 2009, 49, 331 (in Estonian).

4 Veeseadus (Water Act). – RT I 1994, 40, 655; 2009, 49, 331 (in Estonian).

5 Jäätmeseadus (Waste Act). – RT I 2004, 9, 52: 2009, 62, 405 (in Estonian).

3 Looduskaitseseadus (Nature Conservation Act). – RT I 2004, 38, 258; 2009, 53, 359 (in Estonian).

7 For these, see SCALCd 3-3-1-81-03. See also the 'National Strategy of Sustainable Development of Estonia', approved by the *Riigikogu* on 14 September 2005, 'Environmental Strategy until 2030', approved on 14 February 2005, 'Environmental action plan of Estonia for 2007–2013', approved by the Government of the Republic order No. 166 on 22 February 2007, national radiation safety development plan (Radiation Act (RT I 2004, 26, 173; 2009, 48, 322) § 7 (1)), national oil shale use development plan (Land Improvement Act § 34 (1) 17)), forestry development plan (Forest Act § 7) (all in Estonian).

8 Säästva arengu seadus (Sustainable Development Act). – RT I 1995, 31, 384; 2009, 12, 73 (in Estonian).

9 Maaparandusseadus (Land Improvement Act). – RT I 2003, 15, 84; 2009, 57, 381 (in Estonian).

10 For these, see H. Veinla. Keskkonnaõigus (Environmental Law). Tallinn: Juura 2005, p. 172 *ff.* (in Estonian). The provisions of the secondary law of the European Union, however, are important, requiring the administrative agencies of the member states to adopt action plans and programmes for the protection of the environment (see point 2 below). This paper does not address spatial planning, even though the environmental aspects must undoubtedly be taken into consideration in relation to them.

11 Metsaseadus (Forest Act). – RT I 2006, 30, 232; 2009, 62, 405 (in Estonian).

into force just like that. In the second half of the 1980s, the European Union began to attribute importance to developing strategies in member states in order to achieve the environmental situation prescribed by directives. In order to do that, following the example of the Anglo-American and Scandinavian legal orders, directives impose on states the obligation to adopt various rather specific action plans and programmes.*[12] It is thus not surprising that many provisions regarding environmental exploitation action plans in Estonian law introduce the provisions set out in the environmental directives of the European Union.*[13] Although water management plans were prescribed by § 38 of the initial version of the Water Act already back in 1994, i.e., long before Estonia's accession to the European Union, the regulation of planning the protection of water has changed considerably in the meantime because of European law. Yet, the present situation regarding the transposition of environmental directives concerning plans in Estonia cannot, by far, be considered satisfactory.*[14] Let it be emphasised here that the fact that the plans originate from European Union law must be borne in mind when assessing the constitutionality of the plans. If the adoption of a plan that has certain content and legal features is required according to European Union law, the implementation of the plan cannot be questioned according to the Constitution of Estonia. The Constitution can be decisive only if the plan is not governed by European Union law or a plan prescribed by European Union law is implemented in areas or in the cases to which European Union law does not extend or, upon the adoption of the plan, the member state has been afforded playing room, within the limits of which the Constitution of Estonia can be taken into account.*[15]

The preparation of plans has been imposed as mandatory in European Union law, not out of bureaucratic enthusiasm. Even though adherence to pollution thresholds is vital for the protection of the population's health, the actual situation in large cities, along major roads, and in industrial areas, frequently fails to comply.*[16] This is also true for Estonia, in the area around Liivalaia Street in Tallinn, where compliance with the maximum permitted number of instances—35 days per year—of exceeding the emission limit value for fine particulate matter of less than 10 μm (PM_{10}) has not been achieved over the past few years.*[17] It has been concluded that it is not possible to efficiently comply with the provisions by regulating individual sources of pollution in an isolated manner. For example, by limiting traffic along one street to reduce the dust and noise pollution, we would most likely increase pollution on other potential routes.*[18] The administrative activities coordinated by plans may also be necessary to maintain, in the long run, the present good or satisfactory status of the environment and avoid environmental disturbances (prevention).*[19]

It is not expected in the implementing of environmental exploitation plans that the desirable level of protection of the environment shall be solely achieved by the adoption of the plan or voluntary adherence to it by all relevant parties. The core of the environmental exploitation plans is to outline further administrative measures (spatial planning, permits and their secondary conditions, precepts for operators, traffic limitations, etc.—Minister of the Environment regulation No. 123 of 22 September 2004 § 4 (1) 11), AAPA § 132 (2), WA § 38 (8) 4) and 5), WasteA § 39 (2) and (3) 5)).*[20] They generally do not have to contain directly applicable limits and precepts for individuals. The role of a plan in first mapping the status of the environment along with strategic problems is not insignificant.*[21] However, plans cannot be limited to that function. Further adminis-

[12] K. Faßbender. Grundfragen und Herausforderungen des europäischen Umweltplanungsrechts. – NVwZ 2005, p. 1132.

[13] E.g., Articles 28–33 of the Waste Directive (2008/98/EC); Articles 23 and 24 of the Framework Directive on Ambient Air (2008/50/EC); Article 8 of the Directive relating to the assessment and management of environmental noise (2002/49/EC); Articles 11 and 13 and Part VII of the Framework directive on water policy (2000/60/EC).

[14] See, e.g., Commission Communication (18.09.2008) regarding infringement proceedings No. 2007/2236; Minutes No. 97 of the session of 9 February 2009 of the Environmental Committee of the *Riigikogu*. Available at http://www.riigikogu.ee/?op=emsplain&content_type=text/html&page=pub_ooc_file&file_id=536632&u=20090928143219&mnspkl=09.02.2009&fd=11.02.2009&komisjon=KKK.

[15] See SCALCr 3-3-1-85-07, paragraphs 38–39; SCCRCr 3-4-1-5-08, paragraphs 30–31 and 33.

[16] C. F. Fonk. Das subjektiv-öffentliche Recht auf ordnungsgemäße Luftreinhalteplanung. – NVwZ 2009, p. 69.

[17] OÜ Eesti Keskkonnauuringute Keskus. Tallinna linnastu välisõhu kvaliteedi parandamise tegevuskava (Action Plan for Improving Ambient Air Quality in Tallinn Conurbation), 2009 (not adopted), p. 104 (in Estonian). See also A. Alvela. Õhuseire käib pidevalt, kuid info seisab (Air Pollution is Continually Monitored but Information is Stuck). – aripaev.ee, 26.11.2009 (in Estonian).

[18] P. Cancik. Aktionspläne zur Lärmminderung – effektives Instrument oder „Aktionismus"? – Zeitschrift für Umweltrecht (ZUR) 2007, p. 174; a more general approach in W. Köck. – Grundlagen des Verwaltungsrechts. W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Hrsg.). München 2008, § 37, margin No. 4, 10.

[19] R. Sparwasser, R. Engel, A. Voßkuhle. Umweltrecht. Heidelberg 2003, § 10, margin No. 434; *cf.* K. Faßbender (Note 12), p. 1132. See also H. D. Jarass. Saksa immissioonikaitseõiguse põhistruktuurid (Basic Structures of German Immission Protection law). – Juridica 2007/7, p. 471 (in Estonian).

[20] The plans should not be seen as a wonder cure in achieving this objective either. Directing administrative rulings by such plans is very complicated and resource intensive. See W. Köck (Note 18), margin No. 3. P. Cancik notes that the efficiency of plans as environmental law documents considerably depends on how specific obligations are imposed by plans and to what extent citizens and environmental associations can be involved in implementing them. See P. Cancik (Note 18), p. 175 *ff*.

[21] In some areas, the description of the situation must be submitted together with an action plan (e.g., air pollution action plan—Minister of the Environment order No. 123 of 22 December 2004 § 4; water management plan—WA § 38 (8); waste management plan —WasteA § 39 (3)), in other cases, it must be adopted as a separate document that serves as the basis for an action plan (strategic ambient noise map—AAPA §§ 131 and 132).

trative measures must be specified in the plan with sufficient detail, in order to ensure the achievement of the objectives of the plan. The European Court of Justice has explained that the programmes specified in Article 7 of directive 76/464/EEC (on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community) are 'specific programmes' that 'must embody a comprehensive and coherent approach, covering the entire national territory of each member state and providing practical and coordinated arrangements for the reduction of pollution'[*22]. There is reason to take such positions seriously in preparing all plans related to the environment. A plan cannot contain only recommendations of a general nature to consider one or another measure to improve the situation at an unspecified point of time in the future.[*23] The description of the measures must indicate who must act, what they must do and under what type of situation. Agencies can retain further right of discretion only regarding whether in that particular case the implementation of the plan is proportional to the colliding legal rights. The Court of Justice has also emphasised that the measures prescribed in the plan must be suitable for achieving the required status of the environment.[*24] It is not possible to assess compliance with that requirement without a sufficient degree of specification.

3. Legal nature

Within the spectrum of administrative forms of action, the environmental law plans serve as administrative law plans (sectoral plans).[*25] However, plans are not the main legal type of administrative rulings, but a comprehensive notion that includes instruments of a very different nature. It must be specified separately for each plan how it should be legally classified.[*26] Since the plans are not phenomena preordained by nature or God, but constructs created by humans in legislative acts, their classification is, above all, a question of interpretation and pragmatic judgment, which must be addressed, considering the objectives of the plans and constitutional principles of administrative law.[*27] Spatial planning and budgets are most likely the best-known plans. Comprehensive and detailed plans are, by nature, the closest to administrative legislation (general orders)[*28] and are regarded as such in Estonian practice.[*29] National spatial plans and county plans are very general documents that rather guide agencies in their further decisions, including in adopting lower-level plans, hence remaining as mostly internal acts. Budgets serve as internal administrative acts, imposing obligations only on agencies of the public authority.

It would be easy but uninformative to comment that environmental exploitation plans are *sui generis* administrative activity. Rather than classifying plans as certain types, it is more important to consider how to apply essential distinctive criteria to them in administrative law and administrative court proceeding.

- Do environmental exploitation plans have a regulatory effect, i.e., are they legislative acts?
- If yes, is the regulation of the plan abstract or specific, i.e., is it legislation of general or specific application?
- If the answer to the first question is in the affirmative, is the regulatory effect external, i.e., do the plans impose obligations on or grant rights to persons outside administration?

Answers to these questions shape the procedural and formal requirements to adopting the plans, implementation of the principles of reservations to acts and exercise of the right of discretion as well as possibilities for protection by the court.[*30] The above particularly determines whether an individual can demand:

- revocation of a plan;
- adoption of a plan;
- inclusion of a particular measure in the plan;
- implementation of a measure prescribed in the plan;

[22] Case C-207/97, *Commission v. Belgium*, paragraph 39 *ff*.; Case C-232/95, *Commission v. Greece*, paragraph 32 *ff*. See about waste disposal plans Case C-387/97, *Commission v. Greece*, paragraph 75 *ff*.; Case C-298/97, *Commission v. Spain*, paragraph 16.

[23] Unfortunately, this is all that has been stated, e.g., in the draft ambient air action plan of Tallinn (Note 17), pp.113–116. This plan does not obviously conform to the court practice referred to above.

[24] In the case of the ambient air pollution action plan Case C-237/07, *Janecek*, paragraph 47.

[25] See, e.g., H. Maurer. Haldusõigus. Üldosa (Administrative law. General Part). Tallinn: Juura 2004, § 16, margin No. 6 (in Estonian); W. Köck (Note 18), margin No. 40.

[26] H. Maurer (Note 25), § 16, margin No. 13, 18.

[27] See W. Köck (Note 18), margin No. 18.

[28] A. Aedmaa *et al*. Haldusmenetluse käsiraamat (Handbook of Administrative Proceeding). Tartu: Tartu Ülikooli Kirjastus 2004, p. 265 (in Estonian).

[29] E.g., SCALCd 3-3-1-54-03, paragraph 34.

[30] W. Köck (Note 18), paragraph 33 *ff.*

– implementation of a measure not set out in the plan[*31];
– compensation for damage, if the plan has not been adopted or implemented as required;
– upon amending the plan, adherence to restrictions set out in §§ 64–70[*32] of APA.[*33]

3.1. Regulatory nature

There are both regulatory and only informative (indicative) plans in administrative law.[*34] Declarations, positions, development plans, strategies, etc. are not binding; they only outline the situation and forecasts and do not appear to have a legal effect on the activities of agencies and individuals.[*35] The environmental exploitation plans are not limited to this.[*36] The sole obligation to take the plan into account, as an expression of public interest in making further discretionary decisions, does not indeed turn a plan into a legislative act.[*37] Yet, it is seriously doubtful whether the obligation to take them into account suffices for the effective implementation of the plans. As explained above, the objective of the plans to serve effectively in coordinating individual environmental decisions requires that they be binding at least to some degree. This particularly concerns measures addressed in the plans, the implementation of which is necessary for the actual enforcement of the European Union law, *inter alia*, maximum permitted levels of pollution.

There is much debate in German specialised literature, for example, about the legal nature of the programmes of measures and water management plans to be adopted under Articles 11 and 13 of the water framework directive (2000/60/EC). It is clear that a water management plan is more general, containing particular information about the status of a river basin, environmental objectives set under Article 4 of the framework directive and summaries of further measures, including a summary of the programme of measures (Annex VII to the directive). A programme of measures is more specific, prescribing more precise measures for achieving the environmental objectives (permit reservations, prohibitions, limits of pollution, etc.—Article 11 (3) and (4) of the directive, precluding, for example, granting of permits for activities that are not in compliance with the programme of measures.[*38] It has been construed to imply that at least a programme of measures must be adopted as a legal act (regulation)[*39], whereas the management plan remains only informative (being as an instrument of transparency primarily aimed at the European Commission).[*40] The other authors are of the opinion that also some parts of the management plan, for example, the standards imposed on emissions as environmental objectives[*41], or the water management plan in its entirety, are binding.[*42] The management plan at least has a framework setting significance, as specified in Article 3 (2) a) of the directive on the assessment of the effects on the environment (2001/42/EC).[*43] However, there are people who claim that a programme of measures is not a legislative act either[*44], relying, *inter alia*, on the second sentence of Article 11 (1) of the framework directive, according to which a programme of measures may make reference to legislation.[*45]

The jurisprudence of the European Court of Justice distinguishes between transposition and implementation acts upon the enforcement of directives.[*46] Based on the principle of legal certainty, provisions can be transposed only by indisputably binding, genuine and overtly obligatory provisions, which means legislation of general application (act or regulation) in the Estonian context, not by specific administrative acts, internal

31 See P. Cancik (Note 18), p. 171.

32 See H. Maurer (Note 25), § 16, margin No. 28–35.

33 Haldusmenetluse seadus (Administrative Procedure Act). – RT I 2001, 58, 354; 2009, 27, 164 (in Estonian).

34 See original terms H. Maurer. Allgemeines Verwaltungsrecht. München 2002, § 16, margin No. 15 *ff*., 19 *ff*.

35 A. Aedmaa *et al* (Note 28), p. 262; H. Maurer (Note 25), § 16, margin No. 25; SCALCd 3-3-1-81-03, paragraph 19.

36 The noise map is an exception (AAPA § 131).

37 The right of discretion in making individual decisions can be affected even by a draft action plan, judgment of the Federal Administrative Court of Germany (BVerwG) of 23 November 2005. – NVwZ 2006, p. 331 *ff*.

38 G.-M. Knopp. – F. Sieder *et al*. Wasserhaushaltsgesetz. Abfallwirtschaftsgesetz (as of 1 August 2008), WHG § 36, margin No. 5a.

39 R. Sparwasser *et al* (Note 19), § 8, margin No. 228; M. Kotulla. Das Wasserhaushaltsgesetz und dessen 7. Änderungsgesetz. – NVwZ 2002, p. 1415; W. Seidel, J. Rechenberg partly take the same position. Rechtliche Aspekte des integrativen Gewässermanagements in Deutschland. – ZUR 2004, p. 219.

40 K. Faßbender (Note 2), p. 248; M. Kotulla (Note 31), p. 1417; G.-M. Knopp (Note 38), § 36, margin No. 5, § 36b, margin No. 3 and 5.

41 R. Sparwasser *et al* (Note 19), § 8, margin No. 227.

42 M. Reinhardt. Wasserrechtliche Richtlinientransformation zwischen Gewässerschutzrichtlinie und Wasserrahmenrichtlinie. – Deutsches Verwaltungsblatt (DVBl) 2001, p. 145 (clause II.2.b).

43 G.-M. Knopp (Note 38), § 36b, margin No. 5.

44 K. Faßbender (Note 2), p. 247; G.-M. Knopp (Note 38), § 36, margin No. 11; *cf.* K. Faßbender (Note 12), p. 1130, making a reservation to the minimum requirements set out in Article 11 (3) of the framework directive, which 'clearly create rights and obligations for an individual'.

45 I cannot see the reasoning as relevant. The fact that a document refers to legislation or prescribes its issue does not mean that a document could not be a legislative act itself.

46 Particularly Case C-159/99, *Commission v. Italy*, paragraph 32.

acts or actual acts. It can be said with relative certainty that the adoption of environmental exploitation plans does not serve as the transposition of the provisions of the directives but their administrative implementation. Yet the 'obligatory, indisputable and binding nature' of a measure can be necessary for the effective implementation of a directive in individual cases.*[47] In order to avoid an extensive amendment of the plan in its implementation stage, in other words, to prevent the loss of its role as a consistent*[48] coordinator of the activities of environmental agencies, the legal regulation of the plans must ensure that any derogation from them could be considered only under exceptional circumstances. In my opinion, this would mean that the plan has at least some legal effect with regard to environmental agencies. The plan must considerably limit the further right of discretion of agencies, not remain limited to the expression of public interest. Consequently, all environmental exploitation plans that, according to European Union or national law, must include a consistent and coordinated programme of action of agencies in making decisions that affect the rights of an individual, should be considered as legislative acts.

A distinction must certainly be made between different parts of the plan when evaluating its regulatory nature. It would be wrong to consider as binding the description of the present status of the environment or even future forecasts contained in the plan. Binding identification of matters of fact by an administrative act is, in principle, possible, but administrative law regards this as an exception (APA § 60 (1), third sentence).*[49] A specific legal basis or justified need is required for adopting such an administrative act. Such a need is absent in the case of environmental exploitation plans. The surveys preceding the plans are extensive and complicated, which is why mistakes can inevitably be made in describing and forecasting data. It should be presumed that the data provided in the plan are correct and they should be taken into account when implementing the plan; yet the possibility to refute the data contained in the plan, by other evidence, if necessary, should be retained. It is not necessary to ensure legal certainty related to the actual status described in the plan to the same extent as related to the measures prescribed by the plan. Also, besides measures provided by law, which limit the rights of individuals and are as a rule mandatory, the parts concerning the implementation of the plans can contain 'soft instruments', such as provision of information, calls for action, monitoring, pilot projects, etc.*[50], the implementation of which can remain advisory or obligatory only within administration.

3.2. Degree of specificity

When distinguishing between legislation of general and specific application, instead of the number of people at whom the act is aimed it is decisive whether the act governs a specific case (specific cases) or an abstract number of cases.*[51] This is often hard to distinguish, especially in the case of plans. Plans, including environmental plans, are located between regulations of general application and specific decisions on the scale of legislation.*[52] On the one hand, a plan prescribes guidelines for the application of a large and mostly unspecified number of further measures. On the other hand, the regulation can usually be delimited to the creation of a certain legal situation in a certain area. A plan can be regarded as a set of a number of individual, mutually coordinated decisions. A plan regulates a specific status of affairs, it is much more closely related to the particular situation to be regulated than legislation of general application.*[53]

Estonian legal practice has increasingly considered such borderline acts that establish rules in a certain territory, in a particular agency or in a delimited issue comparable with specific acts.*[54] If the effect is aimed outside administration*[55], the act is a general order (APA § 51 (2)).*[56] By their degree of specificity, the environmental

[47] K. Faßbender (Note 12), p. 1130; Case C-415/01, *Commission v. Belgium*, paragraph 21 *ff*. The obligation to adopt a waste management plan prescribed in Article 7 (1) of directive 75/442/EEC is not only a legal obligation according to the Court of Justice but an obligation to achieve an actual result. See Case C-292/99, *Commission v. France*, paragraph 39.

[48] Let us recall the positions of the European Court of Justice referred to above (Note 22).

[49] More precisely, I. Pilving. Haldusakti siduvus (Binding Nature of Administrative Act). Tartu: Tartu Ülikooli Kirjastus 2006, pp. 127–132, 136–138 (in Estonian).

[50] As exemplified by programme of measures in the area of water policy W. Seidel, J. Rechenberg (Note 39), p. 219.

[51] A. Aedmaa *et al* (Note 28), p. 263.

[52] G.-M. Knopp (Note 38), § 36, margin No. 5a; W. Köck (Note 19), margin No. 14.

[53] According to German authors, plans are rather closer to legislation of general application but, e.g., in the case of spatial planning, this does not yield satisfactory results in their opinion. Together with further references W. Köck (Note 19), margin No. 11 and 14.

[54] E.g., placing a special conservation area under protection: SCALCd 3-3-1-57-09, paragraphs 11–13; 3-3-1-27-09; protection rules of landscape protection area: SCALCr 3-3-1-13-04, paragraph 11, SCALC 3-3-1-31-03, paragraph 12; legislation concerning the internal rules of a prison: SCALCd 3-3-1-102-08, paragraph 15, SCALCd 3-3-1-20-08, paragraph 14, SCALCr 3-3-1-95-07, paragraph 11, SCALCd 3-3-1-54-07, paragraph 7; rules of admitting pupils to secondary schools: SCALCd 3-3-1-85-08, paragraph 21.

[55] See below, point 3.3.

[56] Regardless of somewhat misleading terminology, it is legislation of specific application. See A. Aedmaa *et al* (Note 28), p. 263 *ff*.

plans as they should be adopted[*57] are not inferior to spatial comprehensive and detailed plans.[*58] As referred to above[*59], the latter are regarded as general orders.

The classification of environmental exploitation plans as legislation of specific application is supported by pragmatic considerations in organising legal protection. If we regard plans as legislation of general application, their immediate judicial supervision would, in principle, be practicable now only in the constitutional review procedure. However, an individual lacks the right to initiate a procedure, regulated by law. With regard to further discussion below, it must be mentioned that the need for immediate judicial supervision of environmental exploitation plans derives at least from European Union law.[*60] Proceeding from efficient implementation, we should prefer a solution in the case of which a plan that has been adopted and has not been directly disputed acquires certain conclusive force during a particular period of time. This is possible only in the case of administrative acts. Since an individual cannot dispute a provision of general application, he or she can demand that it be not applied in disputes regarding measures based on the plan (Constitution § 152 (1)).

3.3. External effect

If a plan includes limitations directly applicable to the activities of an individual or obligations to be imposed on individuals, the plan certainly has an external effect and it would qualify as an administrative act according to APA § 51. If there are no such precepts aimed at individuals and the sole purpose of the plan is to coordinate further administrative rulings, the evolvement of external effect depends, among other things, on the extent of discretion conferred on the person implementing the plan. If all important choices have already been made in the plan, its implementation by further administrative acts is only formal, as a result of which the plan would have an external effect on operators and developers, but also on third parties. If, however, the agency retains, in principle, the possibility to derogate from the plan in individual cases, the act could be both an internal act and a general order. The legislator could opt for one or another form of activity as regards particular plans.

Such an approach would conform to the principle of internal administrative law in Estonia. If regarded from the point of view of the European Union, the effect of environmental exploitation plans on an individual is more extensive. In its decision of 25 July 2008, the European Court of Justice explained that an individual can require the competent national authorities to draw up an action plan in the case—referred to in Article 7 (3) of directive 96/62—where there is a risk that the limit values or alert thresholds may be exceeded.[*61] The directive imposes on the member states sufficiently clear obligations with no reservations in that part. This is enough according to the general principles of European Union law in order to create a judicially protected position for a person concerned. In this case, the Court of Justice did not accept the position of the Federal Administrative Court of Germany that had applied for a preliminary ruling that there was no right of appeal to require the adoption of the action plan because the applicant could require direct application of measures that the action plan should describe in his opinion. The application of other measures does not create a reservation to the obligation to adopt an action plan. The judgment referred to relates all environmental exploitation plans significantly to persons concerned. Further to that, it must be kept in mind that open proceedings must be carried out in the case of plans.[*62] It should be considered higly likely in that light that in a relevant case, the Court of Justice would assume a position that a person concerned must have an opportunity to demand the application of the measures prescribed by the environmental exploitation plan in the court of the member state.[*63] In such a case, the plan would directly grant rights to persons external to administration.

Environmental protection agencies do not act in an isolated manner when implementing the plans but are in legal relationships at least with operators to whom further measures should be addressed, while often also with third parties concerned. If we regard plans as internal acts, their binding nature would in fact become non-existent in all legal relationships involving individuals.[*64] If private individuals are not related to the plan, they could demand that the agency implementing the plan make a new and comprehensive discretionary decision. Taking this into account, a plan with an effect on internal administration could not be used for the sufficient planning of individual decisions. To justify the classification of various plans, including environmental plans,

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57 See above, point 2.2.

58 A comparison with the rules of protection of protected areas is also appropriate. E.g., R. Sparwasser, R. Engel and A. Voßkuhle bring both environmental exploitation plans and rules of protection under the umbrella notion of environmental law plans. See R. Sparwasser *et al* (Note 19), § 2, margin No. 100.

59 Notes 28 and 29.

60 See in greater detail below (3.3) about the external effect on citizens.

61 Case C-237/07, *Janecek*.

62 R. Sparwasser *et al* (Note 19), § 8, margin No. 237.

63 For such a position with further references, see P. Cancik (Note 18), pp. 171, 174.

64 See P. Cancik (Note 18), p. 175, Note 75.

as internal acts, reference has been made to the indirect effect on private individuals.*[65] This is not a convincing argument. In addition, a legislative act that does not limit rights directly but prescribes the enforcement of encumbering administrative acts for its implementation (e.g., a precept for the operator to terminate its activities) has an external effect on the rights of an individual. The environmental exploitation plan will limit the rights of an individual upon the implementation of the plan as well, and it need not be possible to efficiently dispute the implementation any more.*[66] The right of discretion, especially if limited because of the plan, does not preclude regulatory nature.

Since it would be anyway impractical in internal law to distinguish between internal and external acts based on the degree of discretion, while environmental exploitation plans have legal effect on private individuals according to European Union law, environmental exploitation plans (particularly action plan for the protection of ambient air, noise action plan, water status action plan and waste management plan) must typically be considered as administrative acts (general orders) as defined in APA § 51. The more specific legal effect of particular plans and their parts depends on their content, among other things, whether and in what manner the plan prescribes limitations on the rights of an individual. In order to avoid disputes, it would be advisable to set out in the special part of the Environmental Code what plans are general orders.

4. Plan as basis for limiting rights

4.1. Direct precepts

The objective of environmental exploitation plans is not to impose new obligations or prohibitions on private individuals. Considering that a plan is an administrative act, it is not, however, legally impossible, if an underlying provision prescribed by law for issuing such a precept is contained in the plan (Constitution § 3 (1), first sentence, APA § 54), the agency adopting the plan is competent to issue the precept and other requirements imposed on administrative acts are adhered to. The mere obligation of an agency to adopt an environmental plan does not entail that the agency could include arbitrary precepts in the plan, for example, regulations regarding the age of motor vehicles. However, a local government can regulate, for example, in a noise reduction action plan, the use of all-terrain vehicles on its territory (TA*[67] § 70 (6), AAPA § 134 (1) 4)).

4.2. Coordination of further acts

As emphasised repeatedly above, the main objective of environmental protection action plans is the coordination of further measures of executive power in performing the environmental protection duties of the state and other administrators. It has not been meant that new acts would be created when adopting the plans in Estonian and European Union law.*[68] A plan as an administrative act itself cannot replace a legal basis, if it is required for the implementation of further measures because of the infringement of the rights of an individual.*[69] The provision imposing the obligation to adopt a plan (e.g., AAPA § 50 (1)) is not a general clause for the implementation of all appropriate and necessary measures either. The measures that arise from law anyway (plans, permits, precepts, taxation, etc.), and for the application of which the prerequisites in substantive law provided in the underlying provision have already been met in the particular case can and must be implemented. The person adopting and implementing the plan can retain a relatively high degree of independence in deciding what limitations to apply and the extent of the limitations but the measures from which the person adopting and implementing the plan can choose must derive from law.*[70] The underlying provision for implementing the measure can but need not be contained in the same legislative act that governs the adoption of the plan.

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[65] H. Maurer (Note 25), § 16, margin No. 24.

[66] SCALCd 3-3-1-81-03, paragraph 26.

[67] Liiklusseadus (Traffic Act). – RT I 2001, 3, 6; 2009, 68, 463 (in Estonian).

[68] However, the plan can set out the informative measures not provided by law, which do not infringe the rights of the individual, e.g., information campaigns, informative agreements, etc.

[69] Everything that applies to the limitation of rights by a regulation, also applies to administrative acts. As exemplified by the limitation of the right of ownership SCebd 3-3-1-41-06. The second sentence of § 32 (2) of the Constitution or other fundamental provisions cannot be construed to mean that the right of ownership and other rights cannot be limited even by an administrative act based on law. Such an extreme position would preclude the adoption of the majority of administrative acts recognised in the present legal order (e.g. notices of assessment, detailed plans). See also H. Maurer (Note 25), § 16, margin No. 23. For the air pollution action plans see H. D. Jarass. Luftqualitätsrichtlinien der EU und die Novellierung des Immissionsschutzrechts. – NVwZ 2003, p. 262 *ff.*

[70] See the catalogue set out in § 9 (2) of the Planning Act that limits the right of discretion upon the adoption of the detailed plan in the same way.

Any law would do. The Act need not provide directly what measures could be included in the plan because the plan does not serve as the independent basis of these measures.

Since, for example, the adoption of a detailed plan is a discretionary decision, i.e., a rural municipality or a town need not certainly adopt the detailed plan that the developer likes, the local government definitely has the possibility to refuse to adopt the detailed plan, referring to the action plan for the protection of ambient air (Planning Act[*71] § 4 (2))[*72], if the reasons behind the refusal to adopt the plan are covered by the objective of the right of discretion and are proportional to a particular case. Environmental discretions are clearly covered by the objective of the planning discretion (Planning Act § 1 (3)). If the air pollution action plan adopted by a competent authority (Environmental Board) provides that in order to control air pollution, district heating or gas heating must be used in the area, this limits the right of discretion of the local government in adopting the detailed plan.[*73] An owner of a registered immovable could theoretically apply for an exception to the provisions of the action plan because the right of discretion of the local government need not be completely reduced but in reality the owner should have very weighty and special arguments (e.g., considerably higher than usual costs for the connection to the district or gas heating network). The principle of equal treatment must be taken into account when making exceptions. Proceeding from that, all sources of pollution must be addressed both in adopting the plan and its implementation, in line with their individual contribution to pollution in general.[*74] The legislator must answer the question what degree of discretion must be allowed for the person implementing the plan separately regarding each individual plan. It is possible that a differentiated approach must be taken to various measures upon the adoption of the plan—leaving rather limited room for manoeuvre if both the person adopting the plan and the person implementing the plan are state authorities, but leaving somewhat more choice if the plan is adopted by the state but implemented by a local government.[*75]

From the point of view of the reservation to law required for limiting the rights of an individual (Constitution § 3 (1)), the limitation on the heating solution could be feasible within the framework of the applicable legislation. Here an additional problem arises in relation to the autonomy of the local government (Constitution § 154 (1)) upon spatial planning (LGOA[*76] § 6 (1)) and regulating construction activities (BA[*77] § 22 (1) and § 59 (2)).[*78] It can also be construed to mean that the competence of the state in the protection of the environment already provided by law (Constitution § 65 16)), including in adopting environmental exploitation plans in the area of ambient air, limits the autonomy of local governments in adopting the plans, as a result of which the plan itself no longer infringes the autonomy.[*79] In order to avoid disputes, it would be obviously clearer and more secure to provide *expressis verbis* in the rules concerning environmental exploitation plans that local government has the obligation to generally observe or at least take into account the plans upon spatial planning, exercising construction supervision, etc.

The mandatory nature of the plan must not be understood in such a way that if it prescribes a measure not set out by law and limiting rights, the plan as an applicable administrative act should be implemented regardless thereof. It is true that the administrative act is applicable and is mandatory for execution regardless of its unlawfulness (APA § 60). However, an environmental exploitation plan is, as a rule, not used in making a final decision on whether any further measures are taken or not. As emphasised above, the objective of the plan is to coordinate further discretionary decisions, and this specification limits the object of regulation of the plan and through that also the binding nature, imposing on the agency the obligation to implement further measures with a reservation[*80] that the measures are legally admissible as well as founded on a legal basis and proportional. In order to avoid confusion, it would be advisable to limit the effect of plans expressly for example in the general part of the Environmental Code.

It is also important to keep in mind that according to Estonian or European Union law, the environmental exploitation plans do not serve as a precondition for making individual decisions in a particular case in the relevant area. An operator cannot dispute a precept issued for it solely based on the argument that the precept has not been provided in the action plan of a relevant environmental area or that the plan has not been adopted at all.[*81] In such a respect, environmental plans differ, for example, from the detailed plan, the adoption of which often serves as a precondition for issuing a building permit and starting construction works. Yet the

[71] Planeerimisseadus. – RT I 2002, 99, 579; 2009, 39, 262 (in Estonian).

[72] See for the refusal to adopt a plan SCALCd 3-3-1-56-08, paragraph 25.

[73] Similarly, SCALCd 3-3-1-15-08, paragraph 18.4.

[74] H. D. Jarass (Note 69), p. 262.

[75] E.g., in Germany, the air protection action plan is as a rule strictly binding but it must only be taken into account when adopting plans, R. Sparwasser *et al* (Note 19), § 10, margin No. 431; H. D. Jarass (Note 69), p. 262.

[76] Kohaliku omavalitsuse korralduse seadus (Local Government Organisation Act). – RT I 1993, 37, 558; 2009, 62, 405 (in Estonian).

[77] Ehitusseadus (Building Act). – RT I 2002, 47, 297; 2009, 63, 408 (in Estonian).

[78] Besides that, there are procedural questions, discussed below in point 5.1.

[79] See SCCRCd 3-4-1-4-07, paragraph 12; SCALCd 3-3-1-15-08, paragraph 18.4.

[80] For a more detailed discussion of the reservations to the binding nature of an administrative act, see I. Pilving (Note 49), pp. 133–135.

[81] A. Willand, G. Buchholz. Feinstaub: Die ersten Gerichtsentscheidungen. – Neue Juristische Wochenschrift (NJW) 2005, p. 2644.

plan affects the right of discretion if the agency and the issue of a precept not provided in the plan can be a discretionary error because an agency that has special competence has found, that the measure is not necessary for the protection of the environment.

5. Procedure

5.1. Involvement

Proceeding from the assumption that an environmental exploitation plan as an administrative act infringes the rights of individuals (both operators and the third parties concerned), hearing them out in the procedure of adopting the plan emerges as an important topic. At least in the case in which the plans considerably affect the right of discretion of the agencies implementing the measures prescribed by the plans, it is not sufficient if the relevant persons are involved in the implementation stage of the plan because the decisions of principle have been made by that time already. Due to the broad territorial scope of application of the plans, they concern many people. Clause 6 of subsection § 40 (3) of the APA allows for foregoing the personal notification of all individuals concerned but on the level of the constitutional principles of administrative procedure, this unavoidably requires conducting open proceedings. Preparation of the plans away from the public would not be in compliance with ensuring extensive access characteristic of environmental law. Moreover, open proceedings are predominantly necessary in relation to strategic environmental assessment, as the plans are to be adopted by a governmental authority or a local government body as legislative acts (Environmental Impact Assessment and Environmental Management System Act[*82] § 31) and framework documents (directive 2001/42/EC, Article 3 (2) p a)).[*83] At the same time, open proceedings do not preclude the need for the personal involvement of persons who are particularly intensively concerned, such as the owners of large plants or persons living in a particularly sensitive area.[*84]

When drafting the Environmental Code, it would be advisable to take into account the provisions of the APA concerning open proceedings, modifying them by special provisions if possible. An Act should be as comprehensive as possible. In order to avoid overregulation and legal vagueness, the procedure for adopting a plan should not be delegated to the government and ministers, especially if the plan is implemented by a local government. Anything of importance in the procedure should be contained in law and regulation of irrelevant matters should be avoided.[*85]

In addition to individual persons, attention should be paid to the involvement of the agencies that should implement the measures provided in the plan in order to ensure efficient implementation of the plan and avoid disputes between the state and local governments.[*86] This can take place based on APA § 11 (2). The involvement may also be required by the Constitution upon limitation of the autonomy and the right of discretion granted by law to local governments. Hence, it will be worthwhile to set out the involvement of agencies as mandatory in the draft Environmental Code.[*87]

5.2. Supervision

To avoid a situation in which the plans adopted by local governments remain too general or formal, the state would need tools to call them to order. This particularly applies if the enforcement of the European Union directives comes under threat. The obligation of a rural municipality or town to ask a competent state authority for its non-binding opinion would be a relatively mild option to achieve this goal. Right now, such an obligation has been set out for example in WasteA § 55. According to this provision, asking for the opinion of the county governor and the Environmental Board suffices to adopt the plan. The adoption of the plan does not presume state authorities' approval of its content. Unfortunately, such a non-binding opinion can remain inefficient. It is true that it could be compensated for by inspection and, if necessary, by the right to file a protest with an administrative court pursuant to ESA[*88] § 7 (1) and (4), since it is legislation of specific application that has been adopted when pursuing an environmental protection target. Within the framework of general

[82] Keskkonnamõju hindamise ja keskkonnajuhtimissüsteemi seadus (Environmental Impact Assessment and Environmental Management System Act). – RT I 2005, 15, 87; 2009, 3, 15 (in Estonian).

[83] Note 43.

[84] SCALCd 3-3-1-12-08, paragraph 13; SCALCr 3-3-1-47-05, paragraph 13; SCALCr 3-3-1-31-03.

[85] The choice of form and the right of discretion of an agency in the procedure should be valued (APA § 5 (1)).

[86] P. Cancik (Note 18), p. 175.

[87] See SCCRCd 3-4-1-4-07, paragraph 25.

[88] Keskkonnajärelevalve seadus (Environmental Supervision Act). – RT I 2001, 56, 337; 2007, 19, 95 (in Estonian).

supervision of lawfulness, the county governor can also interfere (GRA[*89] § 85 (4)). However, we definitely cannot appreciate a situation in which the Environmental Board must submit its opinion on the plans, but the supervision over them is exercised by the Environmental Inspectorate.[*90]

It would be more worthwhile upon the preparation of the draft Environmental Code to consider the possibility of subduing the plan to be adopted first to supervision of its lawfulness in the form of a binding approval by the Environmental Board. The supervision structure prescribed by PA § 23 as a suitable model could be used in the draft Environmental Code. In the case of a waste management plan, this would again constitute an infringement of the autonomy of the local government, but if supervision is only limited to lawfulness and does not interfere with the purposefulness of the measures planned, the infringement has to be regarded as moderate and constitutional. To avoid going to extremes within the framework of the supervision and to protect the autonomy of the local governments, it is possible to give rural municipalities and towns the option to file a complaint with a administrative court if approval is not granted.[*91]

6. Legal protection

It is easy to derive from the above, conclusions about the legal protection of both operators and the persons concerned in administrative courts, in relation with environmental exploitation plans. It should be reminded, as a general note, that environmental law uses the extended right of appeal that enables persons directly and actually concerned as well as environmental associations to contest administrative measures (Aarhus Convention[*92], Article 9). The environmental right of appeal is broader in scope than the general right to have recourse to an administrative court (CACP[*93] § 7 (1)), yet it is not interchangeable with *actio popularis*.[*94]

6.1. Right to claim adoption of plan

Even though action plans are not legally preconditions for implementing environmental protection measures, they in fact often serve as such.[*95] An individual can theoretically request the implementation of a measure necessary for exercising his or her rights and interests independently of the environmental exploitation plan, but this is considerably more complicated in reality because of the high degree of discretion related to environmental measures. Since the need for a particular measure and the feasibility of its implementation depend on the coordination of the measure with many other measures, the administrative court would be, in most cases, unable to issue sufficiently clear precepts for agencies. As referred to above, it has become clear in relation to the plans deriving from European Union law through the *Janecek* case that the person concerned has the right to file a complaint with a court of the member state if the agencies of the member state have failed to meet their obligation to adopt an environmental exploitation plan.[*96]

In the same judgement, the Court emphasises that the member states are not under the obligation to include in the action plan measures to ensure that the limit values and alert thresholds of pollution are not exceeded at all. The states are obliged to take measures capable of reducing to a minimum the risk of values/thresholds being exceeded and the duration of such an occurrence, taking into account all the material circumstances and opposing interests.[*97] In other words, the agency of a member state, as a rule, has a high degree of discretion upon adopting the plan, in which the court cannot interfere based on a complaint filed by an individual. The request of an individual for including a particular measure in the action plan can consequently emerge only

89 Vabariigi Valitsuse seadus (Government of the Republic Act). – RT I 1995, 94, 1628; 2009, 49, 331 (in Estonian).

90 Proceeding from the duties set out in the statutes, the supervisory competence of the plans adopted by local governments should be vested in the Environmental Board. *Cf*. Minister of the Environment Regulation No. 5 of 19 January 2009, § 5 (1); Regulation No. 12 of 31 March 2008, § 6.

91 *Cf*. Supervision of lawfulness in spatial planning R.-P. Löhr. – U. Battis, M. Krautzberger. R.-P. Löhr. Baugesetzbuch. München 2009, § 6, margin No. 1 *ff*. See also SCCRCd 3-4-1-9-09, paragraphs 32–33.

92 Convention on access to information, public participation in decision-making and access to justice in environmental matters. – RT II 2001, 18, 89.

93 Halduskohtumenetluse seadustik (Code of Administrative Court Procedure). – RT I 1999, 31, 425; 2008, 59, 330 (in Estonian).

94 SCALCd 3-3-1-86-06, paragraph 16; SCALCd 3-3-1-43-06, paragraph 24–29; SCALCd 3-3-1-81-03, paragraphs 23–24; K. Relve. Århusi konventsiooni artikli 9 lõige 3 – kas alus piiramatuks *actio popularis*'eks (Article 9 (3) of the Aarhus convention—a basis for unlimited *actio popularis*?) – Juridica 2009/1, p. 19 (in Estonian); K. Relve. Isikute ühendused keskkonnahuvi esindajana: kas iga ühenduse õigus või valitute privileeg? (Associations of persons as representatives of environmental interest: the right of any association or the privilege of the chosen?) – Juridica 2007/10, p. 727 (in Estonian).

95 As exemplified by the noise reduction action plan P. Cancik (Note 18), p. 174.

96 Case C-237/07, *Janecek*, paragraphs 34–42.

97 *Ibid*., paragraphs 44–45.

when the right of discretion is reduced to nothing, which would be a clear exception.*[98] Such a situation would be created if the problem could indeed be solved by a single specific measure.

6.2. Claim for revoking the plan

The persons actually and directly concerned can contest environmental exploitation plans as environmental general orders in an administrative court (CACP § 4 (1)). This applies both to the possessors of sources of pollution whose activities will be limited upon the implementation of the plan and third parties who find that the plan fails to ensure the protection of the environment directly concerning them to a sufficient extent. It is necessary to also take into account the extensive right of discretion of the person adopting the plan in the latter case; hence, the claim will be satisfied only if the agency made a considerable discretionary mistake. If the autonomy of a local government is infringed, it may be admissible for the local government to contest a plan adopted by the state; the local government should start to implement the plan or the plan impedes the performance of other duties of the local government.*[99]

As the plan is a general order, certain specifications regarding the term for filing a claim would apply to it. The person concerned could contest the plan right after its adoption if he or she so wishes but in the light of recent judicial practice, he or she can retain the possibility to contest the plan also after the expiry of the term of 30 days assigned for filing the claim. The Supreme Court is of the opinion that if "the provision of a general order has a direct effect on the rights of an individual, an action must be filed with an administrative court within 30 days of the notification of the order. If the provision addresses an unidentified number of cases, which does not affect the rights of the addressee of the Act at the time of its notification, the person can file a claim for the revocation of the order within 30 days after the emergence of the effect, for example after an act has been performed or an administrative act has been issued regarding him or her based on the general order"*[100]. It was already indicated above that delays in contesting environmental exploitation plans would impede the efficient implementation of their objective. Similarly to comprehensive and detailed plans (PA § 26 (1)), the requirement of immediate contestation should be imposed on environmental exploitation plans as well. The term for filing an action should as a rule start from the notification of the plan but it is necessary to secure the rights of particularly concerned persons by way of more intensive notification than usual. Special cases when a person regardless of sufficient care could not contest the plan on time can be settled by the restoration of the term.

6.3. Other rights of claim

Besides legislation of general application, subjective rights can also derive from administrative acts, thus in principle also from environmental exploitation plans. Whether one or another plan actually imposes on the individual, alongside the objective obligation of the agency implementing the plan, the subjective right to demand the implementation of the plan on the one hand depends on the relation of the individual with the legal rights and on the other hand on the degree of specificity of the plan (the extent of the right of discretion assigned to the agency). If the obligation to take a measure has been imposed at least among other things in the interests of the health of the individual or for the protection of the environmental resource that the person used (e.g., measures to reduce air pollution at the individual's place of residence), the requirement of the relation has been met. The right of discretion may mean that the agency is not obliged to implement the measure prescribed in the plan regardless of the plan. In such a case, the individual can only request the adherence to discretionary rules in making a decision concerning the individual.*[101] Since the plan does not serve as the final decision on implementing the environmental protection measures referred to in the plan and does not fully preclude the implementation of the measures not specified in the plan, there would as a rule be no causal relationship between the damage caused to the person as a result of unsatisfactory status of the environment and the plan. The plan could not in such a case create a legitimate expectation that the measures included in the plan are implemented as a rule. In the absence of legitimate expectation, APA §§ 64–70 would not limit the amendment of the plans.

[98] P. Cancik (Note 18), p. 174.

[99] SCALCd 3-3-1-86-06, paragraph 16; SCCRC 3-4-1-9-04, paragraphs 26, 33.

[100] SCALCr 3-3-1-95-07, paragraph 14.

[101] I.e., the court can revoke the discretionary decision that contains errors and oblige the agency to adjudicate the matter anew, not to implement a certain measure. For measures not specified in the plan, see point 4.2 above.

7. Conclusions

Environmental exploitation plans constitute, in addition to more general development plans of the state and local governments, a more clearly delimited category of administrative forms of action. As prescribed by European Union law, their content must be relatively specific as regards further measures. They cannot be considered as general guidelines of an informative nature as are strategic environmental policy plans and programmes. The main objective of environmental exploitation plans is to coordinate further environmental law decisions or decisions concerning the environment, such as spatial planning, permits and their secondary conditions, precepts, traffic and activity restrictions, etc.

Due to relatively specific content and the significance attributed by the European Union law, environmental exploitation plans (including air pollution action plan, noise reduction action plan, water management plan and waste management plan) are regarded as administrative acts (general orders) in Estonia. As such, the plans are mandatory both for the agencies implementing them and individuals to be concerned by the measures of implementing the plans. The above does not rid the agencies implementing the plan of their right of discretion but adherence to the plan should be a general rule. The body implementing the plan must ensure that individual measures are proportional to the public and private interests colliding with environmental considerations in a particular case. It would be advisable to provide in the General Part of the Environmental Code Act that plans shall be observed upon granting permits, issuing precepts and making other individual decisions unless there are good reasons for derogations.

Environmental exploitation plans need not contain immediate precepts for individuals; in the case of a provision delegating authority that derived from law, this is not in principle impossible either. A clear and specific legal basis must be set out in the plan for further measures infringing the rights. The mere obligation to adopt a plan cannot be used to derive an authorisation for including arbitrary measures in the plan. The plan itself cannot substitute for the legal basis required for environmental acts. Individuals and local government bodies directly and actually concerned can contest environmental exploitation plans in court and individuals can claim the adoption of the plan concerning them. The judicial supervision of the implementation of specific measures is limited because of the high degree of the right of discretion.

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Amendments to Procurement Contracts:

Estonian Law in the Light of the *Pressetext* Ruling

1. Introduction

The traditional approach divides the Estonian legal regulation of procurement contracts into two distinct parts: relationships preceding the award of procurement contracts are subject to national public law—to the Public Procurement Act[*1] that is implementing EU procurement law—while following the award, procurement contracts are equalled to any private law contracts without substantial exceptions.[*2]

However, by now a significant shift in the sphere of influence of European procurement law has occurred. Namely, recent decisions of the European Court of Justice—especially in the *Pressetext*[*3] and *Commission v. Germany*[*4] cases—have indicated that general principles of the EU procurement law also apply to private law relations and have, in case of a conflict, supremacy over the national private law.[*5] Therefore, even though (procurement) contract law falls within the competency of Member States, formation and application of national private law to procurement contracts must follow the general principles of procurement set out in procurement directives[*6] as well as the fundamental principles arising from the EC Treaty.[*7]

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1 Riigihangete seadus. – RT I 2007, 15, 76; 2008, 14, 92 (in Estonian), hereinafter 'the PPA'. The English text of the PPA is available but not updated at http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXX0005&keel=en&pg=1&ptyyp=RT&tyyp=X&query=riigihaNgete.

2 PPA § 4 (1). The sole exceptions to this rule are the clauses restricting amendments to procurement contracts (§§ 69 (3) and (4) of the PPA) that will be studied in this article.

3 ECJ C-454/06, *Pressetext Nachrichtenagentur GmbH v. Austria*. – ECR 2008, p. I-4401.

4 ECJ C-503/04, *Commission of the European Communities. v. Federal Republic of Germany*. – ECR 2007, p. I-6153.

5 *Commission v. Germany*, paragraphs 31, 32, 36. This rule is developed further by the new remedies' directive—Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007—amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. – OJ L 335, 20.12.2007, pp. 31–46. In order to transpose the directive, the Estonian legislator has passed an amendment that entered into force on 1 July 2010—The Act Amending the Public Procurement Act and Related Acts (Riigihangete seaduse ja sellega seonduvate seaduste muutmise seadus). – RT I 2010, 20, 102 (in Estonian). See also S. Treumer. Towards an obligation to terminate contracts concluded in breach of the E.C. public procurement rules—the end of the status of concluded public contracts as sacred cows. – Public Procurement Law Review 2007/6, p. 376.

6 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. – OJ L 134, 30.04.2004, pp. 1–113; special edition in Estonian: Ch. 6, Vol. 7, pp. 19–131; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. – OJ L 134, 30.04.2004, pp. 114–240; special edition in Estonian: Ch. 6, Vol. 7, pp. 132–262.

7 On the interaction between the general principles of procurement and the EC Treaty, see D. Pachnou. The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece 2003, pp. 42–43.

The freedom to amend procurement contracts and restrictions applicable to that freedom provide a characteristic example of the interaction of national private law and EU-law-based public law norms in private law relations of procurement. On the one hand, the private law principle of freedom of contract, including the freedom to amend a contract, applies to procurement-contract-related relationships. A key characteristic of modern contract law is the concept of contract as a dynamic phenomenon—as opposed to the classical approach's considering of contracts to be static.[*8] The option to amend a contract may not, therefore, be considered merely a threat to the results of a properly conducted procurement but rather as an **inevitable need**. Amending provides for the flexible and dynamic contractual relations and as such (a) helps achieve the end result at a reasonable price, (b) promotes fairness in contractual relations[*9], and (c) avoids obstructions upon performance that may arise from an overly restrictive and rigid legal regime.[*10] With regard to the above, the option to amend procurement contracts cannot be completely excluded.

On the other hand, an **unlimited** freedom to amend a procurement contract may easily conflict with the general principles of procurement (e.g., the principles of equal treatment and transparency). Excessive freedom to amend a procurement contract would also create a controversy with the significant public interest (mainly to avoid corruption) that is present on the national level.[*11] That is why many countries, including Estonia[*12], have established rules for preventing arbitrary amendment of procurement contracts.[*13]

Following, I will analyse the possible criteria for balancing the freedom of amendment of a procurement contract and the restrictions arising from public interests, in order for the regulation of contract amendments to be consistent with the EU general principles of procurement.

2. Exclusion of *de facto* new procurements

2.1. The *Pressetext* ruling: Prohibition of material amendments

Under the general principles of procurement, a contracting body (authority or entity) is prohibited from amending a procurement contract if the amendment will essentially, or *de facto*, constitute a new award of a contract. If facing such a situation, the contracting body must, instead of making the amendment, award a new contract. The procurement directives do not specify when an amendment is prohibited in consequence of this rule. A communication of the European Commission[*14] stipulates that a new contract must be awarded only in the event of a **material** amendment to a contract. The decision of the European Court of Justice in the *Pressetext* ruling sheds some light on what kind of amendment is deemed to be significant enough to constitute a new procurement.[*15]

The latter case involved amendments to the other contractual party, the price and the period of the contract concluded in 1994 between the Republic of Austria and the Austria Presse Agentur (APA) agency.[*16] In 2004,

Available at http://www.nottingham.ac.uk/shared/shared_procurement/theses/Despina_Pachnou_thesis.pdf (28.02.2010); T. Ojasalu. Euroopa Ühenduse asutamislepingu põhivabadused ja neist tulenevad põhimõtted Euroopa Ühenduse riigihankeõiguses (The Fundamental Freedoms of the Treaty Establishing the European Community and the Principles of European Union Procurement Law arising Thereof). Master's thesis. Supervised by Prof. A. Reenumägi. Tallinn 2006 (in Estonian).

8 I. Kull. Lepinguvabaduse põhimõte Euroopa ühtlustuvas tsiviilõiguses ja Eesti tsiviilõiguse reform (The Principle of Freedom of Contract in the Harmonising Civil Law and the Reform of Estonian Civil Law). – Riigikogu Toimetised 2000 (2), p. 4 (in Estonian).

9 P. Vincent-Jones. The New Public Contracting. Regulation, Responsiveness, Relationality. Oxford University Press 2006, p. 356.

10 J. Beermann. Administrative-Law-Like Obligations on Private(ized) Entities. – UCLA Law Review 2001–2002 (49), p. 1718.

11 S. Arrowsmith. Judicial Review of Government Procurement: a Study of Contract as a Public Function. York University (Canada) 1987.

12 Subsections 69 (3) and (4) of the PPA limit the freedom to amend procurement contracts.

13 S. Arrowsmith. Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard. – International and Comparative Law Quarterly 2004 (53), pp. 44–45.

14 Interpretative Communication of the Commission C (2007)6661 on the application of Community law on Public Procurement and Concessions to Institutionalised Public–Private Partnerships, p. 8. Available at http://ec.europa.eu/internal_market/publicprocurement/docs/pp/comm_2007_6661_et.pdf (27.02.2010).

15 On a thorough analysis of the case, see A. Brown. When Do Changes to an Existing Public Contract Amount to the Award of a New Contract for the Purpose of the EU Procurement Rules? Guidance at last in case C-454/06. – Public Procurement Law Review 2008/6, pp. NA 253–267. The argumentation of the *Pressetext* ruling was based on the previous procurement Directive (92/50/EEC) but the conclusions reached also apply according to Directive 2004/18/EC. See Brown, p. NA 267.

16 In 2000 a new party—APA-OTS, a 100% APA owned affiliated company—joined the contract on APA's side. APA-OTS was "integrated financially, organisationally and economically within APA", had to conduct and manage its business on the basis of instructions from APA and was jointly and severally liable with APA. The price of the contract was amended three times: (a) the price was converted and rounded off in 2001 upon changeover to the euro (the rounding off resulted in a price reduction of 0.3%); the calculation of the indexation was decided to be based on the consumer price index calculated for 2001, not on the index for 1986 which was intended initially. At the same time, it was agreed to fixate prices, instead of indexation, for 2002–2004 which also resulted in a small reduction in prices for the contracting body; (c) in 2005 the reduction given on the price for some services, fixed at 15% in the basic agreement, was increased to 25%. The basic agreement was concluded

Pressetext Nachrichtenagentur GmbH, a competitor of APA, unsuccessfully proposed to conclude a procurement contract with the contracting body. Pressetext then contested the lawfulness of the amendments by referring to them as *de facto* awards. The *Bundesvergabeamt* (the Federal Procurement Office of Austria), in turn, referred questions to the Court of Justice for a preliminary ruling, asking, *inter alia*, in which circumstances amendments to an existing procurement contract might be regarded as awards of new contract.

The ECJ noted that "[i]n order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract [...] when they are **materially different** in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract"*[17]. Therefore, a new contract should be awarded instead of making an amendment to the initial one if the amendment is materially different from the initial contract and demonstrates the intention of the parties to renegotiate the essential terms of that contract. The court gave the following **examples** of when an **amendment** may be regarded as being **material***[18]:

- "an amendment [...] introduces conditions that [were] not part of the initial award procedure and that would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted",
- "an amendment extends the scope of the contract considerably to encompass services not initially covered" or
- an amendment "changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the terms of the initial contract".

Next, the issue of acceptability of amendments to procurement contracts is studied separately in cases of change to a contractual partner, the price and the term (time period) of a procurement contract.

2.2. Change concerning the other contracting party

As a rule, acceptance of a new contractual partner instead of the one to which the contract had initially been awarded must be regarded as constituting a change to one of the essential terms of the procurement contract, unless that substitution was provided for in the terms of the initial contract.*[19] However, in the *Pressetext* ruling, joining the procurement contract by a new party was not regarded as a material amendment to the contract, as the new contractual partner (APA-OTS) was an affiliated company of the initial one and wholly owned by it; the initial contract partner (APA) had the right to instruct the new partner, they had concluded a contract of profit and loss transfer, and the initial contractual partner together with the new partner remained jointly and severally liable before the contracting body.*[20] The ECJ held that this was an internal reorganisation of the contractual partner, not a material amendment to the initial contract.

For the purposes of the Estonian private law, **joining in** obligation took place in the case of *Pressetext* (Law of Obligations Act*[21], hereinafter 'LOA', § 178 (1)), i.e., the initial contracting party assumed a joint and several obligation before the contracting body (§ 178 (4) and § 65 (1) of the LOA). Even though, as a result of joining in, a third person, who may not meet the qualification requirements, is joining the procurement contract, the initial—i.e., qualified—person will also remain liable. An absolute prohibition on joining in obligation would therefore not be justified, as it may create an unfounded prejudice to the constitutional freedom of enterprise as well as to the fundamental principle of free movement. However, a contractual obligation to notify the contracting body of such an intention in good time and with sufficient thoroughness would probably be justified.

As an exception, a contracting body may occasionally have a valid interest in refusing to accept the joining in obligation—for example, if personal performance by the initial party is warranted on account of the object or nature of the procurement contract. Joining in could also be excluded if the third party (intended new contracting party) fails to meet the mandatory qualification requirements set forth by the law, e.g., has participated in a criminal organisation or money laundering).*[22]

for an indefinite period, subject to a clause by which the parties waived the right to terminate the agreement until 31 December 1999. In 2005, the waiver of the right to terminate the contract was extended until 31 December 2008.

[17] *Pressetext*, paragraph 34.

[18] *Ibid.*, paragraphs 35–37. The ECJ has referred to the same rationale in later rulings: *Wall AG v. La ville de Francfort-sur-le-Main and Frankfurter Entsourgungs- und Service (FES) GmbH*, case 91/08, – OCJ 148, 5.06.2010, p. 4–5, paragraphs 37–38; *European Commission v. Federal Republic of Germany*, case 160/08. – OJ C 161, 19.06.2010, p. 4–4, paragraph 99.

[19] *Pressetext*, paragraph 40.

[20] *Ibid.*, paragraph 44.

[21] Võlaõigusseadus.– RT I 2001, 81, 487; 2010, 7, 30 (in Estonian).

[22] The 54th recital in the preamble to the Directive 2004/17/EC (Note 13); the 43th recital in the preamble to and Article 45 1) of Directive 2004/18/EC (Note 13).

The ECJ found that if a contracting party remains the same but goes through an internal reorganisation or a change concerning the holding of the company, this is not deemed to be a material amendment.[*23] As an exception, internal reorganisations may be unacceptable if carried out for the purpose of circumventing Community rules governing public contracts.[*24] For example, the court noted that if, in the circumstances of the *Pressetext* ruling, the shares of the joined-in party were transferred to a third party during the currency of the procurement contract, there would be an amendment to the essential terms and hence an award of a new contract (unless the substitution of a party had been planned already during transfer of the relevant activities).[*25] At times however, even internal reorganisations of legal persons may conflict with the general principles of procurement, for example, if the form of the legal person or the composition of shareholders had been a basis for qualification of tenderers. This may bring about a situation where "an amendment [...] introduces conditions that [were] not part of the initial award procedure and that would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted"[*26]. The appearance of such circumstances, however, is probably unlikely and rare.

A situation is different when a procurement contract as a whole or a part of it is subject to transfer (§ 175 (1) and § 179 (1) of the LOA) to a third party—such assumption of procurement obligation(s) by a new contracting party must be distinguished from joining in and internal reorganisations. In the event of an assumption, as opposed to joining in, the new contracting party would be the only one liable for the procurement contract, with no joint and several liability of the initial contracting party. Under the Law of Obligations Act, a contracting body can preclude transfer of obligations by refusing to accept it (§ 175 (1) and § 179 (1) of the LOA). Such a refusal would also be justified with a view to the principle of equal treatment. However, the law does not provide an express duty to refuse from accepting such transfer of procurement obligations. Here it is essential to note that qualification of tenderers is an essential part of legal relations preceding any award of procurement contract. The contracting body must make sure that the economic and financial conditions as well as technical and professional competence of a tenderer meet the qualification requirements set forth in the contract notice (§ 39 (1) of the PPA). Some of the qualification requirements are set out by law and some are determined at the discretion of the contracting body (§§ 4, 38, and 40 of the PPA). The qualification procedure is one of the means for ensuring equal treatment of persons and transparency of procedures. These purposes cannot be achieved and the qualification requirements would become essentially meaningless if an unqualified person, who has or would have been refused the award of a contract initially, could later on manage to assume the contractual obligations. Such a situation would be unacceptable.[*27] With regard to the above, any transfer of a procurement contract or a part of it to a third person must be considered unlawful, and in the event of such need (e.g., if it is impossible for the initially chosen contracting party to continue performance of the contract), a new contract must be awarded.

In conclusion, (a) **as a rule**, entering into procurement contract by a new contractual partner is a material amendment to the contract that the contracting body is prohibited from accepting without a new contract award; (b) **as an exception**, the change of the contractual partner is allowed if such a change had initially been provided for in the terms of procurement; (c) the ECJ has confirmed the lawfulness of joining in a procurement contract when the new contractual party was an affiliated company of the initial contracting party and in close relationship with it; (d) reorganisation or change in holding of a legal person who is a contracting party is presumably allowed, unless acceptance of the new situation in the procurement procedure would have enabled the admittance of other tenderers; and (e) assumption (transfer) of a procurement contract or a part of it is not in conformity with the general principles of the EU procurement law.

2.3. Change of price of a procurement contract

The price is a material term of any contract, and unless such option is specifically provided in the initial procurement conditions, amending the price may violate the principles of transparency and equal treatment of tenderers. However in *Pressetext*, the ECJ did not consider the conversion into euros and rounding of the contract price to be a material change: "[T]he conversion of contract prices into euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract, provided that the adjustment is minimal and objectively justified; this is so where it tends to facilitate the performance of the contract—for example, by simplifying billing procedures." Yet the court noted that if the rounded-off contract fees exceeded the level set forth by law, this would be regarded as a change in the actual value of the contract fee and it would be necessary to determine whether this constitutes a material

[23] *Pressetext*, paragraph 51.

[24] *Ibid*., paragraph 52.

[25] *Ibid*., paragraph 47.

[26] *Ibid*., paragraph 35.

[27] M. Lind. Avaliku ja erasektori institutsionaliseeritud partnerlusprojektid ja hankelepingute üleandmine (Institutionalised Partnership Projects of the Public and Private Sector and Transfer of Procurement Contracts). – Juridica 2009/6, p. 364 (in Estonian).

amendment.[*28] Connecting the price with a new index in the *Pressetext* case did not constitute a material amendment either, as an option for such amendment had been provided in the initial contract. The court did not consider the increase in the discount a material amendment because, *inter alia*, it applied for only some of the services and did not shift the economic balance of the contract in favour of the contractor.[*29]

The issue of lawfulness of a price amendment relates to the third example of material amendments that the European Court of Justice provided: "an amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the terms of the initial contract". In the case of *Pressetext*, both of the price amendments were made **in favour of the contracting body** and were therefore, presumably, lawful changes. A more complicated problem occurs if and when the price is increased—i.e., the contractual balance shifts to the detriment of the contractual authority (entity).[*30] Can a price increase be justified or is it always unacceptable as a material amendment?

An absolute increase in price may be justified when the increase takes place on conditions set forth prior to the awarding of the contract. If the exact terms and conditions of a price increase were disclosed in the procurement procedure, all the tenderers had equal opportunities in that regard, and any actual enforcement of such amendment option cannot be considered to be in conflict with the general principles of procurement. A simple factor justifying price increase is, for example, inflation.[*31] Amendment of price according to previously determined terms and conditions may also be necessary if the fluctuation of expenditure on material and staff, the exact scope of the contract, or the delivery period cannot be predicted. On these occasions, a price amendment formula serves the purpose of a fair distribution of risk. Otherwise, the contracting party would have to include incidental expenses in its price offer[*32]; however, the exclusion of expenditure subject to distribution of risk may, depending on the circumstances, cause delay in performance or even the insolvency of the contracting party. Fixed price tenders can be made on most occasions if performance of the contract takes place within a year or less. In this case, tenderers are able to pre-plan expenses, which is why price amendment formulas are usually not a part of short-term contracts.[*33] However, there may be exceptions to this rule, for example, in the event of considerable fluctuations in material prices.[*34] In the case of long-term contracts, the possibility of change in circumstances has to be taken into account, and the right to claim for adopting the contract with the changed circumstances should be set forth.[*35] Considering the above, a price fluctuation formula turns a contract into a flexible legal instrument and should not be considered to be in contradiction with the EU general principles of procurement (the requirements of equal treatment and transparency). Thus, an increase in price may be justified if it follows an amendment scheme initially set forth in the procurement procedure.

Without a doubt, not all potential changes in circumstances are predictable when compiling a contract. The more complex and specific the contract and the longer the term of contract, the more difficult it is. If the contract provides no indexation or if it is insufficient in view of the actual economic situation and a need to increase the price arises, it will be more complicated to estimate the lawfulness of amendments to the procurement contract. The evaluation of lawfulness of amendments may in this case look into the relative balance of the parties' contractual obligations. Examples of changing the balance of a contract in favour of the other contracting party include increasing the price without increasing the corresponding obligations of the other contracting party, as well as supplementing PPP-agreements (agreements on public–private partnership projects) with generously priced obligations that would compensate for damages arising for the other contracting party in other parts of the project. In such cases, the contract no longer reflects the result of the initial procurement procedure[*36] and favours corrupt relationships.

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[28] *Pressetext*, paragraphs 60, 61 and 63.

[29] *Ibid*., paragraphs 85–86.

[30] In comparison, the possibility of a price increase is precluded, for example, by the law on state assets' transfer: a precondition justifying the increase in price is not to change the contract to the detriment of the state. Clause 49 (3) 1) of the State Assets Act (Riigivaraseadus. – RT I 2009, 57, 381; 2010, 17, 94 (in Estonian)).

[31] P. Trepte. Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation. Oxford University Press 2004, pp. 334–335.

[32] *Pressetext*, paragraph 335.

[33] An example from Estonian judicial practice: A Harju County Court judgment of 21 October 2008 in civil matter 2-08-1770 established a contracting body's right to withdraw from a short-term procurement contract when the other party to the procurement contract had refused to perform the contract for the tender price. On 6 August 2007, the contracting body (the Republic of Estonia through the Rescue Board) awarded a contract to a tenderer who notified on 30 August 2007 that it was unable to perform the contract at the offered price because the subcontractors had changed their price offer. The contract did not set forth a formula for price amendment. The contracting body had the right to withdraw from the contract and award the contract to another tenderer who had offered a higher price. The contracting body had the right to claim damages by way of compensation for the price difference from the initial tenderer.

[34] P. Trepte (Note 31), p. 335.

[35] I. Kull (Note 8), p. 50.

[36] S. Arrowsmith. The Law of Public and Utilities Procurement. London: Sweet & Maxwell 2005, p. 288.

If a price amendment serves the purpose of maintaining the balance of the contract[*37], an increase in price may be justified in a situation of general increase in market prices.[*38] Also, an example of material amendment provided by the European Court of Justice in the *Pressetext* ruling should be taken into account—i.e., the amendment 'extends the scope of the contract considerably, to encompass services not initially covered'.[*39] This means that an amendment of a procurement contract is not justified if, as a result of the amendment, the balance of contractual obligations remains the same but the scope of the contract is extended considerably.[*40]

From the case law of the ECJ and opinions published in literature, I have concluded the following: (a) a **price amendment** is presumed to be a **material (and therefore a prohibited) amendment**, except if an option for the amendment was provided in the initial contract; (b) a price reduction (a change in favour of the contracting body or entity) is presumably lawful; (c) any price increase (amendment to the detriment of the contracting body) must be examined to ascertain if the change is essential, *inter alia*, whether the balance and/or the scope of contract changed; and (d) in addition to the change in the absolute value of the contract price, the establishment of balance of contractual relations and change in the scope of the contract help determine an amendment's lawfulness.

2.4. Change of procurement contract term

The *Pressetext* ruling also examined whether the conclusion of a new waiver of the right to terminate the procurement contract—basically, extension of the time limit—constitutes an award of a new procurement contract. The Court noted that "the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts. Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of Community directives governing advertising of procedures for the award of public contracts". On the other hand, the applicable Community law does not prohibit the conclusion of public services contract for an indefinite period or agreements obliging the parties to waive the right to terminate the contract.[*41]

Evaluation of acceptability of an extension must in any specific case follow the general guidelines for evaluating an amendment: i.e., does the amendment bring about a 'material' change of the procurement contract. A time limit that, if it had been set in the initial procurement procedure, would have allowed the admittance of other tenderers is not permitted. For example, if the new contract period is significantly longer than the initial one, it is possible that competitors who would have been interested in the longer term contract decided not to compete for the initial contract period that was unreasonably short and thus not cost-efficient. Also, a change in the contract period must not affect the balance of the contract to the detriment of the contracting body, unless such conditions of change were already provided for in the initial terms of procurement.

The contract dealt with in the *Pressetext* ruling initially included a clause stipulating waiver of the right of termination, and it was established that regardless of the option of termination, the parties had no actual intention to terminate the contract. The court also found that the three-year time limit for waiver of the right of termination was not too long. From the above-stated findings, it was established that the new waiver of the right-of-termination clause did not restrict competition to the detriment of other potential tenderers. This conclusion, however, is valid only if the contract is not constantly supplemented with such provisions.[*42]

Upon evaluating lawfulness of a change to the contract period, attention must be paid both to restrictions concerning contract changes and to possible restrictions that apply towards determining the initial contract period. An unjustifiably long contract period as well as changing a fixed term into an indefinite period may bring about a conflict with the rule of encouraging competition. The PPA or the procurement directives do not set specific time limits for procurement contracts, even though a maximum time limit for a framework contract is determined. As a rule, a framework contract may be awarded for no longer than four years, and a longer period

[37] Here, the 'balance of contractual relations' must not be applied in the meaning of applying the *clausula rebus sic stantibus* doctrine as provided in § 97 of the Estonian LOA. Instead, it is a wider concept. It may be that the balance of obligations arising from the procurement contract has changed and therefore justifies the increase in price even though no preconditions for applying § 97 of the LOA, which give contractual parties a private law right to claim for amendment of the contract, are present. And *vice versa*: even in a situation when § 97 of the LOA is applicable, the procurement law may mandate that a new contract should be awarded instead.

[38] A. Brown (Note 15), p. NA 262.

[39] *Pressetext*, paragraph 36.

[40] In comparison, under the French law, the lawfulness of an amendment of a procurement contract is established based on whether the amendment concerns the main financial arrangement or objective of the contract, how the new scope of the contract is determined and whether the new arrangement shifts the balance of contractual obligations. A 15% or larger change in price is deemed to be a material, and therefore an unacceptable, price amendment. See Ville de Paris v. Societe Clear Channel France. Conseil d'État, Section du Contentieux, 11/07/2008, 312354, Publié au recueil Lebon. Available at http://www.legifrance.gouv.fr/rechJuriAdmin.do?reprise=true&page=1 (13.09.2009).

[41] *Pressetext*, paragraph 73. In this aspect, it is interesting to compare the *Pressetext* ruling with a rationale in a later ECJ's decision, namely *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben*, case 451/08. – OJ C 134, 22.5.2010, p. 7–7, paragraphs 79 and 97.

[42] *Pressetext*, paragraphs 74–79.

is allowed if objectively necessary and well grounded (§ 70 (1) of the PPA). The four-year time limit could be a yardstick for the determination of justified time limits for other procurement contracts. An appropriate term for long-term public service contracts according to legal literature is 3–5 years. A longer time limit must either be justified by economic or technical circumstances, or a new procurement contract must be awarded periodically, instead of a longer term.[*43] In addition, the character of the specific procurement must be taken into consideration. Any (amended) period of a procurement contract should be justifiable in view of the tax issues, investments related to performance of the contract, and the complexity of the service provided.[*44]

Public–private partnerships (PPP), which, depending on the nature of the partnership, may need a significantly longer term, may constitute an exception. In order to optimise the performance of a PPP, the contractual relationship should last at least for the amount of time necessary for the private partner to earn back the investments made on the basis of the partnership.[*45] For example, an average term for PPPs concluded for design, construction, and building maintenance has been suggested as 25–30 years.[*46]

In conclusion: when making amendments to the contract period of procurement, award of contracts for indefinite or unreasonably long periods of time should generally be avoided. The suggested contract period, together with any amendments, should generally not exceed 3–5 years, while longer terms may be justified for PPP-projects or in case of specific economic or technical conditions.

3. A critical analysis of the current Estonian regulation on amending procurement contracts

3.1. A prohibition stipulated in § 69 (4) of the Public Procurement Act

As was shown above, the general principles of EU procurement law exclude amendments to procurement contracts that constitute *de facto* new awards. In the same way, § 69 (4) of the Estonian Public Procurement Act prohibits amending a procurement contract if the purpose of the amendment could be achieved with the award of a new procurement contract instead.

Admittedly, the meaning of the said provision is expressed somewhat vaguely. Verbatim interpretation may lead to the conclusion that, instead of any amendment, a new contract should be awarded, as awarding of a new contract instead of amendment is always possible. Clearly, this could not be the actual purpose of the provision.[*47] Therefore, it follows that § 69 (4) of the PPA should be given a narrower meaning and enforced according to the *Pressetext* rule: any **material** amendments to a procurement contract are to be excluded, instead a new contract must be awarded.

As indicated above, material changes include any amendments establishing terms and conditions that had not been set forth in pre-contractual relations and that would have allowed admittance of other tenderers or acceptance of another tender.[*48] An amendment to a procurement contract that extends the scope of the contract to a significant extent when compared to the initial scope[*49] also constitutes an award of a new contract. Instead of such amendments, a new contract shall be awarded—as is stated in § 69 (4) of the PPA.

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[43] S. E. Hjelmborg, P. S. Jakobsen, S. T. Poulsen. Public Procurement Law—the EU Directive on Public Contracts. Djof Publishing 2006, pp. 135–136; C. D. Tvarno. Does the Danish Interpretation of EC Public Procurement Law Prevent PPP? – Public Procurement Law Review 2010/2, p. 76.

[44] C. D. Tvarno (Note 43), p. 76.

[45] *Ibid*., p. 86.

[46] C. D. Tvarno. Public Private Partnership in the European Union. – R. Nielsen, S. Treumer. The New EU Public Procurement Directives. Djof Publishing 2005, p. 191.

[47] The initial version of the draft Public Procurement Act contained, instead of the current restriction, a prohibition to make **amendments substantially separable** from the contract. The explanatory memorandum of the draft stated that a contracting body shall award a new contract if the planned amendments are **substantially separable** form the procurement contract. This wording, in the author's opinion, is in better conformity with the ban of *de facto* restriction under the EU procurement law. The purpose or content of this wording is not explained in the minutes of discussions regarding the draft or the explanatory memorandum. See minutes No. 1, 18.01.2007 of a meeting of Economic Affairs Committee of the *Riigikogu*, available at http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=070150002&login=proov& password=&system =ems&server=ragne11 (28.04.2010) (in Estonian). Still, the author assumes that the initial wording of the prohibition in conjunction with the applicable procurement law of the EU is justified.

[48] *Pressetext*, paragraph 35.

[49] *Ibid*., paragraph 36.

The principles of equal treatment and transparency require that a contracting body be bound by the terms and conditions disclosed in the procurement procedure until the end of performance of the procurement contract[*50], and that the scope of the procurement contract and the terms and conditions thereof be established explicitly.[*51] If a contracting body wishes to retain the right to amend terms and conditions of a procurement contract after having chosen the contractual party, the procurement documents must expressly state both the option for as well as detailed rules of such amendment.[*52] The framework set forth for making amendments should allow all persons interested in participating in that particular procurement, to be aware of the option from the start, so that the tenders would be submitted from equal positions.[*53] For example, the European Commission has initiated infringement proceedings and brought a suit with the ECJ against Spain because, according to the Spanish law, a contracting body is allowed to amend material terms after awarding the procurement contract without having stipulated the amendment requirements clearly and expressly in the procurement documents. Such a legal regime for amending procurement contracts is not in line with the principles of equal treatment, non-discrimination, and transparency.[*54] Before awarding the procurement contract, the contracting body may establish the circumstances and rules for amending contractual payment conditions. In this case, the contracting body follows the principle of equal treatment and transparency.[*55] Otherwise, if contracting bodies were free to later amend the terms and conditions indicated in the contract notice, the amendment of contract would constitute a violation of the principles of transparency and equal treatment.[*56]

The above leads to the conclusion that regardless of the restrictions concerning amendments as prescribed by the Estonian PPA, a procurement contract can be lawfully changed if such option has been, specifically enough, provided for prior to the award of the contract. Even when possible additional works or any new terms or conditions of a procurement contract cannot be stipulated in the initial contract, it may often be possible to determine the bases for amendments—a price amendment formula, for example.

Changes that a party is entitled to **claim** either under the law or according to the contract, have a greater probability of being justified—as opposed to changes that are based solely on the agreement (discretion) of the parties.[*57] For example, § 97 of the LOA provides a claim to amend a contract in order to restore the original balance of obligations.[*58] If the bases for amendments are provided for by law or in the contract, all of the tenderers are aware of the risks of amendment of the procurement contract beforehand, and objective amendment mechanisms reduce the risk of abuse of such a right. However, the right of claim arising from law or the contract does not have supremacy over the general principles of procurement. Thus, even a right to claim an amendment may not necessarily ensure the amendment's lawfulness. Rather, the existence of a claim is just one of the circumstances to be taken into account when evaluating an amendment's acceptability.

Even if a contract or law does not specifically provide for the right to amend the contract, changing contractual balance in favour of the contracting body may be acceptable without the need to award a new contract according to § 69 (4) of the PPA. Amendments to long-term, innovative, and complex contracts that restore the balance of the procurement contract may be justified: in such cases, the planning of contract performance is more complicated and awarding a new procurement contract may prove significantly more expensive.[*59] This relates to another factor that may have relevance in evaluation of the justifiability of an amendment: namely, the **cause of amendment**. Many countries accept redistribution of risks to a certain extent if needed because of extraordinary or unforeseeable circumstances. That balances the need to prevent abuse of the freedom to amend and the need to continue the performance of contract.[*60] If a change stems from an unforeseeable event or is justified in terms of public order, security, or public health, then according to an interpretive communication of the European Commission even an amendment of a material term is justified, regardless of its provision in the procurement documents.[*61] However, the possibility of amending a procurement contract should not be limited to such situations.

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50 ECJ C-496/99 P, *Commission v. CAS Succhi di Frutta SpA*. – ECR 2004, p. I-3801, paragraph 115.

51 ECJ C-340/02, *Commission of the European Communities v. the Republic of France*. – ECR 2004, p. I-9845, paragraph 34.

52 Under Estonian law, there is a corresponding right to amend a contract in case of transfer of state property , except if the amendment "is in conflict with the requirements for public auction or selective tender". See § 49 (3) 2) of the State Assets Act.

53 *Succhi di Frutta*, paragraphs 110, 118 and 125.

54 Public procurement: Commission refers Spain to Court of Justice over modification of contracts after award. Available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1752&format=HTML&aged=0&language=EN&guiLanguage=en (23.01.2010).

55 *Succhi di Frutta*, paragraph 126.

56 *Ibid.*, paragraphs 120–121.

57 S. Arrowsmith (Note 36), pp. 288, 290.

58 For interaction of § 97 of the LOA and the norms of the PPA, see M. A. Simovart. Lepingu muutmise nõue riigihankelepingu kohustuste vahekorra muutumise korral (The Requirement of Amendment of Procurement Contract in the Event of Alteration of Balance of Contractual Obligations Arising from Procurement Contract). – Juridica 2008/4 (in Estonian).

59 S. Arrowsmith (Note 36), p. 289.

60 *Ibid*.

61 Interpretative communication of the Commission C (2007) 6661 (Note 14), pp. 8–9.

Upon establishment of the admissibility of an amendment, the conformity of the amendment to the **reasonable practice of the field of activity** may prove important. If amending contracts is an ordinary course of business in a specific field of activity, changes proposed to a procurement contract in the same field are more likely to be permissible. For example, it is a common practice to amend the terms of construction contracts and software development contracts.*[62] Contracts regulating development and implementation of computer software may prove so complicated that it is impossible to prepare a detailed and comprehensive yet flexible contract.*[63] Construction involves many risks that are often unforeseeable and impractical to regulate in the contract yet which bring about a significant change of circumstances making the amendment (supplementation) of the procurement contract inevitable.*[64] Also, it is often not possible to foresee the specific preferences of the contracting body concerning construction parameters. It is a common practice for the contracting body to alter or specify the initial requirements of design or construction in the course of the design process. Such changes cause the increase of the expenses for the contractor.*[65] In the case of an ordinary construction contract (i.e., when the person performing the procurement contract did not participate in the design process), the contractor should not have to incur the costs arising from changes to and/or shortcomings in the design, or of completing the design. Where long-term and complicated procurements are concerned, public–private partnerships have become more commonplace in many fields of activity*[66]—this applies also to Estonia (although in not as large scale as in some other countries).*[67] As a public–private partnership is mostly established to provide services over quite a long span of time, it should be able to adapt to changes in the economic, legal, and/or technical environment.*[68] This, however, relies on the assumption that, at least in certain circumstances, terms and conditions of the contract may be amended.

In conclusion: If interpreted in combination with the *Pressetext* ruling, § 69 (4) of the Public Procurement Act precludes those amendments to a procurement contract that constitute *de facto* awarding—i.e., material amendments. In addition to the criteria set forth in the *Pressetext* ruling, the practices of the economic field concerned, the nature of the contract, and whether the amendment is made on the basis of a lawful claim of a party or solely by agreement of the parties could be taken into account when assessing lawfulness of an amendment.

3.2. Evaluation of restrictions stipulated in § 69 (3) of the Public Procurement Act

According to § 69 (3) of the Estonian Public Procurement Act, the contracting body may agree to amend a procurement contract only if the amendment (a) is due to objective circumstances that (b) could not have been anticipated by the contracting body during the awarding of the public contract and (c) if left unchanged, achievement of the purpose of the procurement contract would be jeopardised.

As mentioned above, this provision regulates a situation wherein amendment of a procurement contract actually is justified.*[69] However, the current legislative solution, which establishes the presence of extraordinary circumstances as the **only** factual situation warranting amendments of procurement contracts, is not justified. The restrictions in the current wording of § 69 (3) of the PPA preclude practically all amendments that are common in the course of contract performance, except in the event of unforeseeable circumstances with a relatively significant effect (jeopardising achievement of the objective of the contract). Moreover, the situation must be unforeseeable for namely the contracting body.*[70]

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62 S. Arrowsmith (Note 36), pp. 288–292.

63 K. E. Davis. The Demand for Immutable Contracts: Another Look at the Law and Economics of Contract Modifications. – New York University Law Review 2006 (81) 2, p. 505.

64 J. Murdoch. Construction Contracts: Law and Management. Routledge 2000, pp. 83–84.

65 M. L. Macaulay, L. E. Ramsey. Construction and Procurement Law. Sweet & Maxwell 2002, pp. 60–61, 64.

66 Interpretative communication of the Commission C (2007) 6661 (Note 14), p. 2. See also M. Freeland. Government by Contract – Functional Issues. – P. Craig, R. Rawling. Law and Administration in Europe. Oxford University Press 2003, pp. 126, 133.

67 M. Käerdi *et al.* Ettevõtja õigus (Right of Entrepreneur). – Juridica 2006/4, p. 231 (in Estonian); T. Saul. Võistlev dialoog Euroopa Liidu ja Eesti riigihankeõiguses (Competitive Dialogue in the European Union and Estonian Public Procurement Law). Master's thesis. University of Tartu 2007, p. 68 (in Estonian).

68 Interpretative communication of the Commission C (2007) 6661 (Note 14), pp. 8–9.

69 *Ibid.*, pp. 8–9.

70 In the proceeding of the draft Public Procurement Act the meaning of the phrase "in case of leaving the procurement contract unchanged, the achievement of the objective set with the procurement contract would be fully or in material part in danger" was discussed, and it was explained that the situation shall be evaluated by the contracting body. Thus, the wording of the provision intended to provide the right of interpretation to the contracting body: the danger to the purpose of the procurement or the possibility to foresee the circumstances should not be evaluated objectively but according to the understanding of the contracting body. See minutes No. 1, 8.01.2007 of a meeting of Economic Affairs Committee of the *Riigikogu* (Note 48).

The current regulation lacks the flexibility needed for dynamic contractual relations, the unnecessary restrictions to the freedom to amend a contract hinder the normal functioning of contractual relations, and the refusal of a contracting body to make amendments to the contract may contradict with the general private law principle of good faith.*[71] Moreover, enforcement of § 69 (3) of the PPA may easily create a conflict with the right to claim contract amendment under the private law *clausula rebus sic stantibus* doctrine as established in § 97 of the LOA.*[72]

The purpose of the prohibition to amend contracts as stipulated in § 69 (3) of the PPA is not commented on in the explanatory memorandum of the draft law.*[73] If one compares the restrictions provided for in § 69 (3) of the PPA with the general principles and objectives of EU procurement law, it appears that regulations of such a strict nature are not necessary. Even though the professional literature and judicial practice has occasionally indicated that a new procurement contract should **presumably** always be awarded*[74] instead of amending an existing contract, that position cannot be deemed equivalent to an absolute prohibition on amendments. Rather, the presumption concerns the burden of proof: in case of a dispute, the contracting body must be able to prove that the amendment was justified and not in conflict with the general principles of procurement.

Based on the above, instead of or in addition to the rules currently in force under § 69 (3) of the Estonian Public Procurement Act, a more balanced solution for regulating amendments of procurement contracts would be based on the approach of the EU procurement law—i.e., that an amendment of a procurement contract is justified if (a) the option and the terms and conditions of amendment were disclosed in the course of the initial procurement procedure; (b) the amendment does not constitute a material change; or (c) the amendment is necessitated by an unforeseeable event or is justified in terms of public order, security, or public health.

4. Conclusions

The EU procurement law excludes material amendments to procurement contracts and obliges contracting bodies to award new contracts instead of such amendments. An amendment is considered material if it (a) brings into the procurement contract material terms and conditions that were absent during the procurement procedure and that, if present, would have allowed for the admission of tenders other than those initially admitted or for the award of the contract to a tenderer other than the now contracting party , (b) extends the scope of the procurement contract significantly, or (c) changes the economic balance of the contract to the detriment of the contracting body (in line with the *Pressetext* ruling).

Subsection 69 (4) of the Estonian Public Procurement Act prohibits amendment of a procurement contract if a new contract may be awarded instead. The prohibition should be interpreted in the light of the *Pressetext* ruling: i.e., the prohibition applies to material amendments only. In addition to the above-mentioned three examples indicated in the jurisprudence of the Court of Justice, material and immaterial amendments can be differentiated by establishing the following: the reasons for the amendment, whether a party has a right to claim for the amendment, whether the bases for the amendment were stipulated in the initial procurement contract, and whether the amendment is in harmony with the common practices in the relevant field of activity.

As set forth in § 69 (3) of the PPA, the grounds for the only acceptable amendment reflect a situation in which amendment of a contract really is warranted. However, EU procurement law does not restrict the possibility of contract amendments solely to situations that are in conformity with the preconditions set forth in § 69 (3) of the PPA. Such a restrictive regime for contract amendments fails to consider the principle of contractual freedom and the need for amendments in actual economic circumstances, and is, therefore, unjustified. Parties to a procurement contract must retain the right to amend the contract on other occasions as well, provided that to do so is not to award a *de facto* new contract.

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[71] In comparison, for example, the German regulation of amending procurement contracts expressly reflects the case law established in relation to construing the contents of the principle of good faith, and provides the person performing a construction related procurement contract with the right to request adjustment of construction contract in case of altered circumstances. – T. Ax. The new contract and contract award legislation in Germany following the adoption of the ordinance on the award of public contracts (Vergabeverordnung). – Public Procurement Law Review 2007/4, pp. NA 102–111.

[72] M. A. Simovart (Note 58), pp. 219–229.

[73] Eelnõu 816 SE I, seletuskiri (Explanatory memorandum of draft 816 SE I). Available at http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=063210004&login=proov&password=&system=ems&server=ragne11 (in Estonian).

It should be pointed out that the explanatory memorandum is prepared for the initial draft of the act which restricts amending a procurement contract as follows: "A contracting body may only agree upon amendment of an awarded contract if the contract is amended, considering the balance of rights and obligations arising from the contract, in favour of the contracting body or if the amendment is necessary due to objective circumstances which could not be anticipated by the contracting body or the effect of which could not be assessed."

[74] S. Arrowsmith (Note 36), pp. 289–290. See also the proposition of Advocate-General – Fennelly – April 2, 1998. *Walter Tögel v. Niederösterreichische Gebietskrankenkasse*. Case C-76/97. – ECR 1998, p. I-5357, paragraph 63.

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Regulation of Proprietary Relations between Spouses in the New Family Law Act:

Toward Better Regulation by Means of Private Autonomy?[*1]

1. General considerations

In history as well as today, the marriage can be viewed either as a contractual relationship between individuals that is arranged by the family members or as a specific status or position of spouses that is granted to the spouses by the competent authority—i.e., the state or the Church.[*2] Accordingly, the traditional marriage can be seen on one hand as a matter for the family members—the matter of a man and a woman or a larger family—or on the other hand a matter of the state or the Church. Therefore, the consequences of the marriage could also either be regulated within the circle of the family members themselves or fall under the competence of the state or of religious authorities. Where proprietary relations between spouses are concerned, also these rights and duties can be determined by the concerned individuals—i.e., the spouses—according to their own will or set forth as mandatory rules by the competent authority.

In continental Europe, it is common today that after the conclusion of the marriage the proprietary consequences will *ex lege* automatically apply for the spouses.[*3] The state has regulated the proprietary relationship between spouses by enacting the laws that stipulate the matrimonial property regime. The legal order is aimed at guaranteeing an appropriate and safe proprietary relationship for the married couple even if the spouses are unaware of the legal consequences.

At the same time, almost all of the European legal orders recognise also, at least to some extent, the right of spouses to regulate their proprietary relations according to their own will and preferences.[*4] In modern

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1 These ideas were firstly expressed by the author in ISFL Regional Conference in Porto, 10–12 September 2009: Family Solidarity *versus* Social Solidarity in an Era of Planetary Crisis, where the autor held the speech on the topic as follows: Regulating Ownership of Matrimonial Property—Task of State or Spouses? Recent Proposal to modify the Law of the Matrimonial Property in Estonia.

2 For more about the concept of marriage, see M. Antokolskaia. Harmonisation of Family Law in Europe: A Historical Perspective. Intersentia 2006, pp. 273–312; M. Antokolskaia. Development of Family Law in Western and Eastern Europe: Common Origins, Common Driving Forces, Common Tendences. – Journal of Family History 2003/28, pp. 52–69.

3 Conclusion made on the basis of the information on the family law in different European countries published by the European Judicial Network in civil and commercial matters: http://ec.europa.eu/civiljustice, also R. Süß, G. Ring. Eherecht in Europa. Angelbachtal 2006; European Family Law in Action. Vol IV: Property Relations between Spouses. K. Boele-Woelki, B. Braat, I. Curry-Sumner (eds.). Intersentia 2009, pp. 1189–1217.

4 *Ibid*.

times, it has been pointed out that the essence of the marriage has changed in the course of the last century. A fundamental change in values and conceptions has led to a gradual shift of focus from status to contract. The law concerning the consequences of marriage and divorce is characterised by a general withdrawal of the state, and the primary focus is on the private autonomy of the spouses. Therefore, the marriage today is conceptualised less as a status and more like a contractual relationship between spouses.[*5]

In the light of these developments, which have led us to the shift of paradigm in marriage concept and, further, also in matrimonial property law, the question arises of whether the status of a spouse conferred by a competent authority could (at least as regards the matters of proprietary rights and duties) be totally replaced by the mutual agreement between spouses or the spouses should be at least promoted to regulating their proprietary relations themselves according to their own will.

2. Recent developments in Estonia

In Estonia, radical legal changes have taken place in the last 15 years concerning the right of the spouses to regulate the proprietary relationship by means of a contract. According to the Marriage and Family Code of the Estonian SSR[*6] (hereinafter 'MFC'), spouses were not allowed to conclude a contract in order to regulate the proprietary relations between them and the mandatory rules of the matrimonial property regime applied for all in a spousal relationship in Soviet times. The freedom of contract of spouses was not recognised in relation to these matters. When one bears in mind that in a totalitarian society there is always very little space for private autonomy, it is clear that the proprietary consequences of a marriage were at that time the business of the state and not of the spouses.

After the regaining of independence, as Estonia recognised again the ideas of the liberal state and grounded her legal system with three pillars—freedom, justice, and law—which were laid down as such in the Constitution of the Republic of Estonia[*7], the civil law of the Republic of Estonia was drafted on the basis of the principles of the 1940 draft of the Civil Code[*8], which led to the recognition of the principle of private autonomy as a basis of civil law. Although the conceptual bases of the Family Law Act from 1994[*9] (FLA 1994), which entered into force in 1995, remained to a great extent the same as in the Marriage and Family Code of the Estonian SSR, the new Family Law Act of 1994 recognised the freedom of contract between spouses in matrimonial property relations.[*10] As before 1995 the spouses were not allowed to conclude a contract in order to regulate their proprietary relations differently from what is provided for in law—i.e., there was recognised only one matrimonial property regime—the Family Law Act of 1994 recognised, besides the legal matrimonial property regime, also the contractual regime. Although there were formal requirements stipulated for matrimonial property contracts and these set some limits as to substance, the freedom of contract of spouses remained rather free of limits.

In the mid-1990s, the essential reform of family law was postponed. It was held that any change in the family law affects the whole of the society emotionally and that radical reforms in that sphere should be undertaken with greater than ordinary prudence.[*11]

The same argument was brought forward as the Parliament of the Estonian Republic read the draft law. Also, social scientists were involved in the process of lawmaking. Being against change in the legal matrimonial property regime, the social scientists came up with the idea to let the spouses themselves decide which matrimonial property regime would be the most suitable for them.[*12] This occasionally expressed idea was picked

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5 For more about the question 'From Status to Contract?' see D. Schwab. From Status to Contract? – Aspekte der Vertragsfreiheit im Familienrecht im Lichte seiner Reformen. – Sonderheft der Deutschen Notar-Zeitschrift (DNotZ Sonderheft) 2001, p. 9; B. Dauner-Lieb. Eheverträge im spannungsfeld zwischen Privatautonomie und verfassungsrechtlicher Aufwertung der Familienarbeit. – Forum Familienrecht 2002/5, p. 151; S. Hofer, D. Schwab, D. Henrich (Hrsg.). From Status to Contract? Gieseking 2005.

6 Eesti NSV abielu- ja perekonnakoodeks. Passed on 31.07.1969. – ENSV Teataja 1969, 31 (appendix); RT I 1992, 11, 168 (in Estonian).

7 Eesti Vabariigi Põhiseadus. Adopted by a referendum held on 28 June 1992. – RT 1992, 26, 349; RT I 2003, 64, 429 (in Estonian).

8 Eesti Vabariigi Ülemnõukogu 6. juuli 1992. a otsus Eesti Vabariigi pankrotiseaduse rakendamise kohta (Resolution of the Supreme Council of the Republic of Estonia of 6 July 1992 on the Implementation of the Bankruptcy Act of the Republic of Estonia), § 7 7). – RT 1992, 31, 404 (in Estonian). See also: P. Varul. Eesti õigussüsteemi taastamine (Restoration of Estonia's Legal System). – Juridica 1999/1, pp. 2–4 (in Estonian); P. Varul. Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia. – Juridica International 2000 (V), pp. 104–118.

9 Perekonnaseadus. Passed on 12.10.1994. – RT I 1994, 75, 1326; 2005, 39, 308 (in Estonian). Some of the English language versions of the Acts of the Republic of Estonia are available at http://www.legaltext.ee.

10 E. Salumaa. Abielu- ja perekonnakoodeksi uus redaktsioon tulekul (A New Version of the Marriage and Family Code on its Way). – Juridica 1993/1, p. 14 (in Estonian).

11 P. Varul. Austatud lugeja! (Foreword). – Juridica 1995/1 (in Estonian).

12 See Perekonnaseaduse eelnõu sotsiaalsete mõjude analüüsi aruanne (Analysis Report on Social Influence of the Draft Family Law Act). Available at http://www.riigikogu.ee/?rep_id=577301 (in Estonian).

up by the legislator, who began to develop and expand it. As a result of that, in spring 2009 the legislator made a proposal to eliminate the then-current matrimonial property system, which consisted of the legal and contractual matrimonial property regimes. The intention was to replace the existing system with the obligation of all spouses to choose the matrimonial property regime on their own when getting married.*[13] The intention of the legislator was to create a totally new matrimonial property system, according to which there would be no legal matrimonial property regime but several matrimonial property regimes from among which the spouses have to choose before concluding the marriage.*[14] The same idea was written into the Draft of Acts Related to Civic Status Act.*[15] These developments point indirectly to the fact that, from the point of view of the legislator, regulation of proprietary rights and duties between spouses should be primarily the concern of the future spouses and not so much of the state. This also refers to the idea that marriage should be mostly understood as a contractual relationship between spouses and not really as a status given by the legal order.

For now, the Estonian Parliament has adopted the new Family Law Act*[16] (hereinafter 'FLA 2009') and the Acts Related to Civic Status Act*[17] (hereinafter 'ARCSA'). These new legal acts entered into force on 1 July 2010. Notwithstanding the previously mentioned ideas about abolishing the legal matrimonial regime in Estonia fully and introducing the obligation of all spouses to choose a matrimonial property regime, the interpretation of the paragraphs of the new Family Law Act and of the Acts Related to Civic Status Act leads to the conclusion that the system of matrimonial property remains still fundamentally the same—there will be both the legal and the contractual matrimonial property regime available for spouses.*[18] As regards the contractual property regime, the general idea of the new Family Law Act is to restrict the freedom of contract between spouses and to set clear rules concerning the substance of matrimonial property contracts. It is held that the Family Law Act, from 1994, allows the spouses too wide a freedom of contract. Therefore, the quite unlimited freedom of contract of spouses was to be replaced by the right (but not the obligation) of spouses to choose from among three matrimonial property regimes stipulated by law.*[19]

As a conclusion, Estonian family law has undergone a radical change in the last 20 years—legally ignored freedom of contract between spouses in relation to matrimonial property matters in Soviet times has been replaced with relatively unlimited possibilities for spouses to regulate their proprietary relations differently from what is provided for by law, with this change coming about after the restoration of the Republic of Estonia. Now the new Family Law Act seeks to find the balance between the previously applied regulations. Hence, the legal matrimonial property regime is not replaced by the unconditional obligation to conclude a matrimonial property contract, but the spouses are encouraged to take responsibility for the proprietary relations with each other and strongly recommended to regulate their proprietary relations according to their own will—i.e., to choose the matrimonial property regime appropriate for them.

3. The intention of the spouses as a basic principle for matrimonial property law?

It is a well-known fact that all matrimonial property regimes stipulated in law have their advantages and disadvantages.*[20] Each matrimonial property regime has its own aim and own purpose for covering the needs of a specific type of family and family life. No one legal matrimonial property regime is perfectly suited to all of the couples living under the same jurisdiction, because the factual relationship between the spouses and the needs of the spouses are not the same. Therefore, it is useful for the spouses to have the possibility of shaping their proprietary relationship according to their needs and interests.

In order to enable spouses to do that, the legal order has to leave the task of regulating the proprietary relations between spouses to the married couple. If the state is going to waive its competence to regulate the proprietary relations between spouses, it should do this to the benefit of the spouses. As marriage is, at least in principle,

[13] Perekonnaseaduse eelnõu ja seletuskiri 20.05.2009. a redaktsioonis 55 SE (Draft Family Law Act and Explanatory Letter in the wording of 20.05.2009). Available at http://www.riigikogu.ee (in Estonian).

[14] These ideas were expressed in the Parliament of Estonian Republic on 25.03.2009, see the shorthand note of the second reading of the draft law in Parliament on 29.03.2009. Available at http://www.riigikogu.ee (in Estonian).

[15] Perekonnaseisutoimingute seaduse eelnõu ja seletuskiri 25.03.2009. a redaktsioonis (Draft of Acts Related to Civic Status Act and Explanatory Memorandum in the wording of 25.03.2009); shorthand note of the second reading of the draft law in Parliament on 29.03.2009. Available at http://www.riigikogu.ee (in Estonian).

[16] Perekonnaseadus. Passed on 18.11.2009. – RT I 2009, 60, 395 (in Estonian).

[17] Perekonnaseisu toimingute seadus. Passed on 20.05.2009. – RT I 2009, 30, 177 (in Estonian).

[18] See FLA § 24 (2) and ARCSA § 37 (4).

[19] Perekonnaseaduse eelnõu ja seletuskiri 28.05.2007. a redaktsioonis 55 SE (Draft Family Law Act and Explanatory Letter in the wording of 28.05.2007). Available at http://www.riigikogu.ee (in Estonian).

[20] For more about the types of matrimonial property regimes, see M. Antokolskaia (Note 2), pp. 455–484.

based on the equal partnership of the spouses, the spouses are supposed to be able to regulate the proprietary rights and duties in relations to each other by mutual consent. Thus, granting them the task of regulating their proprietary relations according to their own will and on their own responsibility could lead to the regulation that is most in accordance with the factual relationship and needs of the spouses. As far as the legal order recognises the principle of private autonomy, it would be compatible with the key principles of private law.

In every European state, private law as a whole is based on the principle of private autonomy, which gives the individual the possibility of shaping the legally binding private relationships. According to the principle of private autonomy and of freedom of contract, individuals are entitled to shape their private relationships according to their own will on their own responsibility.*[21] Also, § 19 (1) of the Constitution of the Republic of Estonia stipulates that everyone has the right to free self-actualisation, which, above all, includes the freedom to do something or not, as well as the freedom to enter into an autonomous private relationship or not.*[22]

Accordingly, almost every European legal order also recognises the possibility for spouses to enter into a contract with each other in order to determine their proprietary rights and duties between themselves, but the boundaries of the freedom of contract are rather different, mostly subject to court review.*[23]

The right of the spouses to regulate their proprietary relations on their own is based on the freedom, self-determination, and autonomy of individuals, as well as recognition of gender equality, which has historically allowed women to take part in legal transactions on their own. There has been recommendation that all European states recognise the right of spouses to regulate at any time the financial consequences of the dissolution of their marriage by agreement and that those states encourage the courts to take into account the agreement of the spouses, as long as the overall result of the agreement seems just and reasonable.*[24] However, there is no comprehensive suggestion of recognising the autonomously created proprietary relations between spouses in any case and in all matters between spouses. Nevertheless, self-determination is an important part of matrimonial property law, though the extent of the autonomy of spouses varies enormously from state to state.

In conclusion, one can state in general that, regardless of the exact extent of the private autonomy in matrimonial property relations, there are broadly two types of regulations in Europe concerning the contractual property relations between spouses.*[25] Firstly, the spouses may be given a right to stipulate mutual proprietary rights and obligations different from those provided for in the law—i.e., to modify the legal marital property regime, or to waive the legal marital property regime completely and stipulate their own rights and duties by mutual consent. Secondly, the spouses may be granted the right to choose between the different matrimonial regimes stipulated by law and in addition may have the right to modify the chosen matrimonial regime as far as said modification is in accordance with the aim of the law.

In analysis of the role of private autonomy in proprietary relations between spouses in Estonia, it has to be pointed out that, in comparison to other European legislation, the spouses here have been left nearly unlimited possibilities to shape their proprietary relations according to their own will until the New Family Law Act entered into force. Thus it is that private autonomy between spouses has been largely recognised.

As is mentioned above, the aim of the new Family Law Act of Estonia is also to promote the spouses taking responsibility for the proprietary relations with each other. Therefore, it is strongly recommended to regulate proprietary relations between spouses according to the self-determination of spouses. In order to facilitate the autonomous creation of proprietary relations between spouses, in the new Family Law Act there are stipulated three different matrimonial property regimes, between which the spouses have to choose.

Thus, on one hand in Estonia the legislator imposes on the spouses the responsibility for the matrimonial property relations—i.e., makes autonomous creation of proprietary relations between spouses quasi-compulsory—which

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[21] For more about the principle of private autonomy see, e.g., W. Flume. Allgemeiner Teil des Bürgerlichen Rechts. Bd. 2. Das Rechtsgeschäft. 4. Aufl. Berlin, Heidelberg, New York, London, Paris, Tokyo, Hong Kong, Barcelona, Budapest 1992, pp. 1–2, 10–12; K. Larenz, M. Wolf. Allgemeiner Teil des Bürgerlichen Rechts. München 2004, pp. 393–394. See also: Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition). Tallinn 2002, p. 227 (in Estonian); Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpuaruanne. Põhiseaduse 2. peatükk „Põhiõigused, vabadused ja kohustused" (järg) (Final report of the committee for expert analysis of the Constitution of the Republic of Estonia. Chapter 2 of the Constitution 'Fundamental Rights, Freedoms and Obligations' (continuation). Available at http://www.just.ee/10725 (in Estonian).

[22] For more about the aim of this subsection, see Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 2., täiendatud trükk (The Constitution of the Republic of Estonia. Commented edition. Second, amended edition). Tallinn 2008, pp. 196–201 (in Estonian); R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and the Protection of Fundamental Rights and Freedoms). Tallinn 2004, p. 347 (in Estonian); Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne (Final report of the committee for expert analysis of the Constitution of the Republic of Estonia). Available at http://www.just.ee/10716 (in Estonian).

[23] For more see, e.g., European Family Law in Action. Vol IV: Property Relations between Spouses (Note 3), pp. 1189–1217; I. Schwenzer. Model Family Code. From a lobal perspective. Intersentia 2006, pp. 82–83; J. Gernhuber, D. Coester-Waltjen. Familienrecht. 5. neubearb. Aufl, C. H. Beck 2006, pp. 138–142.

[24] See Model Family Code, Art. 1:38, 1:39; I. Schwenzer. Model Family Code. From a lobal perspective. Intersentia 2006, pp. 82–85.

[25] The same distinction has been also made by the Commission on the European Family Law, see European Family Law in Action. Vol IV: Property Relations between Spouses (Note 3), pp. 1189–1217.

is a rather unusual solution in the context of European legal orders. On the other hand, at least in comparison to the regulation of the Family Law Act from 1994, the first type of regulation mentioned above has been replaced with the second; i.e., the freedom of contract has been more restricted in its substance than it was formerly, but, when compared to that enshrined in other European legislation, the freedom of contract is still fairly extensive.

4. The obligation of spouses to determine the proprietary relations between themselves

Whilst spouses have the right, there is generally no obligation to exercise it. If they do not regulate proprietary relations on their own, the legal matrimonial property regime—i.e., the law enacted by the state—will apply. Normally, it is the task of the state to guarantee the protection of the proprietary rights and interests of spouses, while the spouses have only the right to regulate the proprietary relations, if they want to, and no obligation to realise the granted right.

From the legal point of view, the right and/or the duty of spouses to enter into a contract with each other is at the first stage an issue of state powers and human rights and freedoms, which are stipulated in the Constitution of the Republic of Estonia. According to § 26 of the Constitution, everyone has the right to the inviolability of family life. State agencies, local governments, and their officials shall not interfere with family life, except in the cases foreseen in the Constitution. It stipulates a negative obligation of the state—i.e., a duty **not** to act—of not interfering with family life unless doing so is otherwise allowed. Concerning family relations, there is also another relevant paragraph. According to § 27 of the Constitution, the family, being fundamental to the preservation and growth of the nation and as the basis of society, shall be protected by the state. This imposes on the state a positive obligation—a duty to act—of taking action in order to protect the spouses. Among other things, it means that the state is to enact the laws that guarantee proper protection for the spouses.[*26]

Therefore, if the compulsory choice of matrimonial property regime gives the spouses the required protection, the delegation of the powers to the spouses would be in accordance with the above-mentioned paragraphs of the Constitution.

The delegation of regulation powers to the spouses might take place in different ways. Firstly, the state could refuse to regulate the proprietary relations between spouses and leave it as a whole to the competence of the spouses. In this case, there would be no protection for the so-called weaker or more vulnerable spouse (who need not always be a woman) and the circumstances would not be compatible with Constitutional values, especially with the principle of the social state. It would be too liberal (an) approach, which could, metaphorically speaking, be described in the ironical words of Roger Garaudy as a totally free action of totally free foxes in a totally free hen-house among totally free hens.[*27] This approach would not be acceptable in the light of the values of today.

The second option, as is found in the case of Estonia's new Family Law Act, is that the state will not impose one legal matrimonial property regime on all spouses but make it possible and compulsory for the spouses to choose the matrimonial property regime that seems to be compatible with the real relationship and factual needs of the spouses in the best way. In this case, the state has to enact several matrimonial property regimes (e.g., community of property, limited community ownership; deferred community ownership; separated ownership, etc.). Here, the state takes an action to protect the spouses but also imposes on the spouses the duty to protect themselves on their own. At the Constitutional level, the question of the balance between the two Constitutional values—freedom and justice—arises. Nevertheless, from the standpoint of the Constitutional values, it would be possible to leave the task to spouses, if there is a balance between these values.

But even if so-called mandatory freedom to choose from between different regulations concerning proprietary rights and duties seems to be in accordance with the Constitutional values, one must also examine the willingness and ability of the spouses to determine the proprietary rights and duties in marriage. As many sets of statistics show, today spouses are not eager to conclude contracts to regulate matrimonial property relations differently from what is provided by law.[*28] On the basis of this, one may assume that the spouses do not want to regulate the matrimonial property relationship on their own or they are not able to take responsibility. Therefore, it would be inappropriate to make the choice of matrimonial property regime compulsory for the spouses.

Furthermore, introduction of this kind of new matrimonial property system may also be seen as a refusal of the state to take responsibility for guaranteeing an equal and fair proprietary relationship between spouses. There

[26] For more, see Eesti Vabariigi põhiseadus: kommenteeritud väljaanne (Note 21), pp. 226–250; Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpuaruanne (Note 22).

[27] U. Wesel. Geschichte des Rechts: Von den Frühformen bis zum Vertrag von Maastricht. München 1997, p. 446.

[28] Since 1995 there has been registered only 4095 matrimonial property contracts in Estonia. Statistics originates from the Estonian Ministry of Justice and shows the figures on 1.01.2009.

are several grounds for believing that without the state's patronage, many people would be left without the most elementary rights and claims against their spouse, which may lead to an unfair and impaired relationship.

Firstly, at least theoretically, the spouses can be seen as equal partners while in reality this is not always the case. But as regards freedom of contract, it has to be pointed out that, because a contract is to be concluded between at least two persons, the parties have to come to an agreement; i.e., here there has to be a shared intention of both parties. This leads to restricted private autonomy as far as one party is not allowed to shape the legally binding relationship alone. Further, creation of a two-sided relationship always encompasses also the risk of foreign determination—one of the parties may be hindered such that the relationship is not shaped according to his or her self-determination and for one or another reason has to accept a foreign determination.*[29] In the case of obligatory choice of matrimonial property regime, this would lead to a situation wherein only one spouse actually determines the rules according to his or her will and therefore the interests of the other spouse are not protected.

Secondly, there is also to be taken into account the fact that marriage is expected to be a long-term relationship or at least it takes time before it comes to an end. In the course of the marriage, the actual relationship and the needs of the spouses usually change. So it is that the choice of today may be out of date tomorrow. In view of the fact that the spouses are allowed to change the choice of matrimonial property law in general only by mutual agreement and only in exceptional cases claim for ending of the matrimonial property regime in court*[30], a compulsory choice of matrimonial property regime is more likely to turn out to be improper for a couple and there are not enough remedies to eliminate the unfair choice. This leads to the conclusion that, if it is to fulfil its duties, the state is not allowed to ignore the need to regulate the proprietary relationship between spouses and has to take steps to afford the spouses proper protection. If the legislator would not stipulate the mandatory matrimonial property regime and would make it obligatory for the spouses to regulate their proprietary relations, there would be urgent need for effective mechanisms of control over the contracts, to guarantee protection for the spouses (e.g., judicial review).*[31]

Thirdly, the majority of spouses do not have enough knowledge to make right and proper decisions while getting married. Although there is stipulated an obligation for the competent authority (the vital statistics officer; notary; or minister of religion of a church, congregation, or association of congregations who has been granted the right to contract marriages) to explain the essence of the various matrimonial property regimes, this would not be enough for imposing on the spouses the duty of choosing the right one.

In conclusion, on the one hand the obligatory choice of matrimonial property regime would be not compatible with the principles and values of today. Furthermore, it would most probably lead to serious practical problems.

5. Conclusions

Summed up, the principle of private autonomy enables the spouses to regulate their proprietary relations according to their own need, interests, and intention. It gives the spouses the possibility of shaping their proprietary relations as is most suitable for them. This possibility—that is, the right to shape the relationship between the spouses—would in many cases lead to that regulation that is in the greatest possible accordance with the factual relationship and needs of the spouses. Therefore, the possibility of choosing matrimonial property regime before getting married would probably avoid situations in which the spouses are not aware of the proprietary consequences of marriage.

On the other hand, compulsory choice of matrimonial property law is not acceptable as regards current values and principles. Even if the task of regulating the proprietary relations between spouses would be left for spouses, the state has the ultimate obligation to guarantee solidarity between the spouses and ensure protection for the more vulnerable spouse.

That protection may be either in the form of legislation (i.e., binding rules) or by way of jurisdiction (i.e., judicial review of the autonomous regulation of proprietary relations between spouses when needed). In any case, however, it is the state that is responsible for guaranteeing the fair substance of the contracts concluded by the spouses. This leads to the conclusion that regulating the proprietary relations between spouses is ultimately the task of the state and not of the spouses, although the state may give the spouses the right to regulate their rights and duties on their own.

Thus, by means of private autonomy, there is an opportunity to find the most appropriate solutions in some cases, but this does not hold in every case.

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[29] See D. Medicus, S. Lorenz. Schuldrecht I. Allgemeiner Teil. 18. neubearb. Aufl. München: C. H. Beck 2008, p. 30.

[30] See FLA (2009) § 62.

[31] For more about judicial review and inalienability of certain rights, see, e.g., S. Hofer *et al*.; D. Schwab. Zur neuen gerichtliche Kontrolle von Eheverträgen und Scheidungsvereinbarungen. – FS H. Holzhauer. Recht als Erbe und Aufgabe. Berlin 2005, pp. 410–429; D. Coester-Waltjen. Liebe – Freiheit – gute Sitten. Grenzen autonomer Gestaltung der Ehe und ihrer Folgen in der Rechtsprechung des Bundesgerichtshofs. 50 Jahre bundesgerichtshof. C. H. Beck 2000, pp. 985–1008.

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Regulation of Strict Liability in the CFR and the Estonian Law of Obligations Act

1. Introduction

In delictual liability we can generally distinguish between fault-based liability and liability without fault if we look at it from the angle of the strictness of liability. Strict liability and producer liability are the most commonplace types of no-fault liability or heightened delictual liability. In addition to the afore-mentioned types of liability, several other no-fault cases under the law of delict may exist (such as the parental liability for a delict of a child less than 14 years of age). They are all opposed to fault-based liability arising out of the general elements of delict.

Within Chapter 53 of the Law of Obligations Act[*1] (hereinafter 'LOA'), which deals with unlawful damage, it is possible to distinguish the general elements of delict (Division 1) determinable as a set of specific prerequisites to liability in the presence of which the person causing the damage (tortfeasor) faces the obligation to compensate the injured party for the damage.The fault of the tortfeasor is one such prerequisite. Secondly there is a separate issue of strict liability (Division 2) where the act or fault of the tortfeasor is irrelevant, but rather it is ascertained whether the damaging result was caused by the actual realisation of the heightened risk characteristic to things or actions. The third type of liability under the law of delict regulated by the LOA is the liability for a defective product (Division 3).

The aim of this article is to provide for a comparative analysis of strict liability in the LOA and the provisions of the law of delict, as defined by the Study Group on a European Civil Code, in the Common Frame of Reference (hereinafter 'CFR').[*2] The author of this article wishes to clarify whether the general elements of strict liability in the LOA and CFR are similar; and if not, which are the main differences between the two regulations and whether the difference of the LOA regulation from the CFR is justifiable in each case.

The author also wishes, in order to delimit his treatment of the subject, to note that this article will analyse only the general elements of strict liability. Legal literature specifies that we can speak of strict liability only where we deal with an institute, historically developed, under which the determinant factor of liability is whether the risk characteristic to the major source of damage realised or not.[*3] Although the first article (3:201) of

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1 Võlaõigusseadus. Adopted on 26 September 2001. – RT I 2001, 81, 487; 2010, 2, 3 (in Estonian).

2 The text of the CFR is available at www.sgecc.net. Analysis of the CFR rules certainly contributes to a better understanding of the strict liability provisions of the LOA.

3 F. G. v. Westphalen jt. Produkthaftungshandbuch. Band 2. Das deutsche Produkthaftungsgesetz, Produktsicherheit, Internationales Privat- und Prozessrecht, Länderberichte zum Produkthaftungsrecht. München: C.H.Beck'sche Verlagsbuchhandlung 1999, pp. 11–14.

Section 2, Chapter 3 of the CFR, titled 'Accountability without Intention or Negligence'[*4], which regulates accountability for damage caused by employees and representatives, represents a case of no-fault liability, it does not, however, include classical elements of strict liability[*5], but rather is representative of a case of heightened liability.[*6] Based on the same reasoning, the analysis does not cover the problems associated with producer liability (CFR Article 3:204, LOA §§ 1061–1067).[*7]

This article has six parts, the first of which treats strict liability in general, the second deals with the general elements of strict liability, the third one concerns the strict liability related to immovables and the fourth part is dedicated to strict liability related to animals. The fifth part analyses liability for motor vehicles. The sixth and final part of the article is about strict liability related to dangerous substances or dangerous emissions.

2. Strict liability in general

Strict liability can be treated as liability without a fault of the possessor of the major source of danger. Strict liability means that a person who causes excessive danger for another person is entitled to do so but must take account of the potential obligation to compensate for no-fault damage.[*8]

As regards the evolution and developments of strict liability in European countries, one notes that in Great Britain the House of Lords laid the bases of strict liability in the case of *Rylands v. Fletcher*.[*9] In French law, until the end of the 19th century, fault as the prerequisite to liability under the law of delict was not questioned[*10]; nevertheless, in 1896, the French cassation court made a sensational decision by ordering payment of compensation to a widow whose husband had died in an occupational accident despite failure to prove the company's fault.[*11]

In Germany, strict liability was introduced into positive law for the first time in the 1838 Prussian Railway Act. In 1909, keepers of a motor vehicle were subjected to liability without a fault (*Kraftfahrzeuggesetz* § 7). H. Hattenhauer believes that this gave a green light to no-fault liability.[*12] In 1922, the Federal Republic of Germany established the strict liability of aircraft keeper, thereafter in the other domains of strict liability. The authors of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), which entered into force on 1 January 1900, treated fault as the fundamental prerequisite to liability under the law of

4 CFR does not use the term 'strict liability' because different meanings can be attributed to it. About this, see J. Blackie. The Torts Provisions of the Study Group on a European Civil Code. – European Tort Law. Eastern and Western Perspectives. M. Bussani (ed.). Bern: Stämpfli Publishers Ltd. 2007, p. 75.

5 Pursuant to Article 3:201 of the CFR a person who employs or similarly engages another is accountable for the causation of legally relevant damage suffered by a third person when the person employed or engaged: (a) caused the damage in the course of the employment or engagement; and (b) caused the damage intentionally or negligently, or is otherwise accountable for the causation of the damage. Subsections 1054 (1)–(3) of the LOA too provide for liability irrespective of the fault of the user of the service: the liability of the user of the service may, under § 1054 of the LOA, be brought about if one person engages another person in the person's economic or professional activities (subsection (1)), by the performance of duties (subsection 2)) or if a person performs an act at the request of another person (subsection (3)). Similarly to the CFR, the condition precedent to such a liability in the LOA is that the damages were caused by the economic or professional activities of the service user (subsection (1)), performance of the duties (subsection 2)) or the performance of a task given by one person to another person (subsection (3)). Although § 1054 of the LOA does not *expressis verbis* provide that the service provider's wrongful act is a condition precedent to such liability, the Supreme Court deemed the service provider's wrongful act to be a condition precedent to the service user's liability in its ruling in the case 3-2-1-75-05 of 5 October 2005. Thus, the wording of Article 3:201 (1) of the CFR and the practice in implementing § 1054 of the LOA are similar.

6 On the meaning and differences of heightened liability and strict liability, see, e.g., C. Van Dam. European Tort Law. Oxford University Press 2006, p. 255.

7 The producer liability regulation of the LOA is based on the Council directive 85/374 of 25 July 1985. The directive was amended by directive 1999/34 of 10 May 1999. It should be added that some authors treat producer liability similarly to fault-based liability. See G. Brüggemeier. Common Principles of Tort Law. A Pre-Statement of Law. The British Institute of International and Comparative Law 2004, p. 83.

8 About this, see also E. Deutsch, H.-J. Ahrens. Deliktsrecht. Unerlaubte Handlungen. Schadenersatz. Schmerzengeld. 4, völlig überarbeitete und erweiterte Auflage. Köln, Berlin, Bonn, München: Carl Heymanns Verlag 2002, p. 162.

9 In *Rylands v. Fletcher* strict liability was applied to an owner of a plot of land where emission from non-natural factors caused damage to another plot of land. It should be noted that as the case of *Rylands v. Fletcher* did not develop into a general clause of strict liability in Great Britain, it is the task of the legislator to incorporate the elements of strict liability into law. An example of this is the 1965 Atom Act. C. v. Bar, J. Shaw. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Dänemark, England, Wales. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, pp. 12–43.

10 K. Zweigert, H. Kötz. Introduction to Comparative Law. 3rd Edition. Oxford: Clarendon Press 1998, p. 659.

11 See H. Kötz, G. Wagner. Deliktsrecht. Neunte, überarbeitete Auflage. Neuwied, Kriftel: Luhterhand 2001, p. 13. In French law, it is the task of the courts to develop strict liability principles. *Ibid.*, p. 135.

12 H. Hattenhauer. Grundbegriffe des Bürgerlichen Rechts. Historisch-dogmatische Einführung. München: C. H. Beck'sche Verlagsbuchhandlung 1982, p. 113.

delict.*[13] Strict liability was said to not, in any case, serve the development of circulation, but instead to unreasonably restrict the freedom of movement of an individual.*[14]

Today, strict liability is an inherent element of liability under the law of delict. However, the entirety of delictual liability has not developed into no-fault liability, and today jurists and legislators alike consider the principle of fault viable. This is further proved by the part of the CFR dedicated to the law of delict, Article 1:101 (1) of which sets out that a person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently (or is otherwise accountable for the causation of the damage). Thus, the authors of the CFR also treat fault-based liability as a rule and strict liability mostly as a special case.

In view of the developments of the law of delict in Europe, the predominant stance has been that negligence liability and strict liability are two equally important forms of liability and are not opposed to each other. Rather they are interconnected: on the one hand, in most legal orders fault liability does not impose an option to subjectively admonish the tortfeasor for the damage caused*[15]; on the other hand strict liability is not absolute, rather it is a hybrid institute of causal and fault-based liability.*[16]

3. General elements of risk liability

The author understands the general elements of strict liability as a regulation which imposes liability for causation of damage with a major source of danger in general, without specifying such major source of danger. It should be noted that before entry into force of the LOA on 1 July 2002, the then applicable Civil Code of the Estonian SSR regulated the entire realm of strict liability in just one clause. The general elements of strict liability were contained in an indicative list.*[17]

The CFR does not contain general elements of strict liability; however, it does not limit the provision of the additional elements or the general elements of strict liability to national law. Article 3:207 of the CFR sets out that a person is also accountable for the causation of legally relevant damage, if national law so provides, where it: (a) relates to a source of danger which is not within Article 3:103 to 3:205; (b) relates to substances or emissions; or (c) disapplies Article 3:204 paragraph (4) (e).*[18]

Subsection 1056 (1) of the LOA sets out that if damage is caused resulting from danger characteristic to a thing constituting a major source of danger or from an extremely dangerous activity, the person who manages the source of danger shall be liable for the causing of damage regardless of the person's culpability.*[19] A person who manages a major source of danger shall be liable for causing the death of, bodily injury to or damage to the health of a victim, and for damaging a thing of the victim, unless otherwise provided by law. Damage subject to compensation under strict liability provisions may be both patrimonial and non-patrimonial. The extent of compensation is regulated in Chapter 7 of the LOA (§ 127 *ff*.).

Thus, under Estonian law, strict liability may be applicable also to cases not specified in §§ 1057–1060 of the LOA. The prerequisite to this is that the damage has been caused by a major source of danger. The major

[13] This is also because BGB contains only one element of strict liability: the liability of a keeper of an animal. Thus, it is clear that the legislator has treated the principle of fault as the fundamental basis of liability and that strict liability is approached as a special phenomenon. See H. Kötz, G. Wagner (Note 11), p. 136.

[14] About this, see H. Kötz, G. Wagner (Note 11), p. 13.

[15] Pursuant to § 1050 (2) it is still necessary.

[16] N. Jansen. Auf dem Weg zu einem europäischen Haftungsrecht. Zeitschrift für Europäisches Privatrecht. 9. Jahrgang. München: Verlag C. H. Beck 2001, p. 47. About the justifiability of strict liability as a type of delictual liability, see, e.g., F. J. Vandall. Strict Liability. Legal and Economic Analysis. New York, Westport Connectict, London: Quorum Books 1989, pp. 17–25.

[17] The Civil Code of the Estonian SSR was adopted by the Supreme Council of the ESSR on 12 June 1964. – ÜNT 1964, 25, 115; RT I 1997, 48, 775 (in Estonian). Section 458 of the Civil Code of the Estonian SSR provided that organisations and citizens whose activities involved a major danger to the surroundings (transport organisations, industrial enterprises, structures, car possessors, etc.) were required to compensate for the damages caused with a major source of danger unless they could prove that such damages were caused as a result of *force majeure* or the intent of the person suffering the damage.

[18] Pursuant to Article 3:204 (4) (e) of the CFR, a person is not accountable for the causation of damage if that person shows that the state of scientific and technical knowledge at the time that person put the product into circulation did not enable the existence of the defect to be discovered.

[19] The causation of damage as a result of the realisation of the risk characteristic to a major source of danger is one of the conditions precedent to the application of strict liability. E.g., the damage caused with a motor vehicle can be treated as a consequence of the realisation of the risk characteristic to a motor vehicle as the major source of danger primarily in the case where the damage is a result of the moving vehicle and not where a pedestrian gets dirt on his clothes as a result of climbing through parked and dirty cars. See P. Varul *et al*. Võlaõigusseadus III. Kommenteeritud väljaanne (Law of Obligations Act III. Commented edition). Tallinn: Juura 2009, p. 692 (in Estonian). It should be added that under § 1056 (3) of the LOA, the provisions of the strict liability division do not preclude or restrict the right to make claims on any other legal basis, including claims for compensation of unlawfully and wrongfully caused damage.

source of danger is defined in § 1056 (2) of the LOA: a thing or an activity is deemed to be a major source of danger if, due to its nature or to the substances or means used in connection with the thing or activity, major or frequent damage may arise therefrom even if it is handled or performed with due diligence by a specialist. However, if liability for causing damage by means of a source of danger is prescribed by law, any thing or activity similar to such source of danger is also deemed to be a source of danger, regardless of whether the person who manages the source of danger is culpable or not.

In Estonian court practice, the following instances **were not** treated as major sources of danger: a barrier which dropped on a person's head at the entry to a paid parking lot (CCSC decision, 31 May 2007, in case 3-2-1-54-07), a telephone pole placed on the highway which the injured party's car hit (CCSC decision, 30 June 1994, in the case III-2/1-24/94), or the potable water within the building's piping which ruined the wallpaper in the injured party's living quarters after a pipe burst (CCSC decision, 24 April 1997, in case 3-2-1-53-97). Similarly, the Supreme Court did not treat the operation of a roll transporter as a major source of danger: the court stated that the imminent danger to the plaintiff, i.e., the possibility of the plaintiff's hand being caught between the moving chain and the gear of the working transporter could have been reasonably avoided by remaining at a safe distance from the transporter or by shutting down the transporter before attempting to remove a splinter from between the machine's rolls (CCSC decision, 21 March 2007, in the case 3-2-1-2-07).*[20]

Obviously it can be claimed that as with the general elements of strict liability there is also the question about what the major source of danger is and, in turn, this is often a question of a fact and restricts the legal certainty of the existence of the general elements of strict liability.

A general clause on strict liability is not completely unknown in European countries. The general elements of strict liability can be found, e.g., in the civil codes of Italy and Portugal.*[21] The author of the article finds that the general elements of strict liability as such should be supported: although the legal certainty may be lower, the law will be able to adapt to the changing world without a need to change the texts of law. However, the final assessment regarding the existence of the general elements of strict liability will depend on how these elements are applied by courts. On the one hand, strict liability might be used so excessively that the very essence of risk liability might be modified. On the other hand, strict liability might find so little use in practice that the existence of such elements would have only marginal importance. Estonian courts have, to date, been rather timid in applying § 1056 of the LOA.

Neither the CFR nor the LOA regulate how to approach the issue of liability where two major sources of danger have caused mutual damage (e.g., two vehicles collide as a dog runs onto the motorway, etc.). On the basis of CCSC decision 3-2-1-75-07 of 24 September 2007, it may be claimed that in such a case strict liability should be applied. The Supreme Court stated in the decision that the defendant, being the keeper of an animal, may be liable under § 1060 of the LOA despite the plaintiff, as the possessor of the motor vehicle, having at the moment he suffered damages managed a major source of danger as the possessor of the motor vehicle. The liability without the fault of the manager of the major source of damage, i.e., the strict liability (§§ 1056–1060 of the LOA) is applied also where the manager of the major source of danger that caused the damage was not culpable of the causation of damages to the other manager of the major source of danger. The potential role of the plaintiff as the manager of the other source of danger should be assessed in order to lower the amount of compensation for damages in case strict liability is applied to the defendant.

In Estonian judicial practice, the application of strict liability to certain injured parties is restricted. The decision of the CCSC in case 3-2-1-27-07 of 18 April 2007 states that persons who participate in the management of a major source of danger or temporarily manage the major source of danger or benefit from such management are not entitled, in keeping with the principle of good faith, to invoke the provisions of strict liability in order to claim compensation from the manager of the major source of danger for the damages they have suffered.

Section 1056 of the LOA does not provide for any circumstances which would exclude liability on the basis of the general elements of strict liability. One such circumstance might be *force majeure,* but only if *force majeure* has such a determining impact on the evolution of damages that it is no longer possible to talk about the realisation of the risk characteristic to the major source of danger. In addition, liability under § 1056 of the LOA might also be excluded where the injured party voluntarily accepts the risk. C. von Bar believes that the systematic application of the concept of voluntary acceptance of the risk in the law of delict is still a rather questionable issue.*[22] However, such a basis which excludes or restricts liability has been recognised quite widely, as evidenced in Article 5:101 (2) of the CFR which sets out that a person has a defence if the person suffering the damage, knowing the risk of damage of the type caused, voluntarily takes that risk and

[20] The decisions of the Supreme Court are available at www.riigikohus.ee (in Estonian). In Estonian legal literature, the prevailing stance is that, e.g., the following instances may be deemed to be major sources of danger: lighting a live fire in the nature, spraying toxic substances onto a field, using a weapon in a shooting gallery, etc. P. Varul *et al* (Note 19), p. 692. The author of the article generally agrees with those instances.

[21] See F. Werro, V. V. Palmer (eds.). The Boundaries of Strict Liability in European Tort Law. Bern: Stämpfli Publishers Ltd. 2004, p. 29.

[22] C. von Bar. The Common European Law of Torts. Volume Two. Damage and Damages, Liability for and without Personal Misconduct, Causality, and Defences. Oxford University Press 2000, p. 535.

is to be regarded as accepting it. The LOA does not contain a provision similar to that article of the CFR and the current case law has yet to specify the issues related to the voluntary acceptance of risk.

4. Strict liability related to an immovable

Pursuant to Article 3:202 (1) of the CFR, a person who independently exercises control over an immovable is accountable for the causation of personal injury and consequential loss, loss within Article 2:202, and loss resulting from property damage (other than to the immovable itself) by a state of the immovable itself which does not ensure such safety as person in or near the immovable is entitled to expect having regard to the circumstances including (a) the nature of the immovable; (b) the access to the immovable, and (c) the cost of avoiding the immovable being in that state.[*23] The LOA has a similar provision, § 1059, under which the owner of the land under a structure or a person who owns another real right on the basis of which the structure is created, shall be liable for damage caused by the collapse of the structure and for damage caused by loosened and falling parts of the structure, icicles and so on, unless the owner proves that the damage is caused by *force majeure* or an act of the victim. Article 3:202 (1) of the CFR sets out the damage for which a person who exercises independent control over an immovable may be accountable for. Such damages may be loss from personal injury and consequential damages (e.g., the cost of providing care to the victim), as well as property damages. Loss in the meaning of Article 2:202 is loss suffered by third persons as a result of another's personal injury or death. Under the LOA too, the legal remedies are restricted: pursuant to the second sentence of § 1056 (1) of the LOA, strict liability shall apply where the death of, bodily injury to or damage to the health of a victim is caused or the thing of a victim has been damaged. As the issue of compensation in the CFR provisions analysed below is regulated identically in Article 3:202 (1) and as the second sentence of § 1056 (1) of the LOA applies to all elements of strict liability, it will not be dealt with in detail in the remaining part of this article.

One of the fundamental differences between the LOA and CFR regulations is in that while the CFR ties liability to the independent control over an immovable, under the LOA, ownership of the immovable (or ownership of the real right under which a structure has been erected) is the determining factor. More specifically, it embodies being the owner at the very moment when an accident occurred.[*24] Such difference in content is levelled by the fact that under Article 3:202 (3) of the CFR, the owner of the immovable is to be regarded as independently exercising control. As already mentioned, the owner of an immovable can prove that he was not the one independently exercising control. Under the LOA, the person independently exercising control, such as a lessee or a tenant, may be liable if they fall within the definition of the manager of the major source of danger (§ 1056 of the LOA) or if general elements of a delict are identifiable in their behaviour. The owner of an immovable will, however, remain liable in any case.

Both of the provisions under scrutiny here provide for liability where damage is caused by the unfit state of a thing. Therefore, under those provisions no liability should ensue where, e.g., a construction worker repairing a roof throws down broken tiles and one of them happens to hit the victim. In such a case, the owner of the immovable can be accountable under other provisions (first and foremost, under § 1054 (3) of the LOA and Article 3:201 of the CFR).

Pursuant to Article 3:202 of the CFR, the safety a person was entitled to expect in or near an immovable is also significant from the aspect of liability. The nature of the immovable, access to it and the cost of avoiding the immovable being in that state must, *inter alia*, be considered. For example, the standard of safety is higher where the person was invited or permitted to be in the immovable and lower where the person enters a strange immovable against the will of the owner. Moreover, a thief, for example, is not entitled to expect the safety of an immovable.[*25] The LOA does not contain a provision to that effect but liability may be excluded on the basis of *force majeure* or the actions of the victim. Based on the CCSC decision of 20 June 2006 (in case 3-2-1-4-06), actions of a victim as a factor excluding the application of § 1059 of the LOA means that the victim intentionally harmed himself because only such action would exclude the realisation of the risk characteristic to a structure as the major source of danger. The liability of the structure's owner for damage under § 1059 of the LOA cannot be excluded solely on the basis of the victim's negligence (including gross negligence). However, the victim's negligence may give rise to the reduction of the compensation for damage under § 139 (1) of the LOA.[*26]

[23] Under Article 3:202 (2) of the CFR, a person exercises independent control over an immovable if that person exercises such control that it is reasonable to impose a duty on that person to prevent legally relevant damage within the scope of this Article. The owner of the immovable is to be regarded as independently exercising control, unless the owner shows that another independently exercises control (3).

[24] See CCSCd 2.11.2005, 3-2-1-105-05.

[25] C. v. Bar (prepared by). Non-Contractual Liability Arising out of Damage Caused to Another. Principles of European Law. Study Group on a European Civil Code. Sellier. Berne: European Law Publishers, Bruylant, Stämpfli Publishers Ltd. 2009, p. 661.

[26] In this case, due to the heaviness of snow, a rain pipe from the house owned by the defendants fell onto the car of the plaintiff.

Likewise, in invoking *force majeure*, it must be established that *force majeure* was the sole cause of the damage: if a storm rips off a part of the roofing, the cause may also have been that it had not been properly installed.

5. Strict liability related to an animal

Pursuant to Article 3:203 of the CFR, a keeper of an animal is accountable for the causation by the animal of personal injury and consequential loss, loss within 2:202, and loss resulting from property damage. In Estonia, the liability of a keeper of an animal without a fault is provided for in § 1060 of the LOA.

Liability under § 1060 of the LOA does not necessarily ensue where an animal causes damage. Section § 1060 of the LOA cannot obviously be applied where a person stumbles upon an animal lying on the ground and suffers bodily harm as a result of the fall.[*27] A dog, e.g., can be seen as a major source of danger because it can attack and bite a person.[*28]

The main issue that arises in connection with the liability of a keeper of an animal is in who should be understood to be such a keeper.[*29] The keeper of an animal is not defined in the LOA. It would not be right to proceed solely from the definition provided in the Animal Protection Act, under which a keeper of an animal (for the purposes of that Act) is a person who owns an animal (the owner of an animal) or who, on the basis of a commercial lease or other relationship with the owner of the animal, is engaged in keeping an animal. A keeper of an animal may be defined in quite a different manner for the purposes of the LOA on the basis of the existing case law. In providing content to the term 'a keeper of an animal' the most relevant case in Estonian judicial practice is the decision of the CCSC in case 3-2-1-75-07 of 24 September 2007. According to the facts of the case, a vehicle and a dog that had run onto the motorway collided. The Supreme Court concluded that for the purposes of § 1060 of the LOA, a keeper of an animal is the person who acts as the master of an animal, i.e., who uses the animal by controlling it. In that sense, a person directly possessing but not owning the animal, but also a person who, while not owning or possessing the animal, decides alone or with someone else on the issues related to the upkeep, care and supervision of the animal, may be understood to be a keeper of an animal. In comparison, under Article 3:203 of the CFR, a keeper of an animal should be understood as a person who benefits from the animal or has physical control over the animal and exercises such control.[*30]

The question of the moment when the status of a keeper of an animal passes from one person over to another is also an intriguing one. When A transfers his dog to B, then obviously A will no longer be the keeper of the animal. The matters complicate when A only leased the dog to B (or rendered the use of the dog to B on another contractual basis).

Unlike § 834 of the BGB, the LOA does not provide that a person who, under contract, takes over the supervision of an animal from its keeper shall be liable for the damage caused by the animal to a third party as indicated in § 833. He shall not be accountable if, in supervising the animal, he has exercised due care or if the damage had occurred irrespective of such care. P. Schlechtriem has noted that under German law, treatment of the lessee of a horse as the supervisor of the animal should release the lessor (the keeper of an animal) from liability.[*31]

The issue of the animal owner's accountability under the strict liability principle also remains debatable in the cases where an animal has been lost or has run away. The author of this article believes that in such a case the owner should continue to be treated as the keeper at least until a third person takes care of the animal with the intent of keeping it.

Article 3:208 of the CFR sets outs that for the purposes of this section, a person remains accountable for an immovable, vehicle, substance or installation which that person abandons[*32], until another exercises independent control over it or becomes its keeper or operator. This applies correspondingly, within reason, in respect to a keeper of an animal.

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27 About this, see CCSCd 18.04.2007, 3-2-1-27-07.

28 About this, see CCSCd 22.10.2008, 3-2-1-85-08. About the realisation of a typical animal risk as a condition precedent to liability in other European countries, see F. Werro, V. V. Palmer (Note 21), p. 431.

29 One might also discuss who an animal is. E.g., under § 2 (1) of the Animal Protection Act (Loomakaitseseadus. Adopted on 13 December 2000. – RT I 2001, 3, 4; 2009, 62, 405 (in Estonian)) an animal is (for the purposes of the Act) a mammal, bird, reptile, amphibian, fish or invertebrate. In the context of § 1060 of the LOA, bacteria and viruses as well as insects cannot obviously be treated as animals because they cannot have a keeper. See P. Varul *et al* (Note 19), p. 700.

30 C. von Bar (Note 25), p. 675.

31 P. Schlechtriem. Võlaõigus. Eriosa. Neljas, ümbertöötatud trükk (Law of Obligations. Special Part. Fourth, revised edition). Tallinn: Õigusteabe AS Juura 2000, p. 284 (in Estonian).

32 Abandonment requires conscious and intentional giving up of control over a thing. See C. von Bar (Note 25), p. 742.

Despite the LOA not having a similar provision, a keeper of an animal should also not be released from strict liability under the LOA if he abandons the animal (e.g., by driving it out of the house). What might be considered though is the release of a keeper of an animal from strict liability where the animal has been stolen—in such a case, his potential liability under the general elements of delict should, however, not be excluded.[*33] As a rule, after stealing a dog the thief becomes its keeper; Article 3:203 of the CFR should be understood in this vein.[*34]

6. Strict liability related to a motor vehicle

Pursuant to Article 3:205 (1) of the CFR, a keeper of a motor vehicle is accountable for the causation of personal injury and consequential loss, loss within Article 2:202, and loss resulting from property damage (other than to the vehicle and its freight) in a traffic accident which results from the use of the vehicle. Pursuant to Article 3:205 (2), 'motor vehicle' means any vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled.

In Estonia, strict liability for damages caused by a motor vehicle is provided in § 1057 of the LOA. The respective regulations of the CFR and the LOA can be compared mainly as regards the following issues: (a) what is a motor vehicle, (b) who is the obligated subject, and (c) which damage the obligated subject is liable for under the strict liability principle.

The LOA does not provide for a legal definition of a motor vehicle. Pursuant to § 12 (2) of the Traffic Act[*35] a power-driven vehicle is a vehicle which is powered by an engine. Motor assisted cycles, mopeds and power-driven rail-borne vehicles are not deemed to be motor vehicles. Pursuant to § 12 (1) of the Traffic Act, a vehicle is a device which is intended to be driven on a road or which is driven on a road, and which is power-driven or propelled in some other manner. The Traffic Act, however, is not a proper source for providing content to a motor vehicle in the context of the LOA. Namely, it derives already from § 1057 3) of the LOA[*36], that the definitions of a motor vehicle as used in the LOA and the Traffic Act do not overlap; particularly true is the claim that the LOA uses a broader definition.

And in comparing the definition of a motor vehicle in the CFR and the LOA we also encounter several differences. Firstly, unlike the LOA, the CFR does not treat aircraft as a motor vehicle. Furthermore, the LOA (unlike the CFR) does not exclude treating a power-driven rail-borne vehicle as a motor vehicle. Thus, as far as these two terms are concerned, the definition of a motor vehicle in the LOA is broader than the corresponding term in the CFR.[*37] The third important difference between the CFR and the LOA is in that unlike the LOA, the CFR also deems a trailer to be a motor vehicle. The author of this article believes that an interpretation to the effect that the motor vehicle specified in § 1057 of the LOA also includes a trailer would be too daring as the regulation makes no *expressis verbis* mention of a trailer.[*38]

To sum up, although the regulations of the LOA and the CFR do not completely coincide as regards providing content to the term 'motor vehicle', they both cover the most commonplace case—the one where damage is caused by an ordinary automobile.

While pursuant to 3:205 (1) of the CFR, a keeper of a motor vehicle is accountable for damage caused by a motor vehicle, under § 1057 of the LOA, the direct possessor is the obligated person. Obviously, a keeper and a direct possessor are not completely overlapping persons. Pursuant to § 33 (1) of the Law of Property Act[*39] (hereinafter 'LPA'), a possessor is a person who has actual control over a thing. The relationship between direct and indirect possession is explained in subsection (2) of the same section: a person who possesses a thing on the basis of a commercial lease, residential lease, deposit, pledge or other relationship which grants the person the right to possess the thing of another person temporarily is a direct possessor, while the other person is an indirect possessor.

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[33] It should be added that, e.g., under French law, an owner or a keeper of an animal is liable, on the basis of strict liability, for the loss or escape of the animal if there is a sufficient causal relationship between the loss or escape. See C. van Dam. European Tort Law. Oxford University Press 2006, p. 357.

[34] See C. von Bar (Note 25), p. 677.

[35] Liiklusseadus. Adopted on 14 December 2000. – RT I 2001, 3, 6; 2009, 68, 463 (in Estonian).

[36] Pursuant to § 1057 3) of the LOA, a direct possessor of a motor vehicle shall be liable for any damage caused upon the operation of the motor vehicle, unless the damage is caused by *force majeure* or by an intentional act on the part of the victim, unless the damage is caused upon the operation of aircraft. Thus, unlike the Traffic Act, the LOA treats aircraft as a motor vehicle.

[37] Instead, as regards the conditions discussed here, the regulations of the CFR and the Traffic Act are similar.

[38] A trailer, like a motor vehicle, is required to be covered by a compulsory traffic insurance contract. See § 4 (1) of the Traffic Insurance Act (Liikluskindlustuse seadus. Adopted on 10 April 2001. – RT I 2001, 43, 238; 2009, 62, 405 (in Estonian)).

[39] Asjaõigusseadus. Adopted on 9 June 1993. – RT I 1993, 39, 590; 2009, 68, 463 (in Estonian).

It may be asserted that a keeper of a motor vehicle is a broader term than a direct possessor of a motor vehicle. Thus, an owner of a motor vehicle who has granted the use of the vehicle to another person under a contract might also qualify as a keeper of a motor vehicle. Pursuant to § 1057 of the LOA, such an owner would apparently not be liable.

It should be noted that pursuant to § 1057, the so-called possession servant, i. e., a person who exercises actual control over a thing according to the orders of another person in the housekeeping or enterprise of the other person, should also not be liable. Pursuant to § 33 (3) of the LPA, such a person is not deemed to be a possessor. In legal literature it has been opined that an employee may be liable on the basis of the general elements of strict liability (§ 1056 of the LOA) where he uses his employer's vehicle beyond the performance of his work duties. He may be liable while fulfilling his duties on the basis of the fault-based delictual liability.[*40] The author of the article believes that the liability of an employee under § 1056 of the LOA is not completely excluded even if he caused damages while performing his duties.This is the question to which the future judicial practice needs to provide an answer. Article 3:205 of the CFR does not apply to a driver of a vehicle who is not the keeper of that motor vehicle.[*41]

On the basis of the general elements of strict liability, it is in principle possible to hold liable also an owner of a motor vehicle who has, e.g., leased the vehicle and is thus an indirect possessor of the vehicle.

Based on this reasoning it may be asserted that although the content of the terms—keeper and direct possessor—respectively used in the CFR and the LOA does not coincide, the LOA allows holding liable also those persons connected with a motor vehicle who are not direct possessors but may be treated as the keepers of the vehicle in the meaning of the CFR. It means that a majority of individual cases would be settled in the same way, irrespective of whether on the basis of the LOA or the CFR.

Article 3:205 (1) of the CFR sets out the damage for which a keeper of a motor vehicle is liable. The set of legal remedies protected by the LOA is provided for in the second sentence of § 1056 (1). Pursuant to § 1057 1) of the LOA, strict liability does not apply where the damage is caused to a thing being transported by the motor vehicle (which is not worn or carried by a person in the vehicle). Since logic dictates that § 1057 of the LOA would also not apply where the motor vehicle itself is damaged, it can be said that as far as the damage subject to compensation is concerned, both the CFR and the LOA have largely similar regulation.[*42]

Furthermore, § 1057 of the LOA does not apply where the damages is caused by *force majeure* or by an intentional act on the part of the victim (clause 3), the victim participates in the operation of the motor vehicle (clause 4), or the victim is carried without charge and outside the economic activities of the carrier (clause 5). The differences, seemingly rather substantial at first glance, may be regarded as not so significant if we look at the final outcome: thus, a person has, under Article 5:302 of the CFR, a defence if the damage is caused by an abnormal event; where the person suffering the damage is at fault, the reparation is to be reduced (Article 5:102 of the CFR). An intentional act of the victim may break the causal chain also in the context of the CFR. Finally there is Article 5:101 of the CFR, which excludes the liability of the person who caused the damage where the person suffering the damage agreed to the damage or acted at his own risk.[*43] It should be added, the presence of the circumstances set out in clause 1–5 of § 1057 of the LOA do not restrict the victim's right to claim compensation under the provisions regulating fault-based liability.

7. Strict liability related to dangerous substances or emissions

Article 3:206 (1) of the CFR sets out that a keeper of a substance or an operator of an installation is accountable for the causation by that substance or by emissions from that installation of personal injury and consequential loss, loss within Article 2:202, loss resulting from property damage, and burdens within Article 2:209, if: (a) having regard to their quantity and attributes, at the time of the emission, or, failing an emission, at the time of contact with the substance it is very likely that the substance or emission will cause such damage unless adequately controlled; and (b) the damage results from the realisation of that danger.[*44] It is necessary to take

[40] P. Varul *et al* (Note 19), pp. 694–696.

[41] C. von Bar (Note 25), p. 705.

[42] There are certain differences. Strict liability is not applied, under the LOA, also where, e.g., the damage is caused to a thing deposited with the possessor of the motor vehicle (§ 1057 2) of the LOA). At the same time, it can be debated whether a thing deposited is also the freight of the vehicle damage to which shall not be compensated under Article 3:205 (1) of the CFR.

[43] The author concedes that the agreement of the victim to a damage and acting upon one's own risk are not identical to the cases specified in §§ 1057 4) and 5) of the LOA.

[44] Under Article 3:206 (2) of the CFR 'substance' includes chemicals (whether solid, liquid or gaseous). Microorganisms are to be treated like substances. Under Article 3:206 (3) 'emission' includes: the release or escape of substances; the conduction of electricity; heat, light and other

account of the amount of the substance or emission as certain substances and emissions become dangerous only in very large amounts (e.g., water).*[45]

Instead of the liability of a keeper of a substance or an operator of an installation, § 1058 of the LOA speaks about the liability of an owner of a dangerous structure or a thing. Subsection 1058 (1) of the LOA sets out that the owner of a structure shall be liable for damage caused as a result of particular danger arising from the structure due to the production, storage or transmission in the structure of energy, substances which are flammable, involve a radiation hazard or can cause combustion, or toxic, caustic or environmentally hazardous substances, and for damage caused as a result of particular danger arising from the structure for any other reason. The owner of a thing shall be liable for damage caused as a result of particular danger arising from the thing due to its flammable, radiation, combustible, toxic, caustic or environmentally hazardous characteristics, and for damage caused as a result of particular danger arising from the thing for any other reason.

Subsection 1058 (2) of the LOA shifts the burden of proof in the favour of the victim: If a dangerous structure or thing is a potential cause of damage, it shall be presumed that the damage is caused as a result of particular danger arising from the structure or thing. This does not apply if the structure or thing is operated according to requirements and if the operation thereof is not disturbed.

The Supreme Court has concluded that there is no basis, under §§ 1056 and 1058 of the LOA, to treat a fish factory as a major source of danger because of a risk that it might clog the public sewerage system as the realisation of such a danger and causation of damage are avoidable provided that due care expected from a professional is employed.*[46]

Pursuant to Article 3:206 (5), a person is not accountable for the causation of damage under this Article if that person: (a) does not keep the substance or operate the installation for purposes related to that person's trade, business or profession; or (b) shows that there was no failure to comply with statutory standards of control of the substance or management of the installation.

The LOA does not contain a provision similar to the restriction arising out of Article 3:206 (5) (a) of the CFR. The regulation arising out of § 1058 (4) of the LOA is comparable to paragraph (b), restricting the liability of an owner of a dangerous structure or a thing: if a dangerous structure or thing is operated according to requirements and the operation thereof is not disturbed, the owner of the structure or thing is not liable for damaging a thing of the victim in so far as the thing is not materially damaged or, if it is damaged, to an extent deemed to be normal considering the local circumstances.

In addition, § 1058 (3) sets out three cases where the liability provided for in the same section does not apply: (a) the damage is caused within the boundaries of a marked immovable in the possession of the owner of the dangerous structure; (b) the damage is caused by *force majeure*; (c) the victim participates in the operation of the dangerous structure or thing. In such cases (first and foremost, in the case of clauses 1) and 3)), liability on the basis of the general elements of delict is not excluded.

8. Conclusions

Strict liability is one of the instances of liability without a fault. Both the CFR and the LOA contain several elements of strict liability. It can be asserted that these elements are generally similar both in the LOA and the CFR; differences are only related to aspects which are not fundamental.

The most significant difference between the regulations of the LOA and the CFR is in that the CFR does not have the general elements of strict liability. Such lack of the general elements, on the one hand, contributes to legal certainty (no-fault liability cannot be applied in the cases not explicitly cited in the law), but, on the other hand prevents operative response to the changes that take place in society (application of strict liability to actions or things which, although dangerous, but whose evolution into a major source of danger was not yet foreseen when the law was adopted).

To sum up, despite such differences, in a majority of individual cases, a similar final outcome may be yielded both on the basis of the LOA and the CFR. Estonian judicial practice may certainly have a role in shaping Estonian law so that it becomes closer to the CFR regulation.

radiation; noise and other vibrations; and other incorporeal impact on the environment. Under Article 3:206 (4) 'installation' includes a mobile installation and an installation under construction or not in use.

[45] C. von Bar (Note 25), p. 721.

[46] See CCSCd 12.03.2008, 3-2-1-2-08.

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Expert's Liability to a Third Person at the Point of Intersection of the Law of Contract and the Law of Delict

1. The problem

The question of expert's liability arises when an expert of a certain field provides information or an expert opinion to another person in relation to a proprietary matter on the basis of specialist knowledge that later proves to be incorrect.

If the opinion was provided under a contractual relationship, the person who entered into contract with the expert may exercise contractual remedies if the information or opinion proves to be incorrect—primarily claim for the compensation of damage. Contractual remedies cannot generally be used if there is no contract between the parties, or if a person in contractual relationship with the expert presents the expert's opinion to a third party. In this situation, expert's delictual liability is also excluded, since the expert has not committed an unlawful deed toward the recipient of the opinion.[*1]

The purpose of this article is to explain the procedure for settling the above-mentioned situations in the legal orders of Estonia, Germany, and Switzerland, on the basis of the Draft Common Frame of Reference for European contract law[*2] (hereinafter 'DCFR'). In principle, there are three routes to settlement: delict law, contract law, and quasi-contract law. Before the problems are settled, the following starting points need to be kept in mind.

Firstly, the principle of *mandatum tua gratia*[*3] has been used since the times of Roman law to state that a person who gave advice to another person is not responsible for damages incurred through his or her advice, unless we

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[1] See C. v. Bar. Gemeineuropäisches Deliktsrecht. Erster Band. Die Kernbereiche des Deliktsrechts, seine Angleichung in Europa und seine Einbettung in die Gesamtrechtsordnungen. München: C. H. Beck 1996, p. 497.

[2] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the Principles of European Contract Law. Edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll. Munich: sellier. european law publishers 2009. Abailable at http://ec.europa.eu/justice_home/fsj/civil/docs/dcfr_outline_edition_en.pdf (25.03.2010).

[3] Gaius Dig. 17, 1, 2: quod si tua tantum gratia tibi mandem, supervacuum est mandatum et ob id nulla ex eo obligatio nascitur. Citation: H. Honsell. Die Haftung für Auskunft und Gutachten, insbesondere gegenüber Dritten. – A. Koller (Hrsg.). Dritthaftung einer Vertragspartei,

are dealing with a contractual relationship or a delict. The basis of this principle is private autonomy, according to which everyone has to decide his or her matters on his or her own and does not need to follow anyone's advice. One expression of private autonomy is freedom of contract—everyone's right to decide whether, with whom, and on what conditions to enter into contract. The principle described is explicitly set forth in § 675 (2) of the German Civil Code[*4] (hereinafter 'BGB'), stating that providing information or advice does not create liability, because liability for mere words would not correspond to the concept as generally accepted.[*5]

Estonian and Swiss law lack a corresponding provision, but the starting point is the same. Giving advice to another person without a legal obligation to do so does not generally bring about a contractual or delictual claim against the adviser. The DCFR's Article VI–2:207 is also based on consideration that there is no general liability for advice or information provided by a person outside the legal commitment.

Secondly, the law of delict does not generally protect property as such. Only certain absolute rights are under protection. Liability in the law of delict is generally absent in the case of pure economic loss caused by carelessness. Such interests are protected under contract law.

The purpose of the law of delict is to establish general standards of conduct applied to everyone; the purpose of contract law is to protect the interest of performing a contract. Respectively, the interests protected by the liability systems of the law of delict and contract law are different: in the case of contract law, it is performance interest (positive interest: performance of agreements); in the case of the law of delict, it is integrity interest (negative interest: to avoid violation of rights).

In the German judicial arena, protection from pure economic loss under the law of delict is guaranteed in the case of a result of damage inflicted intentionally and against good morals, or if the unlawful deed is a violation of lawful obligations purposed to protect from pure economic loss.[*6]

Such differentiation in liability in the law of delict is not incidental but a restriction purposefully prescribed by the legislators. Therefore, we are dealing not with lack in the law of delict but with a reasonable restriction to expansion of liability in the law of delict.[7]

In the case of wrong advice, it is generally pure economic loss that arises—a person relying on advice makes a proprietary decision (i.e., a bank grants a loan on the basis of the opinion of a real-estate valuator, a person buys securities according to a bank's recommendations, or businessmen conclude transactions with each other in reliance on audited annual accounts) he or she would not have made if knowing the correct information, or would have made under different conditions. Loss due to such decisions is generally not compensable in the law of delict.

If the recipient of the opinion or the third person has legitimately relied on expert opinion and the expert knew or had to know of the other person's reliance on his or her opinion, it is considered unfair in all of the legal orders under consideration to leave the risk of incorrectness of opinion solely to the person who relied on that opinion. Therefore, attempts have been made to find a way to ensure expert's liability for incorrect opinion also with respect to a person with whom the expert has no contractual relationship.[*7] The DCFR and the Estonian Law of Obligations Act[*8] (hereinafter 'LOA') provide for compensation for such damage *expressis verbis*. However, the dogmatic grounds for such liabilities are arguable in different legal orders.

2. The basis of the claim

2.1. Germany

According to the BGB, liability in the law of delict generally arises when a person has violated some sort of legal right provided by law or when damage was caused intentionally. The law of delict under the BGB as a rule does not protect from pure economic loss in instances other than those of intentional damage caused contrary to good morals, under the BGB's § 826.

Beiträge der Haftpflicht- und Versicherungsrechtstagung. St. Gallen 2005, p. 169 *ff.*, also P. W. Heermann in: Münchener Kommentar zum Bürgerlichen Gesetzbuch. K. Rebmann, F. J. Säcker (Hrsg.). 5. Aufl. München: C. H. Beck 2006 *ff.*, § 675, margin No. 110 (hereinafter 'MüKo').

4 Bürgerliches Gesetzbuch. Available at http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf (25.03.2010).

5 H. Honsell. Die Haftung für Gutachten und Auskunft unter besonderer Berücksichtigung von Drittinteressen. – V. Beuthien (Hrsg.). Festschrift für Dieter Medicus Zum 70. Geburtstag. Köln, Berlin, Bonn, München: Heymanns 1999, p. 211 *ff.*, p. 213.

6 C. v. Bar, U. Drobning. Study on Property Law and Non-contractual Liability Law as they relate to Contract Law. Available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf (25.03.2010).

7 C. v. Bar (Note 1), p. 497 *ff.*

8 Võlaõigusseadus. – RT I 2001, 81, 487; 2010, 7, 30 (in Estonian). Available in English at http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30085K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5la%F5igusseadus (25.03.2010).

Therefore, after the BGB's entry into force, judicial practice came to look for ways of bringing the damage inflicted by providing incorrect opinion or information outside a contractual relationship within the scope of application of the BGB's § 826. The position was taken that a person who provided information to third parties and knew it was incorrect is intentionally acting against good morals.[*9] The same is said to apply, if, as a result of negligence, objectively incorrect information is provided 'for no good reason' to persons to whom this information has an identifiable importance and the provider of information has to consider the possibility of inflicting damage on the recipient. However, these principles have only been applied in a relationship between the provider of information and the direct recipient; the third person to whom the information was delivered by the direct recipient was left unprotected.[*10]

One shortcoming of early judicial practice is considered to be withdrawal from the original meaning of the law, since the BGB's § 826 was never meant to provide for compensation of damages inflicted by gross negligence.[*11] In principle, judicial practice has found that this provision also applies in cases of gross negligence in respect of circumstances that cause disregard of good morals. Hence, from gross negligence toward good morals, an intent to inflict damage is deduced.[*12]

Consequently, the original scope of the BGB's § 826 is expanded to encompass pure economic loss inflicted through gross negligence.

The practice of expanding the scope of the BGB's § 826 is nowadays marginalising in nature. Newer judicial practice is working on the fiction of a silent contract for providing information[*13], expanding the scope of application of the basis of contractual and quasi-contractual claims, and trying to accommodate expert's liability under different parts of the BGB system of claims.[*14]

Arising of a silent contract is assumed if (a) the advice or information has a recognisably relevant economic meaning to the recipient from the viewpoint of the provider of the information and (b) the adviser has special knowledge or is personally interested in giving the advice for economic reasons.[*15] The BGB's § 826 is applied as the basis for liability only if the above-mentioned prerequisites are not met.[*16]

On the basis of those principles, the situations in which an expert's opinion is relied on by a person who obtained the information directly from the expert without having a contractual relationship with him or her are settled. If a person who has had no direct contact with the provider of information—for example, being given the advice by a person who received it from the provider—relies on incorrect advice from the provider, creating contractual fiction is not sufficient. Such a situation arises when, for example, a person wishing to obtain a loan from a bank orders valuation of real estate from a real-estate assessor, wishing to use the real estate as security for his or her loan application. In this case, the bank has no contractual relationship with the real-estate valuator.

Therefore, an institution of contract with protective effects for third parties has been introduced.[*17] Initially, the Federal Court of Justice[*18] (hereinafter 'BGH') applied this in cases of information provided by a person appointed as an expert with approval from an official authority or some similar action, if the information was recognisably intended for presentation to a third party and had to express special probative value[*19] according to the will of the seeker of advice.

According to the latest judicial practice, national or other public acknowledgement of expertise is no longer a prerequisite. The same principles of liability apply when the interests of the third person are also protected under contract. The BGH practice does not enable exclusion of the extension of protection to third person by agreement; such agreement would be against good morals and non-applicable.[*20]

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9 RGZ 91, 80, 81; 157, 228, 229; BGH NJW 1992, 3167, 3174.

10 G. Wagner. – MüKo (Note 3), § 826, margin No. 61.

11 The wording of BGB § 826 is as follows: "Person who inflicts intentional damage to another person contrary to good morals has to compensate the other person for the damage inflicted."

12 H. Honsell (Note 5), p. 215 with onward references to judicial practice and the materials of compiling the BGB. According to the author's assessment, the latter is the reason for intentionally leaving infliction of damage due to gross negligence and against good morals out of the wording of BGB § 826, since a negligent intervention to other people's sphere of interests was not considered a strong violation thet would require a reaction from the legislator.

13 In German, *Fiktion eines stillschweigenden Auskunftvertrages*.

14 G. Wagner. – MüKo (Note 3), § 826, margin No. 62; P. W. Heermann. – MüKo (Note 3), § 675, margin No. 120; H. Honsell (Note 5), p. 219.

15 BGH NJW 1991, 3167; BGHZ 7, 371; BGHZ 74, 103; BGH NJW 1990, 513; 1991, 352; G. Wagner. – MüKo (Note 3), § 826, margin No. 62; P. W. Heermann. – MüKo (Note 3), § 675, margin No. 122.

16 G. Wagner. – MüKo (Note 3), § 826, margin No. 62.

17 In German, *Vertrag mit Schutzwirkung für Dritte*.

18 *Bundesgerichtshof*.

19 BGHZ 159, 1; BGH NJW-RR 2004, 1464; BGHZ 127, 378; BGH NJW 2001, 514.

20 G. Wagner. – MüKo (Note 3), § 826, margin No. 66 with further references to judicial practice.

Composition of delict under the BGB's § 823 (2) is also applied to expert's liability. Its prerequisite is the expert's violation of obligations pursuant to some specific law.*[21]

In the case of an 'obligation with duties' between the parties in the meaning of the BGB's § 311 (2) and § 241 (2), the provisions of *culpa in contrahendo* (c.i.c.) are applied.*[22]

However, this is not a specific expert liability, since in c.i.c., liability does not arise from particular trust the expert is enjoying but arises from the general obligation to disclose truthful information during the course of negotiations.

2.2. Estonia

Liability for incorrect opinion arises from LOA § 1048 in the chapter on the law of delict. The following legal relationships need to be distinguished with regard to the scope of application of this provision.

If information is provided under contractual relationship—for example, a person orders an expert opinion or certain data on a contractual basis—the relationships between the parties, including the expert's liability, are regulated by the contract (an order as a rule). In the case of breach of contract, contractual remedies specified in LOA §-s 100 *ff.* may be applied.

The contract between a provider of opinion or information and the person seeking advice can state that the opinion has to be passed on to a third person. In that case, it is a contract for the benefit of a third party in the meaning of LOA § 80.*[23]

In LOA § 81, regulation of contract with protective effect for the third party is provided. Such contract is accompanied by an obligation to take into account the interests or rights of the third party to the same extent as the interests or rights of the obligee. Said obligation is presumed when (a) the interests and rights of the third party are at risk to the same extent as are the interests and rights of the obligee, (b) the intent of the obligee to protect the interests and rights of the third party can be presumed, and (c) the third party and the intent of the obligee in protecting the interests and rights of the third party are identifiable by the obligor. In the case of non-performance of the obligations specified in such a contract, the third party may claim compensation for damage caused thereto.*[24]

According to the legal literature, there can be no contract with protective effect for a third party if the interests of the contracting party and the third party are contradictory. For example, when the seller of an immovable orders valuation of that immovable, the buyer cannot be the protected third person in the meaning of LOA § 81.*[25]

The relationship between contractual and delictual obligations has been regulated in paragraph 2 of LOA § 1044.

According to this provision, compensation for contractual damage cannot be claimed under the law of delict, unless the purpose of the contractual obligation violated was to prevent such damage. Therefore, no claims can arise between parties in the case of contractual relationship under LOA § 1048.*[26]

Information can also be provided under c.i.c. claim. In that case, claims against the expert who provided incorrect information or opinion arise from LOA § 115 (1) and § 14.*[27]

The competition between contractual and lawful claims has been regulated in LOA § 1044 (1). According to that provision, the victim has a right to choose the basis of his or her claim. According to legal literature, an expert involved in pre-contractual negotiations who does not participate in the future contract shall not be liable on the basis of LOA §§ 115 and 14. The regulation in LOA § 1048 is applied to such an expert's liability.*[28]

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[21] H. Sprau in O. Palandt. Bürgerliches Gesetzbuch, Beck'sche Kurz-Kommentare. Bd. 7. 69. Aufl. München: C. H. Beck 2010, § 675, margin No. 47 (hereinafter 'Palandt').

[22] P. W. Heermann. – MüKo (Note 3), § 675, margin No. 116.

[23] See T. Uusen-Nacke. Kolmandat isikut kaitsev leping. Asjatundja vastutus kolmandate isikute ees (Contract with Protective Effect for a Third Party: Liability of an Expert to a Third Party). – Juridica 2003/8, pp. 536, 541 (in Estonian).

[24] LOA § 81 (2).

[25] T. Tampuu, M. Käerdi. – P. Varul *et al* (Compilers). Võlaõigusseadus III. Kommenteeritud väljaanne (Law of Obligations Act III. Commented edition). Tallinn: Juura 2009, p. 670 (in Estonian).

[26] See H. Tammiste. Asjatundja ebaõige arvamusega tekitatud puhtmajandusliku kahju hüvitamine (Compensation of Pure Economic Loss Resulting from Professional's Misstatement). – Juridica 2005/6, pp. 385, 389 (in Estonian); T. Tampuu, M. Käerdi (Note 25), p. 670; T. Uusen-Nacke (Note 23), pp. 536, 541.

[27] On the nature of c.i.c. claim, see CCSCd No. 3-2-1-89-06, paragraph 15. – RT III 2007, 3, 23 (in Estonian).

[28] I. Kull. – Võlaõigusseadus III (Note 25), p. 64.

Therefore, a certain number of expert's liability cases wherein there is no contractual relationship remain within the scope of application of LOA § 1048, if the aggrieved party is not the third person under protection. In the LOA system, one condition bringing about unlawfulness in the meaning of LOA § 1045 is incorrect expert opinion, in the case of which liability in the law of delict arises as provided in LOA § 1043.[*29]

According to LOA § 1048, providing incorrect information or an incorrect opinion to another person or, regardless of receipt of new knowledge concerning the matter, failing to correct information or opinion already provided is unlawful if the expert enjoys particular trust due to his or her professional activities and the person who was given the information or opinion could expect to rely on such trust.

2.3. Switzerland

In the case of a contract between the expert and recipient of information, contractual liability is applied. Switzerland has chosen a different path from Germany for solving borderline liability cases of contractual and delict obligations. While in German practice, such cases are generally transferred to the scope of application of contract law, the tendency in Switzerland is to expand the scope of application of the law of delict.[*30] Therefore, the concept of contract with protective effect for the third party is not so widely known in Switzerland.

In the Swiss Code of Obligations[*31] (OR), the law of delict has been settled on the principle of a so-called general clause.[*32] Thus, compensation for pure economic loss inflicted in consequence of negligence would be possible in principle. However, Switzerland has adopted the delict structure of German law, according to which in the case of infliction of damage arising from negligence, the prerequisite for obligation to provide compensation for damage is unlawful violation of some legal right.[*33] Thus it is that, in the absence of a special protective norm, the prerequisite for obligation to compensate for damage according to OR Article 41 (2) is intent.[*34] This provision tends to be interpreted restrictively, reducing its scope of application to mostly cases of violation of the prohibition of abuse of rights.

The courts have nevertheless affirmed the obligation of compensation for damage under the law of delict. It remains unclear whether it is applied under the general clause of OR Article 41 (1) or due to violation of the prohibition to inflict intentional damage as provided in subsection 2.[*35]

The Swiss Federal Court of Justice has admitted that responsibility applies if a person provides information based on his or her specialist knowledge that is contrary to his or her best knowledge, shares false information as a result of negligence, or fails to disclose important circumstances known to him or her. The prerequisite for liability is the identifiably important effect of the expert's information on the recipient's decisions.[*36] Therefore, the concept of unlawfulness in Article 41 (1) of the OR is being gradually expanded to conduct going against the principle of good faith that violates the trust of the third person.[*37]

2.4. The DCFR

Similar settlement to the LOA approach can be found in Article VI–2:207 of the DCFR, which provides that loss inflicted on a person as a result of a decision made in reasonable reliance on incorrect advice or information has to be compensated for if (a) the advice or information is provided by a person in pursuit of a profession or in the course of trade and (b) the provider knew or could reasonably be expected to have known that the recipient would rely on that advice or information in making a decision of the kind made. Thus, this is a non-contractual liability.[*38]

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29 See T. Tampuu, M. Käerdi (Note 25), p. 672.

30 T. Guhl, H. Merz *et al*. Das Schweizerische Obligationenrecht mit Einschluss des Handels- und Wertpapierrechts. Achte Auflage. Zürich: Schulthess Polygraphischer Verlag AG 1991, p. 232.

31 Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht). Available at http://www.admin.ch/ch/d/sr/c220.html (25.03.2010).

32 OR, Article 41.
1 Wer einem andern widerrechtlich Schaden zufügt, sei es mit Absicht, sei es aus Fahrlässigkeit, wird ihm zum Ersatze verpflichtet.
2 Ebenso ist zum Ersatze verpflichtet, wer einem andern in einer gegen die guten Sitten verstossenden Weise absichtlich Schaden zufügt.

33 T. Guhl, H. Merz *et al.* (Note 30), p. 173 *ff.*

34 H. Honsell (Note 5), p. 217.

35 BGE 111 II 474 E. 3; BGE 116 II 695 *ff.*

36 M. Wick. Die Vertrauenshaftung im schwezerischen Recht. – AJP/PJA 1995/10, p. 1270 *ff.*, 1275.

37 *Ibid*.

38 With same explicitness, see also C. v. Bar, E. Clive, H. Schulte-Nölke (ed.). Principles, definitions and model rules of European private law: Draft Common Frame of Reference (DCFR). Full Edition. Vol. 1–6. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Munich: Sellier. European Law Publishers 2009 (4), p. 3345.

The standard for a claim in the law of delict in the DCFR is Article VI–1:101, according to which a person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage. This is not a general clause in the law of delict, and the prerequisites for its application are regulated in other provisions of Book VI.[*39]

Systematically, this regulation is very similar to the regulation of the LOA. One element of unlawfulness in the meaning of Article VI–1:101 is described in Article VI–2:207 of the DCFR.

The relationship between liability in contractual and delict law is regulated in subsection c of Article VI–1:103. According to this, compensation for damage in the law of delict is not applied if its application would contradict the purpose of other rules of private law. The purpose of this provision is to establish clear priority of contractual liability over delictual liability if applying the law of delict would rule out attainment of the purposes of the contract law.[*40] However, when the purpose of the contractual liability is not preclusion of liability, delict law and contract law are applied in parallel.[*41]

3. Prerequisites for a claim

3.1. Trust of an expert

In the DCFR's Article VI–2:207 and in LOA § 1048, the prerequisite for liability for providing incorrect information or opinion is particular trust enjoyed by the provider as a result of his or her professional activities. Liability arises only in the case of particular trust in the statement when the provider of information knows about formation of such trust.[*42] The prerequisite for liability is that the provider of information or advice acts in pursuit of a profession. The claim does not arise for everyone knowing the information, and it is not decisive whether the provider knew or could reasonably be expected to have known that someone would rely on the advice or information. Only cases in which advice or information was given to a specified circle of people are to be included in the scope of application of the DCFR's Article VI–2:207; i.e., the provider of information or knowledge has to know who may rely on the given information.[*43] It is sufficient that a person belonging to that circle receive from a mediator information not personally intended for him or her.

Estonian legal literature has taken a view that the prerequisite for liability under LOA § 1048 is the provider's consideration for the third person's interests due to so-called objective trust that arises from provision of the information or knowledge.[*44] For trust to be formed, it is sufficient if the expert has identifiable special knowledge and corresponding professional reliability. Often, simply the professional position of the expert as an auditor, sworn advocate, or real-estate valuator is sufficient for such trust to form.[*45] An expert acting in the meaning of § 1048 can also be a person representing the other contractual party in pre-contractual negotiations who provides incorrect information or recommendations concerning the object of contract on which the other contractual party relies because of particular trust enjoyed by the representative, or his or her presumable professional expertise and special knowledge.[*46]

It can be concluded from the indication of particular trust arising from the expert's professional activities in LOA § 1048 that provision of the opinion or information has to take place as a part of professional activity, part of which is advising people on proprietary matters. Therefore, experts in this meaning can include auditors, lawyers and other solicitors, tax advisers, notaries, architects, real-estate assessors, sworn translators, trustees in bankruptcy proceedings, bailiffs, investment advisers, and other specialists who advise persons on proprietary matters.[*47] Similarly, in Swiss practice, the prerequisite for liability is also particular trust enjoyed by the expert.[*48]

In German judicial practice, formation of a contract on providing expert information or opinion is also possible concludently, when a person provides the information with an intention of being legally bound.[*49] The

39 *Ibid*., p. 3087.

40 *Ibid*., p. 3119.

41 *Ibid*.

42 *Ibid*., p. 3345.

43 *Ibid*., p. 3346.

44 M. Käerdi, T. Tampuu (Note 25), p. 390.

45 See T. Uusen-Nacke (Note 23), pp. 536, 542; T. Tampuu, M. Käerdi (Note 25), p. 671.

46 T. Tampuu, M. Käerdi (Note 25), p. 669.

47 *Ibid*.

48 M. Wick (Note 36), p. 1270 *ff*., 1275; P. Loser. Die Vertrauenshaftung im schweizerischen Schuldrect. Grundlagen, Erscheinungsformen und Ausgestaltung im geltenden Recht vor dem Hintergrund europäischer Rechtsentwicklung. Bern: Stämpfli 2006, p. 493.

49 In German, *Rechtsbindungswille*.

latter has to be assessed in view of how the other party had to evaluate the conduct of the provider, considering all of the circumstances.[*50] The presence of such intention has to be presumed if, in assessment of all the circumstances, a notion of the presence of intention to be legally bound arises and it is reasonable to draw such a conclusion because of certainty of return.[*51] If existence of a contract cannot be ascertained, German judicial practice still settles certain cases on the principles of expert's liability if the provider's particular trust has been derived from a long-term or a planned long-term relationship between the provider and recipient of information.[*52] For the planned long-term relationship, the provisions of the BGB's § 311 (2) 3) and § 241 (2) are taken as a legal basis. For the most part, these regulate the c.i.c. claim and were developed as part of the BGB right of obligation reform in 2002.

The prerequisite for a contract with protective effect for the third party in German law is knowingly compiling an opinion within the sphere of one's professional competence, or providing information identifiably meant for use by third persons.[*53] Since most of the cases in Germany are settled in terms of contractual relationship, the obligation to protect the third person should extend to the provider of information according to the BGH, even when the interests of the seeker of opinion conflict with the interests of a possible third person. For example, it generally applies to ordering a valuation of an immovable by a person who shall present this to a bank as a valuation of a security.[*54] The provider of information cannot exclude his or her liability by claiming that the person seeking an opinion had deceived him or her about the circumstances affecting the nature of his or her opinion, or left them non-revealed. The BGH does not apply § 334 of the BGB, which principally enables such objection, taking the position that the parties have ruled out such application through consequential declaration of intention. However, the liability of the provider of information can be excluded if he or she states in the opinion that he or she has not been given information that is necessary for providing a certain opinion, or that his or her conclusions are based on only certain information received from the originator.[*55] Establishment that the circle of possible third persons was not known to the expert does not exclude liability.

3.2. Provision of information or opinion

Information or opinion provided by an expert is a body of claims or circumstances presented as factual data or recommendations, in reliance on which a third person can make a proprietary decision.[*56] Section 1048 of the LOA is interpreted in such a way that liability also arises from presenting an opinion that cannot be purely factual information; an opinion inevitably includes subjective evaluation by the expert, at least to some extent.[*57] German law does not require it to be a combination of facts and opinion; however, the information given has to be correct as well as complete. The same principles are proceeded from in Swiss practice.[*58]

The problematic element is identification of the incorrectness of opinion. Accordingly, in Article VI–2:207 of the DCFR, it is emphasised that, although according to the wording of the provision, the prerequisite is 'incorrect advice or information' from the provider, it is nevertheless an inseparable concept. They are not mutually exclusive; pure advice cannot be incorrect. On the basis of the DCFR, the prerequisite for arising of liability is solely the combination of advice and a fact.[*59] According to Estonian law, an incorrect opinion is an opinion that is arbitrary—i.e., an opinion that could not be formed on the basis of existing information through application of the relevant professional skills, or an opinion that has been formed on the basis of incorrect data.[*60]

If the provider of opinion learns about the incorrectness of data after providing the data, the obligation to correct the data applies only under special circumstances in German judicial practice.[*61] In the LOA, the obligation to correct the data has been set forth *expressis verbis*.

Providing information or an opinion is also a prerequisite according to the LOA and other legal orders under consideration. In the case of § 1048 of the LOA, it is stated that not just any kind of declaration by an expert

50 H. Sprau. – Palandt (Note 21), § 675, margin No. 36 with further references to judicial practice.

51 *Ibid*.

52 *Ibid*., margin No. 47 with further references to judicial practice.

53 G. Wagner. – MüKo (Note 3), § 826, margin No. 66.

54 BGHZ 127, 378; BGH JZ 1985, 951; P. Gottwald. – MüKo (Note 3), § 328, margin No. 124.

55 BGH NJW 1998, 1059.

56 For example, acquisition or transfer of certain property, awarding a certain contract, conclusion of some other transaction or deed that influences the financial situation of the person relying on the opinion.

57 H. Tammiste (Note 26), pp. 385, 390.

58 M. Wick (Note 36), p. 1270 *ff.*, 1275.

59 C. v. Bar, E. Clive (Note 38), pp. 3347–3348.

60 T. Tampuu, M. Käerdi (Note 25), p. 671.

61 H. Sprau. – Palandt (Note 21), § 675, margin No. 39.

may be regarded as information or opinion. A declaration has to be presented in a certain form, generally at least being reproducible in written form, and accessible to third persons, to gain trust.*[62]

3.3. Reliance on information

The other prerequisite for liability under the DCFR is infliction of damage due to violation of reasonable reliance.*[63] Actual relying on the information or advice is not relevant; it is sufficient if there is the possibility of a victim relying on such information when making decisions. A person does not act under reasonable trust in the meaning of the DCFR if he or she knows or has to know that the information is incorrect or the opinion is not adequate, or the expert does not wish to take responsibility for the information.*[64]

On the basis of LOA § 1048, whether third persons can reasonably rely on such information has to be identified from the expert's trust. The question is whether it can be presumed that the expert's opinion expresses a neutral and objective point of view that can be relied upon regardless of whether the expert has provided his or her opinion on request or as a representative of the other person. This depends on the position of the expert, as well as the nature of the opinion or information, and its form of expression.*[65]

In addition to the objective aspect, the subjective trust of the victim in the correctness of the data is important as well. First and foremost, subjective trust cannot be considered to apply when the person knew about the untrustworthiness of the expert*[66], incorrectness of data, or inappropriateness of the opinion.

According to German judicial practice, the question of reliance on data is settled under the BGB's § 254 by the institution of the victim's complicity; all that counts is that the person knew or had to know about the incorrectness of data.*[67]

In Swiss judicial practice, the decisive factor is whether the information or opinion received from the provider was a circumstance that affected the activities of the recipient.*[68] Credulity is evaluated on the basis of the comprehension horizon of the recipient. Only information issued under an obligation with duties is taken into account. Therefore, no expert's liability arises when the expert makes a public statement—for example, sharing his or her opinion in a newspaper.*[69]

3.4. Liability

In Estonia, LOA § 1050 applies to expert's liability; i.e., culpability and guaranteed liability arising from LOA § 103 does not apply where expert's liability is concerned.

According to the DCFR, the provider of information should be able to foresee that the information causes reasonable reliance.*[70] Part of foreseeability of reasonable reliance is usually the importance of decisions made in reliance on such information.*[71]

According to LOA § 1054, the expert is also liable for damage caused to persons he or she engages in his or her economic or professional activities on a regular basis, if the causing of damage is related to the expert's economic or professional activities. The same applies if the expert engages another person in the performance of his or her duties.

According to the BGB, the basis for liability in the case of contractual relationship is the BGB's § 280, and guilt shall be determined on the basis of § 276 of the BGB. The expert is liable for the person used for fulfilling contractual obligations under the BGB's § 278. Therefore, the expert has no right to relieve him- or herself from liability as would occur under the BGB's § 831 if the law of delict were to be applied to expert's liability. According to Swiss law, a prerequisite for liability is guilt.*[72]

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62 T. Tampuu, M. Käerdi (Note 25), p. 671.

63 C. v. Bar, E. Clive (Note 38), p. 3346.

64 *Ibid*., p. 3347.

65 T. Tampuu, M. Käerdi (Note 25), p. 672.

66 H. Tammiste (Note 26), pp. 385, 390.

67 H. Sprau. – Palandt (Note 21), § 675, margin No. 42.

68 In German, *Kriterium der Einflussnahme*, also see P. Loser (Note 48), p. 493.

69 *Ibid*., p. 497.

70 C. v. Bar, E. Clive (Note 38), p. 3347.

71 *Ibid*.

72 M. Wick (Note 36), p. 1270 *ff*., 1275; U. Sommer. Vertrauenshaftung, Anstoss zur Neukonzeption des Haftplficht- und Obligationenrechts? – AJP/PJA 2006, pp. 1031, 1033.

3.5. Damage and the causal connection

In Estonia, damage must be determined on the basis of general provisions regulating compensation for damage and, therefore, similarly to contractual liability, The LOA's § 127 *ff.* are applied. In the case of the BGB, § 249 *ff* are applied.

An obligation to compensate for damage under the DCFR presumes the existence of a double causal connection. An incorrect opinion has to be the cause of another person's decision, and damage has to be caused by that decision.*[73]

The judicial situation under the LOA is the same. Since we are dealing with a case settled in the system of delict liability, there has to be a causal connection between violation of trust and the expert's activity, creating liability, and also a causal connection between damage and reliance on trust, concretising the liability.

The existence of a causal connection between damage and violation of obligations as a prerequisite for a claim for compensation for damages is equally necessary in the case of the BGB and OR.

4. Legal consequences

The purpose of LOA § 1048 is to protect people from the results of unfavourable proprietary decisions. Therefore, all economic loss inflicted as a result of reliance on incorrect opinion shall be subject to compensation. Thus, the LOA enables compensation for pure economic loss. The scope of compensation is to be determined individually for each case in accordance with the rule of purpose of the standard arising from LOA § 127 (2). The purpose of compensation for damages is to create the proprietary situation in which the victim would have been if he or she would not have relied on the incorrect opinion.*[74] The same applies under OR and DCFR regulations.

In Germany, damage inflicted through trust in the correctness and completeness of the expert's opinion has to be compensated for.*[75] Since under the German approach, a contractual relationship is involved, the aggrieved person has to be placed in the situation, via compensation, in which he or she would have been if the obligation would have been fulfilled as required—that is, the situation that would have obtained in the case of correct information or an adequate opinion.*[76]

5. Evaluation

The purpose of liability of a person who has provided incorrect information or opinion on a proprietary matter to another person, outside a contractual relationship, is to protect the proprietary interests of the person relying on the opinion or information in the case of trust enjoyed by the provider of information. The main purpose of this composition of liability is the protection of reasonable reliance. It is especially clearly expressed in the laws of Estonia and Switzerland, and in the DCFR.

The settlements of Estonia, Switzerland, and the DCFR overlap in their sections on prerequisites for liability: liability arises if the expert is enjoying particular trust. The state of trust derives from the professional position of the expert.

The other prerequisite for arising of liability according to the LOA, OR, and DCFR is provision of incorrect information or opinion, or leaving the information or opinion uncorrected.

The third aspect is that arising of expert's liability presumes a proprietary decision made by a victim that is based on the information provided by the expert. It involves both whether the person relying on the opinion could reasonably rely on the state of trust of the expert and whether he or she relied on the accuracy of the opinion or information in good faith. In the case of meeting of such prerequisites, the expert is liable for damage inflicted on a third person that is due to his or her incorrect opinion if that expert is guilty of providing incorrect information or data—i.e., if the expert had to reasonably consider the possibility of someone relying on such information and nevertheless published the incorrect information.

[73] C. v. Bar, E. Clive (Note 38), p. 3348.

[74] T. Tampuu, M. Käerdi (Note 25), p. 672.

[75] H. Sprau. – Palandt (Note 21), § 675, margin No. 41.

[76] *Ibid*., with further references to judicial practice.

As a legal consequence, the expert forms for him- or herself an obligation to compensate for the loss of the third person, the purpose of which is to create the situation in which the victim would have been if he or she would not have relied on the incorrect information or opinion. Thus, this is compensation for pure economic loss.

This settlement differs from the solution of Germany, the starting point of which is formation of contract between the expert and the third person. Judicial practice uses the fiction of a silent contract and presumes formation of a contract when the expert is enjoying a particular trust. If a contract is formed in such a way, it may be a contract with a protective effect for a third party that also includes people who are not parties to the contract. The obligation to protect the third person is not excluded even when the interests of the seeker of advice and the third person are in mutual contradiction.

The 'silently awarded contract with protective effect for a third party' concept has received strong criticism in the professional literature.*[77] It is claimed that the concept adopted by the BGH has nothing to do with private autonomy, wherefore such cases should be dealt with under the law of delict.*[78] It is also said that in its nature, expert's liability rather resembles the concept of violation of obligation arising as part of contractual liability, for which reason the system of contractual liability should be applied. To achieve that, it is suggested that contracts for providing information should be regulated by law or settled as a contract-like claim by the example of c.i.c. claim, for which § 311 (3) of the BGB is said to provide sufficient grounds.*[79] In the scope of the theory of a contract with protective effect for a third party, severe difficulties are claimed to arise with respect to justification for leaving the right of the expert to present objections under the BGB's § 334 unapplied, for example, in cases wherein a person having entered into a (silent) contract has deceived the expert; as well as difficulties in addressing why the principle of complicity, or limitation of liability agreed upon between the expert and a party to the contract with relation to the third party, does not apply. Protecting third persons under a contract with a protective effect for third parties is also dogmatically problematic if the interests of the third person and the seeker of advice as a party to the contract are in conflict. According to the DCFR and LOA, the concept of a contract with protective effect for a third party does not apply to such persons.

The disadvantage of settlement under the law of delict taken as a basis in the LOA and DCFR is that, with this action, an exemption is made from the conception of unlawfulness accepted by the LOA, BGB, and DCFR, and to a great extent also Swiss law. This is not a violation of legal rights—a special legal relationship pursuant to the law is formed between the provider and the receiver of information in fulfilment of composition of trust.*[80] Although this is not a contract, a heightened requirement to exercise due care is formed between the parties. Thus, in its nature, the regulation of expert's liability rather resembles a c.i.c. claim or the responsibility of an unauthorised representative. The position of LOA § 1048 and the DCFR's Article VI–2:207 in the law of delict can, therefore, be deemed arguable. The advantage of the delict responsibility in the LOA is that in the case of liability under the law of delict, the expert is only responsible for providing wrongful incorrect information. If the situation were to be regulated as an obligation pursuant to law, as in LOA § 14 and 15, the principle of guarantee liability arising from LOA § 103 would be applied on account of lack of a specific rule.

Both delictual and contractual settlements are difficult to combine with the existing liability system under the law of obligations. Therefore, there have been suggestions in legal theory to replace both concepts with expert's liability based on the principles of c.i.c. In accordance with such liability for breach of confidence*[81], it would be natural that the expert would be obliged to compensate the third party directly for the damage, regardless of the contract with the seeker of advice.*[82] In the case of liability created on the basis of c.i.c. principles, it would be understandable for the statements of the expert to have to be interpreted according to the comprehension horizon of the third person and not of the person who entered into contract with the expert.

Liability for breach of confidence would be prerequisite upon provision of expert opinion being viewed as creating composition of trust, which is already being done in the legal systems under consideration here. The provider of information can limit the composition of trust, by presenting the data on which he or she has based the opinion during presentation of said opinion, and indicating the data needed for giving a complete

[77] H. Honsell (Note 5), p. 223; S. Lammel. Zur Auskunftshaftung. – AcP 1979 (179), p. 337 *ff.*, p. 344; B. Grunewald. Die Haftung des Experten für seine Expertise gegenüber Dritten. – AcP 1987 (187), p. 285 *ff.*, p. 294; E. Picker. Gutachterhaftung. Ausservertragliche Einstandpflichten als innergesetzliche Rechtsfortbildung. – V. Beuthien (Hrsg.). Festschrift für Dieter Medicus Zum 70. Geburtstag. Köln, Berlin, Bonn, München: Heymanns 1999, p. 397 *ff.* p. 400 *ff.*

[78] C. v. Bar. Verkehrspflichten: richterliche Gefahrsteuerungsgebote im deutchen Deliktsrecht. Köln, Berlin, Bonn, München: Heymann 1980, p. 233 *ff.*

[79] J. Köndgen. Selbstbindung ohne Vertrag. Zur Haftung aus geschäftsbezogenem Handeln. Tübingen: Mohr Siebeck 1981, p. 358; H.-B. Schäfer. Haftung für fehlerhafte Wertgutachten aus wirtschaftwissenschaftlicher Perspektive. – AcP 2002 (202), p. 809 *ff.*, p. 826 *ff.*; B. Grunewald (Note 77), p. 299 *ff.*; G. Wagner. – MüKo (Note 5), § 826, margin No. 67; C.-W. Canaris. Die Reichweite der Expertenhaftung gegenüber Dritten. – ZHR 1999 (163), p. 206 *ff.*, p. 220 *ff.*

[80] See T. Uusen-Nacke (Note 23), pp. 536, 541.

[81] In German, *Vertauenshaftung*.

[82] C.-W. Canaris (Note 79), p. 229.

opinion.[*83] The expert can use the same method to limit his or her liability to the circle of persons who may rely on such information, and to determine the purpose for which this information may be used.

Relying on an expert's opinion forms part of composition of trust because the provider of information is to be reliable.[*84] Therefore, liability for breach of confidence may be considered if the person relying on the opinion can reasonably view the provider of information as an expert. This is also a prerequisite in all of the judicial orders under consideration.

Proceeding from c.i.c. principles, one prerequisite for expert's liability would be presentation of an opinion under the obligation of one's duties.[*85] Thus, liability could be considered only if the opinion has been provided during preparation of the contract. Since the expert generally prepares not his or her own contract when providing an opinion but the contract of a person seeking his or her opinion, the principles of third party liability should be applied in the case of c.i.c. claim. At that, the idea of a contract being prepared should be taken broadly—liability should include those cases in which the expert knows neither the other party to the future contract nor the exact content of that contract or the number of contracts awarded in the 'transaction'.[*86] Limiting liability through a generally understandable transaction is said to be dogmatically and teleologically right, since it enables the expert's liability to be reasonably limited by foreseeability. Thus, for example, the liability of a person who has presented an opinion to the public would be limited since he or she did not present the information under obligation in conjunction with his or her duties as an expert and cannot therefore give a personal guarantee of the opinion against all possible activities that a person could plan in reliance on his or her opinion.[*87] The same is presumed in the LOA, the DCFR, and Swiss practice, and it is also covered under contract with a protective effect for a third party.

In the case of liability for breach of confidence, the provider of the information or opinion should take account of, and bear, the risk that the person receiving his or her opinion will use it in a different manner than planned by the provider of opinion, and in so doing create liability for the provider of opinion. That risk resting with the provider of information is justified since the risk is principally 'governed' by him or her. The provider of information or opinion can eliminate the liability if he or she specifies in the opinion the purpose for which that opinion was provided.[*88]

Settling of cases on the basis of the concept of liability for breach of confidence may come to the same conclusion as the systems under consideration. Its advantage when compared to implementation of the institution of the contract with protective effect for a third party as adopted in German law, is that a contract is formed with protective effect according to which a third person can be protected only when his or her interests overlap the interests of the person who awarded the contract, or at least corresponds to their general nature.[*89]

Although liability for breach of confidence has not become a dominant basis for assessing expert's liability in German law, it has been adopted in Swiss judicial practice. Namely, the Federal Court of Justice holds the view that the c.i.c. claim is one version of liability for breach of confidence, the prerequisite for the arising of which is lawful special connection[*90], according to which the obligations to protect and explain arise between the parties.[*91]

Special connection also arises with the expert knowingly presenting his or her expert opinion. Direct contact between the persons providing information and the person relying on it is not relevant. It is sufficient if the person who provided the information has stated—or it can be concluded from the provider's activities—that he or she wishes to be liable for the correctness of his or her information or opinion, and the other person has trusted such conduct in a way that has caused damage.[*92]

In arguments against regarding liability for breach of confidence as an independent basis for liability, it is claimed that doing so constitutes artificial broadening of the institution of c.i.c. The latter should be applied only in the case of an obligation prior to awarding of the contract, or when a contract 'falls off' for some reason. It is also claimed that such interpretation would bring about blurring of the line between contractual and delictual law and would open up liability under the law of delict for compensation of pure economic loss.[*93]

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83 *Ibid*., p. 230.

84 *Ibid*., p. 232.

85 *Ibid*., p. 235.

86 *Ibid*., p. 236.

87 *Ibid*., p. 239.

88 *Ibid*., p. 239.

89 *Ibid*., p. 242.

90 In German, *Sonderverbindung*.

91 BGE 124 III 297; 130 III 345.

92 H. Honsell (Note 3), p. 169 *ff.*

93 *Ibid*.

Such criticism cannot be agreed with. The concept of the law of delict taken as a basis by the LOA and DCFR, as well as the concept of contract with protective effect for a third party in German law, represents blurring of the line between the laws of delict and that of contract. In one case, a path for compensation for pure economic loss is created with the law of delict, and in the other, persons not belonging to the protective area of the contract according to general rules are becoming artificially involved in the contract. Accordingly, there is no such thing as 'purely' the law of delict or 'pure' contract law. In that light, acknowledging liability for breach of confidence as an independent composition of liability in a similar way to the institution of c.i.c. would be, rather, a simpler and a clearer solution. At the same time, placing the provisions of expert's liability under the law of delict, and (vicariously) applying the provisions of delict law to it, does not prevent treating expert's liability as liability for breach of confidence.

6. Conclusions

In this article, the author has explored ways of resolving situations in which a person who is an expert in a certain field presents, on the basis of his or her professional knowledge, information or an expert opinion that later proves to be incorrect in connection with a proprietary matter to another person, with whom he or she has no contractual relationship, in view of the approaches of the legal orders of Estonia, Germany, and Switzerland, and according to the principles provided in the DCFR.

Estonian law and the DCFR try to extend protection under the law of delict to cases of infliction of pure economic loss, creating a special composition under the law of delict to do so. German judicial practice primarily works with the institution of a contract with protective effect for a third party as arising from the legal fiction. In Swiss law, the concept of liability for breach of confidence proceeds from, and all cases of liability are included under, the principle of liability under c.i.c. Such an approach is also supported by the minority opinion presented in German judicial literature.

As a result of the foregoing analysis, a conclusion was reached that including the concept of liability for breach of confidence as part of expert's liability was not excluded in any of the legal orders under consideration, and the prerequisites for expert's liability correspond to a great extent to the prerequisites proposed in the context of liability for breach of confidence in all of the legal orders considered.

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Systematics of Shareholder Remedies—Origins and Developments[*1]

The effectiveness of a legal provision serves as demonstration of its actual impact in the society, as well as whether that specific provision can be implemented in practice.[*2] Law is effective only if it is possible to enforce it. Connected with this principle is a succinct maxim often applied in Anglo-American jurisprudence: For every right, there's a remedy—a statement derived from the Latin concept of *ubi ius ibi remedium*.[*3] Accordingly, law needs remedies—opportunities established for the benefit of an entitled person to eliminate the negative consequences of the violation of an obligation that occurred with respect to him or to prevent the realisation of such consequences.

The meaning of a remedy (accordant with the German concept of *Rechtsmittel*) is in most cases associated with a certain violation, and the objective of a remedy is primarily to rectify, in one way or another, a violation of a subjective right of a person. The meaning and objectives of a remedy may vary according to the branch of law in question. For instance, in judicial proceedings law, remedies are understood as legal opportunities that a party to a proceeding may exercise to contest a judicial decision in a court of higher instance. The legal literature notes that the objective of such remedies is primarily to correct and alter the decision while remedies may have a different procedural effect. The principle is that a party to a proceeding is granted an opportunity to contest the decisions that said party considers to be unlawful and unfavourable to him.[*4] State liability law recognises primary and secondary remedies—with the former, the objective of the remedy is to prevent or eliminate the causation of damage, and in the second case compensation for damage is granted in the direct (i.e., monetary) sense of the term.[*5] Environmental law too speaks of a comprehensive approach to remedies and to the violations associated with one particular area of the law.[*6]

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[2] A. Aarnio. Õiguse tõlgendamise teooria (Theory of Interpretation of Law). Tallinn 1996, p. 77 (in Estonian).

[3] About this principle, see, e.g., T. A. Thomas. Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy under Due Process. – San Diego Law Review, November 2004 (41). Available at SSRN http://ssrn.com/abstract=564302 (23.03.2009); J. Kahn. The Search for the Rule of Law in Russia. – Georgetown Journal of International Law 2006 (37) 2. Available at SSRN http://ssrn.com/abstract=1011822.

[4] T. Rauscher *et al.* (Hrsg.). Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen. 3. Aufl. München 2004. Vorbemerkung zu den § 511 *ff.*, margin No. 1–3.

[5] E. Andresen. Õigusvastaste tagajärgede kõrvaldamine ja kahju hüvitamine riigivastutusõiguses (Elimination of Unlawful Consequences and Compensation for Damage in Sate Liability Law). – Juridica 2006/3, p. 160 (in Estonian).

[6] M. Kloepfer. Saksamaa tulevase keskkonnaseadustiku mõte ja sisu (The Idea and Content of the Future German Environmental Code). – Juridica 2007/7, p. 513 (in Estonian).

This article aims to investigate the specific nature and objectives of shareholders' remedies under company law and the approaches employed by different legal systems and countries to the systematics of shareholders' remedies. The paper will also provide an assessment of the regulation of this particular issue under Estonian law.

1. Specifics of remedies under company law

In the Estonian legal space, with its influences from the Germanic legal tradition, the complex concept of legal remedy has perhaps been defined best in the law of obligations, where a remedy is treated as an opportunity that a creditor has at his disposal for eliminating, when an obligation has been violated, the negative consequences of said violation or for preventing such consequences. A remedy may include both an opportunity to claim something from the other party to the obligation (the right of claim, e.g., such as an action for the compensation of damage) and the right to unilaterally alter the obligation (in German, *Gestaltungsrecht*, e.g., the right to withdraw from or cancel a contract). The legal literature ties the opportunity to apply a remedy in the law of obligations to the concept of liability.*[7] Proceeding from the principle of private autonomy, it is characteristic of remedies in the law of obligations that it is up to the creditor to decide on their application and neither courts nor other institutions can interfere and apply a remedy whose application the creditor has not requested or upon which he has not relied.*[8]

However, one certainly cannot claim that remedy as an independent legal concept is something characteristic solely to the Germanic law of obligations. The term can be found in the Principles of European Contract Law*[9], whose Article 8.101 (1) provides that whenever a party does not perform an obligation that is set forth in the contract and the non-performance is not excused, the aggrieved party may resort to remedies. These are remedies under contract law, and their systematics proceeds from the violation, providing for which remedies are available. Likewise, Chapter 3 of Book III of the Common Frame of Reference*[10] contains regulation of remedies for non-performance.

Relations under company law are characterised by their multifacetness, which arises from there being numerous parties to such a legal relationship, and these relations are also multi-layered. Therefore, creation of an appropriate system of remedies is a rather challenging task in this domain. Internal relations include, simultaneously, the relations of the members of management with the company, relations between directing bodies, relations among the shareholders, and the relations of the shareholders with the members of the directing bodies. In addition, account should be taken of the relations of the public limited company, as a legal entity acting in commerce in its own name, with third parties because the legal capacity of a legal entity is realised by its management board via the members thereof.*[11]

The dilemma under company law lies in the fact that, on the one hand, any company, in order to operate, needs a stable environment. The managers of a company need to act independently within the limits of the powers conferred upon them and to have a guarantee that, under normal circumstances, there will be no interference in the day-to-day economic activities of the entity they manage. On the other hand, there is a risk of abuses because of conflicts between the management board and the shareholders, characteristic especially of companies with fragmented holdings, as well as conflicts between the majority and minority, which are burdensome for those companies with one strong majority shareholder and a number of minority shareholders.*[12] Contradictions may also develop, and proper remedies are necessary in the case of closed limited companies in which the shareholding is evenly split between two shareholders or between two homogenous interest groups who, whilst having similar interests and acting together, compete with each other.*[13] Thus it can be seen that the requirements imposed on the catalogue of remedies under company law are more diverse.

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7 I. Kull *et al*. Võlaõigus I. Üldosa (Law of Obligations I. General Part). Tallinn 2004, p. 192 (in Estonian).

8 P. Varul *et al*. Võlaõigusseadus I. Kommenteeritud väljaanne (Law of Obligations I. Commented edition). Tallinn 2006, § 101, commentary 3 (in Estonian).

9 Principles of European Contract Law. Available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm.

10 C. von Bar *et al.*(ed.). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Outline edition. Available at http://www.law-net.eu/.

11 K. Saare. Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine. Doktoritöö (Delimitation of the Legal Subjectness of a Legal Entity under Private Law. Doctoral thesis). Tartu 2004, p. 132 (in Estonian).

12 H. Hansmann, R. Kraakman. Agency Problems and Legal Strategies—The Anatomy of Corporate Law. A Comparative and Functional Approach. R. Kraakman *et al*. Oxford 2004, p. 21.

13 At first glance, such a distribution of shareholding may seem democratic, but in essence in such a case both shareholders and voting blocs need to vote for every resolution in order to adopt it. Conflicts of a principle nature may render a company incapable of acting if, e.g., the term of office of the directing bodies elapses and, because of the differences between the shareholders, new members cannot be appointed into the directing bodies.

A remedy under company law is, it may be said, a legal measure whose objective is to eliminate or prevent the negative consequences of violations committed by subjects in company law (such as a company, members of its directing body, or shareholders). However, a remedy under company law may, in equal measure, be directed toward the prevention of future violations.

2. The nature and objectives of the remedies for a shareholder

At the turn of the century, the theory of company law brought to the fore the company as a whole, and the interests of the shareholders, as one interest group among many, were pushed into the back seat.[*14] This tendency has of late started to change. In the light of the financial crisis that originated in the United States of America in 2008, there has been increasing talk about broadening the rights of shareholders in order to balance the powers of the management board.[*15] In Germany too, there is ongoing legal debate, unlike in the past, about the rights of a shareholder, even going as far as to discuss the possibility of claiming compensation for personal damages of a shareholder.[*16]

While the legal literature discusses protection of the shareholders, the emphasis has differed: in America, it has been on protection of shareholders as a class, in contrast to Europe, where the focus is on the protection of minority and small shareholders. These approaches have been conditioned by the differences between the relevant capital markets—compared to the USA, Europe (in particular, continental Europe) features considerably more limited companies that are controlled by a majority shareholder.[*17] Majority interest has been the basic principle guiding company law. However, as Finnish researcher Seppo Kinkki has explicitly stated, the existence of minority protection is the very reason for which a person, instead of just giving his money to a random stranger, would invest it in a limited company.[*18] In fact, Japanese jurist Eiji Takahashi has posited minority protection to be the paramount task of modern company law.[*19] Whilst a majority shareholder should be able to protect his rights by voting, the minority shareholder does not have that option.

The shareholder, being the original owner of the investment, will, according to the legal principle of *casum sentit dominus*[*20], generally bear the risks inherent to the company.[*21] However, according to that principle, the owner bears only the so-called risk of accidental destruction[*22], while for errors of the management clearly beyond the scope of the business judgement rule[*23], the liability shall be borne by the person who made such an error. This means that the shareholder carries a risk to lose his investment should the business fail. Where the directing bodies have acted in keeping with the business judgement rule—i.e., when they have observed the due-care obligation of a prudent entrepreneur—any consequences of loss of assets invested in the company by the shareholders shall be borne by those shareholders if the business fails. However, if the directing bodies have not exercised due care in management, the shareholders need not bear the negative consequences and the

[14] Even in the USA, which is classically considered to be at the forefront of shareholder protection, in the post-Enron times the need to consider the broader goals of corporate governance has been intensely emphasised. See, e.g., T. Baums, K. E. Scott. Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany. – American Journal of Comparative Law, Winter 2005 (53); ECGI – Law Working Paper No. 17/2003; Stanford Law and Economics Olin Working Paper. Available at SSRN http://ssrn.com/abstract=473185.

[15] As noted by Jennifer Hill, in reference to an article in The Financial Times, business once again has a 'legitimacy problem', adding that the financial crisis represents an opportunity to reassess whether shareholders should be afforded stronger power, as a check on managerial control. See J. G. Hill. Who's Afraid of Shareholder Power? A Comparative Law Perspective. Unpublished Paper, 2009, pp. 2–3. Available at http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=jennifer_hill.

[16] See, e.g., G. Wagner. Schadensberechnung im Kapitalmarktrecht. – Zeitschrift für Unternehmens- und Gesellschaftsrecht, August, 2008 (4), pp. 495–531.

[17] K. J. Hopt. The German Two-Tier Board: Experiences, Theories, Reforms. – Comparative Corporate Governance—The State of the Art and Emerging Research. K. J. Hopt, H. Kanda *et al* (ed.). Oxford 1998, p. 232.

[18] S. Kinkki. Minority Protection and Dividend Policy in Finland. – European Financial Management, 2008 (14) 3, p. 471.

[19] E. Takahashi. Der Gleichbehandlungsgrundsatz im japanischen Aktienrecht als Aufgabe der Rechtswissentschaft. – Zeitschrift für Vergleichende Rechtswissenschaft. Archiv für Internationales Wirtschaftsrecht. 108. Band. Mai 2009, p. 105.

[20] *Casum sentit dominus* is a principle derived from Roman law under which the owner of a thing is primarily the one to bear the risk of accidental destruction or damage of a thing. See, e.g., R. Lieberwirth. Latein im Recht. 3. Aufl. Berlin: München 1993, *sv* "casum sentit dominus".

[21] H. C. von der Crone. Haftung und Haftungsbeschränkung in der aktienrechtlichen Verantwortlichkeit. – SZW/RSDA 2006/1, p. 159. Available at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/vdc/cont/Haftung_und_Haftungsbeschraenkung.pdf.

[22] Of course, here we can speak about the risk of accidental destruction only conditionally as in legal sense there is not necessarily a linear relationship between the 'destruction' of the shareholder's investment and the bad economic situation of the limited company.

[23] For more on this, see, e.g., T. Tiivel. Äriühingu juhtorgani liikme kohustused ja vastutus. Magistritöö (Duties and Liability of a Member of a Directing Body of a Company. Master's thesis). Tartu 2004, p. 30 (in Estonian).

members of management must compensate for the damages they have caused. Such is the principle of *casum sentit dominus* as expressed in the structure of a limited company as a legal entity.

A remedy available to a shareholder under company law is, in the broadest sense, any right vested in a shareholder to prevent a planned violation or to respond to a violation already committed in the company (by taking action to clarify the violation; demand the elimination of the consequences of the violation, restoration of the original situation, or claim damages; etc.). In this sense, among the remedies a shareholder can exercise are also the right to call a general meeting when the management board has not summoned a general meeting after receiving a demand from the shareholders (set forth in § 292 (2) of the Commercial Code[*24]), the right to demand a special audit (see § 330 (2) and (2[1]) of the CC), claims related to merger and winding-up procedures, and other remedies.[*25] In a narrower sense, the remedies available to a shareholder may be understood primarily as claims directed toward the elimination of the consequences of violations, of which contestation of the resolutions of the general meeting or directing bodies and compensation for damages are the primary ones.

In addition to remedies under company law, a shareholder may avail himself of the remedies provided under, for example, the law of obligations.[*26]

In comparison to remedies under the law of obligations, for which the objective is to eliminate a violation arising from an obligation, the objectives of the remedies available to a shareholder under company law are somewhat broader. The objective of remedies under company law are not necessarily limited to the enforcement of a particular, purely subjective right (such as compensation for damages); rather, they are targeted at protecting the interests of the company as a whole—catering to reasonable resolution of conflicts within the company, alleviating discord between majority and minority shareholders, preventing abuse by directing bodies, or creating an adequate and flexible system to address the consequences of violations already committed. This logically gives rise to the question of whether remedies under company law should be always and in any event guaranteed to each individual shareholder or whether it makes sense to establish in certain cases some specific majority vote requirements.

3. Proportionality of legal regulation

Responses to a violation may generally be divided into responses in private law and those in public law, according to whether the response requires state intervention or not.[*27] In view of this, the legal literature treats various forms of control and mechanisms of liability created by the state under penal law as sanctions under public law.[*28]

The literature makes mention of a goods market as one possible alternative to remedies under company law (including options for response to any violations committed by a member of the directing body); however, it is stressed that the regulatory impact of the market varies significantly in different countries and legal orders.[*29] B. Black and R. Kraakman believe that the use of various options of legal intervention and regulators based on market forces depends, *inter alia*, on the type of economy in place in the country in question, and they also hold that, for example, an emerging economy needs a company-law environment different from that of a developed, stable economy.[*30] These authors also highlight the prohibitive economic model that was characteristic of the British and US company law in the 19th century and wherein the main legal regulator was the

[24] Äriseadustik. Adopted on 15 February 1995. – RT I 1995, 26/28, 355; 2010, 9, 41 (in Estonian). Hereinafter 'CC'.

[25] E.g., under § 378 (4) of the CC, shareholders who represent at least one tenth of the share capital may bring an action with a court, in a liquidation proceeding, within two months after the date on which the shareholders were informed that the balance sheet and asset distribution plan are presented to the shareholders for examination. The shareholders may demand the preparation of a new balance sheet or asset distribution plan, or supplementary liquidation.

[26] As stated in CCSCd 10.02.204, 3-2-1-16-04 (RT III 2004, 6, 64 (in Estonian)), a claim for payment of dividend, e.g., is an enforcement claim under the law of obligations. The adoption of a resolution to pay dividend creates an obligation between the company and the shareholder under which the company is required to pay the dividend when the claim falls due and there exist no other objections such as, e.g., those arising from the prohibition to abuse rights. If the company refuses to pay to a shareholder the dividend allocated to him by a resolution of the general meeting, the shareholder may demand the payment of the dividend and resort to other appropriate remedies under the law of obligations (paragraph 15 of the decision).

[27] The author believes that such a distinction is rather conditional because sanctions under private and public law are understood differently in different legal systems. In the Germanic legal system, on which our classification of the branches of law is built on, e.g., the meaning of public law is understood more broadly and as the enforcement of an action for compensation of damage in private law also requires, if not obeyed voluntary, enforcement via a court proceeding carried out by the public authorities, then in our legal theory, civil court procedure is treated as a part of the public law. See R. Narits. Õiguse entsüklopeedia (Encyclopedia of Law). Tallinn 2004, p. 47 (in Estonian).

[28] A. Reisberg. Derivative Actions and Corporate Governance. Theory and Operation. New York 2007, p. 31.

[29] *Ibid.*, p. 37.

[30] B. Black, R. Kraakman. A Self-enforcing Model of Corporate Law. – Harvard Law Review, June, 1996 (109) 8, p. 1939. Available at SSRN http://ssrn.com/abstract=10037.

prohibition of various activities that by their nature would be conducive to the most violations (e.g., related-party transactions). Black and Kraakman concede that in the early phases of an emerging economy such a model might be justified, but they argue that a self-enforcing model may also be effective in the conditions of an emerging economy.[*31] They consider the market as regulator to be an alternative not only to the remedies of a shareholder but to legal regulation in general. How great a role legal provisions should have at all in the regulation of a capital market is the starting point of the discussion. However, the collapses of Enron and other major listed companies, which cast a shadow over the turn of the century, have demonstrated that even the capital market of the USA can no longer be the corresponding environment's sole regulator. The literature notes that, in reality, market mechanisms and protection of shareholders and investors go hand in hand and that where no proper protection measures are in place, flow of capital from outside the company dries up (or just becomes too expensive) and abuse related to insider trading begins to spread.[*32]

The existence of any remedy is justified by the right whose enforcement the corresponding remedy purports to serve. A concrete remedy can be viewed from two angles—firstly, from that of the right protected and secondly from the perspective of violation as consequence. The question is of whether individual shareholders (or a minority holding a certain number of votes) should have the possibility of controlling only the resolutions adopted at a general meeting, by contesting the resolutions that are unlawful or adopted in violation of the rules of procedure, or they should also be granted the same right of control over the activity of the directing bodies, vesting in the shareholders, *inter alia*, the right to bring charges against the members of the directing bodies to remedy a violation or to compensate for damage.[*33] On the topic of democracy in company law, the literature notes that it is not so much democracy of shareholders as it is democracy of the shares, meaning that the general emphasis leans toward building the catalogue of other legal options on one's proportion of property rights.[*34] The principles of company law do, however, accept to a certain extent the right of the shareholders to control the activities of the directing bodies, and, despite the general rule that the majority decides, it is deemed necessary to protect the rights of the minority against abuse by the directing bodies and the majority shareholder.

Contrary to the stance that every shareholder should have a maximum arsenal of legal remedies, specialists in economics argue that even granting each shareholder the right to contest the resolutions of a general meeting may cause excessive problems for a limited company. In Germany, for example, it has been opined that individual shareholders have for much too long had an excessively wide playing ground for blocking vital reforms in a company by first provoking a basis for invalidating or nullity of a resolution of the general meeting and then bringing the case before a court in order to sway the company to employ, instead of the economic choice expressed in the contested resolution, another solution, one preferable to that particular shareholder.[*35] Such court proceedings are often very distressing and time-consuming for the company, which is why the threat of court proceedings has indeed been used as a means of exerting pressure on a company.[*36]

In creating a catalogue of remedies for shareholders under company law, one should take into account more factors than merely the need to restore someone's subjective right that has been violated. In addition to the interests of shareholders, the interests of a company as a social whole and those of its other interest groups must be born in mind as well as the need to launch changes vital to the shaping of a secure investment environment and the normal operation of the company. It should also be considered that the system of measures should be developed in a balanced and proportionate way.

In summary, it can be stated that the affording to shareholders of remedies under company law is a rather significant issue of legal regulation; the only question concerns the objectives sought and whether or not such measures are consistent with the general legal and economic environment of the state.

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[31] *Ibid*., pp. 1930–1932.

[32] W. W. Bratton, J. A. McCahery. Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference. – Columbia Journal of Transnational Law 1999 (38) 2, p. 60. Available at SSRN http://ssrn.com/abstract=205455.

[33] A. van Aaken. Shareholder Suits as a Technique of Internalization and Control of Management. A Functional and Comparative Analysis. Heidelberg 2004, p. 7. Available at http://www.uniformterminology.unito.it/downloads/papers/AakenShareholder.pdf.

[34] P. L. Davies. Gower and Davies' Principles of Modern Company Law. Seventh Edition. London 2003, p. 328.

[35] H.-U. Wilsing. Der Reiz der Anfechtungsklage. Der ökonomische Gastkommentar. – Handelsblatt, 2.10.2007. Available at http://www.handelsblatt.com/politik/handelsblatt-kommentar/der-reiz-der-anfechtungsklage;1330686.

[36] A draft act has been prepared in Germany which, *inter alia*, purports to reduce the time consumed by contesting a resolution and therefore also to alleviate the burden of such a proceeding on a company. See Entwurf eines Gesetzes zur Einführung erstinstanzlicher Zuständigkeiten des Oberlandesgerichts in aktienrechtlichen Streitigkeiten. Bundesrat. Drucksache 901/07 (Beschluss). 14.03.2008. Available at http://dip21.bundestag.de/dip21/btd/16/090/1609020.pdf.

4. Various possibilities of systematics of shareholders' remedies

4.1. France and Belgium

Different legal systems approach shareholders' remedies differently, and sometimes when speaking about shareholders' remedies, different phenomena are understood as being referred to. Therefore, the systematics of remedies also may differ. French lawyer Bernard Grelon, for instance, divides claims for remedying violations of shareholders' rights into, first, those against the directing bodies of the company and, second, claims against the other shareholders, and for the latter claims he distinguishes, further, between claims arising from the abuse of rights and those arising from the shareholders' agreements. Grelon divides claims against the directing bodies into temporary measures, whose aim is to collect evidence or prevent damages, and measures to restore rights in order to eliminate a violation.[*37]

According to Grelon, the so-called nullity lawsuits are the measures directed toward elimination of a violation. The author cites as the most characteristic nullity lawsuits those cases wherein a shareholder files a lawsuit to establish the nullity of a transaction concluded by the members of management with that particular shareholder or with a person having the same economic interest in a situation in which the transaction was entered into without the prior consent of the board of directors (in the case of a one-level management structure) or the supervisory board (where a two-level structure applies).[*38] [*39] French law is affirmative of the shareholder's right of intervention in such a situation even where the violation occurred before that person acquired the shares in the company, and also where the relevant person, while a shareholder at the time of violation, later transferred his shares. However, in the latter case it is important to prove, if one is to rely on nullity, the existence of justified interest.[*40]

The measures for restoring rights or the claims for compensation for damage may, according to Grelon, be original or derivative. Derivative claims are directed against the members of management who were in breach of their obligations and the compensation has to be paid by, instead of the company, another person—i.e., in the context of these systematics, by the shareholder. Grelon calls those lawsuits *ut singuli* lawsuits. In their case, unlike that of nullity lawsuits, should the claim be enforced, the shareholder needs to own a certain number of shares both at the time of filing suit and throughout the whole course of proceedings. Original claims, on the other hand, are claims to compensation made by shareholders for their own personal damage that the shareholders may bring against the members of the directing bodies in a situation wherein damages have been caused directly to the shareholders. Although, in theory, claims for compensation of shareholders' personal costs are possible according to Grelon, the courts tend to ignore such compensation claims of shareholders. Judicial practice has generally demonstrated the stance that bad management primarily harms the company and even where the market price of the shares drops as a result of the wrongdoing of the managers, the shareholders are not deemed to be aggrieved parties.[*41]

Belgian lawyers Alexia Bertrand and Arnaud Coibion generally share the systematics of shareholder protection outlined above. Namely, they distinguish among shareholder suits against the directors of the company, suits against other shareholders, claims against the company, and shareholder suits in so-called summary proceedings whose aim is to provide for provisional and prompt regulation of a certain legal relationship.[*42] The group of suits classed as summary proceedings includes, for example, suspension of the holding of a convened shareholders' meeting, suspension of the effects of the resolutions of the company, prohibition of certain activities of the company (sale of assets, publication of an official announcement, publication of a press release, etc.), and also curtailing of a shareholder's right to information.[*43] The cases cited here can be treated as measures for securing an action or as measures for provisional regulation of a legal relationship.[*44]

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[37] B. Grelon. Shareholders' Lawsuits against the Management of a Company and its Shareholders under French Law. – European Company and Financial Law Review, August 2009 (6) 2/3, pp. 205–218.

[38] See Code de Commerce (Code de Commerce (Commercial Code) accordingly. Last amendment: Act No. 2006-11 of 5 January 2006 Art. – Official Journal of 6 January 2006, Article L.225-38 and Article L225-86. Available at http://195.83.177.9/code/liste.phtml?lang=uk&c=32.

[39] B. Grelon (Note 37), p. 210.

[40] *Ibid*., p. 211.

[41] *Ibid*., p. 213.

[42] By their nature, these measures are similar to the measures for securing an action or provisional legal protection, as known in the Estonian law, which must be connected with a particular court case, already initiated or pending initiation.

[43] A. Bertrand, A. Coibion. Shareholder Suits against the Directors of a Company, against other Shareholders and against the Company itself under Belgian Law. – European Company and Financial Law Review, August, 2009 (6) 2/3, p 270–271.

[44] Thus, § 378 (1) 3) of the Code of Civil Procedure (Tsiviilkohtumenetluse seadustik (RT I 2005, 26, 197; 2010, 8, 35, (in Estonian)), hereinafter 'CCP', allows a prohibition on the defendant from entering into certain transactions or performing certain acts, clause 10) of the same subsection also allows another measures considered necessary by the court. In the case of a register proceeding, a court may, under § 598 of the CCP, suspend the proceedings in the matter of the petition for entry until the time the dispute has been adjudicated by way of actions.

As the main cases of shareholders' suits against other shareholders, Bertrand and Coibion highlight suits connected with exit from the company. These authors note that for a long time, the only solution set forth by law for an enduring dispute among the shareholders of a company was the judicial liquidation of said company. Since 1996, a minority shareholder in Belgium has been able to request that one or several other shareholders sell all of their shares or other securities in the relevant company, for so-called valid reasons (exclusion), or that one or several other shareholders buy all of their shares in the company (withdrawal), also for valid reasons and on the premises that other measures would not provide solutions to the dispute and the dispute is likely to lead to the winding up of the company. Today, Belgium has significant judicial practice of such proceedings; therefore, it can be seen that these remedies do actually work.[*45] Bernard and Coibion mention, as the main type of shareholder suits against a company, the challenging of a resolution of the company. They also mention remedies (predominantly claims to compensation for damages) applied in the course of various categories of take-overs, mergers, divisions, and restructuring proceedings.[*46]

4.2. The United Kingdom

The systematics of the shareholders' remedies in the United Kingdom are reflected in the consultation paper prepared by the Parliament-commissioned Law Commission (Shareholder Remedies Consultation Paper, hereinafter 'SRCP').[*47] The document analyses the rights of shareholders as well as the main types of existing remedies and their application. Shareholders' remedies are accorded a rather broad meaning, and distinction is made among personal actions of shareholders, derivative actions[*48], unfair prejudice remedies (in German, *Beeinträchtigung*), and additional remedies arising from the law.[*49] The main remedies the paper deals with are the shareholders' derivative actions and unfair prejudice remedies. The last of the remedies mentioned here, also called oppression remedy, allows the minority to contest any abuse of the minority rights and also contest acts damaging the company generally. This remedy has been treated as an effective measure also in Canadian corporate law, into which it was incorporated in 1983.[*50] Such a remedy was already in place in the law of the UK as far back as in 1948, and before the corporate-law reform of 2006, it was regulated by Articles 459–561 of the Companies Act. The Companies Act in effect since 2006[*51] also provides for such remedy; namely, Article 994 specifies that a member of a company may apply to the court, by means of a petition, for an order on grounds that the company's affairs are being, or have been, conducted in a manner that is unfairly prejudicial to the interests of members generally or that an actual or proposed act or omission of the company is, or would be, so prejudicial. The persons whose rights are affected may represent all or only some of the shareholders, but in order for them to bring charges, the condition necessary is that at least the rights of the petitioner have been violated.

This remedy is considered to be a complex and flexible legal option that can be exercised by the court to assess the various aspects of the company's business operations and simultaneously resolve different types of disputes.[*52] A. Reisberg has called this measure a substitute for a derivative action and referred to the fact that British courts continue to be more keen to process such actions than derivative actions.[*53] The SRCP too indicates that this is an important procedural alternative to a derivative action. Part 9 of the SRCP analyses the instances wherein the unfair prejudice remedy is used the most, among which are exclusion from management, failure to provide information, increase of the share capital issued, alteration of articles of association, diversion of company business and 'misappropriation' of assets[*54], excessive remuneration or non-payment of dividends, and mismanagement (SRCP, 9.33–9.44).

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45 A. Bertrand, A. Coibion (Note 43), p. 290.

46 *Ibid*., pp. 298–301.

47 The Law Commission. Shareholder Remedies. Consultation Paper No. 142, 1996. Available at http://www.lawcom.gov.uk/docs/cp142.pdf.

48 A shareholder derivative claim is a claim originally owned by the company which the shareholder or the shareholders representing certain share capital may, in the presence of the prerequisites provided by law, enforce against a member of a directing body by demanding (primarily) that the violation of an obligation is stopped and the damages caused by such violation are compensated to the company. A. Reisberg has more thoroughly explored the shareholder derivative action as a remedy (Note 28).

49 Special rights vested into the shareholders by law are treated as such; e.g., the right to challenge a resolution changing the goal of the company (Article 12.11 *ff*.), the right to request information, etc.

50 I. Ellyn, K. de Champlain. Shareholders' Remedies in Canada. Toronto, 28.03.2005, p. 15. Available at http://www.ellynlaw.com/PDFs/ellyn%20-shareholders%20remedies%20in%20canada.pdf.

51 Companies Act 2006. Available at http://www.opsi.gov.uk/ACTS/acts2006/pdf/ukpga_20060046_en.pdf.

52 I. Ellyn, K. de Champlain (Note 50), p. 17.

53 A. Reisberg (Note 28), p. 298.

54 For the purposes of Estonian law: violation of the loyalty obligation, competing activities, etc.

4.3. Germany

Germanic company law, in contrast, is characterised by different procedures and remedies being provided for different types of violations. Less attention is devoted to a complex analysis and systematics of shareholders' remedies. The possibility of challenging the resolutions of the general meeting and directing bodies—establishment of nullity or revocation of a resolution—is one of the fundamental shareholders' remedies in Germany. The term 'shareholder action' (equivalent to the German concept of *Aktionärsklagen*) is used to denote the remedies available to shareholders in a narrower sense. In the legal literature, it has been argued that a corresponding, comprehensive realm of law is still in the process of developing, with the support of legal theory and judicial practice. German lawyer Walter Bayer has classified shareholder actions as actions directed toward the remedy of defective resolutions, on one hand, and as defence actions or actions for compensation for damage, on the other. The first type of action is applicable in the case of defective resolutions; depending on the nature of the defect, a shareholder may turn to a court and demand that either the nullity of the resolution be declared or the resolution be annulled.[*55] This right arises primarily out of §§ 241 and 245 of the German *Aktiengesetz*[*56], which grant the shareholders the right to demand revocation of an unlawful resolution of their general meeting or recognition of its nullity. As this is one of only a few remedies available to minority shareholders, it is employed widely, which, in turn, has prompted extensive criticism. For instance, in the legal literature it has been opined that in many instances shareholders initiate actions to contest or annul a resolution for provocative reasons, in order to interfere purposefully with the operations of the company.[*57]

As regards the second type of shareholder actions (defence actions or actions for compensation of damage), Bayer highlights those sets of instances wherein the corresponding remedies are applied most often: illegal meddling of the directing bodies with the rights of the shareholders, causing of damages to the company by the members of the directing bodies, breach of law by the directing bodies in preference of the interests of a particular shareholder, damages unlawfully caused to the company by third parties, and unlawful affecting of the directing bodies by third parties (shareholders included).[*58] However, the enforcement of actions for compensation for damages is a matter of some debate in German law.[*59] Problems are also caused by practices contrary to articles of association where those practices are based on non-formalised resolutions—i.e., contesting the *de facto* alteration of the articles (*faktische Satzungsänderung*).[*60] Namely, it has been argued in German legal theory that *de facto* alteration of the articles of association does not necessarily constitute a violation of the provisions of the articles and that this situation involves *de facto* behaviour beyond one's competence, which may prove difficult to challenge.[*61]

5. Shareholders' remedies in Estonian company law—haphazard *versus* systematic

If we proceed from the classification according to which shareholder actions are divided into actions aimed at correcting resolutions and so-called defence actions, it becomes clear that Estonian corporate law focuses on the opportunity granted to a shareholder to contest the resolutions of a general meeting or directing bodies. Both the General Part of the Civil Code Act[*62] (hereinafter 'GPCCA') and the Commercial Code distinguish, in the case of contested resolutions of a general meeting, between invalidation of resolutions and nullity of resolutions. In respect of public limited companies, the special provision made in § 302 (1) of the CC applies. Under this provision, on the basis of an action filed against a public limited company, a court may revoke a resolution of the general meeting of shareholders that is in conflict with the law or the articles of association.

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55 W. Bayer. Aktionärsklagen *de lege lata* und de *lege ferenda*. – Neue Juristische Wochenschrift 2000, Heft 36, p. 2610.

56 Aktiengesetz vom 6. September 1965 (BGBl. I p. 1089), zuletzt geändert durch Artikel 11 des Gesetzes vom 16. Juli 2007 (BGBl. I p. 1330). Available at http://bundesrecht.juris.de/bundesrecht/aktg. Hereinafter 'AktG'.

57 E. Wiedmann. Der Rechtsmissbrauch im Markenrecht. Dissertation zur Erlangung des Doktorgrades der Rechtswissenschaft der Rechts-, Wirtschafts- und Verwaltungswissenschaftlichen Sektion der Universität Konstanz, Fachbereich Rechtswissenschaft. Konstanz, 2002, pp. 42–43. About the criticism, see also H. -U. Wilsing (Note 35).

58 W. Bayer (Note 55), p. 2610.

59 See, e.g., H. C. von der Crone *et al.* Aktienrechtliche Verantwortlichkeit und Geschäftsführung. Bibliothek zur Zeitschrift für Schweizerisches Recht. Beiheft 43. Basel, 2006, p. 38. Available at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/vdc/cont/Verantwortlichkeit_und_Geschaeftsfuehrung.pdf.

60 B. Kropff, J. Semler. Münchener Kommentar zum Aktiengesetz. Band 4. 2. Aufl. München 2004, § 179, margin No. 44.

61 B. Helmke. Satzungsdurchbrechungen bei der GmbH. Dissertation zur Erlangung des Grades eines Doktors der Rechtswissenschaft des Fachbereichs Rechtswissenschaft I der Universität Hamburg. Hamburg 2001, p. 10.

62 Tsiviilseadustiku üldosa seadus. Adopted on 27 March 2002. – RT I 2002, 35, 216; 2010, 38, 231 (in Estonian).

Pursuant to subsection 3 of the same section, a shareholder who did not participate in the general meeting may demand the revocation of the resolution. A shareholder who did participate may demand revocation only if said shareholder's objection to the resolution has been entered in the minutes of the general meeting. Thus, the law does not require that a shareholder necessarily prove that a resolution violates his rights (a violation may be objective), but, instead, it directs the shareholder to take proactive measures and at least have his objection recorded in the minutes. The purpose of such regulation is to reduce the opportunities to file protection actions.

An action to establish nullity of a resolution is provided for in § 301[1] (1) of the CC, under which the resolution of the general meeting of shareholders is void if it violates a provision of law established for protection of the creditors of the associated public limited company or for reasons of other public interest, if it is contrary to good morals, if the minutes of the general meeting that passed the resolution have not been notarised in the manner prescribed by law, or the procedure for calling a meeting was violated in the calling of the general meeting that passed the resolution. Nullity of a resolution may be relied upon in court proceedings through filing of an action or objection. At the same time, reliance in legal practice on the nullity of a resolution requires that a court have previously established such nullity (see the second sentence of § 38 (2) of the GPCCA).

As regards those persons who are entitled to demand that a court establish that a resolution of the general meeting is void, the law does not list the subjects who have such rights of contestation. Subsection 301[1] (3) of the CC just sets out that nullity of a resolution may be relied upon in court proceedings by filing an action or objection.

For the purpose of determining the list of persons with the right of contestation, when cases of nullity are involved, one can turn to § 38 (3) of the GPCCA—in this provision, the term 'interested person' is used. The author believes that the question as to which shareholders may demand the establishment of nullity can be approached in two ways. Firstly, it is possible to claim that, as the person whose rights are violated by a resolution has the right to demand the establishment of nullity, in order for that shareholder to demand the establishment of the nature of that resolution, it must directly violate his rights. Secondly, because of the specific character of relations under company law, it can be argued that the shareholder is indeed the interested person, in view of the fact that he, as the provider of capital, has a special relationship with the company and also that the shareholder's right to rely on nullity and demand the establishment of nullity is precluded only in exceptional cases (first and foremost, when he abuses his rights in the filing of his action) The author of this article leans toward the second interpretation and believes that a shareholder's right of claim is generally to be deemed worthy of regard; however, the prohibition of abuse of one's rights and the principle of good faith rule out the possibility of a claim being enforced by a shareholder who was present at the meeting and voted in favour of the resolution (see §§ 32 and 138 of the GPCCA).[*63] Such a restriction arises, *inter alia*, from the fact that the holder of a subjective right must not exercise a right vested in him contrary to the objective of such a right.[*64]

Contestation of resolutions as a legal remedy has found its most in-depth treatment in Estonian legal theory[*65], and it is also the remedy exercised most widely by shareholders in judicial practice.[*66] The situation is somewhat more complicated for actions for compensation of damage filed against members of directing bodies. Estonian law proceeds from the principle that the filing of an action shall be decided upon and the company represented during the proceedings by a person appointed to this task by the supervisory board. Although the practice of the Supreme Court shows that quite a number of actions against members of directing bodies for compensation of damage have been processed, civil cases in which a member of the management board has been held accountable are rather rare. One of the features of proceedings directed against members of the management board is that they are carried out in the name of the bankrupted company.[*67] The compensation for personal damages of shareholders has not been discussed in the legal literature. However, the CC includes provisions that allow such actions. For instance, § 403 (6) of the CC sets out that the members of the management board and supervisory board shall be liable to the company for any damage wrongfully caused by the merger. In addition, the CC contains several provisions that, although providing for the obligation of certain persons to compensate for damage, do not specify to whom such persons are liable. For instance, § 33 (8) of

[63] Under § 32 of the GPCCA, the shareholders or members of a legal person and the members of the directing bodies of a legal person shall act in accordance with the principle of good faith and consider each other's legitimate interests in their mutual relations. Subsection 138 (2) of the GPCCA provides that a right shall not be exercised in an unlawful manner or with the objective to cause damage to another person.

[64] I. Kull. Hea usu põhimõte kaasaegses lepinguõiguses. Doktoritöö (The Principle of Good Faith in Modern Contract Law. Doctoral thesis). Tartu 2002, p. 169 (in Estonian).

[65] A. Vutt has more thoroughly explored the issues related to the contestation of the resolutions of the general meetings of companies. See A. Vutt. Äriühingu organi otsuste vaidlustamisega seotud probleeme (Problems related to the Contestation of the Resolutions of a Body of a Company). – Juridica 2005/1, pp. 53–61 (in Estonian).

[66] On the basis of the index provided at the web site of the Supreme Court (www.nc.ee), a total of 19 such cases have been processed by the highest national judiciary since 1998.

[67] See, e.g., CCSCd 3.05.2002, 3-2-1-75-02. – RT III 2002, 18, 208; CCSCd 30.04.2003, 3-2-1-41-03. – RT III 2003, 17, 164; CCSCd 11.05.2005, 3-2-1-41-05. – RT III 2005, 17, 181; CCSCd 25.04.2006, 3-2-1-27-06. – RT III 2006, 17, 162, etc.

the CC sets out that if incorrect information is submitted to the commercial register, the persons who signed the petition shall be solidarily liable for any damage wrongfully caused.*[68] The author of the present article believes that in actuality we lack a theoretical treatise about the area of protection of those provisions as well as a clear understanding of whether they have ever been applied in practice and, if they have, which problems have been encountered and whether they could be treated as the shareholder protection provisions—and, if so, which of them could.*[69]

When defining the areas of protection related to actions for compensation for damage, Bayer posed, among other questions, those of the opportunities that a shareholder should have for enforcing his personal claims and of his opportunities to enforce them on behalf of the company. The author of this article believes that Bayer's approach, in material published about 10 years ago, is meaningful for the current analysis of Estonian company law because it broadly reflects our current legal situation and problems. The part of company law that Bayer calls defence actions has not been explored or developed in Estonia. One cannot but arrive at the view that the development of shareholders' remedies has lacked proper systematic attention and that, in this domain, further development of the law has been haphazard and limited to just a few, often half-masted solutions. For instance, by the amendments of 1 January 2006, § 289^2 was introduced into the Commercial Code. Under this new section, a person who, by misusing his powers of control, influences a member of the management board or supervisory board to act contrary to the interests of the public limited company, has become liable for compensation of any damage incurred thereby by the public limited company; however, no attention was paid to the fact that the persons who, in such a situation, could initiate proceedings to enforce an action for compensation of damage might be and actually often are those very members of the directing bodies who were influenced.*[70] Another problem is that currently a shareholder must be able to navigate amid a plethora of requirements, objections, and procedural problems, and also often the opportunities for protecting the rights of a failing company and the persons connected with it are unclear or undefined. The author of this article has already expanded upon the problems related to the lack of a derivative action as an institute in Estonian company law.*[71]

Therefore, the protection of the rights of shareholders is defective in the Estonian context, because often measures such as contesting resolutions made by the directing body of the company, requesting information, commissioning a special audit, or employing other preventive measures are of no avail in defending against the abuse perpetrated by the directing bodies or the majority shareholder, while, on the other hand, the compulsory dissolution of the company would be either impossible or disproportionate because of the extremity it involves, or simply not desirable.*[72] The author of this article is of the opinion that not enough attention has been paid in Estonian law to the areas where most of the problems are expected to occur: abuses by the majority at the expense of the minority, influencing the directing bodies and thereby causing damages for the company, and creation of flexible (additional) measures to enforce actions for compensation of damage. Models are plentiful in the laws of other countries, and closer analysis of such models as well as identification of the problems we face in practice will allow us to develop our law in the direction we want.

[68] Similar provisions are, e.g., § 223 (3) of the CC which sets out that the issuers are liable to compensate for the damage caused by the issue of shares with a nominal value of less than ten kroons, § 249 (4) which provides for the obligation to compensate for any damage caused by an inaccurate valuation of the non-monetary contribution, etc.

[69] The Supreme Court made its first ruling on an action for compensation of damages to a shareholder on 31 March 2010 (civil case 3-2-1-7-10). In this case, a shareholder filed, on the basis of § 403 (6), an action against the members of the management board and supervisory board for compensation of damages caused by a merger; the Supreme Court affirmed the existence of the shareholder's right of claim on the basis of the general elements of liability set forth in law.

[70] True, the situation is a bit different where a company is bankrupt because the enforcement of claims is decided and the company is represented in the proceedings by a bankruptcy trustee. However, the author does not believe that lenience just towards the enforcement of claims by a bankruptcy trustee is the correct path to take.

[71] M. Vutt. Shareholder's Derivative Claim—Does Estonian Company Law Require Modernisation? – Juridica International 2008 (XV), pp. 76–85.

[72] The bases of compulsory dissolution are set forth in § 40 (1) of the GPCCA and in the context of the topic at hand, the following instances may be highlighted: the objective or activities of the legal person are contrary to law, public order or good morals; the articles of association of the legal person are contrary to law to a significant extent; incapability to appoint new persons in place of the removed members of the management board, etc. The person with the right of action is in this case the Minister of Internal Affairs or 'any other person or agency so entitled by law'. Compulsory dissolution, being by its nature extreme, cannot therefore be treated as a normal measure to be employed for solving disputes encountered in business activity.

6. Conclusions

The objectives of remedies under company law are multifaceted, covering not just the elimination of the negative consequences of violations committed by subjects in company law (companies, members of directing bodies, shareholders, etc.) or the prevention of the arrival of such consequences. They are also directed at the avoidance of further violations and initiation of restructuring within the company as needed, as well as at the protection of the interests of the company as a whole and at reasonable resolution of internal conflicts.

Different countries have tackled the matter of shareholders' remedies at differing levels. During a recent reform, the United Kingdom developed, in the preparatory state of the reform, a consultation paper that provides an in-depth analysis of the various forms of shareholders' remedies. Likewise, French and Belgian practitioners of jurisprudence are actively discussing the subject of shareholder actions and more interest is being shown in the so-called defence actions and their enforceability (actions for compensation for damages). In German legal literature too, though this area has not been addressed systematically to any great extent, increasingly more writings have been published on the topic of potential actions for compensation of damage. However, in contrast, shareholders' remedies have not been systematically developed in Estonia.

On the basis of the above reasoning, the author of this article concludes that this domain of company law needs to be analysed in Estonia and that related regulations should be reviewed. The starting point should be to map out the typical circumstances of violations on the basis of our judicial experience as well as the experiences of other countries as to situations that involve a greater risk of violations (e.g., mergers, divisions, take-over proceedings, excessive remuneration of members of directing bodies, and also cases wherein a legal entity has been penalised for a crime by means of a fine but there is no functioning mechanism of recourse against the members of the directing bodies). After this, the current laws and judicial practice should be analysed from the standpoint of the effectiveness of remedies (with assessment of their enforceability and also procedural aspects, as well as, for instance, the alternatives provided in protection measures under public law). The problems should be compiled in a coherent manner, and the necessary amendments to the law should be formulated on the basis thereof in consideration of issues of suitability for the general legal and economic backdrop.

Ragne Piir

LL.M., Berater am estnischen Staatsgericht

Eingreifen oder nicht eingreifen, das ist hier die Frage

Die Problematik der Bestimmung und des Anwendungsbereichs der Eingriffsnormen im internationalen Privatrecht*

1. Einleitung

Die alltäglich gewordene grenzüberschreitende Kommunikation und die zunehmende Internationalisierung sowohl des gesellschaftlichen als auch familiären Bereichs bedeuten, dass die Richter zunehmend Fälle zu lösen haben, die nicht nur mit einem Staat verbunden sind, und Rechte anzuwenden haben, die sie nicht ausreichend kennen. In solchen Fällen können die Eingriffsnormen als „Rettungsringe" dienen, die es dem Richter dennoch ermöglichen, von der Anwendung des ausländischen Rechts abzuweichen und damit inländische Grundwerte und -Prinzipien zu gewähren.

Hinsichtlich dieses Bedürfnisses, mitunter eine solche Abweichung zuzulassen, wurde sowohl in inländischen Gesetzen zum internationalen Privatrecht als auch in entsprechenden neuesten Staatsverträgen und EU-Verordnungen die Möglichkeit vorgesehen, die Anwendung des ausländischen Rechts aufgrund innerstaatlicher Interessen zu verweigern. Bei den Eingriffsnormen handelt es sich um eine der zahlreichen Änderungen, die mit dem Inkrafttreten der Rom I-Verordnung*[1] stattgefunden hat und für die Rechtspraxis von Bedeutung ist. Die Anwendung dieser Ausnahme fällt jedoch schwer, da es sich dabei um einen Begriff handelt, der nicht nur inhaltlich kompliziert zu definieren ist, sondern dessen Eingreifen auch von vielen Aspekten und ihren Mitwirkungen abhängig ist.

In diesem Aufsatz soll die Problematik und Bedeutung von Eingriffsnormen aufgezeigt werden. Das Ziel des folgenden Beitrags ist es zu untersuchen, was im Allgemeinen als Eingriffsnormen bezeichnet wird und vornehmlich – unter welchen Voraussetzungen sie in der Praxis eingreifen können. In dem Aufsatz wird auf die neuesten entsprechenden Entwicklungen in der EU eingegangen und untersucht, ob und welche Fortschritte diese gegenüber dem EVÜ bringen. Als gesetzliche Grundlagen der Untersuchung werden die entsprechenden

* Diese Arbeit wurde durch die Stiftung der Universität Tartu und den Europäischen Sozialfonds im Rahmen der DoRa-Programme des Promotionsstudiums und der Internationalisierung unterstützt.

[1] Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I"). Vom 17. Juni 2008 (ABl. EU 2008 Nr. L 177 S. 6 (hiernach: Rom I-Verordnung). Die Rom I-Verordnung wurde im Dezember 2009 wirksam und hat somit das bislang geltende EVÜ (Römisches EWG-Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht. Vom 19. Juni 1980 (BGBl. 1986 II, S. 810) i.d.F. des 4. Beitrittsübk. Vom 14. April 2005 (BGBl. 2006 II, S. 348) hiernach: EVÜ) abgelöst.

Gesetze Estlands und die EU-Verordnungen benutzt; außerdem wird rechtsvergleichend auch das deutsche Recht einbezogen.

2. Begriff und Bestimmung der Eingriffsnormen

2.1. Begriff der Eingriffsnormen

Bei den Eingriffsnormen handelt es sich um Normen, die ohne Rücksicht auf das Vertragsstatut bzw. Deliktsstatut den Sachverhalt zwingend regeln. Diese sind in § 31 des estnischen IPR-Gesetzes[*2] (und im Art. 34 EGBGB[*3]) geregelt – Art. 34 nennt zwar den Begriff von Eingriffsnormen nicht ausdrücklich und spricht nur von zwingenden Vorschriften, im EIPRG dagegen wird schon seit dem Inkrafttreten des EIPRGs am 1. Juli 2002 ausdrücklich von Eingriffsnormen gesprochen.

Die Festlegung des Begriffes der Eingriffsnormen kann vielschichtige Probleme aufwerfen. Es ist dabei von besonderer Wichtigkeit, zwischen den Eingriffsnormen und zwingenden inländischen Bestimmungen (§ 32 Abs. 3 EIPRG, Art. 27 Abs. 3 EGBGB) zu unterscheiden. Der Grund dafür ist, dass zwingende inländische Bestimmungen nur dann eingreifen können, wenn der Sachverhalt mit einem und demselben Staat verbunden ist. Ebenso müssen Eingriffsnormen von zwingenden Bestimmungen zum Schutz des Verbrauchers im Sinne des § 34 EIPRG abgegrenzt werden, die nur in den Fällen anzuwenden sind, in denen der innerstaatliche Verbraucherschutzstandard durch Anwendung von ausländischem Recht gefährdet wird.

In verschiedenen Sprachen wurden bis heute mehrere verschiedene Begriffe anstelle vom Begriff Eingriffsnormen (üldist kehtivust omavad sätted) benutzt.[*4] Solch eine Verwendung paralleler Begriffe ist an sich nicht problematisch, obwohl die Benutzung eines konkreten Begriffs im Interesse der Rechtssicherheit vorzuziehen wäre. Besonders wichtig ist, dass die Verwendung paralleler Begriffe keine Schwierigkeiten bei der Festlegung der Eingriffsnormen verursacht. Zum Beispiel werden in der estnischen rechtswissenschaftlichen Literatur neben dem Begriff der Eingriffsnormen auch solche Termini wie *imperative Bestimmungen* (imperatiivsed normid)[*5], *international zwingende Normen* (rahvusvaheliselt imperatiivsed sätted)[*6] oder *zwingende Vorschriften* (kohustuslikud sätted)[*7] verwendet. Gerade die Benutzung des Begriffs der imperativen Bestimmungen oder zwingenden Vorschriften ermöglicht es aber nicht, die Natur der Eingriffsnormen eindeutig zu verstehen, und Schwierigkeiten können sowohl bei der Unterscheidung zwischen Eingriffsnormen und zwingenden inländischen Bestimmungen als auch bei der Entscheidung über deren Anwendung entstehen.

In der Fachliteratur wurde vielfach kritisiert, dass der Begriff von Eingriffsnormen in Art. 7 EVÜ inhaltlich undefiniert gelassen wurde.[*8] Eigentlich definieren weder § 31 EIPRG, Art. 16 Rom II-Verordnung[*9] noch Art. 34 EGBGB nicht, was unter dem Begriff der Normen, die ohne Rücksicht auf das Vertragsstatut bzw. Deliktsstatut den Sachverhalt zwingend regeln, zu verstehen ist. Deswegen ist zu begrüßen, dass bei der Umwandlung des EVÜ in die Rom I-Verordnung auch die Eingriffsnormen revidiert wurden. Bei der Umwandlung wurde

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2 Estnisches IPR-Gesetz (Rahvusvahelise eraõiguse seadus) vom 27.03.2002. – RT I 2002, 35, 271; 2009, 59, 385 (hiernach: EIPRG).

3 Einführungsgesetz zum Bürgerlichen Gesetzbuche. 21. September 1994. – BGBl. I S. 2494, ber. 1997 I S. 1061. München 2007 (hiernach: EGBGB).

4 In der deutschen rechtswissenschaftlichen Literatur werden vor allem die Begriffe von *Eingriffsnormen* oder *internationalen zwingenden Normen* benutzt; der entsprechende Artikel in EGBGB ist dagegen als *zwingende Vorschriften* tituliert. In der englischsprachigen rechtswissenschaftlichen Literatur spricht man von *overriding mandatory provisions, overriding statutes, conflicts-mandatory rules* und *internationally mandatory rules*. In der französischen Sprache werden Begriffe wie *lois de police* oder *lois d'application immédiate* benutzt. S. näher: H.-J. Sonnenberger (Redaktor). Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-46). Internationales Privatrecht. München 2006, Art. 34 EGBGB Rn. 10 *ff.* (hiernach: Münchener Kommentar/Martiny); U. Magnus (Redaktor). J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Einführungsgesetz zum Bürgerlichen Gesetzbuche/IPR. Berlin 2002, Art. 34 EGBGB Rn. 1 *ff.* (hiernach: Staudinger/Magnus); P. Bassenge, U. Diederichsen. Palandt Bürgerliches Gesetzbuch. München 2009, Art. 34 EGBGB Rn. 1 *ff.* (hiernach: Palandt/Thorn); C. Reithmann, D. Martiny. Internationales Vertragsrecht. Köln 1996, Rn. 390 (hiernach: Internationales Vertragsrecht/Limmer); A. V. Dicey, J. H. C. Morris. The Conflict of Laws. London 1993, S. 21 *ff*; G. C. Cheshire, P. M. North. Private International Law. London 1993, S. 455 *ff.*; P. Kaye. The New Private International Law of Contract of the European Community. Aldershot 1993, S. 160, S. 242 *ff.*; A. Bonomi. Mandatory Rules in Private International Law. – Yearbook of Private International Law 1999, I, S. 219; u.a.

5 I. Nurmela, L. Almann u.a. Rahvusvaheline eraõigus (Internationales Privatrecht). Tallinn 2005, S. 120; R. Jankelevitš. Avalik kord ja imperatiivsed sätted rahvusvahelises eraõiguses (Öffentliche Ordnung und imperative Bestimmungen im IPR). – Juridica 2002/7, S. 483.

6 R. Jankelevitš (Fn. 5) S. 484.

7 EVÜ Art. 7.

8 P. Mankowski. Der Vorschlag für die Rom I-Verordnung. – IPRax 2006, II, S. 109; R. Jankelevitš (Fn. 5) S. 484; S. auch z. B. A. Briggs. The Conflict of Laws. Oxford 2002, S. 166.

9 Verordnung (EG) Nr. 864/2007 des Europäischen Parlaments und des Rates über das auf außervertragliche Schuldverhältnisse anzuwendende Recht („Rom II"). Vom 11. Juli 2007 (ABl. EU 2007 Nr. L 199 S. 40 (hiernach: Rom II-Verordnung).

nicht nur die Überschrift der Vorschrift verbessert – diese Norm ist jetzt als *Eingriffsnormen* tituliert – sondern der Verordnung wurde auch die Legaldefinition der Eingriffsnormen hinzugefügt, was die Natur von Eingriffsnormen besser zu verstehen ermöglichen soll. Gemäß der in Art. 9 der Rom I-Verordnung beinhalteten Definition ist eine Eingriffsnorm eine zwingende Vorschrift, deren Einhaltung von einem Staat als so entscheidend für die Wahrung seines öffentlichen Interesses, insbesondere seiner politischen, sozialen oder wirtschaftlichen Organisation, angesehen wird, dass sie ungeachtet des nach Maßgabe der Rom I-Verordnung auf den Vertrag anzuwendenden Rechts auf alle Sachverhalte anzuwenden ist, die in ihren Anwendungsbereich fallen. Diese Begrifflichkeit folgt eng der *Arblade*-Entscheidung des EuGH[*10] und stimmt in begrüßenswerter Weise mit dem bisherigen Verständnis der international zwingenden Bestimmungen weitgehend überein.[*11] Die Benutzung des Terminus Eingriffsnorm hilft hoffentlich von jetzt an die Verwendung paralleler Begriffe zu vermeiden. Erfreulicherweise ist durch die Verwendung der Legaldefinition auch die unter dem EVÜ bestehende Begriffswirrung zwischen einfach und international zwingenden Bestimmungen beendet.[*12]

2.2. Bestimmung der Eingriffsnormen

Obwohl die neue Rom I-Verordnung eine Legaldefinition der Eingriffsnormen beinhaltet, ist damit keinesfalls eine umfassende Regelung vorgesehen. Im Gegensatz – allein die Definition selbst genügt meistens nicht um zu entscheiden, ob eine Vorschrift auch eine Eingriffsnorm ist.[*13] Demzufolge ist für die Feststellung des international zwingenden Charakters einer Norm festzulegen, ob die fragliche Norm einen sog. Anwendungswille oder Geltungswille hat. Der Anwendungswille, der auch bisher zu fordern war, bedeutet einen besonderen Geltungsanspruch der Norm, ohne Rücksicht auf fremdes Recht in jedem Fall durchgesetzt zu werden. Im Idealfall sollte der Anwendungswille der Norm schon aus ihrer Formulierung ableitbar sein. Um weitere Fraglichkeiten zu vermeiden, sollte der Gesetzgeber mithin schon beim Formulieren von Rechtsakten gegebenenfalls *expressis verbis* vorschreiben, dass ein Vorschrift ohne Rücksicht auf das für das Rechtsverhältnis maßgebende Recht anzuwenden ist. Zum Teil hat z. B. der deutsche Gesetzgeber dies auch getan, indem er – insbesondere in jüngeren Vorschriften – die internationale Normgeltung ausdrücklich angeordnet hat.[*14] Da solche *expressis verbis* vorgeschriebene internationale Normgeltung jedoch vergleichsweise selten in Gesetztexten vorkommt, ist es unmöglich bloß nach der Formulierung der Vorschrift zu entscheiden, ob der Anwendungswille der Vorschrift vorhanden ist.[*15]

Wenn der Wortlaut der Norm den Anwendungswillen nicht ausdrücklich erwähnt, muss ihr staatspolitischer Zweck ermittelt werden, um den international zwingenden Charakter der Norm festzulegen. Es bedeutet, dass Normen, die als Eingriffsnormen anzusehen sind, hauptsächlich staats- und wirtschaftspolitischen Interessen dienen (sollen), oder aus sozial- oder gesellschaftspolitischen Gründen erlassen worden sein sollen.[*16] Dieser schon zu Art. 34 EGBGB und Art. 7 EVÜ entwickelte Meinungsstand wurde auch in die Rom I-Verordnung eingenommen – gemäß Art. 9 Abs. 1 wird die Wahrung des öffentlichen Interesses eines Staates, insbesondere seiner politischen, sozialen oder wirtschaftlichen Organisation *expressis verbis* als Zweck der Eingriffsnormen genannt. Für die Klassifizierung als Eingriffsnorm ist es also notwendig, dass die Norm überwiegend oder zumindest stark im öffentlichen Interesse liegt – Vorschriften, die in erster Linie Privatinteressen ausgleichen, fallen somit aus dem Kreis der Eingriffsnormen heraus.[*17] Es ist jedoch nicht *per se* ausgeschlossen, dass Eingriffsnormen auch zum Schutz der sozial schwächeren Partei eingreifen können. Dabei muss aber berücksichtigt werden, dass sie daneben zumindest auch Gemeinwohlziele verfolgen.[*18]

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[10] EuGH Slg. 1999, I-8453.

[11] R. Freitag. Die kollisionsrechtliche Behandlung ausländischer Eingriffsnormen nach Art. 9 Abs. 3 Rom I-VO. – IPRax 2009, II, S. 112.

[12] S. dazu auch: R. Freitag (Fn. 11).

[13] Siehe V. Loussouarn, P. Bourel, P. Vareilles-Sommières. Droit international privé. Paris 2004, S. 140; U. Magnus. Die Rom I-Verordnung. – IPRax 2010, I, S. 41.

[14] Staudinger/Magnus Art. 34 EGBGB (Fn. 4), Rn. 52; P. Mankowski (Fn. 8), S. 109; Internationales Vertragsrecht/Limmer (Fn. 4), Rn. 391. Die ausdrückliche Anordnung der internationalen Normgeltung z. B: Börsengesetz. 9. September 1998. – BGBl. I, S. 2682; Wertpapierhandelsgesetz, Börsengesetz, Verkaufsprospektgesetz. Stuttgart 1999, Art. 61; Gesetz gegen Wettbewerbsbeschränkungen. 15. Juli 2005. BGBl. I, S. 2114. Zuletzt geändert durch Artikel 1a des Gesetzes vom 18. Dezember 2007. BGBl. I, S. 2966. Siehe unter http://bundesrecht.juris.de/bundesrecht/gwb/gesamt.pdf, Art. 98.

[15] S. auch R. Jankelevitš (Fn. 5), S. 485; A. Bonomi (Fn. 4), S. 231.

[16] J. Kondrig. Der Vertrag ist das Recht der Parteien – Zur Verwirklichung des Parteiwillens durch nachträgliche Teilrechtswahl. – IPRax 2006, V, S. 427; H. P. Westermann (Hrsg.). Erman Bürgerliches Gesetzbuch II. Köln, 2008, Art. 34 EGBGB Rn. 12 (hiernach: Erman Bürgerliches Gesetzbuch/Hohloch); Internationales Vertragsrecht/Limmer (Fn. 4), Rn. 391.

[17] J. Kropholler. Internationales Privatrecht. Tübingen 2006, § 52 IX 1; U. Magnus (Fn. 13), S. 41.

[18] Palandt/Thorn (Fn. 4), Art. 34 EGBGB Rn. 3; H.-J. Sonnenberger. Einriffsrecht – Das trojanische Pferd im IPR oder notwendige Ergänzung? – IPRax 2003, II, S. 107; BGHZ 165, 248, Rn. 26; BAGE 63, 17 Rn. 32 und 33.

3. Voraussetzungen der Anwendung der Eingriffsnormen

Obwohl Art. 16 Rom II-Verordnung aufgrund des Widerstands einzelner Mitgliedstaaten[*19] nur von einer einzigen Art von Eingriffsnormen – internen Eingriffsnormen oder Eingriffsnormen der *lex fori* – spricht, ist gemäß Art. 9 der Rom I-Verordnung zwischen zwei Arten von Eingriffsnormen zu unterscheiden. Nämlich werden neben den Eingriffsnormen der *lex fori* auch sog. externe oder fremde Eingriffsnormen erwähnt. Eine wesentliche Änderung im Vergleich zu der bisherigen Rechtssituation, wo viele Vertragsstaaten von einem möglichen Vorbehalt gegenüber der Berücksichtigung ausländischer Eingriffsnormen Gebrauch gemacht haben, ergibt sich daraus, dass nach dem Inkrafttreten der Rom I-Verordnung am 17. Dezember 2009 sind alle Mitgliedsstaaten unter gewissen Umständen verpflichtet, auch ausländische Eingriffsnormen zu beachten.[*20]

3.1. Eingriffsnormen der lex fori

Wie schon gemäß EIPRG und EVÜ der Fall war, ordnen auch Rom I- und Rom II-Verordnungen an, dass andere Vorschriften nicht die Anwendung der Eingriffsnormen der *lex fori* berühren.[*21] Aufgrund der Formulierungen der genannten Rechtsakte kann es auf erstem Blick scheinen, dass, sofern nichts deren Anwendung berührt, es für die Anwendung der Eingriffsnormen der *lex fori* ausreicht, wenn lediglich deren internationale Geltung festgestellt wird. Allerdings ist es umstritten, ob es zusätzlich zum Anwendungswillen noch des, im Wortlaut nicht erscheinenden, Elements der engen Verbindung bzw. eines objektiven Inlandsbezugs bedarf.[*22] Eine solche zusätzliche Anforderung findet zwar im Wortlaut der Regulierungen der Rom I- und Rom II-Verordnungen eine Stütze, folgt aber wohl aus dem Sinn und Zweck dieser Vorschriften. Das ergibt sich daraus, dass die Durchsetzung eigener, die politische, Wirtschafts- oder Sozialordnung schützenden Normen tatsächlich nur dann Sinn ergibt, wenn diese von der Anwendung zumindest räumlich betroffen ist.[*23]

Es kann dennoch fraglich sein, welche Intensität der Inlandsbeziehung für die Anwendung der Eingriffsnormen verlangt ist oder wie die Inlandsbeziehung festzulegen ist. Einerseits mag der Grad der Inlandsbeziehung schon gesetzlich angeordnet sein. Beispielsweise müssen in Deutschland die Preisvorschriften der Honorarordnung für Architekten und Ingenieure nach ihrer Zielsetzung zwingend zur Anwendung gelangen, wenn die in einem grenzüberschreitenden Architektenvertrag vereinbarten Leistungen für ein im Inland gelegenes Bauwerk erbracht werden.[*24] Auch z. B. die in § 36 Abs. 3 ESchRG[*25] beinhaltete Regulation der allgemeinen Geschäftsbedingungen sieht vor, dass der Vertrag mit allgemeinen Geschäftsbedingungen oder mit deren Erfüllungsort verbundene Tatorte in Estland liegen würden. Beim Fehlen einer solchen Inlandsbeziehung kann die Regulation der allgemeinen Geschäftsbedingungen nicht als Eingriffsnorm angewendet werden. Andererseits, wenn die Intensität der Inlandsbeziehung als Anwendungsvoraussetzung gesetzlich nicht angeordnet ist, ist es in jedem Einzelfall durch Auslegung zu ermitteln, welche Umstände die erforderliche Beziehung zur inländischen Rechtsordnung herstellen. Dabei ist es erheblich zu beachten, dass es auf die zu untersuchende Vorschrift und nicht etwa auf den Vertrag, auf den die Vorschrift angewendet wird, ankommt.[*26]

In letzter Zeit werden in der Fachliteratur beide Elemente – der Anwendungswille der Norm als subjektives Kriterium und Inlandsbeziehung als räumliches Kriterium, zu einander in Wechselbeziehung gesetzt.[*27] Diese Methode bedeutet, dass beide Kriterien negativ voneinander abhängig gemacht werden sollten und der jeweilige Normzweck der Vorschrift zur Intensität der jeweiligen Inlandsberührung in Verbindung zu setzen ist – je wichtiger der Normzweck für grundlegende ordnungs- und sozialpolitische Interesse ist, umso geringer darf die Inlandsbeziehung des jeweiligen Sachverhaltes sein. Umgekehrt kann ein starker Inlandsbezug auch bei einem weniger ausgeprägten öffentlichen Interesse ausreichen. Mit einer solchen Auslegung stimmen auch die in den Erwägungsgründen der Rom I- und Rom II-Verordnung genannten Begründungen überein, gemäß

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19 Palandt/Thorn (Fn. 4), Anh. zu Art. 38-42 EGBGB: Rom II-VO Art. 16, Rn. 1.

20 Bislang hatten die Bundesrepublik Deutschland, Irland, Lettland, Luxemburg, Portugal, Slowenien und das Vereinigte Königreich gem. Art. 22 Abs. 1 lit. a EVÜ einen Vorbehalt gegen die Anwendung ausländischer Eingriffsnormen erklärt.

21 § 31 EIPRG, Art. 7 Abs. 2 EVÜ, Art. 9 Abs. 2 Rom I-Verordnung, Art. 16 Rom II-Verordnung; ebenso Art. 34 EGBGB.

22 Die herrschende Lehre in Deutschland verlangt für die Anwendung der Eingriffsnormen zusätzlich eine gewisse Inlandsbeziehung – Bezüglich der Inlandsbeziehung s. ausführlich: Münchener Kommentar/Martiny (Fn. 4), Art. 34 EGBGB Rn. 130; Palandt/Thorn (Fn. 4), Art. 34 EGBGB Rn. 3; Erman Bürgerliches Gesetzbuch/Hohloch (Fn. 16), Art. 34 EGBGB Rn. 13; Internationales Vertragsrecht/Limmer (Fn. 4), Rn. 393; J. Kropholler (Fn. 17), § 52 IX 1.

23 Internationales Vertragsrecht/Limmer (Fn. 4), Rn. 393.

24 BGH 27.2.2003=IPRax 2003, 449, 436 Aufsatz Kilian/Müller=IPRspr. 2003 Nr. 27; J. Kropholler (Fn. 17), § 52 IX 1.

25 Võlaõigusseadus (Estnisches Schuldrechtsgesetz). 26. september 2001. – RT I 2001, 81, 487; RT I 2010, 7, 30 (hiernach: ESchRG).

26 Internationales Vertragsrecht/Limmer (Fn. 4), Rn. 393.

27 Siehe: Palandt/Thorn (Fn. 4), Art. 34 EGBGB Rn. 3; Internationales Vertragsrecht/Limmer (Fn. 4), Rn. 394.

der die Gründe des öffentlichen Interesses die Anwendung der Eingriffsnormen nur unter außergewöhnlichen Umständen rechtfertigen.[*28]

3.2. Beachtung fremder Eingriffsnormen

3.2.1. Gesetzliche Grundlage für die Beachtung fremder Eingriffsnormen

Neben internen Eingriffsnormen beinhaltete das EVÜ auch eine Obliegenheit, unter bestimmten Voraussetzungen fremde Eingriffsnormen zu beachten.[*29] Daher waren nicht alle Gerichte der Mitgliedstaaten des EVÜ dazu verpflichtet, diese zweite Art von Eingriffsnormen – fremde oder externe Eingriffsnormen –, zu berücksichtigen. Das ergab sich daraus, dass wegen der gegenseitigen Meinungen der Mitgliedstaaten des EVÜ und vielfältiger Kritik über Art. 7 Abs. 1 es gemäß Art. 22 Abs. 1 lit. a EVÜ möglich war, einen Vorbehalt gegen die Beachtung der ausländischen Eingriffsnormen einzulegen.[*30] Aufgrund dieser „Angstklausel" des Art. 22 entfaltete also Art. 7 Abs. 1 EVÜ in Bezug auf drittstaatliche Eingriffsnormen keine gemeinschaftsweite Wirkung.[*31]

Dennoch hatten sich selbst diejenigen Mitgliedstaaten des EVÜ, die den Vorbehalt gegen die Anwendung des Art. 7 Abs. 1 EVÜ eingelegt hatten, einer Berücksichtigung ausländischer Eingriffsnormen bekanntlich nicht gänzlich verschlossen. So hat z. B. der Bundesgerichtshof Deutschlands zwar nicht Art. 7 Abs. 1 EVÜ angewandt, doch hat er statt dessen im Rahmen der *lex causae* auf materiell-rechtliche Rechtsinstitute ausgewichen, indem er bei Verstößen gegen ausländische Eingriffsnormen, deren Wertungen vom deutschen Recht geteilt werden, § 138 BGB angewendet hat. Ähnlich hat die englische Rechtssprechung fallweise eine materiell-rechtliche Berücksichtigung solcher ausländischer Eingriffsnormen in Betracht gezogen, deren Wertung vom englischen Recht geteilt wurde.[*32]

Um die Rechtseinheit im Binnenmarkt zukünftig stärker sicherzustellen, wurde die Möglichkeit, einen Vorbehalt gegen die Beachtung der ausländischen Eingriffsnormen einzulegen, bei der Umwandlung des EVÜ in die Rom I-Verordnung ausgeschlossen, was aber keine endgültige Zustimmung der Mitgliedstaaten gefunden hat.[*33] Als Kompromiss zwischen der Einbeziehung und Ausschaltung der ausländischen Eingriffsnormen wurde beschlossen, den Anwendungsbereich der Vorschrift einzuschränken. Somit wird in der Rom I-Verordnung jedoch zwischen den internen und externen Eingriffsnormen prinzipiell differenziert, von den externen Eingriffsnormen sind aber nur die Eingriffsnormen dieses Staates zu berücksichtigen, in dem die durch den Vertrag begründeten Verpflichtungen erfüllt werden sollen oder erfüllt worden sind.

Folglich ist also auch künftig zwischen zwei Arten von Eingriffsnormen zu unterscheiden, aber während sowohl das EVÜ als auch der Kommissionsvorschlag Eingriffsnormen der *lex fori* und Eingriffsnormen anderer Staaten als zwei Arten von Eingriffsnormen erwähnt haben, so spricht die endgültige Fassung der Verordnung neben der Eingriffsnormen der *lex fori* von Eingriffsnormen des Erfüllungsortsstaates. Bei dieser Änderung handelt sich um eine Begrenzung, die vom europäischem Parlament in der ersten Lesung des Entwurfs praktisch im letztem Moment eingeführt wurde – zunächst wurde gar eine vollständige Streichung der externen Eingriffsnormen erwogen, um Übereinstimmung mit der Rom II-Verordnung zu erzielen.[*34] Das Parlament war mit der Zufügung der Vorschrift in den Text der Verordnung nur unter der Bedingung einverstanden, dass deren Anwendungsbereich mit Eingriffsnormen des Erfüllungsortsstaates abgegrenzt ist.

In der Fachliteratur wird behauptet, die neue Formulierung der Vorschrift entspreche im Wesentlichen englischen kollisionsrechtlichen Vorstellungen. Daraus folge jedoch nicht, dass die Verordnung auch genau so auszulegen und anzuwenden wäre, wie dies dem englischen Verständnis der Behandlung ausländischer Eingriffsnormen entspricht – die Verordnung als ein Gemeinschaftsrechtsakt sei vielmehr den Gesetzmäßigkeiten und Auslegungsprinzipien des europäischen Rechts verpflichtet.[*35]

Die Anwendungsvoraussetzungen der Eingriffsnormen des Erfüllungsortsstaates unterscheiden sich deutlich von der bisherigen Regulation der Eingriffsnormen anderer Staaten (EVÜ Art. 7 Abs. 1). Dennoch handelt es sich bei beiden Vorschriften um eine Norm, deren Anwendungsvoraussetzungen noch spezifischer und

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[28] Erwägungsgrund 37 zur Rom I-Verordnung, Erwägungsgrund 32 zur Rom II-Verordnung.

[29] Art. 7 Abs. 1 EVÜ.

[30] A. Bonomi (Fn. 4), S. 221; G.C. Cheshire, P. M. North (Fn. 4), S. 139.

[31] R. Freitag (Fn. 11), S. 109.

[32] Ausführlich dazu: R. Freitag (Fn. 11), S. 109; S. auch: Vorschlag der Kommission KOM(2005) 650 endg, S. 8; Private International Law (Miscellaneous Provisions) Act 1995 (c. 42), section 14 (4); A. Bonomi (Fn. 4), S. 222.

[33] S. dazu Vorschlag der Kommission KOM(2005) 650 endg.

[34] Bericht über den Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I). (KOM(2005)0650–C6-0041/2005–2005/0261(COD)). 21.11.2007. Siehe unter http://www.europarl.europa.eu/sides/; S. auch R. Freitag (Fn. 11), S. 110.

[35] R. Freitag (Fn. 11), S. 111.

außergewöhnlicher sind, als es bei der Anwendung der Eingriffsnormen der *lex fori* der Fall ist.[*36] Sowohl bei der bisherigen als auch bei der derzeitigen Regulation muss aber darauf Rücksicht genommen werden, dass der andere Staat i.S.d. Norm ebenso ein Mitgliedstaat wie ein Drittstaat sein kann. Obwohl während der Diskussionen über den Inhalt der Rom I-Verordnung am Anfang auch über die Möglichkeit verhandelt wurde, nur Eingriffsnormen der Mitgliedstaaten anstatt drittstaatlicher Eingriffsnormen zu berücksichtigen, wurde dieser Vorschlag abgelehnt.

Wie oben erwähnt, hat die Rom II-Verordnung in Art. 16 auf eine entsprechende Regelung verzichtet, daraus ist aber keineswegs auf ein Verbot der Berücksichtigung ausländischer Eingriffsnormen – ob drittstaatlicher oder zumal solcher aus anderen Mitgliedstaaten – zu folgern. Die Autorin dieses Aufsatzes stützt den, auch in der deutschen rechtswissenschaftlichen Literatur erwähnten Standpunkt, dass das mit der Rom II-Verordnung verfolgte Ziel des internationalen Entscheidungseinklangs gerade eine maßvolle Anwendung ausländischer Eingriffsnormen gebiete, da ansonsten ein Anreiz zum *forum shopping* geschaffen würde.[*37] Folglich sollte auch die Rom II-Verordnung es prinzipiell ermöglichen, ausländische Eingriffsnormen zu berücksichtigen, deren Voraussetzungen bleiben zurzeit aber unklar und es ist äußerst fraglich, ob und wann deren Anwendung in Praxis in Frage kommen könnte. In der deutschen Literatur wird erwähnt, dass sich z. B. für den Bereich der Arbeitskampfmaßnahmen eine Berücksichtigung ausländischer Eingriffsnormen aus Erwägungsgrund 28 ableiten lassen.[*38]

3.2.2. Hinreichende Inlandsbeziehung

Art. 7 Abs. 1 EVÜ hat vorgeschrieben, dass die Eingriffsnormen eines anderen Staates Wirkung verliehen können, wenn der Sachverhalt mit diesem Staat eine enge Verbindung aufweist. In die Formulierung der neuen Regulation dagegen wird eine hinreichende Beziehung des Eingriffsstaates nicht *expressis verbis* angeordnet, sondern es wird nur die Möglichkeit erwähnt, dass Eingriffsnormen des Staates, in dem die durch den Vertrag begründeten Verpflichtungen erfüllt werden sollen oder erfüllt worden sind, Wirkung verliehen können.[*39]

Als der Staat, in dem die durch den Vertrag begründeten Verpflichtungen erfüllt werden sollen oder erfüllt worden sind, von selbst und ganz unvermeidlich mit dem Sachverhalt eine hinreichende Beziehung aufweist, ist dennoch das bis jetzt gegoltene Prinzip in diesem Sinne in Kraft geblieben. Im Vergleich zum EVÜ wird in der Rom I-Verordnung der Anwendungsbereich der Norm aber durch eine Präzision der erforderlichen Inlandsbeziehung bemerkenswert begrenzt. Nach der neuen Verordnung kann somit nur eine Art von hinreichender Beziehung die Anwendung ausländischer Eingriffsnormen rechtfertigen, nämlich der Erfüllungsort, der sich im Ausland befindet. Folglich ermöglicht die neue Verordnung nicht mehr die Berücksichtigung der Eingriffsnormen aller Staaten, die mit dem Sachverhalt eine enge Verbindung aufweisen. Demzufolge, wenn für die Anwendung der ausländischen Eingriffsnormen nach Art. 7 Abs. 1 EVÜ nur eine hinreichend enge Verbindung mit diesem Staat festgestellt werden musste, dann sieht die neue Rom I-Verordnung eine Berücksichtigung der Eingriffsnormen allein dieses Staates vor, in dem die Verpflichtungen erfüllt werden sollen oder erfüllt worden sind, obwohl zudem eine enge Verbindung mit dem Recht eines anderen Staates bestehen mag.

Eine weitere Frage ist, ob es sich beim Erfüllungsort im Sinne des Art. 9 Abs. 3 Rom I-Verordnung um einen rechtlichen oder faktischen Erfüllungsort handelt. Dieser Aufsatz stütz die Maßgeblichkeit des tatsächlichen Erfüllungsortes. Es könnte aber auch gegen dieses Standpunktes argumentiert werden, z. B. mit Begründungen, dass Art. 9 Abs. 3 nach dem Vorbild des englischen Rechts gefasst wurde, in dem überwiegend allein Eingriffsnormen des Erfüllungsortes im Rechtssinne für berücksichtigungsfähig gehalten werden, oder dass es sich bei dem Terminus „Erfüllungsort" um einen Rechtsbegriff handelt. Dennoch wird auch im deutschen Rechtschrifttum ausgehalten, dass es nach der genannten Vorschrift bei bereits erfolgter Leistung im Sinne einer *ex post*-Betrachtung allein auf den Ort ankommen solle, an dem die Vertragsverpflichtungen erfüllt worden sind.[*40] Genau vor diesem Hintergrund soll auch bei noch nicht erfolgter Erfüllung abgestellt werden, wo künftig tatsächlich entscheidende Handlungen zu erbringen sind. Folglich sollten bei bereits erfüllten Vertragspflichten die tatsächlichen Erfüllungsorte von Bedeutung sein, bei noch ausstehender Erfüllung sollte demgegenüber darauf abgestellt werden, wo die Erfüllung nach dem Vertrag tatsächlich zu erfolgen hat.

Zusätzlich zu der Abgrenzung des Anwendungsbereichs der Eingriffsnormen des Staates, die mit dem Sachverhalt eine enge Verbindung aufweisen, wird in der neuen Rom I-Verordnung auch der Umfang deren Berücksichtigung präzisiert – nach Art. 9 Abs. 3 S. 1 Rom I-Verordnung kann nur solchen ausländischen Eingriffsnormen Wirkung verliehen werden, die die Erfüllung des Vertrages unrechtmäßig werden lassen. Die Eingriffsnormen

[36] S. auch: Staudinger/Magnus (Fn. 4), Art. 34 EGBGB Rn. 24.

[37] Erwägungsgrund 6 zur Rom II-Verordnung.

[38] Palandt/Thorn (Fn. 4), Anh. zu Art. 38-42 EGBGB: Rom II-VO Art. 16, Rn. 3.

[39] Art. 9 Abs. 3 Rom I-Verordnung.

[40] S. dazu ausführlich R. Freitag (Fn. 11), S. 114 *ff.* m.w.N. aus Schrifttum.

des Erfüllungsortsstaates können somit auf den Vertrag nur ausschließend einwirken.*[41] Doch auch dann, wenn der Erfüllungsort sich in einem anderen Staat befindet, kann die ausländische Eingriffsnorm nicht unbesehen hingenommen werden. Vielmehr bedarf es vorher einer inhaltlichen Überprüfung, ob sie mit der Rechtsordnung des Forumstaats vereinbar ist und ob andere Anwendungsvoraussetzungen erfüllt sind.*[42]

3.2.3. Diskretion der Gerichte

Sowohl die bisherige Regulation (Art. 7 Abs. 1 EVÜ) als auch das geltende Recht (Art. 9 Abs. 3 Rom I-Verordnung) bestimmen – anders als bei der Eingriffsnormen der *lex fori*, die beim Vorliegen ihrer Anwendungsvoraussetzungen immer anzuwenden sind – dass ausländische Eingriffsnormen unter den in der Vorschrift genannten Voraussetzungen *Wirkung verliehen können*. Damit wird die Wirkungsverleihung in das freie Ermessen nationaler Gerichte gestellt – die Formulierung der Vorschrift stellt klar, dass die Wirkungsverleihung nicht etwa einem Automatismus folgt, sondern auf einer wertenden Entscheidung des Gerichts beruht, bei der die für und gegen die Wirkungsverleihung sprechenden Argumente gegeneinander abzuwägen sind.*[43] Deshalb wird in der Literatur auch behauptet, eine solche Norm erinnere etwas an die Ermessensvorschriften des Verwaltungsrechts.*[44]

Allerdings darf der Richter die Anwendungsentscheidung nicht nach eigenem Gutdünken treffen, da die dafür maßgeblichen Entscheidungskriterien ihm in der Rom I-Verordnung vorgeschrieben sind.*[45] Zunächst ordnet die Verordnung an, dass bei der Entscheidung, ob den ausländischen Eingriffsnormen Wirkung zu verleihen ist, „Art und Zweck“ (oder „Natur und Gegenstand“ in EVÜ) dieser Normen zu berücksichtigen sind. Im Prinzip bedeutet es, dass eine Analyse des Normzwecks und der in der Vorschrift beinhalteten Werte durchgeführt werden muss. Bedauerlicherweise bleibt hier unklar, ob es erforderlich ist, dass das Gericht die ausländische Werte auch teilt oder ob es für deren Beachtung genügt, dass es sie zumindest nicht ablehnt. In der Literatur wird das Erfordernis einer positiven Anerkennung der ausländischen Wertung für rechtspolitisch überzeugender angesehen.*[46] In der Praxis soll nach Ansicht der Autorin dieser Aufsatz aber genügen, wenn die in einer ausländischen Eingriffsnorm beinhalteten Werte nicht den inländischen Werten widersprechen.

Zweitens hat das Gericht bei der Entscheidung, ob den ausländischen Eingriffsnormen Wirkung zu verleihen ist, die Rechtsfolgen deren Berücksichtigung bzw. Nichtberücksichtigung zu bedenken. Damit wird das Gericht über allgemeine außenpolitische Erwägungen hinausgehend zu einer Analyse verpflichtet, ob und in welchem Ausmaß die Berücksichtigung bzw. Nichtberücksichtigung der betreffenden Eingriffsnorm die inländischen aber auch ausländischen Staatsinteressen tatsächlich tangiert.*[47] Es wird in der Literatur argumentiert, dass im Allgemeinen eher solche ausländische Eingriffsnormen berücksichtigt werden, die internationalen Standards entsprechen und international typisch sind. Dagegen können Normen, die das eigene Wirtschafts- und Gesellschaftssystem ernsthaft stören würden oder die der Absicht andere Staaten zu diskriminieren oder zu schädigen dienen, nicht beachtet werden.*[48] Dabei ist aber nicht nur von inländischen Staatsinteressen auszugehen – auch europäische Werte und Wertentscheidungen, die mittlerweile in zahlreichen Rechts- und Politikbereiche, insbesondere im Außenhandelsrecht getroffen wurden, spielen heutzutage bei der Entscheidung über die Berücksichtigung bzw. Nichtberücksichtigung eine immer wichtigere Rolle. Somit dürften z. B. solchen ausländischen Eingriffsnormen keine Wirkung verliehen werden, deren Anwendungsfolge eine Beschränkung des freien Warenverkehrs darstellen würde.*[49]

Zum Schluss muss darauf hingewiesen werden, dass weder das bisher gegoltene Recht noch die neuen Verordnungen dem Richter die Anwendung ausländischer Eingriffsnormen vorausgehend ganz auszuschließen ermöglichen – wenn erforderlich, muss er somit deren Berücksichtigung bzw. Nichtberücksichtigung zumindest erwägen.*[50] Das heißt, das mitgliedstaatliche Gericht hat – in ähnlicher Weise wie bei *ordre public*-Überlegungen – auch bei der Berücksichtigung der ausländischen Eingriffsnormen die für eine Wirkungsverleihung

[41] Eine solche Wirkung bedeutet, dass die Eingriffsnormen des Erfüllungsortsstaates sich von Natur aus der öffentlichen Ordnung nähern - bei der Anwendung des ordre public-Vorbehalts im internationalen Vertragsrecht handelt es sich auch meistens um solche vertragliche Verpflichtungen, welche im Forumstaat unrechtmäßig sind.

[42] Münchener Kommentar/Martiny (Fn. 4), Art. 34 EGBGB Rn. 158.

[43] R. Freitag (Fn. 11), S. 111.

[44] J. Fetsch. Eingriffsnormen und EG-Vertrag. Die Pflicht zur Anwendung der Eingriffsnormen anderer EG-Staaten. Tübingen 2002, S. 54; A. Bonomi (Fn. 4), S. 246; P. Stone. EU Private International Law. Harmonization of Laws. Cheltenham 2006, S. 310.

[45] Ähnlich hat auch das EVÜ die gesetzlichen Grenzen des richterlichen Spielraumes bestimmt. S. dazu auch J. Fetsch (Fn. 44), S. 54; J. Kropholler (Fn. 17), § 52 X 3a; P. Stone (Fn. 44), S. 310.

[46] R. Freitag (Fn. 11), S. 110.

[47] Ausführlich dazu: J. Fetsch (Fn. 44), S. 55.

[48] Münchener Kommentar/Martiny (Fn. 4), Art. 34 EGBGB Rn. 160. z. B. würden auch Freihandelsverbote, die sich gegen das eigene Land richten, keine Anwendung finden.

[49] A. Bonomi (Fn. 4), S. 246; S. auch J. Fetsch (Fn. 44), S. 56; Münchener Kommentar/Martiny (Fn. 4), Art. 34 EGBGB Rn. 160.

[50] J. Fetsch (Fn. 44), S. 53.

in Betracht kommenden Normen in jedem Fall zunächst zu identifizieren und anschließend zu begründen, ob und warum ihrer Berücksichtigung inländische Wertungen entgegenstehen. Ferner sind die Kriterien eines richterlichen Beurteilungsspielraums dem Richter streng vorgeschrieben. Einerseits ist der Richter deshalb verpflichtet, die beiden genannten Entscheidungskriterien (Art und Zweck der ausländischen Norm und ihre Anwendungsfolgen) zu beachten, andererseits bedeutet der Zusammenhang mit den Entscheidungskriterien, dass andere Erwägungen von dem Richter nicht herangezogen werden dürfen. Deswegen besteht es nach Art. 9 Abs. 3 Rom I-Verordnung eine Verpflichtung des Richters, sich mit den Zielen der ausländischen Eingriffsnorm und den Konsequenzen ihrer Anwendung auseinanderzusetzen und die Vereinbarkeit des Normzwecks mit der inländischen Rechtsordnung zu überprüfen.*[51] Demzufolge ist der richterliche Beurteilungsspielraum, der auf den ersten Blick ziemlich groß erscheint, in Wirklichkeit stark eingeschränkt. Folglich, falls nach Ansicht des Richters alle Anwendungsvoraussetzungen der ausländischen Eingriffsnorm tatsächlich gegeben sind und es nicht den inländischen Werten widerspricht, fehlt dem Gericht ein Grund, ausländische Eingriffsnormen oder – wie jetzt in Rom I-Verordnung reguliert – Eingriffsnormen des Erfüllungsortsstaates nicht zu berücksichtigen.

4. Fazit

In dem vorstehenden Aufsatz wurde aufgezeigt, wie problematisch die Festlegung der Kriterien für die Bestimmung der Eingriffsnormen und ihrer Anwendungsvoraussetzungen ist. Zwar soll die *expressis verbis* Verwendung des Terminus „Eingriffsnormen" in den neuen Rom I- und Rom II-Verordnungen die bisher bestehende Begriffswirrung zwischen einfach und international zwingenden Normen beenden und somit die Festlegung von Eingriffsnormen erleichtern. Als entscheidendes Kriterium für die Feststellung des international zwingenden Charakters einer Norm sollen deren Anwendungswille – d.h. Wille, unabhängig vom anwendbaren Recht gelten zu wollen – und der staatspolitische Zweck der Norm dienen. Es bedeutet, dass die fragliche Norm primär überindividuelle Gemeinwohlzwecke verfolgt und sie auch gegen ein an sich geltendes, anderes Recht zwingend durchsetzen will.

Die Untersuchung der zwei Arten von Eingriffsnormen – internen Eingriffsnormen oder Eingriffsnormen der *lex fori* und externen oder ausländischen Eingriffsnormen hat gezeigt, dass für deren Anwendung diverse Voraussetzungen vom Richter zu beachten sind. Die Vorbehaltslösung des EVÜ ist in der Rom I-Verordnung nicht mehr vorgesehen und folglich sind jetzt alle Mitgliedstaaten unter gewissen Umständen verpflichtet, auch ausländische Eingriffsnormen zu berücksichtigen. Obwohl die Beachtung der beiden Arten von Eingriffsnormen trotz fehlender Nennung im Wortlaut der Rom I-Verordnung einer hinreichenden Inlandsbeziehung bedarf, ist der Anwendungsbereich der ausländischen Eingriffsnormen im Vergleich zu inländischen Eingriffsnormen weitaus enger. Ferner wird der Umfang deren Berücksichtigung in der Rom I-Verordnung nur auf solchen ausländischen Eingriffsnormen eingeschränkt, die die Erfüllung des Vertrages unrechtmäßig werden lassen. Außerdem werden die Kriterien eines richterlichen Beurteilungsspielraums für die Berücksichtigung bzw. Nichtberücksichtigung der betreffenden Eingriffsnorm in der neuen Regulation dem Richter streng vorgeschrieben.

[51] Näher R. Freitag (Fn. 11), S. 111.

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Economic Crisis and the Effectiveness of Insolvency Regulation

1. Introduction

In the circumstances of the economic recession, saving of money and the effective use of resources has become a highly popular subject. Also the effectiveness of legal regulation is without doubt an important part of this topic. The objective is not just the ensuring of legal regulation appropriate to the society's level of development but the ensuring of that with the least possible expense. Insolvency law and the regulation of economic relations arising from insolvency—one of the essential elements of legal order—is also of great importance and deserves at least as much attention as the rest of the elements of legal regulation. During an economic crisis, insolvency law obtains a much more prominent place in the social consciousness than usual. This is, above all, due to the rise in the number of insolvency cases (including bankruptcies). An increasing part of the society is beginning to sense insolvency-related issues as personal problems or at least as a source of personal problems.

The author of this article has set three objectives for himself: first, to examine the statistical relationship between the state's economic circumstances and the number of insolvency proceedings; second, to ascertain the principles according to which it is reasonable to evaluate the effectiveness of insolvency regulation, which, in turn, requires definition of the objectives of the legal regulation of insolvency; and, third, to compare different types of procedures and different regulations from the standpoint of expected effectiveness. However, the article also serves a purely practical purpose: to investigate whether the regulation in force in Estonia is sustainable in the circumstances of an economic crisis, and if not, what could be done to improve the regulation. The author has proceeded from the hypothesis that the regulation currently in force is not effective enough to handle the rising number of insolvency proceedings resulting from the economic crisis, and this is not a problem unique to Estonian regulation. Although the article mostly relies on Estonian data, most of the conclusions drawn are also applicable to other countries, with similar regulations. Because of the rising trend of insolvency proceedings, it is likely that finding ways for reducing procedure expenses—above all, for improving the effectiveness of the existing types of procedures and for using such types of procedures as involve the court and the state as little as possible—is unavoidable.

2. The relationship between the number of insolvency proceedings and change in GDP

Comparing the recent years' dynamic of bankruptcy matters filed in Estonian courts[*1], we will see that in 2007, there were 698 bankruptcy cases filed in courts; that is a 67.8% increase in comparison to the previous year, and the number of bankruptcy matters filed in courts in 2008 was 698, which is, in turn, 69.9% more than in the previous year. The data of 2009 are not directly comparable with those of previous years, because of a change in procedure rules[*2], but the total number of filings for action for proceedings concerning petition and other bankruptcy matters was 2,420, which means that the number has more than doubled.[*3] Also, it cannot be claimed that the increase in bankruptcy matters has occurred proportionally to the decrease in other cases. In fact, both the total number of civil matters and the percentage of bankruptcy matters in relation to that number are on the rise. In 2007, 2008, and 2009, that percentage was 2.6%, 4.6%, and 8.2%, respectively.[*4]

The facts presented speak for themselves; however, for planning of the measures necessary for updating the insolvency regulation, it is not enough to state the fact that the number of insolvency proceedings is likely to keep rising in the near future. It is important to know how much and when exactly it is going to increase. To get an overview of the situation, statistical parameters descriptive of essential relations must first be determined. Unfortunately, no statistical indicator provides a complete picture of the process. Each indicator only describes specific aspects of the reality, and making some kind of selection is unavoidable. In order to examine the statistical relations between the current economic situation and the number of bankruptcies, the author has chosen the following statistical indicators:

1. Change in gross domestic product calculated via chain-weighting method in comparison with the same period of the previous year (real GDP growth) has been used as a characteristic of the dynamic of the state's economy. As shown by this indicator, Estonia's economic growth was relatively stable in the years 2001–2005, was exceptionally rapid in 2005 and 2006, began to decrease in 2007, and turned negative in 2008. In 2009, the downturn became very rapid. Such a development curve coincides very well with the common understanding of the development trends of the Estonian economy.
2. The number of court-declared insolvency cases of companies—i.e., abated and declared bankruptcies—has been used as an indicator characteristic of the number of insolvency proceedings. The collected data indicated that the result does not change substantially with use of the ratio of the number of insolvency cases to 10,000 registered undertakings.

To get a good overview, it would be practical to use time-series that are as long as possible, but, unfortunately, the options are limited here. All elements of a time series must be determined on the same bases. In the years following the entry into enforcement of Estonia's first Bankruptcy Act (hereinafter 'BankrA') in 1992[*5], the number of bankruptcies was very small because the launch of the new system required some break-in time, while the number of registered companies was very large as a result of the low cost and ease of business registration proceedings. The number of companies registered in Estonia experienced a significant change in the years 1995–1997, when the principles for founding companies changed and companies were reregistered, moving from the register of enterprises, agencies, and organisations to the commercial register. Therefore, it would be misleading to compare the indicators of the years up to 1997 with those of recent years, which is why earlier years have been discarded in this study. The data, presented in table form, are the following:

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1 Kohtute statistika 2007. aasta kokkuvõte (Summary of Court Statistics for 2007); Kohtute statistika 2008. aasta kokkuvõte (Summary of Court Statistics for 2008). Available at http://www.kohus.ee/10925 (21.03.2010) (in Estonian).

2 With the Amendment Act of the Code of Civil Procedure and the related acts (Tsiviilkohtumenetluse seadustiku ja sellega seonduvate seaduste muutmise seadus. – RT I 2008, 59, 330, 284 (in Estonian)), adopted on 10 December 2008 and enforced on 1 January 2009, the initiation of bankruptcy proceedings, the declaration of bankruptcy, and the matters related to bankruptcy proceedings that cannot be settled by action were classified under matters to be settled by proceedings on petition. That also changed the way they were reflected in court statistics.

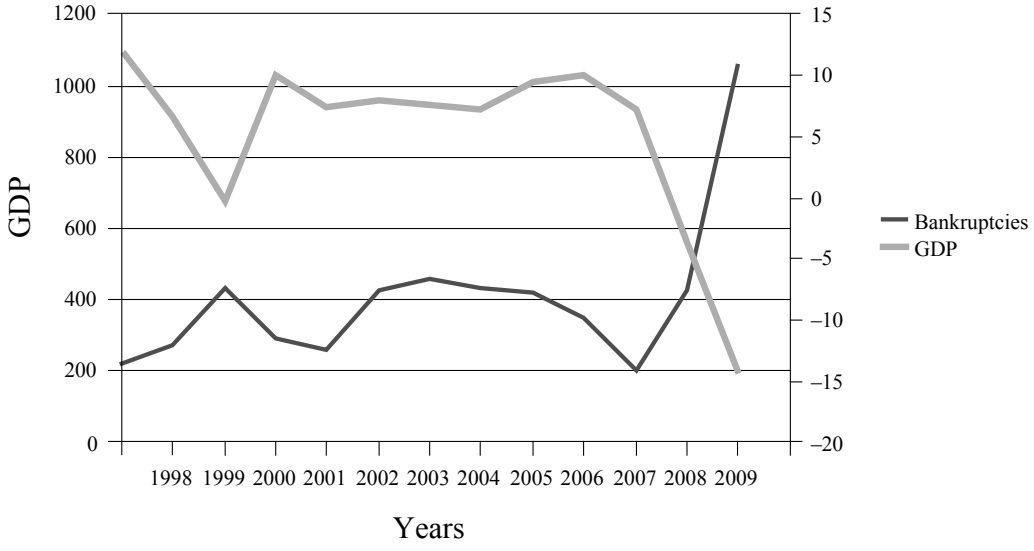
3 I ja II astme kohtute statistilised menetlusandmed. 2009. aasta kokkuvõte (Statistical Procedure Data of Courts of 1st and 2nd instances. Summary for 2009). Available at http://www.kohus.ee/orb.aw/class=file/action=preview/id=49783/I+ja+II+astme+kohtute+menetlusstatistika+2009.a.pdf (21.03.2010) (in Estonian).

4 Kohtute statistika 2007. aasta kokkuvõte (Summary of court statistics for 2007); Kohtute statistika 2008. aasta kokkuvõte (Summary of court statistics for 2008); I ja II astme kohtute statistilised menetlusandmed (Statistical procedure data of courts of 1st and 2nd instances); 2009. aasta kokkuvõte (Summary for 2009). Available at http://www.kohus.ee/10925 (21.03.2010) (in Estonian).

5 Pankrotiseadus. – RT I 1992, 31, 403; 2002, 44, 284 (in Estonian).

Year	**Number of insolvency cases**[*6]	**GDP**[*7]
1997	224	11.7
1998	275	6.7
1999	433	–0.3
2000	293	10.0
2001	257	7.5
2002	427	7.9
2003	459	7.6
2004	436	7.2
2005	419	9.4
2006	352	10.0
2007	202	7.2
2008	429	–3.6
2009	1055	–14.1

In order to show trends, the data have been presented in a line graph:



I will leave more precise correlation calculations to mathematicians, but it is easy to see the clear negative relation between GDP and the number of insolvency cases—the graph lines mirror each other. By examining the maximum and minimum points, one may notice that the relation occurs with a shift of about a year. This could also be formulated by saying that today's trends of GDP change are realised as a corresponding growth or decline in the number of bankruptcies one year later. Given the duration of bankruptcy proceedings[*8], the effect is likely to persist for many years. Decline in GDP therefore increases the work load of courts for more than a year.

It could be said that the author is 'breaking through an open door', and that such a result is entirely expected and this dependency has been noted in the professional literature before.[*9] However, given the novelty of the situation for Estonia, pointing out this problem in such a way is probably necessary nevertheless. It is relevant

[6] Ettevõtlus arvudes 1998–2000 (Business in Numbers, 1998–2000). Tallinn: Justiitsministeeriumi registrikeskus 2001, p. 14 (in Estonian); Paneeluuring. Pankrotid Eestis /2002/ (Cohort Study. Bankruptcies in Estonia /2002/). Tallinn: AS Krediidiinfo 2003, p. 4 (in Estonian); Paneeluuring. Pankrotid Eestis /2004/ (Cohort Study. Bankruptcies in Estonia /2004/). Tallinn: AS Krediidiinfo 2005, p. 4 (in Estonian); Pankrotid Eestis 2007. Paneeluuring (Bankruptcies in Estonia 2007. Cohort Study). Tallinn: AS Krediidiinfo 2008, p. 5 (in Estonian).

[7] Change in chained GDP value in comparison with the same period of the previous year. Available at http://www.stat.ee/43098 (in Estonian); Press release of the Statistical Office, 11.03.2010: Mullu jäi SKP suurim langus II kvartalisse (The Biggest Decrease in GDP Occurred in the 2nd Quarter Last Year). Available at http://www.stat.ee (21.03.2010) (in Estonian).

[8] In the one currently available study that covers Estonia, the average duration of a proceeding is shown to be three years in Estonia. See 10 aastat pankrotimenetlust – mõnel pool tavaline (10 Years of Bankruptcy Proceeding—Common in Some Areas). Äripäev. Finantsjuhtimine. 2006/4, p. 12. Available at http://www.aripaev.ee/pdf/infoleht/fj jaanuar 2006.pdf (21.03.2010) (in Estonian).

[9] See, e.g., P. Ilmakunnas, J. Topi. Microeconomic and Macroeconomic Influences on Entry and Exit of Firms. – Bank of Finland. Discussion Papers 1996/6, p. 24.

to analyse whether and to what extent this (presumably well-known) trend has been taken into account in planning of the developments of the coming years. First and foremost, the question must be answered of whether the existing regulation is effective and inexpensive enough to be able to handle the sharp increase in the number of insolvency proceedings that is very likely to occur in the near future. Given that Estonia lacks experience with crises comparable to the current economic crisis, the study must rely mainly on the experience of other countries. As regards the economic effectiveness of the procedure, there are, however, several opportunities for drawing important conclusions from the statistics for insolvency proceedings in Estonia. Since reorganisation proceedings are still a very young type of procedure in Estonia, it is mostly the statistics pertaining to bankruptcy proceedings that can be used.

3. Evaluation of the effectiveness of the legal regulation of insolvency

The effectiveness of a system can be viewed as the ratio of the level of achievement of the system's objectives (the effect gained) to the resources employed or the expenses used to achieve this.[*10] In order to evaluate a regulation's effectiveness, the objectives of the regulation must, therefore, be determined first. Without a clear idea of the objectives, the level of their achievement cannot be evaluated. Metaphorically speaking, a ship without a target port cannot have a stern wind. By formulating the objectives, one can evaluate to what extent and with what expenses the existing regulation aids in achieving these objectives or, to put it differently, how effective the regulation is. All of the above also applies to the legal regulation of insolvency. If one is to be able to choose between alternative regulations and the different possible procedures, evaluating their effectiveness is of central importance.

Fair distribution of the debtor's assets among the creditors has been regarded as the principal objective of bankruptcy proceedings.[*11] Such an approach shows vividly why execution proceeding for insolvent subjects must be regulated separately from the usual execution proceeding[*12], but it fails to explicate the general objectives of insolvency regulation. If the equal treatment of creditors is considered the sole objective of bankruptcy proceedings, the objective is achieved even if the requirements are not met at all. In more general terms, ensuring fair distribution or putting the creditors in an equal position can only be one component of the objective, one part of the complete system of objectives. The author of this article believes that two sides can be distinguished in this system of objectives. Some authors highlight the component targeted at protecting public interest by claiming that the main objectives of any insolvency regulation are a foreseeable, fair, and transparent distribution of risks among business participants and the preservation and increasing of value for the benefit of all interested parties and the economy in general[*13], whereas others emphasise the component targeted at protecting private interests by claiming that the objective is to distribute the debtor's assets fairly among the creditors. Both sides have a sense and substance particularly in the economic context. The question of whether the regulation could also have non-economic objectives is beyond the scope of this article. In the following passages, the focus is on economic objectives.

In studies and literature on Law & Economics, the economic aspects of a regulation's objective have been examined quite thoroughly. Using the terms of Law & Economics, one can claim that the economic objective of any insolvency proceeding (including a bankruptcy proceeding) is the maximally efficient allocation of resources after the completion of the insolvency proceeding and its achievement with minimal transaction costs.[*14] Therefore, from the perspective of Law & Economics, what matters is

- how many resources (money and time) are spent on an insolvency proceeding and how these expenses are distributed (the amount and structure of transaction costs); and
- how many resources are redistributed by means of insolvency proceedings and what the proportion (ratio) is of transaction costs and the resources to be redistributed.

[10] U. Mereste. Majandusleksikon (Dictionary of Economics). Tallinn 2003, p. 145 (in Estonian).

[11] K. Siibak, P. Kama, M. Vutt. Majandustegevuse õiguslikust keskkonnast Eestis (On the Legal Environment of Economic Activity in Estonia). Tartu: TÜ 1997, p. 108 (in Estonian).

[12] The general procedure of execution proceeding in force in Estonia might put creditors in unequal positions—claims are satisfied in the order of their submission for execution, and those who initiate execution proceeding earlier, gain an advantage. In a situation where the assets do not suffice to satisfy all claims, the regulator has deemed it necessary to place all creditors in an equal position.

[13] Orderly and Effective Insolvency procedures. International Monetary Fund 1999, p. 8. Available at http://www.imf.org/external/pubs/ft/orderly/.

[14] F. Cabrillo, B. W. F. Depoorter. Bankruptcy Proceedings. Encyclopedia of Law and Economics. Gent 2000, p. 261.

The effectiveness of the regulation can thereby be measured in three different stages of the process:

1) *ex ante* (before the insolvency proceeding);
2) *interim* (during the proceeding); and
3) *ex post* (after the proceeding).*[15]

In the first stage, in a situation where the particular insolvency proceeding is not yet being discussed but investments are planned, credit agreements are concluded, and decisions are made with regard to capital structure etc., the regulation is effective if it prevents the launching of unpromising business plans and creates the conditions for the emergence of as few insolvency cases as possible.*[16] A good system must eliminate the possibility of using the bankruptcy proceeding malevolently, among other things.*[17]

Unfortunately, it is very difficult to evaluate the effectiveness of the regulation empirically *ex ante*.*[18] The views expressed in the professional literature vary greatly, and the results of comparison of different studies can be quite surprising. For instance, it has been ascertained that bankruptcies are more frequent in countries where the legal system is more developed and the rights of creditors are better protected.*[19] Several authors have concluded that the great debate of recent decades between two fundamentally different systems of insolvency law (the pro-debtor and pro-creditor system) is, at least from the economic perspective, rather immaterial—economic research shows that there is no statistically significant correlation between the effectiveness indicators of insolvency law and the pro-debtor/pro-creditor system.*[20] More important than the harshness or gentleness of the regulation towards the debtor is the efficiency of the bankruptcy proceeding.*[21]

In the second stage (during the insolvency proceeding), the regulation is effective if it permits solving problems quickly and overcoming insolvency. For the most part, this involves finding a procedure that is as inexpensive and effective as possible. The central problem here is the amount of procedure expenses, but also the distribution of expenses among the various parties is very important. If the protection of private interests is considered important among the objectives of the regulation, it would be reasonable, for example, to reduce the role of courts; if the public interest is highly valued, the opportunities for extra-judicial proceedings should be reduced. These questions no doubt deserve in-depth analysis, which is also being performed quite extensively.

In the third stage, the effectiveness of the regulation can be evaluated empirically by examining, among other things, the direct costs of the process, the recovery rate, the observance of distribution rules, and the duration of the process.*[22] The direct costs of the procedure can be defined as the payments made during the procedure period in order to cover the procedure expenses. This includes the fees of administrators and other consultants as well as all other costs (including those of judicial proceedings) that are directly related to the implementation of the procedure. Recovery rate is defined as the quotient of the total amount paid to all creditors and the sum of the protected claims.*[23] In the third stage, the regulation is effective if post-procedure payments are as large and fair as possible, the costs of the process are minimal, and those involved in the procedure are satisfied with the course of events. It is this aspect of effectiveness that economists tend to study, and some authors believe that discussion around bankruptcy law is typically preoccupied with *ex post* efficiency.*[24]

Regardless of stage, the evaluation of effectiveness requires clarity with regard to the objectives of the regulation. As noted before, the objective of the insolvency regulation is a complex, multi-level, and sophisticated system, in which the particular components of the objective may contradict each other. Such complexity of objectives also necessitates a complex approach to the procedure. Many specialists believe that, when it comes to increasing both *ex ante* and *ex post* effectiveness, the keyword is diversity. The claim that the complexity of the regulation provides a relative advantage with regard to effectiveness has been confirmed by studies.*[25] In September 2003, the report *Best Project on Restructuring, Bankruptcy and a Fresh Start*, prepared by experts

[15] O. Couwenberg, A. Jong. Costs and recovery rates in the Dutch liquidation-based bankruptcy system. – European Journal of Law and Economics 2008/26, p. 107; J. R. Franks, K.G. Nyborg, W. N. Torous. A comparision of US, UK, and German insolvency codes. – Financical Management 1996/25, pp. 86–101.

[16] S. Claessens, L. F. Klapper. Bancruptcy around the world: Explanations and relative use. – American Law and Economics Review 2005/7, p. 283.

[17] F. Cabrillo, B. W. F. Depoorter (Note 14), p. 264.

[18] O. Couwenberg, A. Jong (Note 15), p. 108.

[19] S. Claessens, L. F. Klapper (Note 16), p. 258.

[20] O. Couwenberg, A. Jong (Note 15), p. 125; G. Recasens. Financial Reorganization under Pro-creditors Bankruptcy Laws. – Finance India 2004 (18) 1, p. 643; R. Blazy, B. Chopard, A. Fimayer. Bankruptcy law: a mechanism of governance for financially distressed firms. – European Journal of Law and Economics 2008/25, p. 255.

[21] M. Brouwer. Reorganization in US and European Bankruptcy law. – European Journal of Law and Economics 2006/1, p. 5.

[22] O. Couwenberg, A. Jong (Note 15), p. 108.

[23] *Ibid.*, p. 106.

[24] D. Smith, P. Strömberg. Maximizing the value of distressed assets: Bankruptcy law and the efficient reorganization of firms. Systematic Financial Crisis: Containment and Resolution. Cambridge University Press 2005, p. 237.

[25] S. Djankov, O. Hart, C. McLiesh, A. Shleifer. Debt Enforcement around the World. – Journal of Political Economy 2008 (116) 6, p. 1107.

working under the auspices of the European Commission, was published.[*26] One of the main conclusions of the experts was that legal regulation should provide an opportunity to avoid liquidating bankruptcy proceedings in suitable cases. The possibility of using different types of insolvency proceedings and the employment of economic factors to foster optimal choice are of great importance here. The authors of a study prepared by the International Monetary Fund claim with good reason that in the development of insolvency legislation by states, the key question is how to find such a balance among the different social, political, and economic interests as would prompt all those involved in economic processes to participate actively in the system to be created.[*27] In essence, this is the formulation of the objective of the legal regulation of insolvency *ex ante*. The ways of overcoming insolvency should be viewed as a unitary complex that enables finding an appropriate method for solving each individual case. In the event of equal efficiency, cheaper types of procedure should be favoured. It is important to ensure not only the multitude of options but also the opportunity for smooth transition from one alternative to the next.[*28]

The system of the objectives of the regulation cannot be viewed as a definite and unchangeable catalogue in the order of importance. In consideration of the changes in the economic situation, the different components of the objective can have different weights in different stages of development. In a situation of rapid economic development, the progress of the regulation toward greater formalisation was understandable, which also inevitably entailed an increase in the importance of courts and other institutions, whereas in the circumstances of an economic recession, the idea of saving resources dictates that attention should be focused on reducing procedure expenses and advancing informal procedures. The system should be not only complex but also dynamic. But is that idea practicable in, for example, Estonian circumstances?

Formally speaking, there are only two insolvency proceedings currently used in Estonia: the (liquidating) bankruptcy proceeding and reorganisation. From a practical standpoint, however, it would be reasonable to consider also as separate types of procedures rehabilitation under the bankruptcy proceeding, compromise both under and outside the bankruptcy proceeding, and abatement of bankruptcy. In special cases, also the establishment of creditors' control and compulsory dissolution can be employed as ways of overcoming insolvency.

Lawyers and practicians agree that the ineffectiveness of insolvency proceedings at a microeconomic level and *ex post* is mostly due to the bankruptcy being filed for too late, when the debtor is already in an irrevocably bad economic state.[*29] But could this problem be eliminated by improving the regulation? Perhaps it would be possible, by legalising additional alternatives, to make the debtors assess their solvency at an earlier stage in their monetary trouble and thereby take action earlier? Given that this problem occurs in different countries to a differing extent, there is reason to assume that some relation to the regulation in force exists. In many countries, the number of types of procedure possible is much greater than in Estonia, and it is being increased even further. In France, for instance, the number of possible procedures has risen significantly in recent years.[*30] Perhaps Estonia should consider this option as well.

4. Ways of overcoming insolvency in Estonia

Classical (liquidating) bankruptcy proceeding. An important step in the development of Estonian insolvency law is the amendments to the Bankruptcy Act that entered into force on 1 January 2010.[*31] The amendments partially result from the need to specify the objectives of the bankruptcy proceeding and to emphasise the effect of the regulation *ex ante*. The authors of the amendment find, for example, that the state should ensure that insolvent legal entities do not participate in civil circulation, because that might restrict that civil circulation. The state is able to fulfil this task only if it tries to remove all associations without assets from circulation either through bankruptcy proceedings or via liquidation proceedings.[*32] This wording also conceals the main shortcoming of the Estonian regulation—our regulation tends to favour 'removal from circulation'

[26] Best Project on Restructuring, Bankruptcy and a Fresh Start. Available at http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/pdf_final_report/ (27.01.2010).

[27] Orderly and Effective Insolvency Procedures. International Monetary Fund 1999, p. 13. Available at http://www.imf.org/external/pubs/ft/orderly/ (27.01.2010).

[28] Principles and Guidelines for Effective Insolvency and Creditor Right System. The World Bank 2001, p. 8. Available at http://www.worldbank.org/ifa/ipg_eng.pdf (27.01.2010).

[29] J. A. A. Adriaanse. Restructuring in the shadow of the law. Informal reorganization in the Netherlands. Dissertation. Univesity of Leiden 2005, p. 142 Available at https://openaccess.leidenuniv.nl/bitstream /1887/9755/1/Dissertation_Adriaanse.pdf; J. Luik. Saneerimine eeldab reaalset tegevust ja mastaapi (Reorganisation Requires Real Activity and Scope). – Eesti Majanduse Teataja 2010/1, p. 43 (in Estonian).

[30] Insolvency Law Reform In France: Three Years On. Contributed by Denton Wilde Sapte Law Office. Paris, 12.06.2009. Available at http://www.internationallawoffice.com/Newsletters/Default.aspx.

[31] Kohtutäituri seadus (Bailiffs Act). Adopted on 9.12.2009. – RT I 2009, 68, 463 (in Estonian).

[32] Seletuskiri kohtutäituri seaduse eelnõu juurde. Eelnõu nr 462 SE (Explanatory Memorandum to the Draft Bailiffs Act. Draft No. 462 SE), p. 36. Available at http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=594370&u=20100129115045 (27.01.2010) (in Estonian).

over transforming into solvent, and state-organised proceedings over the initiative of the concerned parties. First and foremost, an attempt should be made to overcome insolvency while maintaining the debtor, and the debtor should be removed from commerce only if there is no other option. The regulation in effect has indeed provided some opportunities for this[*33]; the use of those opportunities, however, has succeeded only in exceptional cases.

Abatement of the bankruptcy proceeding. Considering the very large percentage of abated bankruptcies in Estonia, this subclass of proceedings deserves special attention. The main problem of the regulation in force might well be the fact that, because of abatement of bankruptcies, liquidating bankruptcy proceedings do not usually fulfil their most direct objective, which is, pursuant to § 2 of the Bankruptcy Act as in force, the satisfaction of the creditors' claims from the debtor's assets. This is confirmed, for example, by the statistics concerning the abatement of bankruptcies published by the Statistical Office and the Ministry of Justice. In the years 2002–2004, bankruptcy was left undeclared on account of abatement in almost half of the insolvency cases identified by the court.[*34] Usually the reason for the abatement of proceedings[*35] was the insufficiency of the debtor's assets even for covering the expenses of the bankruptcy proceeding, which is why all claims were left fully unsatisfied. The Statistical Office and the Ministry of Justice have not disclosed the statistics for more recent years, but, according to the data published in the one relevant study, the situation has not improved in the following years; in fact, the contrary holds true: in more recent years, the proceedings have been abated in sometimes more than half of the cases where insolvency has been identified by the court.[*36] In cases of abatement of bankruptcy proceedings, even the expected direct procedure expenses exceed the value of the resources to be distributed. The actual redistribution of resources takes place before the start of the official procedure and is verifiable only to a very limited extent and *post factum*. Therefore, this is an extremely ineffective procedure and the development of the regulation should be targeted at reducing the number of such proceedings.

Rehabilitation and compromise under the bankruptcy proceeding. The concept of rehabilitation was first explained in Estonian law with § 57[1] of the first Bankruptcy Act, in the formulation that entered into force on 1 February 1997: rehabilitation of a debtor that is a legal entity consists in the application of measures that enable the satisfaction of the claims of the creditors through the continuation of the debtor's economic activity. Unfortunately, this regulation has been used in very few instances in the course of this long time span. Despite its several amendments, the Bankruptcy Act in force in Estonia still has one (perhaps formal) deficiency: in the case of a company, compromise also requires rehabilitation, since, pursuant to § 179 (1) of BankrA, the company's rehabilitation plan is always included as an annex to the compromise proposal if the debtor is involved in economic or professional activity. Compromise aimed at saving on procedure expenses and resulting in the liquidation of the company is ruled out, at least pursuant to this provision. This fault would be easy to remove by means of a simple amendment. Also the reorganisation proceeding, whose enforcement has been welcomed by Estonian lawyers[*37] and recognised as a positive step forward by foreign experts[*38], could do without this deficiency.

Reorganisation. The procedure of reorganisation has now been in use in Estonia for more than a year[*39], and attempts to use it have been quite frequent. However, the effect of the new regulation is difficult to assess at first. Studies by researchers in field of Law & Economics have confirmed, on the basis of statistical research, that the reorganisation proceeding has high microeconomic effectiveness. According to some studies, the payments to creditors in the case of reorganisation of large public companies are almost twice as big as in the case of sale in bankruptcy going-concern sales.[*40] Researchers have also pointed out that an advantage of the reorganisation option should prompt the debtor to deal with its insolvency issue in an earlier stage.[*41] At the same time, it has been claimed that reorganisation is a suitable method for large-scale companies only, and in

33 Bankruptcy Act provides for the opportunity of rehabilitation and compromise under the classical bankruptcy proceeding.

34 Pankrotiavaldused esimese astme kohtus. Statistikaamet (Bankruptcy Petitions in Court of First Instance. Statistical Office). Available at http://pub.stat.ee/px-web.2001/Dialog/varval.asp?ma=Js133&ti=PANKROTIAVALDUSED+ESIMESE+ASTME+KOHTUS&path../Database/Sotsiaalelu/17Eigus_ja_turvalisus/04Eigussusteem/&lang=2 (in Estonian); Pankrotiasjade statistika 2002 kuni 2004. Justiitsministeerium (Statistics of Bankruptcy Matters from 2002 to 2004. Ministry of Justice). Available at http://www.just.ee/orb.aw/class=file/action=preview/id=11457/pankrotistats.pdf (27.01.2010) (in Estonian).

35 In the Bankruptcy Act in force up to 1 January 2004, the concept of abatement was broader that in the current act. See §§ 15 (1) and 93 of Bankruptcy Act.

36 Paneeluuring. Pankrotid Eestis (Cohort Study. Bankruptcies in Estonia). Tallinn: Krediidiinfo AS 2008, p. 5 (in Estonian).

37 J. Luik (Note 29), p. 43 (in Estonian).

38 Republic of Estonia: Staff Report for the 2009 Article IV Consultation. International Monetary Fund. IMF Country Report No. 10/4, January 2010. Available at http://www.imf.org/external/pubs/ft/scr/2010/ cr1004.pdf (27.01.2010).

39 Saneerimisseadus (Reorganisation Act). Adopted on 4.12.2008. – RT I 2008, 53, 296; 2010, 2, 3 (in Estonian).

40 L. M. LoPucki, J. W. Doherty. Bankruptcy Fire Sales. – Michigan Law Review 2007 (106) 1, p. 44; O. Couwenberg. Survival Rates in Bankruptcy Systems: Overlooking the Evidence. – European Journal of Law and Economics 2001 (12), p. 270.

41 A. S. Ravid, S. Sundgren. The comparative efficiency of small-firm bankruptcies: a study of the US and Finnish bankruptcy codes. – Financial Management 1998 (27) 4, p. 31.

the case of small companies, selling of the bankruptcy estate in the form of going-concern is preferable.*[42] It must be noted that, according to the criteria of the world economy, there are practically no large-scale companies in Estonia. Most of our companies qualify as small companies.*[43] The size of the companies that are winding up, in turn, is exhibiting a trend of decreasing. In the years 2002–2006, almost half of the dissolved companies had 1–4 employees. The percentage of the companies that had operated without employees during their last year of activity also grew significantly: in 2003, the percentage was 18%, whereas by 2006, this indicator had doubled, reaching 40%. Companies with 10 or more employees made up under four per cent of those liquidated in 2006.*[44]

The first steps of the reorganisation proceeding in Estonia confirm the suspicions of the sceptics. The relatively large number of reorganisation applications submitted to courts and the very low rate of their satisfaction*[45] show that the reorganisation proceeding is only just seeking its place among insolvency proceedings. So far, the legalisation of this proceeding has somewhat reduced the overall effectiveness of insolvency proceedings. It is becoming customary that first of all, an attempt is made to reorganise the debtor, but afterwards a bankruptcy proceeding must nevertheless be performed also. If the reorganisation proceeding turns out to be just a means for delaying the submission of a bankruptcy petition, the effect of this regulation can *ex ante* be regarded, rather, as negative. One expensive proceeding is thereby replaced by two expensive proceedings instead of a cheaper one. However, these might prove to be transitional problems.

Compromise under the law of obligations. Considering the high costs related to bankruptcy and reorganisation proceedings, one finds it in the interests of both the creditors and the debtor to forgo proceedings. The creditors would agree (if they had enough information) to partially abandon their claim in order to hasten the recovery of money and save on procedure expenses, while the shareholders and board members of the debtor would agree to liquidate the company in order to relieve themselves of the inconveniences resulting from the bankruptcy proceeding. Pursuant to the regulation in force in Estonia, this is possible only with the consent of all creditors. The achievement of a consensus, however, is extremely difficult in practice. In order to gain the consent of all creditors, the need may arise to fully satisfy the claims of the creditors who refuse to co-operate. If a bankruptcy proceeding of the debtor must later be initiated despite the compromise, this can be regarded as unequal treatment of creditors under § 113 (1) 2) of BankrA, and the performance can be recovered. Such a regulation does not favour co-operation between creditors. The important advantages of a compromise reached in the course of a bankruptcy proceeding emerge here—the binding nature of the decision made also for those who did not support the compromise and a decision that can be used as an execution document. While making a compromise with a majority vote is probably not transferable to informal procedure, the version of the Conciliation Act that entered into force on 1 January 2010 provides a new opportunity for formalising the decision as an execution document.*[46] At first sight, referring the conciliation procedure to the subject of insolvency might seem artificial, but the result of conciliation activity can, among other things, also be a multilateral compromise. Pursuant to § 14 of the act, such an agreement can in some cases also be formalised as an execution document.

Creditors' control. In some cases, the option of overcoming insolvency through establishment of creditors' control—whether permanent or temporary—should be considered. The former can be done, for example, by increasing share or stock capital in a special issue to creditors. The creditors pay for the acquired holding by setting off claims. Such a procedure is enabled in Estonia by §§ 194[1] and 346 of the Commercial Code.*[47] Temporary control is possible, for example, in the event of selling of the debtor's shares or stocks from shareholders to creditors with the right of repurchase, as permitted under §§ 238 and 242 of the Law of Obligations Act.*[48] In several countries, creditors' control as a form of procedure is relatively common. One of the best-known systems of establishing creditors' control is the procedure developed and promoted by the Bank of England—the so-called London approach.*[49] The use of this procedure spread mainly in the financial sector*[50] and received recognition from scientists and practicians also in other countries.*[51] The procedure

[42] G. McCormak. Rescuing Small Businesses: Designing an "Efficient" Legal Regime. – The Journal of Business Law 2009/4, p. 299; O. Couwenberg (Note 40), p. 273.

[43] See, e.g., G. McCormak (Note 42), p. 316.

[44] S. Sutova. Ettevõtluse demograafia (Business Demographics). – Teemaleht 2008/4. Available at http://www.stat.ee/30598 (21.03.2010) (in Estonian).

[45] L. Linnamäe. Saneerimisseaduse autor: paljude firmade päästmine ebaõnnestubki (Author of Reorganisation Act: The Saving of Many Firms Indeed Fails). – E24 Majandus, 7.07.2009. Available at http://www.e24.ee/?id=139280 (27.01.2010) (in Estonian).

[46] Lepitusseadus (Conciliation Act). Adopted on 18 November 2009. – RT I 2009, 59, 385 (in Estonian).

[47] Äriseadustik. Adopted on 15.02.2005. – RT I 1995, 2628, 355; 2010, 20, 103 (in Estonian).

[48] Võlaõigusseadus. Adopted on 26.09.2001. – RT I 2001, 81, 487; 2010, 7, 30 (in Estonian).

[49] See P. Kent. The London Approach. – Journal of International Banking Law 1993, p. 81.

[50] Principles and Guidelines for Effective Insolvency and Creditor Right System, p. 27. The World Bank 2001. Available at http://www.worldbank.org/ifa/ipg_eng.pdf (27.01.2010).

[51] J. A. A. Adriaanse (Note 29), p. 143; Building Effective Insolvency Systems. Available at www.wordbanjk.org/legal/insolvency_ini/WG6-paper1.htm.lk (27.01.2010).

is largely based on the assumption that the majority of the claims against the debtor have converged in the hands of one creditor. Moreover, activity is governed more by custom than by law.*[52] In the presence of similar preconditions, such a procedure can also be used in Estonia. At least one such case has already been discussed in the media.*[53] Given that, from the perspective of written law, this is an informal procedure, internationally recognised practice could largely be relied on, and amendment of the existing laws is not unavoidably necessary. The designs to be used and the descriptions of working principles have been compiled and issued as recommended materials.*[54]

Deletion from the register. Even just a few years ago, an extremely easy and inexpensive insolvency proceeding was in use in Estonia. If a company or a commercial association lacked assets, the registrar gave a warning to the company about deletion from the register and issued a relevant notice. If the company had not submitted data on the existence of assets to the registrar within four months from the date of the warning, the registrar deleted the company from the commercial register. Presumably, this procedure was abandoned on account of its potential misuse. Unfortunately, the commercial register still contains a significant number of companies that are of no economic interest to anyone. Their voluntary liquidation at the initiative of shareholders or stockholders could be hindered for various reasons, while the completion of a classical liquidating bankruptcy proceeding can take up a disproportionately large amount of resources. It is in the public interest to, on the one hand, remove insolvent companies from circulation and ensure the conformity of the commercial register data to reality and, on the other hand, do this as cheaply as possible. To perform this task, it is reasonable to provide for procedures of differing complexity, depending on how much the society or the creditors are prepared to spend on conducting the particular procedure. In the case of a hopelessly insolvent company, using the state's resources for the activity of the court, the temporary trustee in bankruptcy, and other participants in the procedure is reasonable only in the presence of public interest in the procedure. In the absence of such interest, this simplified deletion procedure could, in the author's opinion, well be used with those companies. If somebody is interested in the performance of a more thorough procedure, he should certainly be guaranteed such an opportunity. Publication of a relevant notice in the media should also exclude the misuse of this simplified procedure.

As mentioned above and as the International Monetary Fund has also recommended to us, the development of insolvency law in Estonia should better facilitate the use of extra-judicial proceedings.*[55] According to the experts of the World Bank, however, all 'semi-informal' ways of saving the debtor must also be utilised.*[56] For that purpose, it is important to familiarise the concerned parties with the alternative methods of overcoming insolvency, including semi-formal and informal procedures that might be even more effective than formal procedures from an economic standpoint.*[57]

It would certainly increase the options if the regulator were to consider providing some safeguards to the debtor for the time during which the debtor regards the restoration of solvency as possible and is actively involved in restoring solvency or negotiating to achieve a compromise. Such an option of so-called bankruptcy protection exists in several countries, such as France.*[58] In regulation of the insolvency proceedings that take place without the direct involvement of a court, the possibility of applying four essential principles, depending on the case, should be considered:

1) the binding nature of decisions associated with an alternative procedure also for those creditors who were themselves not in favour of such a procedure;
2) the immunity of the debtor to judicial claims (including bankruptcy petitions) during the procedure;
3) increasing the options for improving the debtor's situation, especially the opportunity for recovering assets; and
4) suspending the charging of interest on the claims against the debtor.

[52] Orderly and Effective Insolvency Procedures (Note 13), p. 14.

[53] P. Reiljan, K. Bank. Swedbank laseb eestlastel Sportlandi päästa (Swedbank Lets Estonians Save Sportland). – Äripäev, 29.01.2010 (in Estonian).

[54] See, e.g., INSOL International. Statement of Principles for a Global Approach to Multi-Creditor Workouts. Available at http://www.insol.org/Lenders.pdf 30 (27.01.2010).

[55] Republic of Estonia: Staff Report for the 2009 Article IV Consultation. International Monetary Fund. IMF Country Report No. 10/4, January 2010, p. 31. Available at http://www.imf.org/external/pubs/ft/scr/2010/ cr1004.pdf (27.01.2010).

[56] Principles and Guidelines for Effective Insolvency and Creditor Right System. The World Bank 2001, p. 29. Available at http://www.worldbank.org/ifa/ipg_eng.pdf (27.01.2010).

[57] *Ibid*.

[58] Insolvency Law Reform In France: Three Years On. Contributed by Denton Wilde Sapte Law Office. Paris, 12.06.2009. Available at http://www.internationallawoffice.com/Newsletters/Default.aspx.

In practical terms, the application of such measures would mean giving official recognition to informal restructuring. There are several objections to this, but in certain cases, especially in the circumstances of an economic crisis, this might be expedient.

5. Conclusions

The article has demonstrated, using Estonia as an example, that the number of insolvency proceedings has a negative correlation with economic growth. Moreover, the trends of GDP change are realised as a corresponding increase or decrease in the number of bankruptcies about a year later. This leads to the conclusion that the number of insolvency proceedings and that of the related court cases is going to rise in the near future. Also their proportion among all civil matters is going to increase. Stating the fact that the objective of the insolvency regulation is a complex, multi-level, and sophisticated system wherein individual components of the objective might even contradict each other to a certain extent, the article focused on examining the economic effectiveness of the complex of objectives *ex post*. The author of the article is convinced (especially in view of the large percentage of abated bankruptcies) that the regulation in force in Estonia is not economical enough, in financial terms, and does not ensure maximal utilisation of resources. However, this is not a problem unique to Estonia. Presuming that there is a need to save resources in the circumstances of an economic recession, creating different opportunities and favouring procedures that involve the state and other institutions as little as possible should be given top priority in the advancement of the insolvency regulation.

The means of overcoming insolvency should be regarded as a unitary complex that enables finding an appropriate method for solving each individual case. The studies that this article refers to have come to the conclusion that the complexity of a regulation provides relative advantage in terms of effectiveness. It is important to ensure not only a multitude of options but also the opportunity for smooth transition from one alternative to the next. In the event of equal efficiency, cheaper types of procedure should be favoured. The article took a closer look at the changes in the regulation of different insolvency proceedings in the recent past and also at potential developments in the near future. In a situation of rapid economic development, the progress of the regulation toward greater formalisation was understandable, which also—inevitably—entailed an increase in the importance of courts and other institutions, whereas in the circumstances of an economic recession, the idea of saving resources dictates that attention should be focused on reducing procedure expenses and advancing informal proceedings. The system should be not only complex but also dynamic.

In addition to the enforcement of new legislation, the communication of legal and economic knowledge to all undertakings is important. Quite a few insolvency cases could be resolved more easily and inexpensively if those involved had a clear overview of the various options and were able to predict their economic efficiency. Hence, it is not only the enforcement of a complex regulation that is important but also the introduction of the opportunities of said regulation to the parties concerned.

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The Over-Indebtedness Regulatory System in the Light of the Changing Economic Landscape[*1]

The number of individuals' insolvency proceedings, including cross-border insolvency proceedings, has increased globally. The last quarter century has witnessed a rapid expansion of consumer credit, manifested most notably through the proliferation of credit-card lending. This expansion has led to what social scientists term the democratisation of consumer credit, a process in which credit is extended to social groups to whom it was not traditionally available.[*2] For instance, 20 years ago an academic book about consumer bankruptcy systems around the world would not have been possible, because most countries did not have a consumer bankruptcy system.[*3] In 2001, the Council of the European Union noticed that only 10 European Union member states had specific legislation concerning the collective settlement of debts governing the social, legal, and economic treatment of over-indebted consumers, whereas ordinary debt collection procedures continued to apply in the other Member States.[*4] The democratisation of credit has led to a re-examination of the importance of having consumer insolvency laws, and the grant of a discharge for over-indebted individuals. On the basis of social and economic considerations, countries have decided that it is necessary to develop solutions to address the increase in the number of consumer over-indebtedness cases, by somehow regulating this type of insolvency. The question remains—how? The current financial crisis has influenced states to find and take under consideration more rapid measures to deal with consumer over-indebtedness problems. The question arises then of how to find solutions to the problem of over-indebtedness and regulate individuals' insolvency, also in cross border insolvency cases. The author of this paper is of the opinion that insolvency law should always be simple, transparent, and efficient and should prevent or support mechanisms and developments that appear in the economy. Unfortunately, governmental actions on national and EU level reveal no transparent systematic approach to the problem of individuals' over-indebtedness. Furthermore, different policies are applied also in cross-border insolvency proceedings, which influence the simple and proper functioning of the procedures, especially in the context of secondary insolvency proceedings based on Council Regulation (EC) 1346/2000, of 29 May 2000, on insolvency proceedings (hereinafter 'European Insolvency Regulation',

[1] This research was supported by European Social Fund's Doctoral Studies and Internationalisation Programme DoRa.

[2] D. McKenzie Skene, A. Walters. Consuming Passions: Benchmarking Consumer Bankruptcy Law Systems. – P. J. Omar (ed.). International Insolvency Law. Themes and Perspectives. Ashgate 2008, p. 136.

[3] J. Niemi-Kiesiläinen, I. Ramsay, W. C. Whiteford. Introduction. – J. Niemi-Kiesiläinen, I. Ramsay, W. C. Whiteford. Consumer Bankruptcy in Global Perspective. Oxford, Portland, Oregon: Hart Publishing 2003, p. 1.

[4] Council Resolution of 26 November 2001 on consumer credit and indebtedness. – OJ 2001/C 364/01.

or EIR).[*5] Therefore, the purpose of this paper is to consider possible regulatory measures in finding a balance between the needs to provide an appropriate mechanism for enabling over-indebted individuals to start over with their lives and social concerns that debts should always be paid (*pacta sunt servanda*).

1. Different national approaches to individuals' insolvency

Credit is as old as mankind. Representing a pattern of social behaviour, credit also is subject to human weaknesses and environmental conditions. There is no causal necessity ensuring that a loan will be repaid. On the contrary, default is an ever-present possibility, although the relative risks of default can be identified and managed to an extent. Where there is credit, non-payment can equally occur. Although debts are generally repaid, the possibility of default can be seen as an inevitable feature of the credit phenomenon. Laws from the earliest times (the Code of Hammurabi, the Twelve Tables of early Rome, laws of ancient Greece, etc.) reflect this and provided various remedies for a creditor against the insolvent, from enslavement to death. Under early Roman law, when a debtor had too many creditors, the law gave them the option of cutting the debtor in pieces to be divided among themselves.[*6]

Nowadays, there are two primary paradigms for individuals' insolvency: the American liberal paradigm and the European welfare state paradigm.[*7] Consumer bankruptcy law in the United States (US) is described as a market function in which bankruptcy serves as an exit from and a complement to the open-access credit market system.[*8] Conversely, a goal of the welfare state is to protect citizens against risks caused by natural disaster, accident, illness, and economic misfortune. In such systems, the state actively promotes equality of citizens and legal regulation as one means by which politically set goals are achieved.[*9]

In everyday usage, the term 'bankruptcy' carries the meaning of personal disaster and a fate to be avoided at all costs. Yet, in the majority of modern societies, the process of bankruptcy aims to relieve the debtor from the cumulative burden of debts that, as a result of his current economic circumstances, he cannot realistically repay in full. Historical and cultural differences underlying civil and common law jurisdictions also lead to different approaches to bankruptcy. Notably, in the US, the term 'bankruptcy' refers generically both to liquidation and to reorganisation, with or without a trustee. A trustee is always appointed in liquidation (Chapter 7 in the US Bankruptcy Code) and in repayment plans for wage-earners (Chapter 13), and one may be appointed in exceptional circumstances in reorganisation (Chapter 11). Natural persons, corporations, and most other entities are eligible to seek protection under Chapter 7 or Chapter 11 of the US Bankruptcy Code, which can be applied to both natural persons and corporations.[*10] Chapter 13 is available only to physical persons with a regular income.

Even terms such as 'consumer bankruptcy', 'indebtedness', 'over-indebtedness', 'debt counselling', 'debt restructuring', and 'fraudulent debts' may have a different meaning and usage from one country to another. For example, in Portugal, indebtedness means the amount owed by a family unit, whether resulting from a single credit obligation or from multiple obligations, from multiple sources. Frequently, where there is more than one debt, the concept of multi-indebtedness is applied.[*11] As used in the INSOL International Consumer Debt Report (hereinafter 'INSOL Report')[*12], the term 'consumer debtor' refers to a debtor whose liabilities are incurred primarily for private, family, or household purposes, as distinct from business debts incurred either on the debtor's own account or in partnership with others, or arising from guarantees given on behalf of limited-liability entities. The INSOL Report describes the following types of consumer debts: survival

5 Council Regulation (EC) No. 1346/2000 29 May 2000 on insolvency proceedings. – OJ S 160, 30.06.2000, pp. 1–18.

6 J. Kilppi. The Ethics of Bankruptcy. London, New York: Routledge 1997, p. 9.

7 Habermas distinguishes between two contemporary legal paradigms, the liberal paradigm and the welfare state paradigm. See J. Niemi-Kiesiläinen. Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy. – J. Niemi-Kiesiläinen, I. Ramsay, W. C. Whiteford. Consumer Bankruptcy in Global Perspective. Oxford, Portland, Oregon: Hart Publishing 2003, pp. 46 and 48.

8 *Ibid*., pp. 46–47.

9 *Ibid*., p. 48.

10 Chapter 11 is only available for natural persons of a higher net worth, whereas most natural persons will be eligible for a wage earner plan of reorganisation under Chapter 13.

11 M. M. L. Marques, C. Frade. Searching For an Over-indebtedness Regulatory System for Portugal and the European Union. – J. Niemi-Kiesiläinen, I. Ramsay, W. C. Whiteford. Consumer Bankruptcy in Global Perspective. Oxford, Portland, Oregon: Hart Publishing 2003, p. 121.

12 INSOL International, Consumer Debt Report—Report of Findings and Recommendations, May 2001. Available at www.insol.org/pdf/consdebt.pdf (15.03.2010).

debts*[13], over-consumption debts*[14], compensation debts*[15], relational debts*[16], accommodation debts*[17], and fraudulent debts.*[18] In short, as defined in the INSOL Report, a consumer debtor's liabilities are related primarily to bank overdrafts, loans from banks and other financial institutions, personal credit cards, mortgages, and hire-purchase or credit-sales agreements associated with purchases of capital items such as automobiles.*[19] No generally recognised definition of a consumer debtor exists. These words may have different meanings in different jurisdictions. Whether liquidation or rehabilitation procedures by nature, these are usually collectively referred to as insolvency procedures.*[20]

The credit card is a symbol of consumer-led societies. As consumer-led economies having high levels of personal financial credit and allowing a discharge, the US and Canadian systems depend on important monitoring and control mechanisms to manage the risks of default. Instead of punishing the debtor, the US Bankruptcy Code facilitates a 'fresh start' for a debtor at the conclusion of a bankruptcy proceeding by allowing a discharge of all dischargeable debts. Under US bankruptcy law, most general unsecured consumer debts are dischargeable, including credit-card debt and medical debt. Some debts are considered non-dischargeable, among them student loans*[21], domestic support obligations, and many tax obligations, or debts that were incurred through fraud or wrongdoing. When a debt is discharged, it may no longer be collected from the debtor, but it is not cancelled.*[22] The bankruptcy system permits a debtor to keep certain of his assets that are considered to be 'exempt' from the bankruptcy estate and therefore not subject to the claims of creditors. A debtor has an option to elect the exemptions granted either by federal law (i.e., the Bankruptcy Code) or by state law. Some states in the US have much more generous exemptions than others. For example, New York state law permits a debtor to retain $50,000 in a homestead exemption, $2,400 in a motor vehicle exemption, food and fuel to last 60 days, clothing, and household furniture. Under Texas state law, a debtor may keep up to 200 acres of rural homestead property, along with other exemptions. Even if creditors are not repaid in full, the debtor is allowed to keep exempt assets in order to provide a 'fresh start' in his economic life following the discharge.*[23]

Canadian bankrupts are now required to pay their creditors a portion of the surplus income they earn during the period between their filing for bankruptcy and the discharge of their debts. An administrative edict defines surplus income as a function of Canadian poverty lines. After discharge, however, no payments are required from the former bankrupt's income.*[24]

Under most European bankruptcy laws, the discharge of a debtor from (all) debts is almost unheard of without the creditors' approval. This could be the result of widespread historical perceptions about causes of insolvency being attributable to economic distress, unemployment, serious disease, or financial mismanagement. As a result, consumer insolvency in Europe is generally treated as a social problem caused by a *force majeure*, rather than as a market exit or adjustment mechanism.

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[13] Survival debts occur as a matter of survival strategy, when recurrent debts for life necessities accumulate, such as household debts (food, rent, electricity, education, clothing).

[14] Over-consumption debts result from overconsumption by a debtor who initially may have a budget surplus, but finances an extravagant life-style with borrowed money. Typically, such a debtor enters into more than one loan, causing an increased extension of debt.

[15] Compensation debts result from over-consumption by a debtor who typically suffers deprivation or social exclusion. It is triggered by advertising, and establishing social class, power, status or as compensation for other loss. This behavior may result in illness-related debts, gambling debts, alcoholism and mental illness.

[16] Relational debts are acquired through connection with others because of marriage, other relationship or death. In some states, they arise by operation of law as a result of liabilities incurred by a spouse.

[17] Accommodation debts are caused by the inability to adapt to misfortune, a sudden drop in income or unforeseen expenses.

[18] Fraudulent debts occur when a debtor over-commits himself financially. Typically, such a debtor fails to act in good faith or deliberately attempts to defraud his creditors, either while incurring the debt or in his representations of his ability to repay. These debtors are frequently excluded from a discharge altogether.

[19] INSOL Report, p. 1.

[20] INSOL Report, pp. 2–3.

[21] The dischargeability of student loans has been a contentious issue in both the US and in Canada, because the negative consequences of making discharge 'freely available' or 'unfair' since students are thought to be likely to have high future incomes. See S. Schwartz. Personal Bankruptcy Law: A Behavioural Perspective. – J. Niemi-Kiesiläinen, I. Ramsay, W. C. Whiteford. Consumer Bankruptcy in Global Perspective. Oxford, Portland, Oregon: Hart Publishing 2003, p. 80.

[22] That is, if someone else is also responsible to pay the debt, such as a guarantor or co-obligor, then the debt may still be collected from that person or entity. Note that in most Chapter 7 cases (liquidation) of natural persons, there are no assets available to distribute to the creditors, but the debtor may still receive a discharge. See E. Stong. Fresh Start and Convergences in the Treatment of Insolvent Companies in the European Union: the United States Contribution. *Forthcoming.*

[23] In the Chapter 7 case, the debtor, whether a natural person or an entity, turns over to the trustee his non-exempt assets as of the date of the filing of the bankruptcy petition, and those assets are applied to satisfy his debts as of the petition date. In a Chapter 13 case, the debtor, who may only be a natural person, commits his post-petition disposable income for up to five years to repay his creditors, in whole or in part. He must repay the creditors at least as much as they would receive in liquidation. In both Chapter 7 and Chapter 13, if the case is successful, the debtor's pre-petition dischargeable debts will be discharged. Source: E. Stong (Note 22).

[24] S. Schwartz (Note 21), p. 74.

A development in the opposite direction has taken place in continental Europe. Denmark was the first continental European country to adopt a specific legal regime aimed at treating the ills associated with consumer over-indebtedness, beginning in January 1972 and culminating with the adoption of the Danish consumer debt adjustment act, *Gældssaneringslov*, on 9 May 1984.[*25] The aims of the consumer debt adjustment laws in Scandinavia are quite similar to those aims presented in the doctrine of social *force majeure*.[*26] The laws on judicial debt adjustment for consumers entered into force in 1993 in Finland and in Norway, then in 1994 in Sweden. The French law on prevention and regulation of individual and household over-indebtedness was already enacted by 1989, but its very restrictive discharge provision was substantially expanded in 1998. The Netherlands passed a law on consumer debt adjustment in 1997 and Belgium in 1998. In Austria, debt adjustment legislation was accepted in 1993, and in Germany similar legislation entered into force in 1999.[*27]

With the exception of the Czech and Slovak republics, Estonia, and Russia, prior to 2002, the majority of Eastern European transition countries had not tackled the problem of consumer insolvency.[*28] Influenced mainly by the German insolvency regulation system, Estonia adopted a separate procedure for discharge of debts within insolvency proceedings in January 2003. Since 1 January 2004, Chapter XI of the Bankruptcy Act[*29] has regulated discharge of obligations. There is no automatic discharge of debts available in Estonia. Pursuant to the Bankruptcy Act's § 175 (1), a court shall decide on discharge by a ruling made five years after commencement of the proceedings stipulated in Chapter XI of the Bankruptcy Act.[*30] The additional period of time before entering Chapter XI proceedings cannot be predicted, as a consequence of the complexity of insolvency cases. The debtor is not prevented from obtaining more than one discharge but should wait 10 years before becoming eligible for another discharge.[*31]

All mature market economies have well-developed provisions for the bankruptcy of individuals (which are not just households or consumers but also may be owners of very small, micro enterprises).[*32] For example, in England and Wales, the main alternative to bankruptcy is an individual voluntary arrangement (hereinafter 'IVA') under Part VIII of the Insolvency Act 1986. An IVA is a composition or scheme of arrangement that arises from a proposal made by an individual debtor (whether a business or consumer debtor) to his creditors. It is essentially an extra-judicial procedure, as the court has only a limited supervisory role. The proposal, which may encompass the debtor's assets, income, or both, is formulated by the debtor in conjunction with an insolvency process practitioner (the nominee). The creditors vote on the proposal, and, if it is approved, the nominee becomes the supervisor of the IVA and oversees its implementation. If the proposal is approved by the requisite majority, all creditors who were entitled to vote are bound, regardless of whether or how they voted.[*33]

From a creditor's perspective, the infringement of claims pursuant to statutory debt restructuring schemes may seem unjustified. For example, a Finnish creditor complained that the Finnish Debt Restructuring Act violated his rights of ownership under Article 1 of Protocol 1 of the European Convention on Human Rights. From the ECHR's decision dated 20 July 2004[*34], the following general conclusions can be drawn:

a) The debt-adjustment legislation clearly serves legitimate social and economic policies and is not therefore, *ipso facto*, an infringement of Article 1 of Protocol 1.

b) That in the case of bankruptcy the creditor's claims would have remained legally valid and enforceable at a later stage does not change the fact that, by entering into an agreement with a debtor, a creditor takes upon himself a risk of financial loss.

c) The European Court of Human Rights would not exclude the possibility that a court-ordered irrevocable extinction of a debt, as opposed to the scheduling of payments of a debt over a longer period of time, or the bankruptcy of a private individual, could in some circumstances result in the placing of an excessive burden on a creditor.

d) Whether such a burden was placed on the applicant also depends on whether the procedure applied provided him with a fair possibility of defending his interests as one of some 70 creditors.[*35]

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[25] J. J. Kilborn. Twenty-Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark. – International Insolvency Review 2009 (18), p. 155.

[26] J. Niemi-Kiesiläinen (Note 7), p. 48.

[27] *Ibid*.

[28] J. Lowitzsch (ed.). The Insolvency Law of Central and Eastern Europe. Twelve Country Screenings of the New Member and Candidate Countries of the European Union: A Comparative Analysis. – INSOL Europe 2007/2, p. 40.

[29] Pankrotiseadus. Adopted on 22 January 2003. – RT I 2003, 17, 95; 2009, 68, 463 (in Estonian).

[30] Note: not after submission of bankruptcy petition and commencement of the bankruptcy proceedings.

[31] Bankruptcy Act § 171 (2) 3).

[32] See Table 1. J. Lowitzsch (Note 28), pp. 41–42.

[33] D. McKenzie Skene, A. Walters (Note 2), p. 141.

[34] ECHR, *Bäck v. Finland*, Application No. 37598/97. Available at http://www.echr.coe.int/echr (15.03.2010).

[35] See summary of A. Noordam Doctoral Thesis "Schuldsanering en goede trouw" (Debt Restucturing and Good Faith). Amsterdam: Vrije University 2007, pp. 678–679. Available at http://bobwessels.nl/wordpress/wp-content/uploads/2007/11/summary.pdf (15.03.2010).

A fascinating spectrum of policy approaches can be found in states across Europe, including those having recently emerged from operation as command economies and that are now struggling with the different challenges of free-market capitalism. Recently, a number of European countries have initiated consumer insolvency reforms, mainly following the examples of discharge provided in Chapters 7 and 13 of the US Bankruptcy Code. The British discharge may be even more generous than the US. In the UK, the discharge now takes effect after one year has passed from the commencement of bankruptcy, a reduction from the previous period of three years.[*36] Furthermore, debtors may obtain more than one discharge and do not have to wait for a specified minimum period of time before becoming eligible for another discharge.[*37] In mediaeval England, a debtor could be placed in a debtor's prison until he repaid his debt, which was impossible while one was imprisoned and unable to generate an income. Against such practices, the concept of a discharge of indebtedness must be seen as a great privilege, without which many debtors would never find relief from their debts.

As of January 2007, Swedish consumers need not necessarily seek counselling before applying for formal debt relief. Sweden is the first continental European country to do away with the requirement of out-of-court credit counselling and negotiation as a prerequisite to formal relief. Swedish debtors can still seek budget- and debt-related counselling from local state-supported counselling services, but in most cases, neither counselling nor negotiation with creditors is required. As in France and Luxembourg, debtors in Sweden file petitions for relief not with a court but with an official administrative body. Unlike in France and Luxembourg, the Swedish agency in charge of the consumer insolvency system is the state Enforcement Agency (*Kronofogdemyndigheten*, KFM). Formerly an arm of the Tax Service (*Skatteverket*) but a free-standing agency as of June 2006, the KFM's primary function is to act as the official collector of both public and private debts. The courts play almost no role in the Swedish consumer debt adjustment process. They continue to hear appeals from debtors and creditors unhappy with the KFM's findings regarding debtors' qualification for relief and the terms of payment plans, though in the overwhelming majority of cases in the past, courts have affirmed the KFM's decisions.[*38]

In the Netherlands, as of 2008, it is the debtor's responsibility to demonstrate that he acted in good faith for the five years prior to the *wet schuldsanering natuurlijke persoonen* application.[*39] Belgium and Luxembourg exclude debtors who knowingly brought about their own circumstances of insolvency. The bankruptcy rules in England and Wales, Germany[*40], and the US give no subjective grounds to reject a debtor's application for a debt restructuring scheme. Since October 2005, however, a disposable income test has been applied in the US to determine whether the debtor may file directly for liquidation under Chapter 7 or, instead, must file a plan of reorganisation of its debts under Chapter 13.

In Eastern Europe, Latvia represents a country that recently adopted a more modern consumer insolvency law process. On 1 January 2008, the Latvian Insolvency Act established a new procedure that is similar to the British IVA for individuals. The purpose of insolvency proceedings for a natural person is to provide an opportunity for this person to renew paying capacity or to be released from the debt commitment specified in the plan for the sale of his property and satisfaction of creditors' claims, by observing creditors' interests without necessarily being declared bankrupt.[*41] A natural person may apply for insolvency proceedings if this person does not have possibilities for settling the debt commitment, for which the due data has come to pass and the total commitment exceeds 50 times the minimum wage for one month, or, because of the conditions to be proved, it will not be possible for this person to settle the debt commitment, the due data of which will have elapsed within a year, where the debt commitment in total exceeds 100 times the minimum monthly wage.[*42]

The Czech Insolvency Act (Act 182/2006 Coll.) took effect on 1 January 2008, replacing the previous Bankruptcy and Composition Act (Act 328/1991 Coll.). One of the novelties introduced by the act is the set of proceedings called *oddlužení* in Czech, best translated as discharge of unpaid debt or, in shorthand, discharge. In short, in the discharge proceedings, the creditors either receive the proceeds of the sale of the debtor's assets, whereupon the debtor's future income is protected, or they receive instalments from the debtor's income for five years, in which case the debtor's assets are protected—in each case provided that the method chosen leads

36 D. McKenzie Skene, A. Walters (Note 2), p. 147.

37 This contrasts with the position in the US where a debtor who receives a discharge in Chapter 7 must wait eight years before qualifying for another discharge through a Chapter 7 filing. D. McKenzie Skene, A. Walters (Note 2), p. 147.

38 J. J. Kilborn. Comparative Consumer Bankruptcy. Durham: Carolina Academic Press 2007, pp. 48 and 89–90.

39 Note: The Dutch Financial Services Act (*Wetfinanciële dienstverlening*) and the Dutch Finance Supervisory Act (*Wet financieel toezicht*) have not been effective in terms of preventing consumers from falling into debt situations from which they are unable to independently extricate themselves. Debt counselling is not always effective and creditors frequently refuse out-of-court debt settlements. The Dutch Act on Debt Restructuring for Natural Persons (*Wet schuldsanering natuurlijke persoonen*), included in the Dutch Bankruptcy Act in 1998 and generally referred to as the Wsnp, operates as a final resort for individuals experiencing serious debt problems. In 1999, one in every 2000 people in the Netherlands were either declared bankrupt or applied to undergo Wsnp debt restructuring. This number had doubled by 2005. See A. Noordam (Note 35), pp. 667 and 678.

40 See E. Braun (ed.). Commentary on the German Insolvency Code. Düsseldorf: IDW-Verlag, p. 497 *ff.*

41 Latvian Insolvency Act Part D Chapter XXIV, § 149 (1).

42 Latvian Insolvency Act Part D Chapter XXIV, § 151.

to the payment of at least 30% of the debtor's unsecured debt.*[43] After the sale or the elapsing of the five-year instalment period, the court will, in a new order issued upon the debtor's application, discharge the debtor from the remaining part of his debts (under § 414 of the Act). The order will be issued only if the debtor paid at least 30% of his unsecured debts*[44], unless individual unsecured creditors agreed to receive less or unless the debtor can show that he was prevented from paying the minimum amount by circumstances beyond his control and that the unsecured creditors have in any case not received less than they would have in liquidation proceedings (under § 415 of the Act). In the three years following the discharge order, the court may reverse the order if it turns out that the debtor acted fraudulently in the proceedings or committed a crime in relation thereto (described in § 417 of the Act).*[45]

In the Czech Republic, in 2008, the first year of the new act being in force, some 1,700 applications for discharge proceedings were filed, amounting to approximately 1/3 of all insolvency petitions (a total of approx. 5,300) filed under the new act in that first year.*[46] The overwhelming majority of the confirmed applications involved instalments as the chosen method of satisfaction of the debts. The first quarter of 2009 saw a significant increase in new insolvency petitions (up 17.2% from the figure for the fourth quarter of 2008) and even greater growth in the number of applications for discharge proceedings (up almost 50% from the fourth quarter of 2008). These developments are correlated with the deepening economic recession that arrived later to the Czech economy than to some other European markets.*[47]

Since 31 March 2009, there have been personal insolvency proceedings available in Poland.*[48] The scope of the new regulation covers those debtors who are not involved in business (consumers). Before, insolvency proceedings were also available to so-called business individuals (individual entrepreneurs). The new law provides that only the debtor and not its creditors may file for bankruptcy. The consumer insolvency is exclusively a winding-up insolvency, which means that all of the assets will be liquidated and the creditors will be (partially) paid off by means of the proceeds. The liquidation of assets is usually managed by the appointed liquidator; however, it may be allowed for the debtor to carry it on personally under the supervision of a liquidator.*[49] In Poland, by the end of June 2009, in the first three months of the new law being in force, there were about 450 court applications, of which only two (!) succeeded. In both cases, debtors secured their spouses' businesses, which went bankrupt later. The statistics indicate clearly that regulation proves to be too strict with respect to both the material and the financial prerequisites for filing of an effective consumer insolvency petition.*[50]

No individual insolvency law is available in Romania and Hungary. In Hungary, there has been some discussion about introducing the concept of individual insolvency, but no laws have been adopted yet. A proposal was presented in February 2009 concerning procedures available to individuals trying to settle their claims with creditors. This draft proposes to introduce two types of individual bankruptcy:

a) a regulated procedure that aims to establish a compromise between the debtor and his creditors—in such a procedure, the supervision of the debtor's financial decisions is secured; and

b) a procedure (also aimed at securing a compromise between the debtor and creditor) initiated by the request of the debtor or creditor but that does not assume an agreement with the other party.*[51]

Also, a separate new draft law on natural persons' debt adjustment has been pending in the Estonian Parliament since 21 April 2010.*[52] In this draft, a separate court procedure has been proposed in which an individual may apply for several debt adjustment measures. The court in debt adjustment proceedings has the leading and supervisory role in finding balanced interests between creditors and debtor. The proceedings are substantially alternative procedures to bankruptcy proceedings and aimed at preventing individuals from being involved in bankruptcy proceedings. The procedure is similar to and based on restructuring proceedings applied for

[43] T. Richter. Consumer Insolvency Proceedings under the New Czech Insolvency Law. Paper presented in INSOL Europe conference in Stockholm 2009.

[44] Notably, the Act does not require that this be measured in the present value of the payments, i.e., the debtors will in effect pay less than 30 per cent of their debt.

[45] T. Richter (Note 43).

[46] For details see T. Richter. Insolvenční zákon v roce dva: první statistické údaje a jejich prozatimní interpretace (The Insolvency Act in Year Two: First Statistics and a Tentative Attempt at Interpretation). XVII. Karlovarské právnické dny. Praha: Linde 2009 (in Czech).

[47] T. Richter (Note 43).

[48] Articles 491^{1}–491^{12} of the Polish Bankruptcy and Reorganisation Act dated 28 February 2003 amended by the Law of 5 December 2008. – Journal of Laws 2008 (234), section 1572.

[49] P. Filipiak. Consumer Insolvency Proceedings under the Amended Polish Bankruptcy Law. Paper presented in INSOL Europe conference in Stockholm 2009.

[50] *Ibid*.

[51] C. M. S. Cameron McKenna. Individual Insolvency in Russia and Certain Central and Eastern European Countries. September 2009.

[52] Võlgade ümberkujundamise ja võlakaitse seaduse eelnõu seletuskiri (Explanatory Memorandum to the Draft Act on Restructuring of Debts and Debt Protection), draft act No. 743 SE. Available at http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=1004095&u=20100519125501 (22.04.2010) (in Estonian).

reorganisation of corporate debtors as stipulated in the Reorganisation Act[*53], but it takes into account the different nature of the types of debtor.

2. Various aspects to address in a European cross-border insolvency system

In cases of cross-border insolvency in Europe, the European Insolvency Regulation resolves conflicts among the national law regimes and conflicts of jurisdiction among the courts of the various Member States. The regulation has three basic goals:

a) to provide for legal certainty in matters of cross-border insolvency;

b) to promote the efficiency of insolvency proceedings, by favouring those solutions that facilitate their administration and improve the *ex ante* planning of transactions; and

c) to eliminate inequalities among Union-based creditors with regard to access to and participation in such proceedings.[*54]

All of these aims are closely related to creditors' rights, whether in main and/or in territorial insolvency proceedings.[*55] In order to achieve the above-mentioned goals, the regulation does not seek to establish a uniform code of insolvency law in the European Union.

However, uniform rules of conflict of laws—Articles 4 and 28—which replace national rules of private international law[*56], stipulate that the law of the state in which the proceedings are opened (*lex fori concursus*) is applicable for the insolvency proceedings and their effects. Because of the current rapidly changing socio-economic landscape, it can nowadays be debatable whether, as a result of widely differing national substantive laws, it was (at the time when the EIR was written) not practical to introduce insolvency proceedings with a universal scope throughout the Union[*57], as the drafters believed that the application of the law of the state opening an insolvency proceeding would, against this background, frequently lead to difficulties unless there were exceptions, which were drafted and stipulated in Articles 5 to 15. The rules related to the lodging, verification, and admission of claims are governed by *lex fori concursus* according to Article 4 (2) (h) and uniform substantive rules contained in Articles 32 and 39–42 of the EIR itself; the latter provisions also replace national rules of private international law in the Member States.

Equally important for the application of the regulation are the three annexes. These contain, respectively, a list of insolvency proceedings (Annex A), of winding-up proceedings (Annex B), and of liquidators (Annex C). These lists supplement the legal definitions contained in Article 2 of the EIR. By dictating which national legal institutions fall within the definitions, they ease the interpretation of these. According to Article 45 of the EIR, the Council of Europe, acting by qualified majority on the initiative of one of its members or on a proposal from the European Commission, may amend the annexes.[*58] This 'closed-list system'[*59] provides legal certainty, as it enables the parties applying it to ascertain exactly which proceedings fall within the scope of the regulation's application.[*60]

The regulation permits insolvency proceedings to be opened against the same debtor (applicable to both natural and legal persons) in two or more (!) Member States. The regulation does not establish any limit to the number of the territorial proceedings that may be opened, as long as the debtor has an establishment within the meaning of Article 2 (h) of the EIR in the Member State of the opening. As indicated above, Articles 4 and 28—which replace national rules of private international law—stipulate that the law of the state in which the proceedings are opened (*lex fori concursus*) is applicable to the different insolvency proceedings and their effects. Finding of the proper, correctly applicable law may be incomprehensive, costly, and burdensome for individual debtors and also for creditors. Doubling of insolvency proceedings also requires double liquidators

53 Saneerimisseadus. 4 December 2008. – RT I 2008, 53, 296; 2010, 2, 3 (in Estonian).

54 M. Virgós, F. Garcimartin. The European Insolvency Regulation: Law and Practice. Kluwer Law International 2004, margin No. 5, pp. 7–8.

55 Territorial insolvency proceedings can be characterised as either secondary insolvency proceedings pursuant to Article 3 (3) of the EIR, or independent territorial insolvency proceedings pursuant to Article 3 (4) of the EIR, depending on whether the main proceedings have been opened or not.

56 See M.Virgos, E. Schmit. Report on the Convention on Insolvency Proceedings, 8 July 1996, margin No. 87 *ff.*

57 M. Virgós, F. Garcimartin (Note 54), margin No. 5, pp. 7–8.

58 K. Pannen (ed.) European Insolvency Regulation. De Gruyter Commentaries on European Law. Berlin: De Gruyter Recht 2007, Introduction, margin No. 45, p. 17.

59 M. Virgos, F. Garcimartin. The European Insolvency Regulation: Law and Practice, 2004, p. 30. – K. Pannen (Note 58), Article 2, margin No. 3, p. 52.

60 K. Pannen (Note 58), Article 2, margin No. 3, p. 52.

in various Member States to be appointed by the courts to handle these proceedings, which is definitely costly for the system where individuals' insolvency proceedings are concerned.

Another aspect is that all proceedings opened after the main insolvency proceedings must necessarily be winding-up proceedings within the meaning of Article 2 (c) of the EIR.*[61] According to the EIR, this principle applies for both individual and corporate debtors' insolvency proceedings. Member States having seen a constantly increasing number of individuals' insolvencies (which was not an issue in the early 1990s), the requirement stipulated in the EIR that secondary insolvency proceedings may only be winding-up proceedings, by nature, is not, in the author's opinion, well grounded or justified anymore. An appropriate transparent regulatory measure for enabling over-indebted individuals to start over with their lives and for participants in insolvency proceedings to recognise the proceedings in other Member State is needed within the European Insolvency Regulation framework.*[62] Whether it is to involve an abolishment of secondary proceedings from the European Insolvency Regulation framework or some further amendments to the EIR has yet to be considered. The nature of individuals' insolvency proceedings is common to all national legal systems—in the bankruptcy of an individual, the debtor will not cease to exist, unlike corporate debtors. That secondary insolvency proceedings must be winding-up proceedings might not create difficulties in Member States that have separate forms of insolvency proceedings, such as France or Italy.*[63] For Estonia, the proceeding listed in Annex B of the EIR is the *pankrotimenetlus*. *Pankrotimenetlus* (directly translated into English as 'bankruptcy proceeding') pursuant to the Estonian Bankruptcy Act's § 2 may be either a winding-up or a reorganisation proceeding. In contrast to other legal systems, Estonian insolvency law (as is the case in Spanish law, with *concurso* in annexes A and B of the EIR, or German law, *Insolvenzverfahren*, in annexes A and B of the EIR) does not distinguish from the outset between winding-up and reorganisation proceedings. There might arise problems in other Member States in terms of the recognition and transparency of the proceeding in question. Debatable is, for instance, whether an insolvency plan proceeding under German law should be regarded as a winding-up proceeding within the meaning of the regulation.*[64]

In the author's opinion, revision of provisions in national laws and the European Insolvency Regulation is needed in relation to questions of secondary insolvency proceedings and individual debtors (consumers). Because of the complexity of the over-indebtedness problem, some countries have already excluded certain types of debtors from insolvency proceedings altogether, while in other countries a natural person cannot be declared bankrupt unless he acted in the capacity of a merchant.*[65] These constantly changing policies and governmental attitudes do not make European and domestic insolvency systems more predictable, simple, transparent, and efficient for the creditors and debtors to apply. Consumer over-indebtedness may raise wider socio-economic concerns. Firstly, there are concerns of the 'ticking time bomb' variety. Highly leveraged consumers are vulnerable to sudden drops in income caused by changes in their personal circumstances, such as job loss, illness, or family breakdown, or changes in their general economic outlook.*[66] For example, most Western European countries have been dependent on sustained consumer spending. Credit has been a driving force for economic growth and the welfare of consumers. Yet it also poses a risk for credit-providers and threatens additional costs and insolvency for a growing number of consumers. Secondly, there are concerns about the social impact of over-indebtedness on families and communities. Over-indebtedness affects a significant and growing number of European consumers in all Member States. In most cases, over-indebtedness is due to increasing uncertainty in predictability of income. In other cases, changes in societal attitudes to debt and enjoying the present at the expense of the future lead to over-indebtedness.

Naturally, nothing in the regulation prevents only one set of main proceedings from being opened in the Community against the same debtor even though he has establishments operating in multiple Member States; the plurality of proceedings is simply a possibility that the regulation offers to those involved.*[67] However, as a creditor, one should always be aware that

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[61] M. Virgós, F. Garcimartin (Note 54), margin No. 443, p. 235.

[62] During the negotiations on the 1995 Draft Convention on Insolvency Proceedings, many of the Member States wished to restrict the scope of the convention to winding-up proceedings. By way of compromise, it was finally agreed that main insolvency proceedings could also be geared to the reorganisation of the debtor, but that secondary insolvency proceedings could not; these must result in a winding-up. Historical reason for this is that secondary insolvency proceedings geared to the reorganisation of the debtor could pose problems of compatibility and coordination with the main insolvency proceedings. These arguments are not well-grounded within the changed economic landscape in EU.

[63] K. Pannen (Note 58), Article 2, margin No. 13, p. 54.

[64] On this, see, e.g.: S. Smid. Deutsches und Europäisches Internationales Insolvenzrecht. Kohlhammer 2004, Article 2, margin No. 11; C. G. Paulus. Europäische Insolvenzverordnung. Kommentar. Frankfurt a. M.: Recht und Wirtschaft 2006, Article 2, margin No.11; K. Pannen (Note 58), Article 2, margin No. 14, p. 54.

[65] This is the case in France, Greece, Italy, Luxembourg, Portugal and Spain. See K. Pannen (Note 58), Article 4, margin No. 40, p. 223.

[66] D. McKenzie Skene, A. Walters (Note 2), p. 137.

[67] M. Virgós, F. Garcimartin. The European Insolvency Regulation: Law and Practice. Kluwer Law International 2004, margin No. 418, p. 225.

a) the main insolvency proceedings have automatic universal world-wide effects[*68] upon opening of the insolvency proceedings in respect of all the debtor's assets, wherever such assets are located[*69] within the Union[*70], and for all creditors (including residents of other Member States) as being automatically involved in these proceedings[*71];

b) the decision to request the commencement of secondary proceedings[*72] will only make sense when the expected value of the claim in the secondary proceedings is greater than that in the main proceedings[*73] or in situations in which it is not possible to initiate main proceedings[*74];

c) the general rule stated in Article 4 (1) of the EIR, that the *lex fori concursus* applies to the insolvency proceedings opened—either main or secondary proceedings—is subject to a considerable number of exceptions set out in Articles 5–15, 32, and 39–42 of the EIR; and

d) the effects of main insolvency proceedings will not be recognised in relation to local assets since the opening of the secondary proceedings. Once secondary proceedings are commenced, the local assets form part of those proceedings and are governed by local law. This enables local expectations with regard to such matters as local law priorities in respect of dividends and the validity of locally perfected security to be met.[*75]

In addition, most probably the creditor and the debtor need to communicate with, co-operate with, and protect their interests in front of the foreign-language-speaking liquidator, who most probably is not familiar with foreign domestic law in cross-border insolvency cases. The task is not an easy one for all of the participants in cross-border insolvency proceedings if the insolvency system is far too complex and unpredictable.

Legislators should take into account that there are already some unpleasant examples of court cases involving individuals in cross-border insolvency proceedings—in particular, the *Stojevic* case.[*76] In this case, Mr Stojevic, a Croatian national of Russian extraction, was declared bankrupt in two courts in succession, on 27 March 2003 in England and on 28 January 2004 in Austria, both proceedings being the main insolvency proceedings. The annulment of the Austrian Bankruptcy Order removed the conflict of jurisdiction between the two European countries—England and Austria—but in this case, the centre of the debtor's main interests within the meaning of the European Insolvency Regulation, when the bankruptcy petition was filed, was actually in Austria and not in England. It took four years to resolve this matter legally, and the situation resulted in the annulment of the English Bankruptcy Order dated 27 March 2003 under Section 282 (1) (a) of the 1986 Act. The downside of this action meant that Mr. Stojevic, who had huge debts both in Austria and in England, and no assets in either country, escaped bankruptcy altogether.[*77]

3. Conclusions

Attitudes toward individuals' bankruptcy differ significantly between individual societies and cultures. These diversities are reflected in the insolvency laws and in the policies of the respective countries, which shape both the terms of the laws and the mode of their application.

However, the nature of the proceedings is common for all legal systems—in the bankruptcy of an individual, the debtor does not cease to exist. Therefore, we often find ourselves pondering how to find a balance between the need to provide an appropriate mechanism for enabling over-indebted individuals to start over with their lives, on one hand, and social concerns that debts should be paid (moral duty).

Moral philosophy tells us that we should keep to our promises. This is the starting point of contract law as well. The key to the moral obligation to pay a debt lies in the act of promising. If we have a moral duty to keep our promises, it applies to our contractual debts too. The answer to the question 'What makes a promise

68 Recognition based on Article 16 of the EIR.

69 Uniform rules determining the location of assets in Member States are determined in Article 2 (g).

70 Article 4 of the EIR.

71 Article 32 (1) of the EIR.

72 Article 29 (b) empowers to request the opening of secondary proceedings by any person under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

73 It's seems logical because the effects of secondary proceedings are restricted to assets only located in the Member State of the opening of secondary proceedings from which claims may be satisfied.

74 M. Virgós, F. Garcimartin (Note 54), margin No. 418, p. 225.

75 I. F. Fletcher. The Law of Insolvency. 3rd edition. London: Sweet & Maxwell 2002, paragraphs 31–029. – G. Moss, I. F. Fletcher, S. Isaacs (eds). The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide. 2nd ed. Oxford University Press, 2009, margin No. 8.269, p. 307.

76 Case No. 9849 of 2002, High Court of Justice in Bankruptcy, London, 20 December 2006.

77 *Ibid*.

morally binding?' will set the ethical boundaries for the public enforcement of contracts. It is logical to conclude that a society should, as a general rule, sanction only those contracts that, in some rational sense, are morally binding. There are several ways whereby promises can be seen to introduce moral force to contractual obligations.*[78] However, Christianity has played an important role in Western culture and societies. One of its central doctrines is forgiveness, with the Bible advising us to forgive debts every seventh year. Even if the duty to keep promises is given the strictest possible interpretation, to the effect that promises must always be kept, there are circumstances (for example, involving the duty to perform impossible acts) wherein obligation simply becomes void. An insolvent debtor is under no obligation, moral or legal, to pay his debts in a society where there is a law allowing discharge. The most common argument for laws protecting debtors is that their consequences are favourable. They are seen as producing the best outcome, at least from the debtor's and society's point of view, but often from the creditor's perspective as well.*[79]

Among the innovative responses to the rising volume of consumer bankruptcies in many societies, specially targeted procedures are being introduced with the aim of bringing relief to those debtors with limited means, or without any regular income, who are overwhelmed by the level of their debts. When countries evaluate and reform their insolvency laws, the key question will often be how to find the appropriate balance between a variety of social, political, and economic interests that will induce all players in the economy to participate in the system.

Although the bankruptcy laws of individual countries differ in many important respects, we should keep in mind firstly that the overall aim of the bankruptcy laws should be the allocation of risks among participants in a market economy in a transparent, equitable, and predictable manner and, secondly, that the aim of the bankruptcy law is to protect and maximise value for the benefit of all interested parties and the economy in general. When determining how to strike a balance between the various objectives, it is necessary to avoid easy stereotypes—debtors are not always fraudulent or incompetent in their actions, and creditors are not always selfish and grasping. However, discharge for individual debtors should not be made available to those who have engaged in fraudulent behaviour or who have failed to disclose material information during the proceedings.

To achieve a fair and equitable allocation of consumer credit risks, the INSOL Report recommends that legislators enact regulatory means to assure a fair and equitable, efficient and cost-effective, accessible and transparent settlement and discharge of consumer and small business debts.*[80] Whether an appropriate legal measure is an abolishment of secondary insolvency proceedings from the European Insolvency Regulation framework or some further amendments and modifications to the European Insolvency Regulation is yet to be decided.

[78] J. Kilppi (Note 6), p. 17.

[79] *Ibid*., pp. 68–70.

[80] INSOL Report, p. 14.

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The Historical Experience of Estonia with the Plurality of Penal Law Acts

The state intervenes most intensively in a person's life through criminal law. For that reason, criminal law has to be implicit, in order to enable sufficient legal protection. This means that the state has an obligation toward its citizens to provide legal certainty through criminal law and enable people to receive adequate protection against the intervention of the state. One of the primary requirements in order for law to be implicit is for one to have knowledge as to which law is the one under which he or she is being punished. One possibility for ensuring that law is implicit by means of a legal technical remedy is codification through which the regulation of criminal law is exhaustive.

At present, in Estonia there essentially exists plurality of criminal law—coverage of crimes is incorporated into the Penal Code[*1], but misdemeanours are mostly scattered among a variety of special laws.[*2] Whether or not this is purposeful is obviously questionable, but it cannot compare with a situation in which, for a given offence, there is more than one criminal law that can be applied. So far, there has been little harmonisation of substantive criminal law in the European Union—one example of such an attempt being Council Framework Decision 2003/568/JHA of 22 July 2003, on combating corruption in the private sector[*3]—but with the entry into force of the Treaty of Lisbon[*4] the so-called system of pillars has been abolished and successive acts will be directly applicable. If any further acts will be directly applicable, a situation arises wherein we have our national criminal law and the criminal law of the European Union, two parallel systems of penal legislation existing simultaneously. What the direct applicability of criminal-law acts will look like is not yet clear.[*5] Insofar as we already have historical experience of the simultaneous validity of parallel criminal-law sources, it is possible and necessary to show the problems that could await us.

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1 Karistusseadustik. Adopted on 6 June 2001. – RT 2001, 61, 364; 2010, 11, 54 (in Estonian). English translation available at http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&p.=et&sk=en&dok=X30068K8.htm&query=karistusseadus&tyyp=X&ptyyp=RT&pg=1&fr=no (1.04.2010).

2 See further P. Pikamäe, J. Sootak. Einheit der verfassungsmässigen Rechtsordnung: Entscheidungen und Lösungen im Strafrecht. – Juridica International 2002 (VII), pp. 127–137.

3 See J. Ginter. Criminal Liability of Legal Persons in Estonia. – Juridica International 2009 (XVI), pp. 155–156.

4 See http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:ET:HTML (10.03.2010).

5 On problems concerning the so-called European criminal law see for example T. Weigend. Zu einem einheitlichen europäischen Strafrecht? – Nullum ius sine scientia. Festschrift für Jaan Sootak zum 60. Geburtstag am 16. Juli 2008. Tallinn 2008, S. 243–265.

In the first period of the Republic of Estonia, between the two World Wars (from 1918), there were three parallel codes in existence. In 1935, the Estonian Criminal Code[*6] entered into force. With the entry into force of the new criminal code, the situation in criminal law changed dramatically—the general part of criminal law was governed by one legal act and was applicable to the whole of the special part of criminal law: to the offences dealt with in the Criminal Code itself and to the minor offences addressed in special legal acts. It should be noted that criminal law became clearer—there were uniform general norms for all crimes and misdemeanours. The situation that came into being in 1935 is comparable to the current situation in criminal law—the general part of the Penal Code is applicable to all offences that are found addressed therein and in special criminal law. The reform of criminal law that resulted in the enactment of the Criminal Code played a major role in clarification of criminal law. It led to the termination of the applicability of parallel penal codes.

This article will focus on characterising the criminal legislation that was in force until 1935. After this, the principles of the application of each criminal law and problems in application will be dealt with.

1. The sources of criminal law until 1935

1.1. The conceptual choice of the Republic of Estonia in 1918

From the 18th century until the First World War, the three Baltic States of today were parts of Czarist Russia. After the 1917 February Revolution, rapid consolidation by nations for statehood followed. In Estonia, the republic was announced on 24 February 1918, but on the next day German troops reached the capital, Tallinn. After the end of the German occupation, in November 1918, it was decided to restore the criminal law of Czarist Russia.[*7] Mainly because the formation of a new criminal law code in an extremely short span of time was not possible, the provisional government decided to restore the old legislation. Doing otherwise would have also raised the question of what law to apply in the meantime when a new law had not yet been drafted or entered into force. During the German occupation, the new Penal Code (hereinafter 'the New Penal Code') was carried into effect. The New Penal Code, which had been completed in 1903, was held to be a modern and progressive codification, but it had only been enacted in part in Czarist Russia. There were many reasons the Estonian provisional government did not want to enact the New Penal Code in its totality as it had been during the German occupation. K. Saarmann found that most of our lawyers were not familiar with the New Penal Code, there was no law on enforcement of penalties, and the New Penal Code was not in compliance with procedural laws.[*8] Another element that argued against the New Penal Code was the lack of case law, which was, by contrast, represented in a great mass for what we refer to here as the Old Penal Code.[*9] G. Ambach also found that many Estonian lawyers had graduated from Russian universities (in St. Petersburg or Moscow) and were thus acquainted with the Old Penal Code.[*10]

The newly formed republic dealt not only with different branches of law but also with the founding of the general basis for constitutional law. The Republic of Estonia declared itself already in the Constitution from 1920 as subject to the rule of law. The preamble to the Constitution of 1920 states: "The people of Estonia, in unwavering faith and in steadfast will to establish a country that is founded on justice and law and liberty, to protect the internal and external peace, and pledge to present and future generations for their social progress and an overall welfare, the Constituent Assembly adopted and appointed the following Constitution." The part of the preamble that states that the country shall be founded on justice, law, and liberty sets forth the important principle of the rule of law. Near the end of 1920, Professor Eduard Berendts already had written about the Supreme Court of Estonia and the principles of the Constitution of 1920 with the words 'Justitia est fundamentum regnorum' (that is, justice is the foundation of a state).[*11] This is the rule of law. This idea is also the basis for the Constitution of 1920 of the Republic of Estonia and must rule over both the legislative

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[6] Kriminaalseadustik. Adopted on 26 March 1929. – RT 1929, 56, 396; RT 1940, 15, 112 (in Estonian). About the Criminal Code, see for example K. Saarmann. Die Einführung eines neuen Strafgesetzbuches in Estland – Zeitschrift für osteuropäisches Recht. N. F. 1 (1934/1935) nr. 4, pp. 182–186.

[7] G. Ambach. Die strafrechtliche Entwicklung der Republic Estland in der ersten Seite des zwanzigen Jahrhunderts. – Rechtsgeschichtliche Vorträge, Publikation der Rechtsgeschichtlichen Forschungsgruppe der Ungarischen Akademie für Wissenschaften an dem Lehrstuhl für Ungarische Rechtsgeschichte Eötvös Loránd Universität. B. Mezey (Hrsg.). Budapest 2005, S. 3–6.

[8] K. Saarmann. Uue Nuhtlusseadustiku maksmapanemine (Imposition of the New Penal Code). – Õigusteadlaste päevad (Jurists' Days). Õigus 1922, p. 137 (in Estonian).

[9] E. Mailend, A. Rammul (compiled by). Kriminaalõigus. Konsepkt. Prof. K. Saarmann'i ja Riigikohtu prokuröri R: Räägo loengude, Kriminaalseadustiku jt. Alustel koostatud (Criminal Law. Lecture notes. Based on the lectures of Professor K. Saarmann and Prosecutor of the Supreme Court R. Räägo, the Ciminal Code, and etc.). Tartu, 1935, p. 13 (in Estonian).

[10] G. Ambach (Note 7), S. 4.

[11] E. Berendts. Eesti Vabariigi Riigikohus ja 1920. a. põhiseaduse printsiibid (Supreme Court of the Republic of Estonia and the Principles of the 1920 Constitution). – Õigus 1920/2, p. 42 (in Estonian).

and the executive powers in government and their actions in court. The rule of law is related to the limitation of power through general provisions in force, through which the state power is responsible to the people for its activities.*[12] According to § 9 of the Constitution of 1920, it was not allowed to punish a person in Estonia for an act that was not punishable by law and laws against which were not in force during the commission of the act. Thus, the Constitution included the warranty of *nullum crimen*, which states the obligation of specification—namely, that offences are to be sufficiently well defined. Because the state intervenes in a person's life intensively through criminal law, according to the rule of law and the principle of *nullum crimen*, criminal law must be implicit; there must be stipulations that designate the conditions for state intervention. So, we already have principles derived from the Constitution that support response to the fundamental need that criminal law be explicit.

It seems to be that, in direct conflict with the constitutionally required state of law, implicit and ascertainable criminal law was the situation that was caused with the introduction of Czarist criminal law. In Czarist times and before the German occupation, there were three parallel codes of criminal law applicable—the old Russian Penal Code of 1845, the Russian New Penal Code of 1903, and the Russian Penal Code for Peace Courts from 1864. Since the government of the Republic of Estonia decided to put into force the legislation pre-dating the German occupation, the three above-mentioned sources of criminal law entered into force. The Old Penal Code and the Penal Code for Peace Courts were in force completely, but only some parts of the New Penal Code were put into force. It can be suggested that, in situations where there is plurality of, and an overlap between, sources of criminal law, the options a person has to orient in and understand criminal law are restricted. In this kind of situation, is it possible to talk about the application of the rule of law? In addition, each of the above-mentioned legal codes had shortcomings and ambiguities in connection with the principle of the rule of law.

1.2. The Old Penal Code (1845)

The Old Russian Penal Code or 'Code of Criminal Penalties and Corrections', entered into force on 1 May 1846.*[13] With the entry into force of this penal code, the situation of Russian criminal law changed quite dramatically—it was the first source of systemised criminal law in Czarist Russia. J. Sootak has found that it ended legal particularism and harmonised court practice.*[14] Contemporary German writer and famous Baltic jurist A. Paucker esteemed the code very highly—for him, the code was a new creation of the 19th century, one that was free from earlier, outdated concepts of criminal law*[15] and was the source of criminal law for nearly the whole territory of Czarist Russia*[16]; he held also that the penal system was based on general and special prevention*[17] and the corrective nature of punishments*[18].*[19] Given the fragmentation of criminal law, the Penal Code of 1845 played a significant role in the organisation of contemporary law.

The legal act dating from the middle of the 19th century was unable to develop according to needs and had therefore become a heavily criticised source of legislation in the early part of the 20th century. Therefore, 75 years after the Old Penal Code came into effect, it was strongly criticised by various Estonian jurists. K. Grau found in 1921 that, in terms of its content, the Old Penal Code was long obsolete, was outdated, and had lost its reason—it stood far from the then-present-day needs and legal notions. He found that it was casuistic in terms of designations of crimes and misdemeanours and there were no general regulations as would include all the signs of a particular type of crime, as well as that there were fundamental contradictions between concepts in its individual chapters.*[20] Grau did not consider it to be complete and opined that it consumed many words and often undetermined expressions, and it lacked solid legal technique. He also found that not very much was changed by the transposing of legislation into the Old Penal Code, because the content was intended to preserve the content of the legislation and the contradictions between different crimes could not

[12] T. Friedenau. Rechtsstaat in zweierlei Sicht. Berlin: Untersuchungsausschuß Freiheitlicher Juristen 1956, S. 13.

[13] ПСЗ-2, nr. 19283. Уложение о наказаниях уголовных и исправительных. See also Gesetzbuch der Kriminal- und Korrektionsstrafen: nach dem russischen Originale übersetzt in der zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Knazelei. St. Petersburg 1846.

[14] J. Sootak. Development of Estonian Criminal Law. – Juridica International 1996 (I), p. 53.

[15] C. J. A. Paucker. Unsere neuesten Gesetzbücher und ihre geschichtlichen Begleiter. – Das Inland, H 36, S. 853.

[16] *Ibid*., S. 854. The Old Penal Code was only not in force in Finland. See T. Anepaio. Kriminaalõiguse muutumisest 1889. aasta reformi käigus (On the Changes in Criminal Law during the 1889 Reform). – Tractatus Terribiles. A collection of articles for the 60th anniversary of Professor Jaan Sootak. Tallinn 2009, p. 143 (in Estonian).

[17] C. J. Paucker (Note 15), S. 854.

[18] C. J. Paucker (Note 15), S. 857.

[19] See also M. Luts-Sootak. Modernisierung und deren Hemmnisse in den Ostseeprovinzen Est-, Liv- und Kurland im 19. Jahhundert. – Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert. Frankfurt am Main 2006, S. 181–182.

[20] K. Grau. Tarvidus Uue nuhtlusseadustiku maksmapanemiseks Eesti Vabariigis (The Need to Impose a New Penal Code in Estonia). – Õigus 1921, No. 5/6, p. 97 (in Estonian).

be eliminated through supplementation and other amendments to the act.[*21] The same view has been put forth by Saarmann, who found that the makers of the law had set themselves two objectives: firstly, to collect all of the individual penal laws that had been issued in the 200 years directly prior to 1845 and position them in the code in such a way that they would not lose their historic appearance and, secondly, to create a uniform penal code.[*22] Consequently, Saarmann found that there is no reason to search for organic harmony in the Old Penal Code, that there are norms that deal with the same issue but are very different in their nature, and that the norms are very casuistic. He found that, since the writers of the Old Penal Code tried to preserve the historical appearance of the old laws, many grievous crimes had lighter punishments than did less severe crimes.[*23] Also, Grau has said that the system of sanctions in the Old Penal Code is based on the idea of intimidating the perpetrator of the offence—there was no institution of parole, and punishments were extremely restrictive to the individual's rights.[*24]

Approximately 75 years later, the Old Penal Code is still described negatively. Although Sootak saw some positive aspects to it, he found that the Old Penal Code was patriarchal and held a feudal spirit and that it maintained criminal injustice among people.[*25] Ambach has held that the deficiencies of the Old Penal Code are connected with the fact that 19th-century Russian criminal law had not reached punishment theories or punishments as general definitions.[*26] The last may be considered why the Old Penal Code was considered to be outdated and to have insufficient general regulation—it was drawn up on the basis of practical needs with the hope of maintaining what was in force.

The casuistic nature of the Old Penal Code is shown by configurations for the commission of an act or resources used to commit that act.[*27] Its casuistic nature is manifsted also in the very small degree of abstraction. For example, the killing of a clergyman is, in § 212, regulated among crimes against religion, but, in fact, it could be regulated as killing of a person performing official duties and regulated among crimes against persons. In addition, this example shows that the crime of killing was addressed in several chapters of the code. This could hardly have facilitated the work of a judge, a prosecutor, or defence counsel.

Another drawback of the regulation of the Old Penal Code can be seen in the lack of consistent conceptualisation. For example, negligent tort is regulated in § 110 as a reckless movement of the body, which results in unintentional infraction of the law and as any other illegal act in the absence of intent. This means that the person did not have enough foresight or did not recognise the consequence of his act. Was negligent tort possible with every type of crime, or was it necessary to identify it on the basis of the special section of the code? This question is not conclusively answered by the regulation set forth in the code. However, there are crimes included in the special part that involve negligent tort. For example, according to § 1458 of the code, "if a person who knew and foresaw that, because of his unlawful act, another person or several persons may be endangered and nevertheless commits the act and, though acting without direct intent of an act of killing, causes someone's death, then, depending on the type and importance of the unlawful act and type and size of risk that the offender had to anticipate and also with consideration of other factors, the offender will be punished with the type of penalty and rate for the specific crime". This means that in the special part of the code we can find descriptions of negligence associated with different crimes.[*28] The shortcomings of the general regulation of the code made it necessary to describe more precisely what negligence meant in the context of each specific crime.

The inequality of people in the Old Penal Code is evidenced most by the difference of sanctions. Penalties might, for example, depend on the religion of the person. Indeed, § 58 provided that, in addition to criminal and corrective punishments, as provided by law, a person might be obliged to complete spiritual repentance on the order of a clergyman. In the Old Penal Code, crimes with this punishment were, for example, negligent homicide (dealt with in § 1470) and killing with the crossing of self-defence boundaries (in § 1467). There were also different regulations for crimes against family members, which reflect the patriarchal nature of the code.[*29]

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[21] *Ibid.*

[22] See K. Saarmann. Uue Nuhtlusseadustiku maksmapanemine (Imposition of the New Penal Code). – Õigusteadlaste päevad (Jurists' Days). Õigus 1922, p. 138 (in Estonian).

[23] *Ibid.*, pp. 138–139.

[24] *Ibid.*

[25] J. Sootak. Veritasust kriminaalteraapiani (From Vendetta to Criminal Therapy). Tallinn: Kirjastus Juura. 1998, p. 210 (in Estonian).

[26] G. Ambach. Karl Saarmann kui Eesti kriminaalõiguse formeerija ja arendaja (Karl Saarmann as the Shaper and Developer of Estonian Criminal Law). 2006, p. 67 (in Estonian).

[27] See for example § 1453 (1), which lists aggravated killing that is committed in a way that is publicly dangerous: "Intentional killing or murder, if committed using ignition or an explosion, whether through a gas explosion or using gunpowder, with the destruction of building, or if the offender causes a flood, for example by destroying a water dam or in any other way or by destroying a bridge or a railway or a violation in a people's shooting range, although the aim was to kill only one person and all other ways that generally endanger or cause deaths."

[28] E.g., the Estonian Penal Code from 2002 does not describe negligent torts in the specific parts, it only gives punishments and shows that the crime can be committed negligently.

[29] J. Sootak (Note 25), p. 211.

Similarly, the system of penalties was different from what we currently know—the penalties were divided into classes, and, depending on the crime, the penalty fell into a certain class.[*30] For some crimes, it was possible to change classes.[*31] Since the classes were not very wide, a judge had very little freedom in making a decision concerning the length of the sentence.

1.3. The New Penal Code (1903)

The draft of the New Penal Code[*32] was ratified by Czar Nikolai II on 22 March 1903.[*33] In contrast to the Old Penal Code, the New Penal Code was divided into a general and special part, which made the law more systematic and easier to use. The New Penal Code was more abstract than the Old Penal Code. Similarly, the system of penalties was clearer—the sanction for a crime was given as a minimum and maximum penal rate, which gave the judge much more discretion than he would have had with the Old Penal Code. When compared to the Old Penal Code, the New Penal Code was considered to be more scientific, clearer, and more complete. Although there were no provisions for the objectives of punishments, it was still considered to be European law.[*34] Grau described the New Penal Code as a scientific, specific, implicit, and comprehensive law.[*35] Because the New Penal Code was scientific and modern when compared to the Old Penal Code and the Penal Code for Peace Courts, it was used as one key basis for preparation of the Estonian Criminal Code of 1929/35.

The general high quality of the code was overshadowed by the fact that it was recognised to be valid only partially. The parts that were applied were the chapters concerning crimes against religion (§§ 73–80, 82–90, and 93–98, applicable in the Republic of Estonia as long as these provisions were not in contradiction with § 11 of the Constitution of the Republic of Estonia); crimes against the state, amongst them crimes against the higher power (§§ 99–107, which were changed in 1925 in consequence of new state institutions that had been formed, though how these sections were to be implicated until 1925 is not certain) and treason (§§ 108–120), as well as crimes against public order (§§ 121, 123–132, and 134); resistance to authorities (§§ 155 and 155^1); offences against the administration of justice (§§ 163, 164, 166, 168, 170, and 173); offences against the public peace (§ 279 (5)); violations against public performances and printed matter (§ 309); forgery (§§ 437—not applicable in the Republic of Estonia—and 449–452); offences against personal freedoms (§ 500, part I (2) and parts II and III); sexual offences (§§ 530–540); failure to report a finding; intake of foreign welfare and abuse of trust (§§ 579 and 580); offences concerning bankruptcy; usury and other illegal acts related to property (§§ 601, 604, and 605); offences against copyright and exclusive rights (§§ 620 and 622); and offences against official duties (§§ 643–645 and 652). The general part of the New Penal Code applied to these regulations. Many of these regulations were altogether new (for example, those pertaining to offences against copyright and exclusive rights), since there were new legal situations that had to be regulated by law. On the other hand, there were regulations that were already governed by the Old Penal Code, and, therefore, a situation arose wherein some norms were in the New Penal Code and others remained in the Old Penal Code.

Since the New Penal Code was originally designed for full application, the partial enactment of it could not have been a good idea. In a situation where only a portion of a new law is enacted and the old law that was meant to lose its validity remains the main source for criminal law, the legislation is not implicit and there is confusion in law. Obviously, we can see a violation of the rule of law here. Further, in addition to the coexistence of the two above-mentioned laws, there was a third one applicable.

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[30] E.g., according to § 19 of the Old Penal Code the term of forced labour were divided into seven classes:
1st class: unlimited forced labour;
2nd class: 15–20 years of forced labour;
3rd class: 12–15 years of forced labour;
4th class: 10–12 years of forced labour;
5th class: 8–10 years of forced labour;
6th class: 6–10 years of forced labour;
7th class: 4–6 years of forced labour.

[31] For example § 1451 (4) according to which if a woman killed her child at birth, who had been born outside of a marriage could have her punishment lowered to the 4th class of forced labour.

[32] Уголовное Уложение. – Свод Законовъ Российской Империи. T.XV. С.-Петербург, 1909. See also O. S. Bernstein (Übersetzer). Das Neue russische Strafgesetzbuch: (Ugolovnoje Ulozenje): allerhöchst bestätigt am 22. März 1903. Berlin 1908.

[33] With regulations from 7.06.1904, 16.07.1905, 14. 27.03.1906, 25.12.1909 and 20.03.1911.

[34] В. В. Есипов. Уголовное право. Часть особенная. С.-Петербург 1902, стр. 139.

[35] K. Grau (Note 20), p. 98.

1.4. The Penal Code for Peace Courts (1864)

In 1864, the Penal Code for Peace Courts[*36] was introduced alongside the Old Penal Code. Both Ambach and T. Anepaio have found that it was a product of major judicial reforms[*37] and that its content was much simpler and easier to understand than the Old Penal Code and clearly represented indications of its own time.[*38] Many norms from the Old Penal Code were transferred to the Penal Code for Peace Courts[*39]; thus, the judicial reform of 1864 plays a significant role in criminal law—the idea was to organise criminal law and make it easier to understand, but the process resulted in two laws that were contradictory in many respects. The Penal Code for Peace Courts was applied to only minor crimes and misconduct. In cases in which the Penal Code for Peace Courts did not provide a resolution, sections of the Old Penal Code had to be used. Efforts to align and harmonise the Old Penal Code and the Penal Code for Peace Courts failed.[*40]

As an example from the Penal Code for Peace Courts, there was an offence described in § 110 that consisted of threat in the event of which there was no profit to the self or any other such aim to it. Another example could be the various offences concerning theft (content regulating theft of forest property, dealt with in §§ 154–168[1]; theft of a value under 1,000 kroons, in §§ 169 and 170; theft without a special element, handled in § 170[1]; and special regulations in §§ 171–172). The regulation does not differ much from that of the Old Penal Code, which is why it was possible for questions to arise concerning the application of the right law.

The code was very casuistic, comparable with the Old Penal Code. It had separate regulations for theft with breaking into a house and theft by breaking a gate lock. This shows that the regulations were indicative of their time.

Another very important remark about the Penal Code for Peace Courts is that the procedural rules that applied to it were different from those for the previously mentioned codes. Offences under the Penal Code for Peace Courts were prosecuted by private persons, not public prosecutors. This means that criminal acts under this code were prosecuted only if a private person brought a complaint against the offender in court.

It is quite evident that in those circumstances where there is a plurality of criminal laws, we cannot talk about the realisation of the rule of law. The laws overlapped, they were meaningfully different, and this will be made even more obvious through description and illustration of the application of the laws.

2. Principles and problems of application of the criminal codes

2.1. Application of the codes in principle

The above-mentioned Old Penal Code, New Penal Code, and Penal Code for Peace Courts were used in general courts until 1935, when the Criminal Code was introduced. There are many elements to consider in relation to the application of the three codes until 1935.

First of all, the parallel existence meant that various criminal offences were settled under different criminal laws. Less serious offences were governed by the Penal Code for Peace Courts, mainly crimes against the state and religion were stipulated in the New Penal Code, and other grievous crimes were regulated in the Old Penal Code. This, however, meant that the first task, the first thing—in terms of logic—that a person needing to apply the law had to do, was identify the correct legal act that regulated the concrete situation at hand. The enforcement of the Penal Code for Peace Courts alongside the Old Penal Code meant that less serious crimes were processed under the Penal Code for Peace Courts and grievous crimes under the Old Penal Code. However, it has been found that the Old Penal Code and the Penal Code for Peace Courts were incompatible, which could have led to problems in finding of the right law to apply (and hence proper application of the law)—there might have been questions of whether to apply one or the other act in view of a person's actions. For example, § 140 of the Penal Code for Peace Courts stipulates the nature of threats, and the same composition is handled in § 823 of the Old Penal Code. The situation went from bad to worse when the New Penal

[36] Уставъ о наказанияхъ, налагаемыхъ Мировыми Судьями. – Свод Законовъ Российской Империи. Т. XV. С.-Петербург, 1885. Until the situation as at 24 October 1917 and some changes. See also G. J. H von Glasenapp (vlj). Gesetzbuch der Criminal- und Correctionsstrafen und Gesetz über die von den Friedensrichtern zu verhängenden Strafen: nach der Russischen Ausgabe vom Jahre 1885 nebst den Ergänzungen und Abänderungen bis zum Mai 1887. Tartu, 1892.

[37] G. Ambach (Note 26), p. 66 and T. Anepaio (Note 16), pp. 141–142.

[38] G. Ambach (Note 26), p. 66.

[39] T. Anepaio (Note 16), pp. 141–142.

[40] G. Ambach (Note 26), p. 66.

Code was introduced to the legal system. Although the Old Penal Code and the Penal Code for Peace Courts had their differences, the New Penal Code was of a very different cast. Grau has described the situation in criminal law in Estonia at that time as 'sad and impossible', holding that a judge when administering justice embraces the idea of the law but this cannot function if there are laws with different ideas.*[41]

Since there were three different criminal laws, all of the above-mentioned codes were supposed to regulate different crimes and each of them had separate regulation for the general rules.

Imagine the situation wherein, on the one hand, the Old Penal Code, like the Penal Code for Peace Courts, did not have a general part, while the New Penal Code, on the other hand, did. Already in principle the laws were different: the New Penal Code was considered scientific and European, and the other two were not. A person applying the law has to, in this situation, know and understand the logic of all the laws, understand how to apply them, and probably know in what sense they must be applied differently. For example, in the Old Penal Code, punishments were regulated through different classes; in the New Penal Code, the sanction system resembles that of the Criminal Code in effect at present. This means that in the New Penal Code, as in the Criminal Code, the punishment is given as a range from the least to the greatest possible punishment for a given offence. Already such differences provide a different understanding of a possible punishment—with the system of classes, the punishment was narrowly defined, which significantly restricts the understanding of a given sentence, whereas in the case of a wide range, the judge has much broader discretion concerning the length of the sentence. If already a judge might have found it difficult to work in different systems of criminal law, then, on the assumption that most people lack such legal expertise, there was a lack of clarity in Estonian criminal law due to the plurality of criminal laws.

There existed a major problem concerning the application of the correct law. It proves to be problematic, because we are able to find to some extent overlapping provisions in all of the above-mentioned codes. For instance, both the Old Penal Code and the New Penal Code governed offences against religion. Let us consider an example. Sections 180 and 176–178 and § 73 of the New Penal Code stipulated crimes against the public peace, which were all characterised by profanation of God, religion, or the church. Although all of these offences had the same type of punishment —deportation or forced labour—the scale of the penalties differed. And because the judge had broader discretion when imposing a sentence according to the New Penal Code, this was of great importance. Moreover, for example, when comparing § 85 of the New Penal Code and § 201 of the Old Penal Code, which stipulated punishment for voluntary castration committed using violence, one finds it apparent that they are practically the same. According to the New Penal Code, the punishment for committing this crime would have been up to six years of forced labour, whereas according to the Old Penal Code it would be 4–6 years of forced labour and loss of all special rights. This shows that, although the punishments are quite similar, the judge had much broader discretion if he were to employ the legislation of the New Penal Code. Another example may be found in § 212 (3) of the Old Penal Code and § 98 (2) of the New Penal Code (which deal with use of violence against the person of a clergyman), for which the sentence in the old code is 8–10 years of forced labour while in the new code it is unlimited time spent in a reformatory. The above examples only confirm that the regulations concerning offences against religion overlapped, but these were not the only parts of the codes with similar or the same regulation.

The next problem we consider existed in relation to the Old Penal Code and the Penal Code for Peace Courts. As mentioned above, when the Penal Code for Peace Courts was enforced, the aim of systematising criminal law was not met and the two codes were not in compliance. This is most evident when one reads the two texts. These examples will be analysed below, in the light of court practice.

How the prosecutor was supposed to prosecute a crime or how a judge was supposed to administer justice, how he was supposed to decide whether the indictment had been drawn up on the basis of the right law, is very unclear. The conflict between the laws applicable in general courts and also their multitude undoubtedly hampered the application of the law and the work of people who used it. In addition, it cannot be ignored that, in fact, this kind of confusion in legislation was affecting all who were subject to the law. Obviously, not all subjects of the law understand it, but in this kind of case, they probably wouldn't even have the opportunity to do so.

2.2. Some practical examples

To illustrate the problem that existed as a result of the plurality of criminal laws, it is necessary to provide introduction to some relevant practice. There is a case from the Supreme Court, for example, wherein the offender was accused of killing the victim. The accused shot the victim with a gun as a consequence of a public quarrel while in an agitated state, but the victim did not die from the gunshot. Unfortunately, the victim died in hospital, but because of an infection he developed after a minor operation performed on him. For this, the court of first instance convicted the accused of murder under §§ 1455 (2), 311, 9, 115, 134, and 135

[41] K. Grau (Note 20), pp. 99–100.

of the Old Penal Code. The attorney filed a complaint to the Supreme Court saying that, since there was no causal link between the act of the accused and the death of the person, his deed should be qualified as causing bodily harm as regulated in § 1482 of the Old Penal Code. The turn and total surprise comes in the Supreme Court's declaration that the lower courts had applied the wrong law to start with. The Supreme Court found that, since there was little damage caused in the first place and there was no causal link between the act of the accused and the death of the victim, the Penal Code for Peace Courts should be applied. The Supreme Court annulled the decision of the court but, unfortunately, gave no hint of which section of the Penal Code for Peace Courts should be applied.[*42]

This is in very many ways an extremely tricky case. First of all, both laws regulate causing of bodily harm, and it is quite difficult to understand the difference. Since the punishments for the two offences are quite different, it is important that the choice of law be correct in the first instance. This situation may prove to be highly restrictive to the rights of the accused. How can an accused person defend himself if he does not know what law will be applied, and how could he then foresee the possible punishment? § 1482 of the Old Penal Code stipulated that if the offender inflicts harm on another person the act will be punished with imprisonment of eight months to a year and four months or the offender will be sent to a reformatory in accordance with § 31 (fifth class) and, in addition, will lose all of his personal and acquired-status rights.

The other problem is that the procedural norms obtaining in application of one or the other code are significantly different. When the Supreme Court annulled the decision, it was not clear whether the court should discuss the matter further or whether that is properly an assignment for the private prosecutor. The main reason this turns out to be such a problem is that the procedural norms for the Penal Code for Peace Courts demanded that prosecution take place with a private prosecutor and there was no involvement of a public prosecutor. Who would in this case be entitled to bring forward a prosecution if the qualification were changed by the Supreme Court, and, moreover, what happens to the evidence already collected by the public prosecution—may it be used by the private prosecutor, or not? These questions show that there was more that resulted from the problems of which law to choose. The choice of law was thus important from not only the perspective of protection of the accused; it also played an important role in relation to the procedural rules. It is certainly a very interesting and disturbing case showing that there were problems within the laws.

Another case to consider is one in which a person was accused of theft. The defendant removed a broken lock from a gate and through an unlocked window entered the victims' house. He stole two candlesticks and some silverware from the house. For this, he was found guilty by the court of committing the crime stipulated in § 170^1 (1) of the Penal Code for Peace Courts and was sentenced to imprisonment for one year. The Supreme Court annulled the decision, finding that the act meets the conditions for the case stipulated in § 1647 of the Old Penal Code. According to § 170^1 (1) of the Penal Code for Peace Courts, a person may be sentenced to imprisonment of six months to one year and six months when theft has been committed through breaking of barriers that prevent access to the yard, access to a building, or getting from one of these places to the other, except in the cases mentioned in § 1647 of the Old Penal Code. According to the latter section, a person may be sentenced to imprisonment in a reformatory for 12–15 years, with loss of all special, personal rights or rights and benefits acquired in consequence of one's status, if the theft was committed from an inhabited building, its courtyard, or buildings within the courtyard when the offender has previously breached a gate that prevented access to the yard, the inhabited building, or access from one to the other, or if the bolt on the gate has been broken. The Supreme Court concluded that removing the lock from a gate is considered to be breaking the gate.[*43] How to differentiate these sections on the basis of the facts given is apparently unknown. Whether removing a broken lock constitutes breaking barriers or breaking a gate is actually unclear. This also shows that courts had concrete problems applying the so-called correct law. The two offences are very difficult to distinguish. Moreover, the crime stipulated in the Penal Code for Peace Courts is supposed to be less serious, but how can courts assess this question when there is another law that describes the act in almost the same way? The Supreme Court's explanations were not at all thorough in this case; in contrast, the wording of the description of the crime and the judgement in the first instances imply that there were already practical problems in applying the law correctly.

There certainly exists evidence in the legal literature and in the practice of the Supreme Court that shows there to have been a problem with application of the 'right' law. In addition, it is apparently the case that this problem was more acute in lower instances of the court system. This assumption is mainly based on the fact that the Supreme Court dealt mainly with legal issues of a case, whereas the lower instances dealt with the facts of the matter. The facts of the cases are the basis for questioning the appropriateness of the law applied. That is why it is more probable that we can find issues here regarding the choice of application of the law. Unfortunately, it is not possible to raise examples of problems concerning the application of the Penal Code for Peace Courts and the Old Penal Code, on the one hand, and the New Penal Code, on the other, because

[42] Supreme Court decision No. 928, 1926. FOND: ERA.1356.4.81. The Supreme Court's decisions are located at the Estonian National Archive in Tallinn. The number 1356 means the Supreme Court of Estonia, number 4 documents of the criminal department and the last number a number for a group of court decisions from a certain period that have been put in a seperate folder.

[43] Supreme Court decision No. 799, 1934. FOND: ERA.1356.4.104 (see Note 42).

too little research has been done in this field. Nonetheless, when accepting the perspective of Grau, one finds that there had to be a major problem.*[44]

2.3. The light at the end of the tunnel?—the Criminal Code (1929/35)

When the Criminal Code came into effect, in 1935, the substantive legal basis became undeniably clearer and people's rights were better assured. Although misdemeanours were generally dealt with in special laws (*lex specialis*), rights were still better guaranteed, on account of the fact that all crimes were assigned a classification in the Criminal Code. It is not possible to say that the structure and form of the offences were very straightforward—there was a totally new situation wherein the level of abstraction was much higher than ever before. It can be said, of course, that the high level of abstraction shows the development in the legislation, but it is doubtful whether that legislation was clearer for the people in general. Maybe that is why it is possible to consider a six-year *vacatio legis* period (1929–1935) to be positive. In such a situation, there was time for discussion among jurists, and the specialist literature is an excellent example of this. In the Estonian journal *Õigus* (in English, 'The Law'), we can find many articles dating from the time prior to the enforcement of the Criminal Code that deal with questions concerning the new law. Also, the specialist journal for the police, *Eesti Politsei* (in English 'Estonian Police'), published an article by L. Vahter already in 1929 that dealt with the general part of the newly published but not yet valid Criminal Code.*[45] The elaboration on various conceptual issues among lawyers certainly facilitated the subsequent transition from the old law to the new.

3. Conclusions

Estonia remained under a plurality of criminal laws until 1935. There were three criminal codes applicable in general courts. The offences tended to overlap, making it hard to decide which law to apply. These problems were also the reason a new criminal law—the Criminal Code—was introduced.

If we recognise the situation in Estonia from 1918 to 1935 as a problem, we can learn from it. The question that needs to be answered is whether or not we are prepared to understand and cope with the existence of several different criminal laws and whether it is consistent with our own legal system as in force today. If there is one thing that we can learn from our history, it is that criminal law divided among various legal acts is not a good sign for legal certainty. Whether or not this problem already exists in our criminal law, with the crimes handled in one place and misdemeanours mainly addressed by special laws, might have to be answered in the affirmative. Firstly, it is not possible with the amount of legislation regulating misdemeanours for all people to know the regulations. Secondly, it could even constitute a problem for the judge or prosecutor. An even more acute question arises in relation to the probable intersection with European Union law. If we look at the historical experience in Estonia, then we can undoubtedly say that we should in all ways try to avoid being in a situation where criminal law is divided among several different acts—such a situation goes against the principle of *nullum crimen* and the rule of law; it is implicit and violates the rights of individuals. We have to be careful not to step over the very thin line that stands between a country subject to the rule of law and a country violating people's rights, and our historical experience offers one way to show how this could come about and what could be the results.

[44] K. Grau (Note 20), pp. 99–100.

[45] L. Vahter. Eesti kriminaalseadustiku üldosa ülevaade (Overview of the General Part of the Estonian Criminal Code). – Eesti Politseileht 1929, No. 35/36, pp. 431–436 (in Estonian).

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Intentional Homicides in Estonia:

The Short-term and Long-term Trends

1. Introduction

In recent decades, the reliability of recorded crime statistics in assessing crime levels and comparing crime in international terms has increasingly been called into doubt. Court and police statistics are too much affected by the national features of law enforcement authorities and of the crime recording practice to fulfil that purpose. By now, it has become symptomatic of this that general crime indicators are interpreted above all as characterising of the activity of the criminal justice system.[*1] More adequate ways for assessing the crime situation have been sought, including searching for types of crimes that are most immune to the above-mentioned shortcomings.

Intentional taking of another person's life is a type of criminal offence that is characterised by relatively little dependence on the will of the particular regulator involved or on national statistical manipulations; by low latency; and by a high rate of detection. That is why intentional homicides rather than general numbers of recorded crimes are often used for comparing the crime in different countries. The attention to the homicide rate has spread from criminology to more general sociological approaches, where it is used as an indicator in the assessment and comparison of the crime situation and social security of different countries.[*2]

This article looks at violent crime and its level in Estonia as compared to other countries. The most significant type of criminal homicides in Estonia—intentional homicide—is used as empirical material.[*3] The objective is to assess the level of intentional homicide in Estonia in comparison to other countries and to point out the most important short- and long-term trends. Based on homicide rates, an attempt is made to determine the general vector of Estonia's social development.

Up to now only a few in-depth analyses of violent crime in Estonia that have been published in the domestic scientific literature.[*4] Local homicides have been analysed by M. Lehti, who has also gathered material on this

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1 K. Kangaspunta (ed.). Crime and Criminal Justice in Europe and North America 1986–1990. HEUNI Publications Series No. 25. Helsinki: HEUNI 1995.

2 United Nations Development Programme. Human Development Report 1999. New York, Oxford: Oxford University Press 1999; United Nations Development Programme. Human Development Report 2007/2008. Fighting Climate Change: Human Solidarity in a Divided World. New York: Palgrave Macmillan 2007.

3 For problems with the legal qualification of criminal homicides in Estonia before the year 2002, see J. Saar. Kriminaalkorras karistatavate ja õiguspäraste surmamiste regulatsioon Eestis võrrelduna Ameerika Ühendriikide ja Saksamaa õigusega (Regulation of Criminal and Legal Homicides in Estonia as Compared to the Law of the United States of America and Germany). – Juridica 2000/1, pp. 14–26 (in Estonian).

4 H. Urvaste. 1994. aastal Eesti Vabariigis toimepandud tapmistest (On the Homicides Committed in the Republic of Estonia in 1994). – Juridica 1995/2, pp. 50–52 (in Estonian).

subject in Estonia. His research on this subject has been published in Finnish[*5] and also in English.[*6] Homicides in Estonia as indicators of the local crime situation were mostly beyond the scope set for that study, and the time period covered ended with the mid-1990s.

2. Homicide statistics in Estonia

Homicide statistics in Estonia since the restoration of independence must be viewed in the context of the criminal law in force. Firstly, the period from 1991 to 2002—i.e., the time when the Criminal Code of the Republic of Estonia (hereinafter 'CrC') was in force[*7]—must be considered and, secondly, the period that started with the entry into force of the Penal Code[*8] (hereinafter 'PenC') on 1 September 2002.

Until 2002, criminal homicides in Estonia were accounted for in two statistics: the recorded criminal offences (crime) statistics compiled by the Police Board and the court statistics of the Ministry of Justice. Criminal homicides were also accounted for in the health statistics of fatalities caused by external forces—i.e., violent deaths—kept by the Statistical Office. Police and court statistics are normally maintained in terms of criminal offences and types of crimes, whereas violent death statistics focus on crime victims.

In the Estonian crime statistics of the first, earlier, time period, the compilation principles of which remained relatively unchanged from those of the Soviet era, intentional homicides were considered separately.[*9] They were taken to include the CrC § 100 (homicide without aggravated circumstances), CrC § 101 (murder), CrC § 102 (infanticide), and § 103 (homicide by one in a provoked state, so-called affect homicide). In presentation of the intentional homicide statistics, one type of intentional homicide was omitted—CrC § 104 (homicide through exceeding the limits of self-defence).

Another important aspect of Estonian homicide statistics up to the year 2002 was the fact that completed and attempted homicides were viewed together on account of legislative logic according to which attempted and completed crime resulted in prosecution under the same section of the law. The percentage of attempts from the total numbers of homicides varied greatly by types of homicide. In the earlier Estonian crime statistics, causing of fatal bodily injury (CrC § 107 (2) 1)) was not regarded as intentional homicide, which was quite problematic in view of the similarity between this type of criminal offence and homicide with regard to motivation and result.[*10] As demonstrated by international comparisons of judicial practice, some countries prefer to classify violent crimes whose victim survives as attempted homicides, whereas others classify them as causing of serious bodily injury. As a result, the percentage of completed and attempted homicides from the total number of intentional homicides varies greatly by country.[*11] At the same time—as demonstrated by Estonian crime statistics in the Soviet period, among others—the numbers for attempted homicide and fatal bodily injury were almost equal. Given that by the addition of attempted homicides to homicides the total number seemed to rise, while the omission of fatal bodily injury caused the total number of homicides to fall, the total number of intentional homicides in Estonian statistics from that time period can be regarded as quite reliable for the purpose of international comparison.

In 2002, when the PenC entered into force in Estonia, the *corpus delicti* of intentional homicide have been changed and some alterations were made to the principles for compilation of homicide statistics. The Penal Code now has four *corpus delicti*'s that refer to intentional taking of another person's life and are regarded as intentional homicide in crime statistics. The first of these is manslaughter (PenC § 113), the second is murder as an aggravated form of intentional homicide (PenC § 114), third is manslaughter in a provoked state (PenC § 115), and fourth is infanticide (PenC § 116).

It must be pointed out as an organisational characteristic that it is now the Ministry of Justice that compiles and presents national crime statistics, not the police. The statistics differentiate between completed and attempted homicides. At the same time, violent crimes that result in a human fatality but in whose case the death of the victim is not intentional but caused by negligence are still not classified as homicides in Estonian statistics.

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5 M. Lehti. Viron henkirikollisuus 1990-luvulla. English Summary: Homicides in Estonia in the 1990s. Helsinki 1997.

6 M. Lehti. Homicide trends in Estonia, 1971–1996. – H. Ylikangas (ed.). Five Centuries of Violence in Finland and the Baltic Area. Columbus: Ohio State University Press 2001, pp. 133–192.

7 Entered into force on 1.06.1992, effective until 31.08.2002. – RT 1992, 20, 287 and 288; RT I 2002, 64, 390 (in Estonian).

8 Karistusseadustik. – RT I 2001, 61, 364; 2010, 29, 151 (in Estonian).

9 The main reason for that situation was the fact that the Criminal Code of the Republic of Estonia overlapped to a large extent with the Criminal Code of Soviet Estonia with regard to homicides.

10 Estonia is no exception in that regard, and in the Finnish Criminal Code, for instance, there is an analogous so-called fight homicide, in which case the resulting deaths are not qualified as intentional homicides. See The Penal Code of Finland and The Decree on the Enforcement of the Penal Code. Unauthorized Draft Translation, translated by Matti Joutsen. Helsinki: Research Institute of Legal Policy 1983, p. 71.

11 In that regard, see the comparison of the Estonian and Finnish judicial practice M. Lehti. Tahtlikud tapmised Eestis 1990ndatel aastatel (Intentional Homicides in Estonia in the 1990s). Tallinn: Sisekaitseakadeemia 1998, pp. 11–12 (in Estonian).

In that case, the offender's behaviour is qualified as an aggregate of *corpus delicti* in such a way that PenC § 117 (negligent homicide) is combined with one of the following crime events: PenC § 118 (causing serious damage to health), PenC § 121 (physical abuse), or PenC § 122 (torture).*[12]

3. International comparison of intentional homicides

The data on intentional homicides are more comparable on an international basis than are the data on other types of crime. At the same time, it is, of course, impossible to know and consider all country-specific nuances arising from under- or over-recording and differences in classification when one is utilising these data.*[13] Comparative data on intentional homicides can be found from several, quite different sources that have been compiled by international organisations. As a general rule, the number of intentional homicides per year per 100,000 inhabitants is used as an indicator.

a) The UN (through the UNODC, United Nations Office on Drugs and Crime) has been gathering information on crime, including homicides, in member states since 1946. In 1974, a series of special studies on crime trends and the activity of criminal justice systems were commenced. The first of these covered the period from 1970 to 1975 and included 56 member states. The fifth study covered 1990 to 1994 and, among other things, presents the data on intentional homicides in 65 member states. This study employs the concept of intentional homicide ('death intentionally caused by another person, including infanticides by mothers and attempted homicides').*[14] The newest publication in the series covers the years 1995–2004.*[15]

b) INTERPOL (the International Criminal Police Organization) used to collect and publish crime data obtained from national police organisations since 1950. Criminal homicide was defined as 'any act performed with the intention of taking another person's life regardless of the circumstances of the performance of said act'. These statistics included infanticide but not always attempted homicide. The member states of INTERPOL did not submit crime data on a regular basis, and the number of countries that submitted data varied greatly from one year to the next.*[16] Since 2006, INTERPOL is no longer involved in collecting and publishing the data on intentional homicides in member states.*[17]

c) WHO (World Health Organization) data on causes of death, collected since 1948, are regarded as one of the best statistical sources. The WHO has defined homicide as 'death resulting from injuries intentionally caused by other people'. In contrast to the two above-mentioned statistics, this proceeds not from consideration of criminal offence but from information on crime victims, and it includes all homicide victims, regardless of how the case has been described in the criminal code of the country in question.*[18] The newest data from this series cover the situation in 2006.*[19]

d) The Council of Europe has compiled international crime statistics for European countries. In 1996, a committee of the Council of Europe—the European Committee on Crime Problems—formed a specialist group that first collected data on the period from 1990 to 1996. In contrast to the UN and INTERPOL methodology, where country data are defined on the basis of standard definitions of crimes, a number of national correspondents were used instead, in an attempt to render the data from different countries as comparable as possible. Causing of fatal bodily injury, euthanasia, assistance to suicide, and infanticide were added to the standard definition of intentional homicide ('intentional

[12] J. Sootak, P. Pikamäe (ed.). Karistusseadustik. Kommenteeritud väljaanne. täiendatud ja ümbertöötatud väljaanne (Penal Code. With commentary. 3rd revised edition). Tallinn 2009, comment on § 117, p. 374 (in Estonian).

[13] One of the issues related to recording is the combining of homicide and attempted homicide figures in statistics. As mentioned before, some countries prefer to qualify the crime as causing of serious bodily injury if the victim survives, whereas others classify it under attempted homicide. For example, violent crimes whose victim survives are in Estonia mostly recorded as physical abuse. In contrast, Finland currently assigns a much broader meaning to attempted homicide; therefore, if homicides and attempted homicides are presented together, the level of this type of crime is much higher compared to the indicator of completed homicides only (e.g., in 1996 a total of 10.1 homicides and attempted homicides per 100,000 inhabitants were committed in Finland, whereas the corresponding indicator of completed intentional homicides was 3.7).

[14] K. Kangaspunta, M. Joutsen, N. Ollus (eds.). Crime and Criminal Justice in Europe and North America 1990–1994. HEUNI Publications Series No. 32, Helsinki: HEUNI 1998.

[15] K. Aromaa, M. Heiskanen (eds.). Crime and Criminal Justice in Europe and North America 1995–2004. HEUNI Publications Series No. 55, Helsinki: HEUNI 2008.

[16] M. Riedel. Homicide. – L. Kurtz, J. Turpin (eds.). Encyclopedia of Violence, Peace, and Conflict. Vol. 2. San Diego, London: Academic Press 1999, pp. 123–138.

[17] INTERPOL: http://www.interpol.int/Public/otherCrime/default.asp.

[18] United Nations. United Nations Demographic Yearbook 1997. Forty-Ninth Issue. New York: United Nations, Department of Economic and Social Affairs 1999, pp. 450–470.

[19] United Nations. United Nations Demographic Yearbook 2006. Fifty-Eighth Issue. New York: United Nations, Department of Economic and Social Affairs 2008, pp. 609–749.

killing of another person') where possible.[*20] The last, third publication in the series was issued in 2006, and it includes crime data for the years 2000–2003.[*21] In addition, Eurostat publishes the population and social statistics of member states on a regular basis. The last data that also reflect the intentional homicides recorded by the Estonian Police cover the years 1998–2007.[*22]

4. Short- and long-term trends of intentional homicides in Estonia

In order to assess the current level of intentional homicide in Estonia, we will look at the development trends of this type of criminal offence since the founding of the Republic of Estonia, comparing three periods:

1) the Republic of Estonia before the Soviet occupation (1918–1940);
2) the period of Soviet occupation (1945–1990); and
3) the Republic of Estonia after restoration of independence (1991–2009).

In pre-war Estonia, on average, 127 homicides were committed per year; that is slightly above 11 homicides per 100,000 inhabitants, given the population at that time.[*23] During the Soviet period, the average number of homicides and attempted homicides per year was 66; the corresponding indicator is about six homicides per 100,000 inhabitants.[*24] The average figure in today's Estonia is 196 homicides per year, the quotient being 13.9 per 100,000 inhabitants. Such figures require further comment.

At the same time, the very large figures for illegal abortions and infanticides grab attention. In the early 1920s, these two types of homicide accounted for almost a third of the total number of intentional homicides, whereas in 1924 this indicator was already nearly 60%.[*25] Comparing this to the current situation, wherein, on average, only a few such criminal offences are committed per year (e.g., three in 1994, two in 1995, six in 1996, one in 2005, none in 2006, and two in 2007), we can see a significant change in the breakdown of intentional homicides committed in Estonia. The performance and detection of illegal abortions has become virtually non-existent in today's Estonia as a result of legal options for abortion. Therefore, it is better to compare the numbers of intentional homicides in the 1920s and 1930s with later figures only after subtracting out infanticides and illegal abortions. The number of intentional homicides per year in the 1920s and 1930s in Estonia would thus be around 100 cases, on average.

The relatively low homicide figures in the Soviet period require fundamental specification. The crime statistics from that period must be approached with care, because in a totalitarian country the accounting of what goes on in the society is radically different from the practice of democratic nations. Crime statistics in the Soviet period also enabled manipulation of the numbers of intentional homicides. For instance, the crimes committed by the military or defence-industry enterprises' employees staying here were not accounted for. Given that competition with the capitalist world also took place with regard to crime indicators, law enforcement authorities were subjected to strong political and ideological pressure upon producing the figures.

At the same time, it is quite logical that in a society where all of people's conduct was strictly controlled, activity, including criminal activity, was restricted. The low level of intentional homicide in Estonia during the period of Soviet occupation is a vivid example of this. The opportunities of an over-controlled society to keep homicide indicators down is well characterised by China with its more than one milliard people—according to official data, 63 people were killed there in 1996; that is less than one case per 100,000 inhabitants.[*26] It is impossible for an outsider to assess this figure objectively, but it can certainly not be juxtaposed with an analogous indicator from a European country for the purpose of comparison. The same applies to comparing the crime levels of Soviet Estonia and today's Estonia.

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[20] European Sourcebook of Crime and Criminal Justice Statistics. European Committee on Crime Problems. Directorate General I, Legal Affairs, Strasbourg Oct. 1999, p. 17.

[21] M. Aebi, K. Aromaa, B. de Cavarlay, G. Barklay, B. Gruszczynska, H. von Hofer, V. Hysi, J.-M. Jehle, M. Killias, P. Smit, C. Tavares. European Sourcebook of Crime and Criminal Justice Statistics – 2006. Third Edition. Haag: Wetenschappellijk Onderzoek- en Documentatiecentrum (WODC) 2006. Available at http://www.europeansourcebook.org/esb3_Full.pdf.

[22] C. Tavares, G. Thomas. Population and Social Conditions. Crimes Recorded by the Police: Homicide. Eurostat. Statistics in Focus, 36/2009. Available at http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09-036/EN/KS-SF-09-036-EN.PDF.

[23] A. Susi. Kuritegevus Eestis 1919–1924 (Crime in Estonia 1919–1924). – Eesti Statistika 1926 (53) 1, pp. 1–7 (in Estonian); Central Bureau of State Statistics (publisher). Eesti Arvudes 1920–1937 (Estonia in Numbers, 1920–1937). Tallinn: Riigi Statistika Keskbüroo 1937, pp. 303–310 (in Estonian); K. Raid. Süütegevus 1937 (Offences 1937). – Eesti Statistika 1938 (200) 7 – (201) 8, pp. 357–365 (in Estonian).

[24] For the indicators of the Soviet period, see J. Saar. Criminality as an Indicator of the Social Situation in Estonia. – B. Szamota-Sacki, D. Wojcik (eds.). Impact of Political, Economic and Social Change on Crime and Its Image in Society. 51st International Course of Criminology, 12–16 September 1995 Warsaw, Poland. Warsaw: Instytut Nauk Prawnych PAN 1996, pp. 61–77.

[25] See A. Susi (Note 23) and K. Raid (Note 23).

[26] United Nations. Demographic Yearbook of the United Nations 1999. New York: United Nations 1999, pp. 455–460.

When one looks at the homicides committed in the 1990s in Estonia, a clear dynamic emerges. The number of homicides started to rise in the early 1990s, exceeding 15 cases per 100,000 inhabitants in 1992 and 21 cases in 1993. The most homicides were committed in 1994, when the corresponding number was 365, or 24.2 homicides per 100,000 inhabitants. Since then, the number of intentional homicides in Estonia has been decreasing steadily. The latest figure for intentional homicides in Estonia is for the year 2009, during which 7.0 such criminal offences (attempts included) were committed per 100,000 inhabitants. With attempts excluded, the corresponding indicator was 5.2 (see Table). As we can see from the data presented, the level of homicide in Estonia has by now decreased more than three times in comparison to that of the mid-1990s.

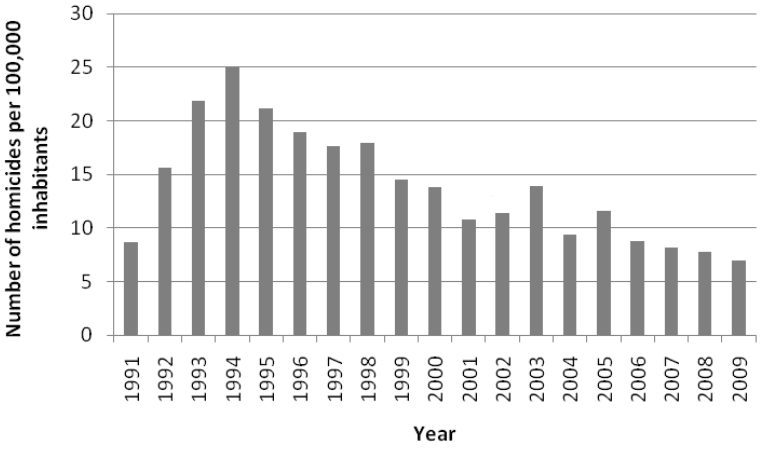

Figure. Intentional homicides in Estonia, 1991–2009

Currently, PenC § 113 (on manslaughter) covers the vast majority of homicides, followed by PenC § 114 (on murder). Then come a small number of crimes qualified under PenC § 115 (manslaughter in a provoked state) (in 2007, for example: PenC § 113, 90 cases; § 114, 20 cases; and § 115, two cases).[*27] When it comes to intentional homicides in Estonia, it also makes sense to see whether the rate of intentional homicide has in recent years decreased inversely to the increase in the number of negligent deaths. Should that prove to be true, there would be reason to claim that whenever possible, law enforcement agencies qualify homicides as causing death through negligence. These statistics do not point to such a tendency, although a surprisingly large number of negligent homicides were recorded immediately after the entry into enforcement of the Penal Code (with 2003 featuring 1207 cases and 2004 having 938 cases). In the following years, however, the number of negligent homicides has been decreasing constantly (e.g., 106 in 2008 and 85 in 2009), which permits rating the reliability of the statistics as quite high from that perspective.

5. Intentional homicides in Estonia and international background

The statistics for intentional homicides committed in Estonia in the mid-1990s received much international attention. For example, the UN Statistical Yearbook, which covered the general trends in Europe and North America, pointed out the criminal (intentional) homicide figures of two countries as exceptionally high. These were Russia and Estonia, whose number of intentional homicides per 100,000 inhabitants was above 20 and had more than doubled from 1990 to 1994.[*28] The UN Human Development Report of 1999 presented 1994 data on intentional homicides. Estonia held the seventh place from the top, ranking two places above Russia. The latter's level of intentional homicide was higher than the figure for Estonia only in such Third World countries as São Tomé and Príncipe, the Bahamas, Colombia, Lesotho, Guatemala, and Jamaica.[*29] In the UN Human Development Report of 2007/2008, Estonia's position had improved significantly, ranking in the 31st place by homicide level and the 11th place among countries with a high level of human development.[*30]

[27] See Ministry of Justice (publisher). Kuritegevus Eestis 2007 (Crime in Estonia 2007). – Kriminaalpoliitika uuringud 8. Tallinn 2008, p. 168 (in Estonian).

[28] United Nations. The Statistical Yearbook of the Economic Commission for Europe. Trends in Europe and North America 1998/1999. New York and Geneva: United Nations 1999, p. 223.

[29] United Nations Development Programme. Human Development Report 1999. New York, Oxford: Oxford University Press 1999, pp. 222–224.

[30] United Nations Development Programme. Human Development Report 2007/2008. New York, UNDP: Palgrave Macmillan 2007, pp. 322–325.

Compared to those for developed countries, Estonia's level was much higher in the mid-1990s also by the number of homicide victims. In 1994, Estonia ranked fourth in the list of the 15 countries with the world's highest level of victimisation, falling below only Colombia, Russia, and El Salvador. By 1997, however, Estonia's position had improved by a couple of places: in addition to the three above-mentioned countries, Armenia and Puerto Rico had a higher number of intentional homicides.*[31] The data from 2007 indicate that Estonia now ranks 45th according to Estonian Police data and only 82nd according to health care institutions' data.*[32] Given the data presented, it can be said with confidence that today's Estonia has no business among the countries where the homicide figures of the mid-1990s placed us.

Most European countries are characterised by low homicide levels when compared to the rest of the world, which is why Estonia firmly held a position among the European countries with the highest such figures in the mid-1990s. According to the above-mentioned study of the Council of Europe, Estonia shared third and fourth place in Europe with Albania for the level of intentional homicide (when cases of attempted homicide are included). More such crimes than in Estonia were committed in 1996 only in Russia and, surprisingly, in the Netherlands.*[33] In the ranking of countries by completed intentional homicides, however, Estonia holds the second place after Russia for that year. The Netherlands, with 1.8 completed homicides per 100,000 inhabitants can be found only in the lower half of the ranking. In 2002, Estonia again ranked highest, with an indicator of 10.3. According to the year-2007 data and among European Union member states only, Estonia with its indicator of 6.9 holds second position, after Lithuania.*[34] However, because countries' figures also differ in the kind of data they provide, compiling an accurate ranking of intentional homicide levels is rather complicated.

On the basis of the violent crime data from the period between the World Wars, it was possible to divide Europe into a western part with a low homicide rate and an eastern part with a high homicide rate.*[35] That was the general picture also in the first decades after World War II. Today such a division no longer applies in full, because the area with a low homicide rate has expanded, also covering several Central and Southern European countries in addition to Western Europe. However, the transitional countries with a large number of homicides (including Estonia) are still mostly found in Eastern Europe. The highest level in that regard characterises the former Soviet republics, followed by the former so-called European socialist countries. It seems that the earlier division of Europe into two parts applies to the overall condition of the society and the level of intentional homicide in combination with traditions that go back several decades. Estonia's intentional homicide rates have improved in comparison to the mid-1990s but are nevertheless not as good as those of long-time European Union countries.

6. Conclusions

Offences against the person (homicides, above all) have been regarded as important from the perspective of characterising the moral level and proneness to conflict of the population. A society's high crime level can be interpreted as the result of social interaction that develops in the presence of a sufficient contingent of motivated criminals, relatively weak social control, and suitable crime targets.*[36] Such a general model where crime level is determined by the interaction of motivational and opportunity-related factors can also be used in interpreting homicide trends. The level of violent crime is correlated with factors of community life such as relative poverty, social inequality, and dissatisfaction with earnings.*[37] At the same time, it is logical that the development of a large middle class brings about a reduction in violence, the level of which is indicated by intentional homicides.

In the interpretation of international trends with regard to intentional homicides, it must be taken into account that different societies have entered different stages of the modernisation process. This is accompanied by constant change in criminal motivation and opportunity. The main element of consistency is as follows: the more

[31] Demographic Yearbook of the United Nations 1994 (1996), pp. 445–465; Demographic Yearbook of the United Nations 1997 (1999), pp. 450–470.

[32] UNODC homicide criminal justice statistics. Available at http://www.unodc.org/documents/data-and-analysis/Crime-statistics/Criminal_justice_latest_year_by_country.20100201.xls; UNODC homicide public health data: http://www.unodc.org/documents/data-and-analysis/Crime-statistics/Public_health_latest_year_by_country_2.xls.

[33] European Sourcebook of Crime and Criminal Justice Statistics (1999), p. 41.

[34] European Sourcebook of Crime and Criminal Justice Statistics (1999), p. 42; European Sourcebook of Crime and Criminal Justice Statistics (2006), p. 40; Eurostat, crimes recorded by police http://epp,eurostat,ec,europa,eu/cache/ITY_OFFPUB/KS-SF-09-036/EN/KS-SF-09-036-EN,PDF.

[35] V. Verkko. Homicides and Suicides in Finland and Their Dependence in National Character. Preface by Professor Thorsten Sellin. Scandinavian Studies in Sociology, 3. Kobenhavn: G.E.C.GADS FORLAG 1951, pp. 65–76.

[36] J. Van Dijk. Opportunities for Crime: A Test of the Rational-interactionalist Model. Report at the Eleventh Criminological Colloquium of the Council of Europe. Strasbourg 1994, 23–30 November.

[37] P. Mayhew, J. J. M.van Dijk. Criminal victimisation in eleven industrialised countries: Key findings from the 1996 International Crime Victims Survey. The Hague: Ministry of Justice, Research and Documentation Centre 1997.

developed the society, the lower the incidence of violence-related crime.[*38] As also demonstrated by Estonia's development, the overall picture of the local crime is changing in a manner characteristic of a modernising society. At the same time, the importance of the socio-cultural context in explaining violent crime has been emphasised. Societies with a low homicide rate have strong informal social control and a generally accepted normative system, a strict network of social responsibilities, and a cultural orientation that suppresses aggression.[*39] After the restoration of independence, Estonia entered an era that can be described as a deficiency of social control, the loss of earlier control mechanisms. The development of a new social control based on other principles does not come about overnight.

The homicide level dynamic in Estonia from the early 1990s to the present day shows how fundamental the social changes in this country have been. Big changes first brought about a phase of social disorganisation in which the earlier bonds and control mechanisms of the society apparently proved ineffective, and all of the factors contributing to a high level of violent crime were at that time represented to a quite considerable degree in Estonian society. Estonia's high level of homicide in the early and mid-1990s was directly related to the poor performance of law enforcement authorities in keeping such crime under control. Paradoxically, the overall numbers of recorded crime dropped in that period in Estonia, pointing to the fact that the resources of law enforcement authorities were mostly spent on curbing serious crime, and there were not always enough resources left for keeping minor offences under control.

It makes sense that social development and more extensive integration into the Western world bring about a steady reduction in the number of homicides. Estonia is no exception in that regard, and a similar process is taking place also in other transitional countries. It might be true that changes have been more rapid here, on account of the relative smallness and the geopolitical position of Estonia. If the current developments in Estonia continue and stability is achieved, the violent crime rate is likely to keep falling, to reach a level characteristic of other developed European countries.

Table. The number of intentional homicides and attempted homicides, the quotient per 100,000 inhabitants, and the number of homicide victims in Estonia in 1991–2009

Year	Number of homicides and attempted homicides	Quotient per 100,000 inhabitants[*40]	Number of victims[*41]
1991	136	8.7	170
1992	239	15.6	302
1993	327	21.9	389
1994	365	25.0	426
1995	304	21.2	328
1996	268	18.9	293
1997	247	17.6	237
1998	248	17.9	267
1999	200	14.5	227
2000	189	13.8	190
2001	137	10.8	207
2002	155 (excl. attempts, 140)	11.4 (10.3)	159
2003	188 (excl. attempts, 147)	13.9 (10.9)	148
2004	127 (excl. attempts, 91)	9.4 (6.7)	109
2005	156 (excl. attempts, 113)	11.6 (8.4)	123
2006	119 (excl. attempts, 91)	8.8 (6.8)	99
2007	110 (excl. attempts, 93)	8.2 (6.9)	95
2008	104 (excl. attempts, 88)	7.8 (6.3)	91
2009	95 (excl. attempts, 70)	7.0 (5.2)	69

38 See M. Riedel (Note 16), p. 126.

39 R. Gartner. Crime: Variations across cultures and nations. – C. Ember, M. Ember (eds.). Cross-Cultural Research for Social Science. Englewood Cliffs, NJ: Prentice-Hall 1997, pp. 101–119; M. Wolfgang, F. Ferracuti. The Subculture of Violence. Beverly Hills, London: Sage Publications, Inc 1982.

40 Starting from 2003, homicide indicator with attempted homicides excluded has been given in brackets. Source: Police Board, from 2003 Ministry of Justice: registered crime 2003–2009. Available at http://www.just.ee/orb.aw/class=file/action=preview/id=49210/Kuritegevuse+andmed+2003-2009.xls (in Estonian).

41 Source: Statistical Office: The Deceased by Cause of Death, Sex and Age. Available at http://pub.stat.ee/px-web.2001/Dialog/varval.asp?ma=RV56&ti=SURNUD+SURMAP%D5HJUSE%2C+SOO+JA+VANUSER%DCHMA+J%C4RGI&path=../Database/Rahvastik/03Rahvastik usundmused/10Surmad/&lang=2 (in Estonian).

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Division of a Company as Means of Corporate Rescue?

On Criminal Liability in the Context of Company Division[*1]

1. Introduction

A new era in Estonia's penal law began in 2002 when Soviet criminal law was replaced by contemporary penal law enriched with European influences. One of the most revolutionary aspects of the new Penal Code was the new concept of criminal liability of legal entities, replacing the vaguer notion of liability of legal entities (hereinafter also 'corporate criminal liability') as developed in previous case law. Criminal liability of legal entities, as well as the very concept of a legal entity, is unarguably the prodigy of legal theory, and those notions are treated rather differently in various legal cultures. For instance, the school of thought in Soviet criminal law—first and foremost, the criminal law dogmatics of the Russian Federation—holds a firm view that the criminal liability of legal entities is a notion belonging to a fantasy world, because the legal entity cannot know and understand its actions nor independently direct those actions: only physical persons can be responsible for committing a crime.[*2]

Whereas in the context of criminal liability of physical persons it is clearly deducible from the principle of guilt that the liability for the crime committed lies with the person who actually committed the act (and only said person and not, for example, his or her children and grandchildren in consequence of affiliation), the situation is less than clear in the context of legal entities, because, differently from physical persons, legal entities may be divided, merged, and reorganised. From the perspective of criminal liability, mergers and reorganisations of legal entities do not cause difficulties (the entity created as a result of merger or reorganisation shall be subject to liability), but with regard to division of legal entities the situation is more complex, as there are several potential entities that may be subject to liability. This article concentrates on issues arising in connection with division of a legal entity that is subject to criminal proceedings. Upon division of a legal entity, should both entities be liable or only the entity that is divided? What are the dangers arising from division of

[1] This article is based on the Estonian-language article published in 2009 in the collection of articles dedicated to the jubilee of Professor Jaan Sootak. Full reference of the article: M. Kairjak. R. Rask. Kriminaalvastutus juriidilise isiku jagunemisel (Criminal Liability upon Division of Legal Entity). – Tractatus terribles. Collection of articles dedicated to the 60th jubilee of Professor Jaan Sootak. Tallinn 2009, pp. 37–49 (in Estonian).

[2] В. Н. Кудрявчева, В. В. Лунеева, А. В. Наумова (Ред). Уголовное право России общая часть. Москва 2004, Chapter 4, § 19.

a legal entity that is subject to criminal proceedings in the course of such proceedings? How can we combat such risks and dangers? As the case law and legal theory in Estonia have not yet clearly tackled these issues, this article should be deemed an introduction to the topic, which one hopes will be followed by opinions of other experts in the field as well as case law.

2. Regulation of division under civil law

According to § 434 (1) of the Commercial Code[*3], division of a legal entity takes place without liquidation proceedings by way of division by acquisition or division by separation. In division by acquisition, the company to be divided transfers its assets to the recipient companies, which may be either existing companies or companies that are yet to be established, and the shareholders of the company subject to division shall become the shareholders of the recipient company. Upon division by acquisition, the company to be divided shall be deemed terminated. In division by separation, the company subject to division shall transfer its assets to one or more recipient companies while the company subject to division remains in existence. Consequently, the shareholders of the recipient company may either be the shareholders of the company subject to division or be the shareholders of the divided company itself.

The characteristic feature of both manners of division is the total or partial transfer of the rights and obligations of the company subject to division to the recipient company/companies. For the purposes of this article, the question of most importance is whether the procedural position of a suspect, the accused, or the convict may be deemed to be part of 'assets' as a combination of rights and obligations of the company subject to division within the meaning of § 434 of the Commercial Code and, consequently, whether such a procedural position could be subject to transfer in the course of division to the recipient company or companies. Or should the procedural position of a suspect, the accused, or the convict be deemed a combination of rights and obligations that is inseparably attached to a specific entity and therefore cannot be transferred to a recipient company in the course of division? With the latter thesis taken as a starting point, it should be impossible to hold recipient companies criminally liable for the acts previously committed by the entity that was subject to division. In other words, division would cause the criminal proceedings to be ended with regard to the company that was subject to division and its successors.

Should the procedural position be treated as a transferable 'property', then, according to § 435 (1) 6) of the Commercial Code, the representatives of the companies that participate in the division procedure should be able to agree among themselves in the division agreement who will bear the rights and obligations associated with criminal proceedings.[*4] In essence, this means that in a situation where a legal entity has become a suspect in criminal proceedings, the liability of that legal entity may be transferred to a third party by way of an agreement among the parties involved. However, § 447 (1) of the Commercial Code is of 'assistance' here, stating that the companies participating in the division (i.e., the recipient companies as well as the company that is being divided) are subject to joint liability for the obligations of the company being divided if such obligations have arisen prior to entry of the division in the Commercial Registry. Accordingly, the regulation set out in the division agreement is relevant only with regard to the relations among the parties involved in the division procedure and all entities involved in the division procedure are jointly liable under private law before third parties.

In search for an answer to the question of whether the status of person subject to criminal proceedings is transferable, the civil-law approach could in principle be utilised by which a legal entity is a combination of assets with a certain purpose.[*5] This, in turn, may lead to a further conclusion that, considering a legal entity to be merely a combination of assets, one would naturally hold that upon transfer of such assets to a third party the procedural position in criminal proceedings should accompany it. In other words, a legal entity lacks the sphere of 'personality', which would tie certain rights and obligations inextricably to a subject. In the context of criminal law, this thesis runs counter to the principle of guilt, according to which the basis for punishing a person is the guilt of the same person who committed the crime. Estonian penal law is based on act-oriented (in German: *Tatstrafrecht*) penal law according to which the act committed by the person is the measure for punishment. We would not imagine that physical persons could inherit along with other assets also the procedural position of a suspect, the accused, or the convict in criminal proceedings.[*6] The essence of the principles of

[3] Äriseadustik. – RT I 1995, 26–28, 355; 2008, 27, 177 (in Estonian).

[4] Clause 435 (1) 6) of the Commercial Code provides that the division agreement shall state 'the list of assets transferrable to each recipient company and division of obligations which form part of the assets between the companies which participate in the division'.

[5] The basis for that is the concept of legal entity as a purposeful combination of assets by A. R. v. Brinz from the 19th century. Along with the fiction and other civil law theories which today may be deemed as classic civil law theories from the 19th century, the aforementioned legal theory is no longer relevant or prevailing today. See also K. Rebmann, F. J. Säcker, R. Rixecker. Münchener Kommentar zum BGB. Ergänzungsband zur 4. 3. Aufl. Lief. ausgegeben im Februar 2006. München 2006, preceding § 21, margin No. 1–10.

[6] The topic of succession of persons subject to criminal proceedings (i.e., not limited to the positions of the suspect, the accused and the convict, but also the positions of the victim and civil law plaintiff and claimant) has essentially not yet been tackled in the legislation or in legal theory.

guilt and act-oriented penal law is to create an inseparable link between the person having committed the crime and the person being punished. That same link is directly reflected in the very nomenclature for the field of law itself—'penal law' (an act is subject to penalty). However, criminal liability is not an end in itself but, rather, is directed at achieving several aims of penal theory (special prevention and general prevention, etc.). The important question is whether those aims should also be applied to legal entities. With that purpose in mind, we will hereinafter attempt to dissect the concept of criminal liability of legal entities.

3. The aims with criminal liability of legal entities

3.1. The aims of punishments applicable to legal entities

In the context of corporate criminal liability, Estonian law has adopted the view that, because physical persons and legal entities are separate subjects of law, legal entities may also commit crimes.[*7] The Penal Code[*8] (hereinafter 'PC') prescribes monetary punishment (PC, in § 44 (8))[*9] or compulsory liquidation (§ 46) as the main punishments applicable to legal entities, with, as supplementary punishments, prohibition from processing state secrets and classified information of foreign states and deprivation of the right to keep animals (§ 55^1). By comparison, in Finland, for example, only monetary punishments apply to legal entities.[*10]

According to the principle of guilt, a person's guilt is the basis for his or her punishment. Following the normative concept of guilt, one may define guilt as reproach for the person having failed to act lawfully despite having the option of doing so. Thus it is reproach for violating 'normatively prescribed' regulations.[*11] In general, the punishment imposed for a crime is aimed at achieving two main goals: (a) compensating for the damages caused by violation of certain legal rights and (b) preventive goals.[*12]

In legal literature, the topic of goals of punishments imposed on legal entities boils down to the question of whether the aim of punishment is only deprivation of economic gains received in the violation (positive general prevention, negative special prevention, and general prevention) or to establish reproach of the specific legal entity that committed the crime (positive special and general prevention).

Definition of special preventive goals of punishment applicable to legal entities is somewhat vague as it remains unclear how a legal entity as a legal abstraction should be subject to special prevention.[*13] This is all the more true when one considers that, according to the Supreme Court, the person who committed the crime should be taken into account if the special preventive aims of the punishment are to be met.[*14] One possible solution would be to apply the special preventive goals of punishment first and foremost to persons listed in PC in § 14 (1), which would be reflected in the obligation to refrain from actions causing liability on the part of the legal entity (for instance, prohibition from holding certain official positions, etc.). However, this conclusion is problematic in the light of amendments to the Penal Code that took effect on 28 July 2008 and that were motivated by the need to harmonise Estonian legal regulations with the requirements of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[*15] Namely, with the 28 July 2010 amendments, § 14 (1) of the Penal Code was amended so that, instead of the previous

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7 CLCSCd 3-1-1-7-04, paragraph 10.

8 Karistusseadustik. – RT I 2001, 61, 364; 2010, 29, 151 (in Estonian).

9 According to the amendment of the Penal Code which took effect from 27 February 2010, the court may, if so provided in the special part of the Penal Code, punish the legal entity with a monetary punishment the amount of which is calculated as a percentage from the turnover of the legal entity from the year immediately preceding to the year when criminal proceedings were initiated, or if the entity has been in existence for less than a year, then the turnover of the year when criminal proceedings were initiated (PC § 44 (9)). The upper limit of the applicable monetary punishment may not exceed the general maximum limit of monetary punishment applicable to legal entities which is 250,000,000 Estonian kroons. Such option is prescribed in case of competitive crimes (PC § 400).

10 R. Lahti. Die jüngsten Entwicklungen im finnischen Strafcrecht. – Die Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 2003 (115), p. 142.

11 J. Sootak. Karistusõiguse alused (Basics of Penal Law). Tallinn 2003, pp. 100 *ff.* (in Estonian); P. Pikamäe. Kes on juriidilise isiku pädev esindaja karistusseadustiku § 14 mõttes? (Who is the Competent Representative of the Legal Entity within the Meaning of § 14 of the Penal Code?). – Juridica 2010/1, p. 8 (in Estonian).

12 J. Sootak (Note 11), pp. 141 *ff.*

13 G. Eidam. Unternehmen und Strafe. Vorsorge- und Krisenmanagement. 3. Aufl. Köln 2008, p. 222; M. Kremnitzer, K. Ghanayim. Die Strafbarkeit von Unternehmen. – ZStW 2001 (113), pp. 551–553; W. Mitsch. Recht der Ordnungswidrigkeiten. 2. Aufl. Berlin 2005, pp. 167–168.

14 CLCSCd 3-1-1-40-04; CLCSCd 3-1-1-99-06.

15 According to the explanatory report of the draft law, the amendments were referred to in the report prepared as a result of the first phase of assessment by the Working Group on Bribery which is one of the committees of the OECD. See also the explanatory report to the draft law on amending the Penal Code and the Criminal Procedure Code (239 SE, *Riigikogu* 11th composition). Available at http://www.riigikogu.ee/?page=pub_file&op=emsplain&content_type=application/msword&file_id=280345&file_name=karistusseadustiku%20ja%20seletuskiri%20(242).doc&file_size=51712&mnsensk=239+SE&fd=.

wording 'act committed by the organ or leading employee in the interests of the legal entity', the liability of the legal entity may be based on the act of the organ, its member, a leading employee, or another competent representative if that act was committed in the interests of the legal entity. Whereas most of the amendments are of a technical nature, the notion 'other competent representative' may raise questions. Firstly, this is a rather ambiguous concept; in accordance with the examples brought forth in the explanatory report on the draft law, such a person could be an employee of the legal entity or possess representation rights on some other grounds (for example, those of an attorney-at-law).*[16] Problems arise in connection with the issue that formerly the essence of the reproach applied to the legal entity was the violation by a person who represented the legal entity on a daily basis (member of the organ of the legal entity or a leading employee) and such a person was in any case responsible for forming the will of said legal entity as an abstraction. Imputation of the guilt of other competent representatives may be difficult from a dogmatic perspective, because imputation to a legal entity of any violation by an employee who plays a minor role in the organisation may excessively widen the area of liability.*[17] A possible solution to this problem could be to impute to the legal entity the crime of only such a representative or employee as has certain decision-making powers, provided that the crime pertains to the respective area of decision-making, or with regard to each violation to refer to the violation by a certain member of the body or organ of the legal entity (insufficient supervision by the supervising organ responsible for the respective field of activity).

The general preventive aim in criminal punishment of legal entities is to show to the society that the legal entity that has committed the crime will be properly punished for it (positive general prevention). Division of a legal entity subject to criminal proceedings undoubtedly obstructs reaching of that goal. From the viewpoint of theories according to which punishment of legal entities bears only pragmatic relevance, mainly aimed at deprivation of unlawfully gained profits (the basis for that thesis being the previously described understanding of a legal entity as a faceless combination of assets that lacks any personal type of rights), division of the company subject to criminal proceedings would not particularly affect reaching of the aims of punishment, because it would not matter whether the former or a new legal entity is punished—the goal is reached if the financial status of at least one entity participating in the division process is negatively affected.

3.2. The goal of deprivation of economic gain

Theories aimed at deprivation of economic gain are associated with views that legitimise corporate criminal liability as something complementary to the liability of natural persons. For instance, corporate criminal liability allows application of statutory penal powers in a situation where the physical person who committed the crime remains unidentified.*[18] According to the above-mentioned theory, the core of punishment of legal entities lies in application of monetary punishment in order to deprive the legal entity of the gains received as a result of the crime—i.e., as a result of behaviour that was profit-oriented and performed with full awareness of the costs.*[19]

The theory directed at deprivation of profits is an attempt to avoid formation of any dogmatic discussion of the legitimacy of punishing legal entities. In search of an easier way out, legal dogmatic arguments have been discarded and economic reasoning applied instead. Views are taken that the risk of the legal entity in connection with criminal liability for a crime is a potential that is fundamentally associated with the economic activity of the company.*[20] The idea operates on the basis of a negative general prevention formula grounded in the simple so-called criminal-economic theory: with profit as a stimulus for committing the crime, punishment in the form of deprivation of that profit works as a stimulus to refrain from crimes. Accordingly, a person who weighs the costs and the gains is aware that committing a crime in the interests of the legal entity may cause application of punishments that are far greater than are the potential gains from the crime.*[21]

The above conclusion is supported by the content of § 44 (8) of the Penal Code, which allows applying monetary punishment as complementary punishment alongside compulsory liquidation. The clause has been interpreted in Estonian legal literature to be applicable in situations where a legal entity has committed an intentional

[16] P. Pikamäe (Note 11), pp. 4–7.

[17] *Ibid*., pp. 7–9.

[18] P. Šamal. Strafrechtliche Haftung von juristischen Personen de lege lata und de lege ferenda in der Stschechischen republik. – Zeitschrift für Wirtschaft und Recht in Osteuropa 2003/3, p. 71.

[19] H. Többens. Die Bekämpfung der Wirtschaftskriminalität durch die Troika der § § 9, 130 und 30 des gesetes über die Ordnungswidrigkeiten. – Neue Zeitschrift für Strafrecht (NStZ) 1999/1; C. Wegner. Die Systematik der Zumessung unternehmerbezoener Geldbussen. Fankfurt (M) 2000, pp. 54–55.

[20] C. Wegner (Note 19), p. 94.

[21] The theory has been applied in drug trafficking cases where application of extensive monetary penalties has visibly changed the market structure which is reflected in the price rises of narcotics. See in more detail G. Kaiser. Gewinnabschöpfung als kriminologisches Problem. – H.-H. Jescheck (Hrsg.). Festschrift für Herbert Tröndle. Berlin 1989, pp. 685–704.

crime with the aim of profiting from that crime.*[22] Thus in Estonian literature it has clearly been conceded that in certain cases (in the form of applying monetary punishment as complementary punishment) penalty applied to legal entities is aimed at depriving them of their profits. This is further supported by § 44 (9) of the Penal Code, which entered into force on 27 February 2010 and according to which the amount of monetary punishment may in certain cases be tied to a percentage of the turnover of the legal entity (see Note 10).

However, reducing the aim of the monetary punishment applicable to legal entities to **merely** deprivation of profits is still questionable.

Firstly, deprivation of the profits as a goal of punishment cannot justify another type of punishment applicable to legal entities that is prescribed in the Penal Code—compulsory liquidation. The latter is clearly meant to reflect reproach for the legal entity that committed the crime. On the assumption that compulsory liquidation with the aim of deprivation of profits is probably not a separate type of punishment, the question arises of whether monetary punishment always bears the goal of profit-deprivation or monetary punishment is sometimes also meant to function as reproach of the legal entity. From the content of § 44 (8) of the Penal Code, it may be concluded that if monetary punishment is applied as a complementary punishment alongside compulsory liquidation, then the main aim of the monetary punishment is to deprive the relevant entity of profits. At the same time, the concept of monetary punishment as a mere tool for taking away the gains from the crime is questionable in a situation where the court is not willing to or cannot apply compulsory liquidation as the main punishment and applies monetary punishment as the main punishment. From this perspective, monetary punishment may possess just as wide-reaching goals and be deemed reproach falling under general prevention.

Secondly, the system of sanctions in the Penal Code is structured such that the institution of law aimed at deprivation of profits received from crime is confiscation. Namely, § 83^1 (1) of the Penal Code allows confiscation of assets received from intentional crime. In addition, § 83^2 of the Penal Code allows one to apply extended confiscation of assets gained from the crime (although the sanction referred to may be applied to physical persons only, while application to legal entities on the grounds of § 83^2 (2) 1) of the Penal Code is rather hypothetical).

Thirdly, the above-referenced theory is mainly characteristic of German law. However, the German legal system offers no concept of liability of legal entities similar to that prescribed in the Penal Code. According to the Code of Order Violations (or 'OWiG'), § 30, the only punishment applicable to legal entities is the monetary penalty if the crime has been committed by the physical person in the interests of and for the benefit of the legal entity.*[23] The above cannot be deemed a separate concept of the legal entity's liability; rather, it is a complementary option, for punishment of the legal entity in a manner complementing the general system of the law—neither the OWiG nor the penal code of Germany expressly provides for the criminal liability of a legal entity. However, even in those states where criminal liability of legal entities is accepted and the concept of deprivation of profits is supported, the only criminal sanction applicable to legal entities is monetary penalty (one such state is Finland).*[24]

Therefore, considering that Estonian penal law prescribes other punishments (compulsory liquidation and restrictions on activity) applicable to legal entities aside from deprivation of profits, one may conclude that in Estonian penal law holding legal entities criminally liable has broader goals than only deprivation of profits received as a result of the crime.

3.3. Punishment as reproach of the legal entity that committed the crime

Despite the fact that criminal liability of legal entities under the Penal Code is regulated as derivative liability and in addition criminal liability must be set out in the composition of a particular criminal offence in the special part of the Penal Code (by the principle of speciality)*[25], legal entities are deemed to be separate and individual subjects under criminal law (at least from the perspective of addressees of punishment) similarly

[22] J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteeritud väljaanne (The Penal Code. The commentary). Tallinn 2004, § 45 commentaries 5.2, 6 (in Estonian).

[23] About the continuing discussion about the need to regulate the liability of legal entities in German law and about the meaning of OwiG § 30, see C. Roxin. Allgemeiner Teil. Bd 1. 4. Aufl. Beck 2006, § 8C; L. Senge (Hrsg.). Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten. 3. Aufl. München 2006, § 30, margin No. 1–14.

[24] It is important to note that the penal code of Finland provides very detailed regulations on the manner of calculation of the amount of monetary penalties applicable to legal entities. The following aspects must be taken into account: (1) extent of the violation; (2) the extent of involvement of leading employees; (3) the economic status of the company. See in more detail Penal Code of Finland, Chapter 9, § 6. Available at http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf. See also H. Jaatinen. Oikeushenkilön rankaistusvastuu. Helsinki: Kaupakaari OYJ 2000, pp. 131–134.

[25] E. Elkind, J. Sootak. Juriidilise isiku vastutus: uued arengusuunad Eesti kohtupraktikas (Liability of Legal Entities: New Directions in the Estonian Case Law). – Juridica 2005/10, pp. 673–676 (in Estonian).

to in civil law.[*26] Consequently, the same punishment policy goals should apply to legal entities and to physical persons.

This conclusion is supported by the final conclusion reached in the previous section of this article, according to which corporate criminal liability in Estonian criminal law is not limited to the goal of depriving the company of the gains achieved as a result of the crime, as well as by the case law of the Supreme Court of Estonia. The Supreme Court in its judgment No. 3-1-1-7-04 has conceded the following: "It is true that punishment of a legal entity may affect negatively the shareholders or members of such a legal entity, its employees, or even its creditors. However, such negative effects **cannot be deemed punishment** but rather damages arising from economic risks", because a "legal entity [is] a **separate subject of law**, which cannot be equated with the physical persons who are the shareholders, members, or leading employees of the company. As a legal entity may be subject to legal obligations, **it** may, by ignoring such obligations, commit legal offences, including crimes" (emphasis added). Attention must be paid to the manner in which the criminal chamber uses its concepts: the chamber clearly distinguishes between punishment and negative consequences associated with it. In view of the above, deprivation of profits received as a result of crimes is rather a collateral negative effect associated with the punishment and the punishment itself must amount to something more—a reproach. The criminal chamber has emphasised that the **penal** character of the reaction to the crime committed by the legal entity is important.

On the basis of the above conclusion, the Penal Code deems legal entities equivalent to physical persons; accordingly, the punishments applicable to legal entities should be deemed to reflect reproach for the legal entity that committed the crime. This conclusion is compatible with the sociological argument used to legitimise criminal liability of legal entities in German legal literature, according to which in everyday social interaction legal entities and physical persons should be considered essentially equal.[*27]

To sum up, the goal of criminal liability of legal entities and the punishments that come with it cannot be merely limited to deprivation of profits. Similarly to how physical persons are addressed, the general preventive aims of the liability and punishment of legal entities should be recognised—to show the society that a legal entity that committed a crime is held liable for the damage caused to society. The reproach must be handed down for the person liable for committing the act. This leads us to the issue that in cases of division of the legal entity it might be difficult to establish to which person exactly the reproach should be made—i.e., to whom criminal liability shall be applied.

4. Criminal liability of legal entities upon division

4.1. Corporate identity

Upon division, a new company or several new companies are established. The Commercial Code prescribes a simple solution with regard to liability for obligations that came about prior to division, providing that all entities involved in the division shall remain jointly liable for the obligations that came about prior to division (§ 447 (1) of the Commercial Code). From the perspective of criminal liability (first and foremost with regard to monetary obligations arising from monetary punishment), it may be concluded that, in principle, the body conducting proceedings may elect at its sole discretion the entity or person to which to apply criminal liability. However, this would contradict the view that the goal of criminal liability and punishment of legal entities amounts to something more than just financial liability or liability for the gains received from the crime—it should also include the element of general prevention, which is reflected in the reproach of the specific legal entity that committed the crime. The element of general prevention becomes unavoidable in the context of compulsory liquidation. Therefore, certain parameters should be determined on whose basis the decision is made as to which of the entities involved in the division process should bear criminal liability for the crimes committed by the company that was subject to division.

Proceeding from the assumption that reproach for the legal entity for the crime committed is the goal of punishment, one finds it necessary, further, to define the concept of the legal entity as a unit that may be subject to criminal liability. The present article does not even attempt to provide such definition. However, to allow answering this question, a very basic distinction can be utilised: the entity that is formally identical (possessing the same registration code) or essentially identical to the entity that committed the crime should bear liability. In the former case, the company that is subject to division would always be liable; in the latter case,

[26] E.g., see CLCSCd 3-1-1-13-06.

[27] P. Šamal (Note 18), p. 71; G. Eidam. Die Verbandsgelbusse des § 30 Abs 4 OwiG – eine Bestandsaufnahme. – Wistra 2003/12, pp. 448–449; L. Senge (Hrsg.). Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten. 3. Aufl. München 2006, § 30, margin No. 10; T. van Jeger. Geldbusse gegen jurstische Personen und Personenvereinigungen. Fankfurt (M) 2002, pp. 55–58.

that of essential identity, the company that is factually—i.e., in terms of economic activities—identical to the company that committed the crime should be liable.

The concept of essential identity is based on the theory of corporate identity, the concept of *Gesellschafts-identität* as developed in German criminal law. According to the latter theory, upon division, the company that from an 'economic perspective' is identical to (i.e., shares economic identity—in German, *wirtschaftliche Identität*—with) the company that committed the crime should be liable.[*28] Economic identity can be verified on a case-by-case basis, and, therefore, the body conducting proceedings must deliver a reasoned decision, exercising its discretionary powers in each individual case—indicating why specifically this legal entity, or those legal entities involved in the division process, have been declared suspect or accused.[*29] Economic identity is not affected by formal criteria such as change of business name or circle of shareholders.[*30]

This interpretation has been set equal with the economic interpretation rules applied in the context of tax law—the aim of such interpretation is not to follow the legal essence of circumstances but, rather, to focus on their economic content. As a result, the actual economic content of actions is revealed, particularly if the aim of such actions is to exclude application of certain legal norms[*31] (for instance, criminal liability).

Application of the above suggestion presumes that certain concrete notions are defined. The notions 'economically similar' and 'attribution of economic meaning' are too vague and therefore may contradict the principle of specificity of criminal law (as set forth in § 23 of the Constitution).

The authors are of the opinion that the concept of economic identity of the company, as previously described, is largely compatible with the notion of enterprise as provided in § 180 (2) of the Law of Obligations Act (on transfer of enterprise) along with § 5 (1) of the Commercial Code. According to the above-mentioned clause of the Law of Obligations Act, an enterprise is a combination of assets, rights, and obligations associated with the economic activities of the it including contracts connected to the activities of the company. According to § 5 (1) of the Commercial Code, an enterprise is an economic unit via which the undertaking carries out its economic activities. An enterprise consists of assets, rights, and obligations that are intended, or in essence should be intended, for carrying out the economic activities of the enterprise. Generally, a legal entity carries out its activities via a single enterprise, yet it is possible for the same legal entity to comprise several identifiable enterprises (dealing with several fields of activity). The concept of enterprise is directed at emphasising the entity's integrity: all rights and obligations that are economically associated with the enterprise are part of that enterprise.[*32]

The Supreme Court has provided a rather extensive interpretation of the notion of the enterprise. According to the opinion of the Civil Chamber of the Supreme Court, it is possible to apply § 5 of the Commercial Code by analogy to transfer of enterprise from one local government unit to another despite the fact that associated legal regulation in public law concerning that issue is lacking.[*33] By the same line of reasoning, the corporate criminal liability in the context of division could be tied to the notion of the enterprise and thereby a specific concept of criminal liability of an enterprise could be created. This presumes that upon commission of a crime by a legal entity, it is possible to identify clearly which enterprise was the most involved with the crime (that is, in the interests of which enterprise the crime was committed).

Taking corporate identity (either based on the notion of enterprise or stemming from other criteria) as a starting point may ensure that the goals of punishment are achieved. Yet it might be problematic to apply the notion of the enterprise as a basis if, as a result of division, the economic activities that were previously pursued cease altogether. For instance, a company that was involved in sales at several locations might decide to cease its previous economic activities, to be divided into two separate companies, with both companies after division concentrating on transferring from the previous sales points in order to pursue other economic activities for the funds received. Neither of the companies that were created in the course of division are economically identical or even similar to the company that was subject to division. Nor is this a case of transfer of enterprise within the meaning of criminal law, because the former enterprise as an integral unit ceased to exist. Taking only the theory of corporate identity as a starting point, one may conclude that no criminal liability follows, despite universal succession.[*34]

It remains unclear which criteria should be applied by the body conducting proceedings—does the body conducting proceedings have discretionary rights? This approach is questionable. In above-described situations,

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[28] L. Senge (Note 27), § 3, margin No. 48.

[29] Judgment of the Federal Court of Justice of Germany BGH 11.03.1986. – Wistra 1986/5, pp. 221–222; Judgment of the Federal Court of Justice of Germany BGH 13.11.2004. – NJW 2005/19, pp. 1381–1382.

[30] L. Senge (Note 27), § 30, margin No. 45.

[31] OLG Frankfurt 06.07.1984. – Wistra 1985/1, pp. 39–40.

[32] P. Varul *et al*. Võlaõigusseadus. Kommenteeritud väljaanne (Law of Obligations Act. Commented edition). Tallinn 2006, § 180, commentary 4.5 (in Estonian); CLCSCd 3-2-1-7-00.

[33] CLCSCd 3-2-1-98-07.

[34] E. Göhler, H. Buddendiek. Gesetz über das Ordnunsgwidrigkeitrecht. 12. Aufl. München 1998, § 30, margin No. 38c; OLG Frankfurt 06.07.1984. – Wistra 1985/1, pp. 39–40.

formal identity (specifically, in the case of division by separation—the company subject to division is liable) could be considered as a starting point or an attempt could be made to determine which of the new companies is the most similar to the company that was subject to division (in the case of division by acquisition).

In situations where the transfer of an economic unit (for instance, an enterprise) is obvious, it would still be appropriate to consider liability of the company acting as the receiver of the economic unit. Therefore, application of corporate identity theory in the future practice of implementation of the Penal Code could still be considered, despite the fact that it is a concept derived from the German legal system and that, on account of the specifics of criminal liability, that theory cannot be applied in full in Estonia. According to the views expressed in the German legal literature, the theory may also be applied in the context of reorganisations—the company coming into existence as a result of reorganisation shall be liable only if it is identical to the previous company.*[35] From the perspective of future implementation practice, it should be carefully considered whether the formula accepted in the German case law regarding division of liability between companies should also be identically carried over to Estonian practice. For example, in order to verify the liability of the recipient company or a company that has been established as a result of division, the following formula of checks has been developed:

- universal succession has occurred (division has taken place),
- the assets of the company that committed the crime have been transferred in identical or similar composition to the new company,
- the transferred assets are clearly identifiable, and
- the transferred assets constitute a significant part of the full body of assets owned by the new company.*[36]

It is important to note that the last presumption is directly aimed at achieving a goal of general prevention. Namely, it is questionable whether punishing the recipient company is appropriate in a situation where the enterprise involved in the crime has been transferred but, in view of the total turnover of the recipient company, that enterprise provides only a minor proportion of turnover.

4.2. Liability in case of division by separation

Upon division by separation, the key issue from the perspective of criminal law is whether the company that was subject to division or the recipient company should bear liability. As mentioned above, from a civil-law perspective there is no difference in division of liability: the two entities remain jointly liable, and in terms of relations between these entities themselves, the division of liability is regulated in the division agreement. Consequently, from the standpoint of civil law, it is possible to apply monetary punishment with regard to both legal entities.

The issue of compulsory liquidation poses more problems. As mentioned above, compulsory liquidation is a sanction of general prevention aimed at reproach directed at the legal entity that committed the crime (see Subsection 2.3, above). Differently from monetary punishment, compulsory liquidation cannot be reduced to a claim under civil law (the state acting as the creditor). In the application of compulsory liquidation, it might be useful to utilise the theory of corporate identity and to apply compulsory liquidation to the legal entity that is the most similar from an economic point of view to the company that committed the crime.

4.3. Liability in case of division by acquisition

The need for a scheme based on corporate identity or another concept is far more acute in cases of division by acquisition, where the company subject to division will cease to exist. There are no problems if there is just one recipient company involved in the division process. In the latter case, the recipient company will also take over the procedural position in criminal proceedings of the company that is subject to division.

The situation is more complex when there are two or more recipient companies. In contrast to division by separation, the context of division by acquisition involves unavoidable transfer of the procedural position of the company that is being divided to one of the recipient companies. If in the course of division the enterprise is divided among several recipient companies, all such recipient companies should become involved in criminal proceedings. At the same time, the extent to which the enterprise was transferred to a particular recipient company should be assessed. If the majority of the enterprise was transferred to one recipient company, then only that recipient company should be included in the criminal proceedings. In the latter case, the principle

[35] G. Eidam. Unternehmen und Strafe. Vorsorge- und Krisenmanagement. 3. Aufl. Köln 2008, p. 225.

[36] G. Eidam. Die Verbandsgelbusse des § 30 Abs 4 OWiG – eine Bestandsaufnahme. – Wistra 2003/12, p. 450; BGH 11.03.1986. – Wistra 1986/5, pp. 221–222; BGH 13.11.2004. – NJW 2005/19, pp. 1381–1382.

of economic identity should be applied, so that the recipient company that is the most similar to the company subject to division shall bear the liability.

If the company has been divided into tens or hundreds of entities and it becomes almost impossible for the body conducting proceedings to determine which companies to include as suspects or accused parties in the criminal proceedings after the division is carried out as successors of the divided company, then division in this form may lead to avoidance of criminal proceedings altogether. In cases such as this, it may have become impossible, or excessively difficult from a procedural standpoint, to verify economic identity.

5. Conclusions

In the previous section of the paper, we reached the conclusion that it is necessary to establish criteria on the basis of which the criminal liability of the company subject to division would be transferred. Enterprise could be used as such a criterion; i.e., criminal liability could be associated with the enterprise. At the same time, the body conducting proceedings must exercise its discretionary powers in each individual case wherein the suspect or the accused is being divided, in order to establish which entities to include in the criminal proceedings. As a company may be divided without limitations, the company that is the suspect or the accused may be scattered into so many fractions during the criminal proceedings that the main problem of the criminal proceedings becomes establishment of the identity of the person or entity that is subject to proceedings. This raises questions regarding the measures available for securing criminal proceedings.

Today, Chapter 4 of the Criminal Procedure Code[*37] (hereinafter 'CPC') does not clearly prescribe measures that would allow prohibition of the division of the suspect or accused legal entity during criminal proceedings. Arrest of assets may be considered (CPC, § 142, while § 308 of PC prescribes liability for violation of storage measures applicable to arrested assets), which would preclude transfer of the assets of the legal entity; however, the success of such measure is still questionable.

In civil-court procedure, division may be obstructed by using the measure for securing the claim as provided in § 378 (1) 3) of the Civil Court Procedure Code[*38], which allows the court to prohibit certain acts and transactions of the plaintiff, including division.

The Criminal Procedure Code does not allow applying the measures for securing the claim as prescribed under the Civil Court Procedure Code in criminal proceedings. The Supreme Court has opined that, in principle, the measures for securing the claim as prescribed in the context of civil-court procedure may also be applied in criminal proceedings, with the specifics of the latter taken into account.[*39] However, this is not a complete and comprehensive solution, and it fails to provide securing measures with regard to criminal cases in the context of which no civil-law claims have been submitted.

Criminal proceedings wherein the suspect or the accused is a legal entity require certain specific regulations. Therefore, an option that should be considered is to exceptionally allow application of the measures for securing the claim as prescribed in the Civil Court Procedure Code in criminal proceedings where the suspect or the accused is a legal entity, or to resolutely amend Chapter 4 of the Criminal Procedure Code and the catalogue of measures for securing criminal proceedings included therein.

If division has already taken place during criminal proceedings, it is necessary to obstruct any further division and to identify the entity that bears liability, as soon as possible, taking into account the changed circumstances. The authors are of the opinion that the principle of corporate identity could be used for that purpose in order to ensure that also the wider aims of criminal punishment of legal entities are reached.

To sum up, the primary aim with this article is to open a discussion of the goals of punishment applicable to legal entities. The authors are convinced that the concept of criminal liability of legal entities as set out in Estonian penal law is not limited to mere deprivation of profits received from the crime but also includes the reproach of the legal entity that committed the crime. Upon division of a legal entity, the identity of said company is partly or entirely transferred to the new recipient companies. Therefore, the question must be answered as to which element for establishing the identity of the company bears the most relevance in the context of the goals of criminal proceedings (punishing the person that committed the crime). The authors believe that essential criteria—namely, criteria related to economic activities—should be preferred over formal criteria. Consequently, the authors propose the solution according to which criminal liability should follow the company that takes over (or that continues to possess) the enterprise of the company subject to division in which interests the crime was committed.

[37] Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; 2010, 19, 101 (in Estonian).

[38] Tsiviilkohtumenetluse seadustik. – RT I 2005, 26, 197; 2010, 26, 128 (in Estonian).

[39] CLCSCd 3-1-1-3-10.

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An Individual's Right to the Effective Assistance of Counsel *versus* the Independence of Counsel:

What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?

The reasons for ineffective assistance of counsel are manifold. First, counsel might just be a bad lawyer. Secondly, counsel may in a particular situation be unable to do his or her job properly (e.g., because of illness, consumption of alcohol, or a busy schedule).[*1] Thirdly, counsel may have too little time or other resources to prepare adequately for trial, and fourthly, the law or the courts may create a situation in which counsel is unable to perform (e.g., excessively short procedural deadlines).[*2] A fifth reason could be counsel's motivation, which might include everything from how attractive the case is for defence counsel to whether counsel will receive fair remuneration.[*3]

There are two primary forces that can help to reduce ineffective assistance of counsel: the market and judicial supervision. It is clear that no one will hire a lawyer with a bad reputation.[*4] But this will not solve the problem entirely. There are regions in Estonia where choice of counsel is limited and clients have to settle with the few local lawyers available.[*5] Also highly problematic is the issue of appointed counsel, referring to where a person has no right to select counsel of his or her choice. As of 1 January of this year, counsel is appointed

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1 This could also include situations where counsel is a good lawyer but specialises in an area of law that is different than the area of law of the case.

2 F. C. Zacharias. Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice? –Vanderbilt Law Review 1991 (44), p. 66.

3 Estonian Ministry of Justice (publisher). Määratud kaitsja kättesaadavus ja kvaliteet kriminaalmenetluses (Ministry of Justice. Access to and Quality of Appointed Counsel in Criminal Proceedings). Available at http://www.just.ee/orb.aw/class=file/action=preview/id=33504/m%E4%E4ratud+kaitsja+k%E4ttesaadavus+ja+kvaliteet_KPO+_2_.pdf (2.03.2010).

4 F. C. Zacharias (Note 2), p. 66.

5 Estonian Bar Association press release of 4 March 2010: Ligi 80% Eesti advokaatidest töötab Tallinnas (Approximately 80% of Estonian Advocates Work in Tallinn). Available at http://www.advokatuur.ee/?id=417 (8.03.2010). One is reminded of a comment posted on the website of the daily newspaper Postimees in which one reader lamented that he required legal assistance in a small town in Estonia but his choice was

at the request of an investigative body, the Prosecutor's Office, or the court by the Estonian Bar Association, which means that the courts have no say in the choice of counsel.[*6] While on the one hand this ensures that the body conducting the proceedings (I dare to say above all an investigating body or the Prosecutor's Office) cannot appoint an advocate who will make its job easy, it also leaves no possibility for the courts to exclude advocates who are known to provide ineffective assistance.

The European Court of Human Rights (hereinafter 'ECtHR') has on numerous occasions emphasised the principle of the independence of counsel in criminal proceedings and has held that all measures taken by the national courts calculated to permit the officially appointed lawyer to fulfil his or her obligations must be taken whilst respecting the basic principle of the independence of counsel.[*7] The Code of Criminal Procedure[*8] (hereinafter 'CCP') does not provide for the independence of counsel. Yet it is clear that defence counsel acts in the interests of the client in criminal proceedings and that it is not up to the opposing side or to the court to dictate how counsel should fulfil his or her obligations.[*9] To a certain degree, the independence of counsel is defined in the Code of Criminal Procedure through the obligations of counsel. Subsection 47 (2) of the CCP provides that counsel is required to use all means and methods of defence that are not prohibited by law in order to ascertain the facts that vindicate the person being defended, prove his or her innocence, or mitigate his or her punishment. This allows us to conclude that counsel is bound by law and only by the law in the fulfilment of his or her duties. Insofar as the majority of counsel involved in criminal proceedings are advocates[*10], it makes sense to look for the definition of independence in the Bar Association Act.[*11] Pursuant to subsection 43 (1) of the Bar Association Act, advocates are independent in the provision of legal services and shall act pursuant to the law, legal acts and resolutions adopted by the bodies of the Bar Association, the requirements for the professional ethics of advocates, good morals, and their conscience.

While counsel may be independent in their activities, a certain level of control over their performance must nevertheless be possible, to ensure that the right of the accused to the assistance of counsel does not become an empty right. Next to competition, judicial supervision is one of the most important mechanisms for reducing ineffective assistance of counsel. The court directs the proceedings and gains a direct overview of counsel's performance, and therefore can react rapidly in cases of ineffective assistance. The supervision of the court over counsel's activities can be divided into two categories, direct and indirect, with the former subdivided into ongoing and *ex post* supervision. By ongoing supervision I refer to the ability of the court to make pertinent remarks and enquiries with ineffective counsel, up to and including the ability of the court to remove ineffective counsel from the proceedings. The courts perform *ex post* supervision at the request of the accused, primarily in appeal or cassation proceedings, which may lead to annulment of the judgment of the lower court on grounds of ineffective counsel and the possibility of new proceedings for the accused.

This article focuses on direct judicial supervision and examines issues involved with both ongoing and *ex post* supervision. The author has intentionally omitted indirect supervision—e.g., complaints lodged with the Bar Association—as proper treatment of this broad topic is not possible within the limits of this article.

1. The right of the accused to the assistance of counsel

According to Article 6, paragraph 3 (c) of the European Convention on Human Rights and Fundamental Freedoms[*12] (hereinafter 'ECHR'), everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal

rather limited: one advocate was a known crook, another was the spouse of the judge trying the case, the third was hired by the opposing party, and he was left with no choice than to hire the fourth and last one.

6 As counsel was previously appointed by the body conducting the proceedings, the purpose of the amendment was to ensure that prosecutors did not select the advocates they preferred (i.e. who were less difficult). See Estonian Ministry of Justice (publisher). Määratud kaitsja kättesaadavus ja kvaliteet kriminaalmenetluses (Note 3).

7 See, for example, ECtHR judgment 9.04.1984, *Goddi v. Italy*, paragraph 31; ECtHR judgment 21.04.1998, *Daud v. Portugal*, paragraph 40.

8 Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; 2010, 8, 35 (in Estonian).

9 The independence of counsel and the obligation of counsel to adhere to the rules and instructions of the court issued pursuant to law should of course not be confused. Failure to adhere to such rules and instructions may justify accusations of ineffective assistance by counsel.

10 Pursuant to § 42 (1) 1) of the CCP an advocate or, with the permission of the body conducting the proceedings, any other person who meets the educational requirements established for contractual representatives in subsection 41 (4) CCP, may serve as contractual counsel. Pursuant to § 42 (1) 2) of the CCP, only an advocate may serve as appointed counsel. While to date no statistics have been published on the percentage of criminal proceedings that are conducted with participation of an advocate or the participation of other counsel, the author of this article dares to say, based on her experience, that the majority of counsel in criminal proceedings are advocates.

11 Advokatuuriseadus. – RT I 2001, 36, 201; 2009, 68, 463 (in Estonian).

12 European Convention on Human Rights and Fundamental Freedoms. – RT II 1996, 11/12, 34. Entry into force in respect of Estonia 16 April 1996.

assistance, to be given it free when the interests of justice so require. While the right to choose counsel is deemed to be an absolute right and is by some authors considered to be the best of the alternatives provided for in Article 6 3 (c)[*13], the ECtHR has in certain cases found limitations of this right to be justified.[*14] For example, the ECtHR has held that the national court may override the choice of the person charged with a criminal offence when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[*15] The ECtHR also accepts that national law may proscribe certain conditions for persons who have the right to act as counsel in criminal proceedings. It is also permissible for national law to lay down even stricter rules for those who wish to defend persons in supreme courts.[*16] In the case of *Engel and others v. Netherlands*, while the ECtHR recognised that the right of the person to choose counsel was limited, it held that there was no violation of Article 6 3 (c) of the ECHR, as the persons charged were, in view of the simplicity of the case, capable of defending themselves.[*17] Strong criticism has been voiced against the case law of the ECtHR that allows for limitations to a person's right to choose counsel, and it has been suggested that that ECtHR should change its position on this issue. Yet critics fail to fully agree as to the lengths to which judicial authorities should go to ensure the active participation of counsel in criminal proceedings.[*18] There is a general tendency to agree with the ECtHR[*19] in holding that counsel must demonstrate a certain amount of initiative to participate in the proceedings (e.g., request permission to be present during the questioning of a witness or suspect), but if counsel fails to do so, there is no violation of a person's right to counsel.[*20] In cases where counsel abuses a person's right to assistance of counsel, with the intention of delaying the proceedings, by systematically failing to appear in court and thereby causing the trial to be repeatedly postponed, the court has the right to limit the person's right to choice of counsel and to appoint counsel for the person charged with a criminal offence.[*21] In such cases, the principle embodied in Article 17 ECHR applies, by which the Convention does not protect any abuse of the law.[*22]

Although a person's right to assistance of counsel for his or her defence was provided for in the US Constitution[*23] already at the time of adoption of the Bill of Rights in 1789, it was not until 1932 that a case concerning a person's right to defence was brought before the Supreme Court.[*24] In its judgment, the Supreme Court held that denial of counsel to the defendant constituted a violation of the Fourteenth Amendment, yet what is more important is that the Court recognised that a defendant in a capital case who is unable to employ counsel or defend himself has the right to have counsel appointed.[*25] Another ten years later, the Supreme Court held that the right of assistance of counsel for a person's defence is protected by the Fourteenth Amendment, and a person must be guaranteed the assistance of counsel where this is necessary in the interests of a fair trial.[*26] The Supreme Court's position halted the development of the right of assistance of counsel for a person's defence as a fundamental right for some time and drew much criticism and dissatisfaction.[*27] In 1963, the Supreme

[13] S. Trechsel. Human Rights in Criminal Proceedings. Oxford: Oxford University Press 2005, p. 266. S. Trechsel does not explain what is meant by the concept 'best'. Since the object of Article 6 3 (c) of the ECHR is an effective defence (see C. Ovey, R. White. The European Convention on Human Rights. 4th Ed. Oxford: University Press 2006, p. 205) and a person can defend himself effectively in a situation where he is opposed by a professional prosecutor (lawyer) with the assistance of professional counsel chosen as he best sees fit, it is clear that the best option among the rights set out in Article 6 3 (c) of the ECHR is a person's right to defence with the assistance of counsel of his or her choice.

[14] See also K. Reid. A Practitioner's Guide to the European Convention on Human Rights. 3rd ed. Thomson: Sweet & Maxwell 2008, p. 153; S. Trechsel (Note 13), p. 268; P. Van Dijk, F. Van Hook, A. Van Rijn, L. Zwaak (eds.). Theory and Practice of the European Convention on Human Rights. 4th Ed. Intersentia: Antwerpen-Oxford 2006, p. 641.

[15] ECJ 25.09.1992, *Croissant v. Germany*, paragraph 29.

[16] ECtHR judgment 26.07.2002, *Meftah and others v. France*, paragraph 45.

[17] ECtHR judgment 8.06.1986, *Engel and others v. Netherlands*, paragraph 91.

[18] See S. Trechsel (Note 13), p. 267.

[19] ECtHR judgment 24.11.1993, *Imbrioscia v. Switzerland*, paragraph 42; ECtHR judgment 22.02.1994, *Tripodi v. Italy*, paragraph 30.

[20] S. Trechsel (Note 13), p. 267.

[21] The ECHR has accepted the appointment of additional counsel by the court on its own initiative even in cases where counsel chosen by the person charged with a criminal offence has not abused any rights, if the matter has been complicated and it can be presumed that the proceedings will take a long time. See *Croissant v. Germany* (Note 15), paragraph 30.

[22] S. Trechsel (Note 13), p. 267. The same principle applies to situations in which a person repeatedly changes counsel with the aim of delaying the proceedings. K. Reid (Note 14), pp. 158–159.

[23] The Constitution of the United States of America. Available at http://supreme.justia.com/constitution/ (3.03.2010).

[24] W. G. Genego. The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation. – The American Criminal Law Review 1984–1985 (22), p. 182. The Sixth Amendment to the US Constitution states laconically that a person has the right of assistance of counsel for his defence.

[25] *Powell v. Alabama*, 287 U.S. 45 (1932). Available at http://supreme.justia.com/us/287/45/case.html (3.03.2010). Here the Court relied not on the Sixth Amendment guarantee of the right to counsel but rather on the due process clause of the Fourteenth Amendment, with its implicit principle that a criminal defendant must receive a fair trial. W. G. Genego (Note 24), p. 183.

[26] *Betts v. Brady*, 316 U.S. 455 (1942). Available at http://supreme.justia.com/us/316/455/case.html (3.03.2010).

[27] W. G. Genego (Note 24), p. 184.

Court finally ruled that all defendants, regardless of the charges against them or the specific criminal case at issue, have the right under the Sixth Amendment of the Constitution to court-appointed counsel.*[28]

In Estonia, the right of a suspect or the accused to assistance of counsel is guaranteed by § 8 3), § 34 (1) 3), and § 35 (2) of the CCP. The right to counsel of a person who is deprived of his or her liberty because he or she is suspected of a criminal offence is prescribed separately in § 21 (1) of the Constitution of the Republic of Estonia.*[29] Participation of counsel is normally mandatory in criminal proceedings as of the presentation of the criminal file for examination, but in the cases set out in § 45 (2) of the CCP*[30], assistance of counsel must be guaranteed throughout the criminal proceeding. If a criminal proceeding has not yet reached the stage at which participation of counsel is mandatory but a suspect nevertheless wishes to have counsel, assistance of counsel shall be ensured, pursuant to § 8 3) of the CCP.

The mandatory participation and assistance of counsel in criminal proceedings does not mean that a person is deprived of the right to defend himself or herself together with the advocate. A person has the right to submit evidence, complaints, and requests (see §§ 34 (1) 7) and 8), 35 (2) of the CCP), and he or she is together with his or her counsel a participant in the proceeding (under § 16 (2) of the CCP) and a party to the court proceeding (see § 17 (1) of the CCP). Only in cassation proceedings does the accused not have the right to defend him- or herself together with counsel, as the accused is not a party to a cassation proceeding under §§ 344 (3) and (5) of the CCP. The ECtHR considers it permissible for a State to restrict the right of a person to defend himself or herself in a supreme court.*[31]

Counsel may participate in criminal proceedings on two bases: on agreement with the client or on appointment by a competent authority. Whereas conclusion of a contract with counsel imposes an obligation on the person being defended to pay for counsel's services, state-appointed counsel provides services to the person being defended free of charge, at least during the proceedings. In the light of ECtHR case law, it can be said that the ECtHR holds that it is compatible with Article 6 3 (c) of theECHR for there to be a situation in which a person is provided with so-called free state legal assistance during the proceedings but assumes the obligation to compensate for such assistance upon conviction.*[32] While the ECtHR has not directly stipulated the conditions under which the accused may be required to reimburse fees for legal assistance, it has been suggested in the literature that this should be possible only if the financial position of the accused has improved after the proceedings.*[33]

According to the ECtHR, two conditions must be met, one financial and one legal, for a person to qualify for the right to free legal aid.*[34] The financial condition is that the right to free legal aid is reserved for persons who do not have sufficient means themselves. The ECtHR has left the definition of this condition primarily to the domestic courts.*[35] The legal condition is that the provision of free legal aid must be in the interests of justice.*[36] The concept 'interests of justice' clearly does not mean that the accused should be provided with free legal aid only where the public interest so requires.*[37] To date, the ECtHR has associated the legal condition with four criteria: the gravity of the offence, the complexity of the case, the principle of equal treatment of the parties, and the personal situation of the accused (e.g., mental health, linguistic skills, etc.).*[38]

The grounds for provision of legal aid by the state are broader in the Code of Criminal Procedure than required by the ECHR and ECtHR case law, and we cannot speak of free legal aid in the classic sense. Namely, there is no consideration of the financial situation of a suspect or the accused under Estonian criminal procedural law; rather, pursuant to §§ 43 (2) 1) and 2) of rhe CCP, counsel is appointed for every suspect or accused person

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[28] *Gideon v. Wainwright*, 372 U.S. 335 (1963). Available at http://supreme.justia.com/us/372/335/case.html (3.03.2010).

[29] Eesti Vabariigi põhiseadus. – RT 1992, 26, 349; 2007, 33, 210 (in Estonian). Subsection 21 (1) of the Constitution provides: "Everyone who is deprived of his or her liberty shall be informed promptly, in a language and manner which he or she understands, of the reason for the deprivation of liberty and of his or her rights, and shall be given the opportunity to notify those closest to him or her. A person suspected of a criminal offence shall also be promptly given the opportunity to choose and confer with counsel. – See also Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. Teine, täiendatud väljaanne (Constitution of the Republic of Estonia. Commented edition. Second revised edition). Tallinn 2008, § 21 comment 6.

[30] The participation of counsel throughout a criminal proceeding is mandatory if at the time of commission of the criminal offence, the person being defended was a minor; due to his or her mental or physical disability, the person is unable to defend himself or herself or if defence is complicated due to such disability; the person is suspected or accused of a criminal offence for which life imprisonment may be imposed; the interests of the person are in conflict with the interests of another person who has counsel; the person has been under arrest for at least six months; proceedings are conducted in the criminal matter pursuant to expedited procedure.

[31] *Meftah and others v. France* (Note 16), paragraph 45.

[32] *Croissant v. Germany* (Note 15), paragraphs 33–38.

[33] S. Trechsel (Note 13), p. 278.

[34] ECtHR judgment 13.05.1980, *Artico v. Italy*, paragraph 34.

[35] ECtHR judgment 19.06.2001, *Kreuz v. Poland*, paragraph 64.

[36] *Artico v. Italy* (Note 34), paragraph 34.

[37] S. Trechsel (Note 13), p. 272; K. Reid (Note 14), p. 155.

[38] S. Trechsel (Note 13), p. 273. The Court has listed these four criteria in for example ECtHR judgment 9.06.1998, *Twalib v. Greece*, paragraphs 52–53.

who has not chosen counsel but has requested the appointment of counsel, or who has not requested counsel in a case where participation of counsel is mandatory. Clause 43 (2) 3) of the CCP allows, as an exception, for a person's choice of counsel to be disregarded.*[39] Since a person's financial situation is irrelevant to his or her right to use the assistance of appointed counsel in a criminal proceeding, it is reasonable that upon conviction the person assumes the obligation to reimburse the costs of legal aid, from which he or she can be released only where his or her financial situation does not allow him or her to perform this obligation. Thus, § 180 (1) of the CCP provides that procedural expenses, which under § 175 (1) 4) of the CCP include remuneration established for appointed counsel, shall be compensated for by the convicted offender in the case of conviction. Pursuant to the first sentence of § 180 (3) of the CCP, when determining procedural expenses, the court shall take into account the financial situation and chances of re-socialisation of the convicted offender. Pursuant to the second sentence of the same subsection, the court shall order a part of the expenses to be borne by the state if the convicted offender is obviously unable to reimburse the procedural expenses.

The ECtHR does not set any limitations as to number for appointed counsel.*[40] Counsel is, however, limited in quantity under Estonian criminal procedure, as § 42 (2) of the CCP provides that a person may have up to three lawyers as contractual counsel. It would be reasonable and also compatible with the principle of equal treatment to apply the same limitation on numbers to appointed counsel. Neither the Code of Criminal Procedure nor the State Legal Aid Act*[41] (hereinafter 'SLAA') indicates that more than one advocate could be appointed as counsel. There might nevertheless be criminal cases that are so complex that the appointment of one advocate as counsel would not guarantee the right to the assistance of counsel to the accused. In such cases, it should be possible to appoint several advocates as counsel.

It is questionable whether the accused should be able to choose counsel who is providing state legal aid. The position of the ECtHR on this issue is unclear. Some judgments indicate that the ECtHR supports the position that the person's preference should be taken into consideration in the appointment of counsel, but it has not always considered this to be a determining factor.*[42] The Code of Criminal Procedure does not impose the obligation to consult with the accused regarding the choice of counsel prior to appointment of counsel. Subsection 20 (1) of the SLAA nonetheless indicates that it is preferable to have a situation in which the accused chooses, so to speak, the person who is appointed as counsel.

2. The right of the accused to effective assistance of counsel and the standard of effectiveness

It is first important to note that international law guarantees the right of a person not only to the assistance of counsel, but to the effective assistance of counsel. While this, however, need not be of the quality that the person charged with a criminal offence would wish, we cannot expect the rules of international law to guarantee the best possible defence.*[43] The ECtHR does not evaluate the effectiveness of the assistance of counsel where the person has had counsel appointed, as it does in cases where a person has contractual counsel.*[44] It has even been suggested by some authors that if more should be required of anyone, then it should be required precisely of appointed counsel. As the preference of the accused normally plays a very small role in the selection of appointed counsel, defence counsel must make a greater effort to create a bond of trust between the defender and the person being defended.*[45] It is another matter altogether whether appointed counsel, who in Estonia receive payment that is 7–8 times lower than the fees paid to contractual counsel*[46], is prepared to make such an effort.

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[39] Under this provision, counsel is appointed if counsel chosen by a person cannot assume the duties of defence within twelve hours as of the detention of the person as a suspect or, in other cases, within twenty-four hours as of entry into an agreement to defend the suspect or accused or summoning to the body conducting the proceedings and the counsel has not appointed substitute counsel for himself or herself.

[40] C. Ovey, R. White (Note 13), p. 207; S. Trechsel (Note 13), p. 271. For example, in its judgment *Croissant v. Germany* (Note 12) the ECtHR accepted that the domestic court appointed a third lawyer in addition to the two lawyers chosen by the person charged with a criminal offence in a complicated matter.

[41] Riigi õigusabi seadus. – RT I 2004, 56, 403; 2009, 67, 460 (in Estonian).

[42] S. Trechsel (Note 13), pp. 276–277; K. Reid (Note 14), pp. 153–154. See also *Croissant v. Germany* (Note 15) and ECtHR judgment 25.04.1983, *Pakelli v. Germany*, paragraph 31.

[43] S. Trechsel (Note 13), p. 270.

[44] See for example two of the leading ECtHR cases relating to ineffective assistance of counsel – *Artico v. Italy* (Note 34) and *Goddi v. Italy* (Note 7). Whereas Mr. Artico had appointed counsel, Mr. Goddi had contractual counsel. In both cases the ECtHR weighed the issue of ineffectiveness according to the same principles.

[45] J. P. Busch, B. J. George Jr, T. Karas, K. Mossman. The Lawyer's Use of the Standards. – The American Criminal Law Review 1974–1975 (12), p. 438.

[46] Aivar Pilv: Seadusandja võiks ka advokaati kuulata (Legislators Could Also Listen to Advocates). Available at: http://www.epl.ee/artikkel/493155 (8.03.2010) (in Estonian).

As the ECHR imposes obligations only on States, a person cannot file an application with the ECHR solely on grounds that the assistance provided by counsel in a criminal proceeding was ineffective. Yet it is possible that the ECtHR will in certain cases hold that a State, primarily a domestic court of the State, is responsible for ensuring that a person charged with a criminal offence receives effective assistance of counsel.[*47] The ECtHR has addressed the issue of effective assistance of counsel in many judgments, in which the ECtHR has considered whether the right guaranteed to the person charged with a criminal offence is in a particular case practical and effective or theoretical or illusory.[*48] It is clear from the judgment in *Kamasinski* v. *Austria* that the ECtHR will refrain where possible from addressing the substantive aspect of counsel's assistance. In the above-mentioned case, the person charged with a criminal offence contended that his rights of defence had been violated, which he supported with a number of claims, including that his defence counsel had not provided effective legal assistance to him in the conduct of the case. Referring to its judgment in *Artico* v. *Italy*, the ECtHR held that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed to provide legal aid. The ECtHR also found that a State should intervene only if a failure by legal counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.[*49] If counsel is unable to perform his or her duties, for whatever reason, the court is obliged to act—that is, either to appoint a substitute or to oblige counsel to perform his or her duties.[*50] In any case, the domestic court may not remain passive in such a situation.[*51] In general, the case law of the ECtHR indicates that the court currently considers Article 6 3 (c) of the ECHR to be breached only where counsel completely fails to perform some duty.[*52] In other cases, the court has referred to the independence of defence counsel and has refrained from evaluating the effectiveness of legal assistance provided by counsel.[*53] In any case, the ECtHR has never found Article 6 3 (c) of the ECHR to have been violated merely on the claim of a person charged with a criminal offence that counsel did not act in his or her best interests.[*54]

In the US, complaints alleging ineffective assistance of counsel became more frequent after the decision of the US Supreme Court in *Gideon v. Wainwright*[*55], of 18 March 1963. Efforts to develop an effective assistance test had been made before that judgment, due to which by 1963 US courts were using the 'farce and mockery test'. According to this standard, it was up to the defendant to prove that the proceedings in his or her case were a farce and a mockery of justice.[*56] This approach centred on the interests of justice and not the rights of the defendant, and it was widely criticised.[*57] While the other US courts were actively seeking to develop a standard that would better protect an individual's rights[*58], the Supreme Court chose for a long time not to address the issue. The Supreme Court was finally compelled to take a position. In its judgment in *Strickland v. Washington*[*59], the Supreme Court held that claims alleging the incompetence of counsel must be decided on a case-by-case basis, and that the court must prove that the deficient performance of counsel harmed the interests of the defendant. This decision established a two-part test for determining whether the performance of counsel was so deficient as to deprive the defendant of his Constitutional right to counsel.[*60] In order to find that counsel's assistance has been ineffective, the defendant must prove both the incompetence of counsel and harm caused. For the first element, the defendant must show that counsel's performance fell short of an

47 S. Trechsel (Note 13), p. 286.

48 See *Artico v. Italy* (Note 34). See also *Imbrioscia v. Switzerland* (Note 19).

49 ECtHR judgment 19.12.1989, *Kamasinski v. Austria,* paragraph 65, but also for example *Daud v. Portugal* (Note 7), paragraph 38; ECtHR judgment 10.10.2002, *Czekalla v. Portugal*, paragraph 60.

50 *Artico v. Italy* (Note 34), paragraph 33.

51 K. Reid (Note 14), p. 157. See also ECtHR judgment 27.04.2006, Sannino v. Italy. In that judgment the ECtHR noted that the passiveness of the person charged did not excuse failure to act by the court (paragraph 51).

52 In the case *Artico v. Italy* (Note 34) counsel refused to provide legal assistance to the person charged with a criminal offence. In the case *Goddi v. Italy* (Note 7) counsel failed to appear in court. In the case *Daud v. Portugal* (Note 7) the first appointed counsel provided no legal assistance at all, and the second failed to prepare for trial. In all these cases the ECtHR held that Article 6 3 (c) of the ECHR had been breached. It is noteworthy that all these cases involved a situation in which counsel completely failed to perform one of his or her duties.

53 As emphasised in the introduction, the ECtHR first referred to the independence of counsel in *Goddi v. Italy* (Note 7) and has since that judgment emphasised the principle of independence of counsel repeatedly.

54 K. Reid (Note 14), pp. 157–158.

55 See also W. G. Genego (Note 24), pp. 185–186; W. H. Erickson. Standards of Competency for Defence Counsel in a Criminal Case. – The American Criminal Law Review 1979–1980 (17), pp. 237.

56 W. H. Ericskon (Note 55), p. 237.

57 W. G. Genego (Note 24), pp. 186–188; W. H. Ericskon (Note 55), pp. 237–239.

58 One of the most famous cases from that period is *United States v. Decoster*, in which the effectiveness of counsel's assistance was contested in the courts of first and second instance for years, and culminated in the position that counsel must be 'reasonably competent'. (See also Identifying and Remedying Ineffective Assistance of Criminal Defence Counsel: A New Look after United States v. Decoster. – Harvard Law Review, February, 1980 (93), pp. 758–772.)

59 *Strickland v. Washington*, 466 U.S. 668 (1984). Available at http://supreme.justia.com/us/466/668/case.html (3.03.2010).

60 See also J. H. Israel, Y. Kamisar, W. R. LaFave. Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text. St. Paul (Minn.): West 1991, pp. 605–606.

objective standard of reasonableness. For the second element, the defendant must prove that without counsel's errors, the result of the proceeding would have probably been different.

This judgment has also been strongly criticised.[*61] First, the standard developed by the Supreme Court does not really differ in any aspect from the farce and mockery test[*62], and, secondly, the Supreme Court forgot that, while the right to counsel is one of the guarantees of a fair trial, it is not the duty of counsel to ensure a fair trial for the defendant. Counsel's duty is to adhere to the rules of ethics and to do everything in his or her power to ensure that the result of the proceedings is as favourable for the defendant as possible.[*63]

For nearly 20 years, the US Supreme Court did not amend the test for effectiveness of counsel. It was not until 2003[*64] that the Supreme Court, in *Wiggins* v. *Smith*, attempted to specify the vague guidelines provided in *Strickland v. Washington* and ruled that the effectiveness of counsel could be determined with reference to the American Bar Association (ABA) Guidelines. The guidelines referred to by the court (Guidelines 11.8.6) suggested that counsel should gather information on the defendant's medical history, educational history, employment and training history, family and social history, prior offences, and religious and cultural influences[*65] While the defendant in *Wiggins v. Smith* faced the death penalty upon conviction, there is no reason a defendant could not refer to the ABA Guidelines in any claim of ineffective counsel.[*66] The Supreme Court has, however, emphasised that the ABA standards are strictly guides for determining what is reasonable and that they do not define reasonableness. While the states are free to set rules to ensure that assistance of counsel is sufficiently effective, the Supreme Court holds that the Constitution sets only one requirement: counsel must make objectively reasonable choices.[*67] The Supreme Court has recently also specified the notion of prejudice and has stated that the defendant must show that it is reasonably probable that, but for counsel's errors, the outcome of the proceedings would have been different. In that judgment, the Supreme Court held that the defendant should have proved that there is a reasonable possibility that if counsel who was knowledgeable of mitigating evidence had presented it during the trial, the jury would have taken it into consideration and would have returned with a different sentence.[*68]

It is rather questionable that a defendant could prove that a lighter sentence would have been imposed by the court if counsel's assistance had been effective, given that the only requirement for a specific sentence is that it be justified. It is, therefore, possible that even if counsel submits mitigating evidence, a court will find the guilt of the defendant to be such as merits the same sentence as would be imposed without any mitigating circumstances. It is submitted by the author of this article that the element of harm could be proved in Estonia primarily where counsel has failed to present evidence that would prove that the act does not involve the elements essential to the offence, the act is not unlawful, or the defendant is not capable of guilt. In such a case, the accused could clearly claim that if counsel had provided effective assistance, the criminal proceedings would have culminated in an acquittal or termination of the proceedings pursuant to § 199 (1) 1) of the CCP. The possibility can also not be ruled out that a reviewing court would find that failure to present important mitigating evidence by counsel also constitutes grounds for annulment of the decision of the lower court.

3. Judicial supervision of performance of counsel in criminal proceedings

Considering that the interpretations of the ECHR by the ECtHR are an inseparable part of the Estonian legal system[*69], Estonian state authorities, including the courts, are obliged to guarantee a right of defence to persons charged with a criminal offence that is practical and effective, not theoretical or illusory. On the basis of the case law of the ECtHR, the Estonian courts have a duty to intervene where the ineffectiveness of counsel is

61 D. A. Dripps. Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard. – Journal of Criminal Law and Criminology 1997–1998 (88), p. 243.

62 This was even recognised by the Supreme Court in *Strickland v. Washington* in which the Court speculated that introduction of a new standard for determining cases of ineffective counsel would lead to a different result compared with determination under the old standard only in a few rare cases.

63 W. G. Genego (Note 24), p. 200.

64 *Wiggins v. Smith*, 539 U.S. 510 (2003). Available at http://supreme.justia.com/us/539/510/case.html (3.03.2010). The Court affirmed the same in its judgment in *Rompilla v. Beard*, 545 U.S. 374 (2005). Available at http://supreme.justia.com/us/545/04-5462/case.html (3.03.2010).

65 Guidelines 11.8.6.: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (11.8.6., 1989).

66 J. H. Blume, S. D. Neumann. It's Like Deja Vu all over again: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel. – American Journal of Criminal Law 2006–2007 (34), p. 129.

67 *Bobby v. van Hook*, 558 U.S. ____ (2009). Available at http://supreme.justia.com/us/558/09-144/percuriam.html (3.03.2010).

68 *Wong v. Belmontes*, 558 U.S. ____ (2009). Available at http://supreme.justia.com/us/558/08-1263/percuriam.html (3.03.2010).

69 CCSCd 20.09.2002, 3-1-1-88-02.

manifest or sufficiently brought to their attention in some other way. Given the degree to which the ECtHR has been reticent to express its views in hearing claims concerning ineffective assistance of counsel, there is a significant chance that if a person who has been convicted in Estonia were to file an application regarding ineffective assistance of counsel, the application would not be satisfied by the ECHR. This should not, however, be taken to mean that the Estonian courts may turn a blind eye and fail to react to a violation of the right set out in the ECHR in the hopes that, should an application be filed, the ECtHR might for some reason (e.g., reference to independence of counsel) find that no violation of Article 6 3 (c) of the ECHR has occurred.

What can the courts do if counsel does not provide effective assistance in a criminal proceeding? One option is to rule on a claim of ineffective assistance lodged by the accused after the judgment has been passed, that is, when the result of the proceedings is clear. In such a case, the court reviewing the claim can consider the performance of counsel throughout the entire proceedings.*[70] This approach is widespread in the US: the defendant, if convicted, has the opportunity to file a number of complaints concerning the ineffectiveness of counsel. The Federal Rules of Criminal Procedure*[71] provide that the defendant has the right to assistance of counsel but does not provide any guidelines concerning what the courts should do if counsel is ineffective. For this reason, claims concerning ineffective assistance of counsel are heard according to the general rules of procedure, and such complaints can be filed as an appeal or a collateral attack.*[72] Since the Supreme Court has held that a complaint regarding ineffective assistance of counsel must be satisfied only if the defendant proves that, but for counsel's errors, the result of the proceedings would have probably been different, it is not generally possible for a defendant to prove violation of the right to assistance of counsel in the course of proceedings. Therefore, a defendant has no choice but to wait for the judgment and to only then file an appeal.*[73]

Applications concerning the ineffective assistance of counsel naturally reach the ECtHR only after the person has been convicted by a domestic court. The ECtHR has stressed that it is not its duty to impose new proceedings in a new form on a State. A State has the right to decide for itself what means it will use to put the applicant, as far as possible, in the position he or she would have been in had there not been a breach of the Convention. In so doing, the means chosen by the State must be compatible with the conclusions of the ECtHR and the rights of the defence.*[74] In *Quaranta v. Switzerland*, the Court also stressed that a State should cure the defect before the case reaches the ECtHR at all.*[75] According to this judgment, if a person's right of assistance of counsel has been breached in a lower court, the case should be tried anew, in a higher court.*[76] If limitations on the cases within the jurisdiction of the court*[77] render this impossible, the person should be guaranteed new proceedings in a lower court.

Unlike the US courts, the ECtHR does not require a person accused of a criminal offence to prove harm in cases of ineffective assistance of counsel. According to the ECtHR, the fact that the interests of a person charged with a criminal offence have not been prejudiced does not mean that his or her right to counsel has not been violated.*[78] Moreover, the Court has noted that a breach of the ECHR is possible even where the rights of a person have not been prejudiced. The element of injury is important only within the context of Article 50 of the ECHR.*[79] Thus, unlike the US Supreme Court, the ECtHR uses a one-step test and has held that a breach of the right of defence is possible even where the element of injury is not involved.

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[70] This is clearly the only option available where the ineffective assistance of counsel becomes evident only after the judgment has been handed down.

[71] Federal Rules of Criminal Procedure. Online. Available at http://www.uscourts.gov/rules/crim2007.pdf (4.03.2010).

[72] P. W. Tague. The Attempts to Improve Criminal Defense Representation. – The American Criminal Law Review 1977 (15) 2, pp. 148–152.

[73] The fact that the defendant, according to the current standard, must prove that the outcome of the proceeding, save for counsel's errors, would have been different has been criticised time and again. It has been suggested that it should instead be up to the prosecutor, where the defendant has shown the errors of counsel, to prove that the errors did not influence the outcome of the proceedings. (See for example J. H. Blume, S. D. Neumann (Note 66), p. 164). Nonetheless, the author of this article has not read anything published in the US where the author would suggest that a breach of the right of defence might occur even where the errors of counsel did not affect the outcome of the proceedings.

[74] *Sannino v. Italy* (Note 51), p. 71.

[75] ECtHR judgment 24.05.1991, *Quaranta v. Switzerland*, p. 37. True, this judgment did not involve the ineffective assistance of counsel, rather the person was not accorded any assistance of counsel at all.

[76] P. Van Dijk, F. Van Hook, A. Van Rijn, L. Zwaak (eds.) (Note 14), p. 637.

[77] In Estonia, the Code of Criminal Procedure does not place limitations on the subject matter of cases before the circuit courts, which are appellate courts. In cassation proceedings, however, only matters of the incorrect application of substantive law or a material violation of criminal procedural law may be brought before the Supreme Court (see §§ 346 1) and 2) of the CCP).

[78] The ECtHR stated this clearly in *Artico v. Italy* (Note 34), p. 35. See also P. Van Dijk, F. Van Hook, A. Van Rijn, L. Zwaak (eds.) (Note 14), p. 638. In the context of the judgment in *Artico v. Italy,* the judgment in *Alimena v. Italy* is somewhat incomprehensible. (ECtHR judgment 19.02.1991, paragraph 20.) The Court repeated its finding in *Artico v. Italy* by which a person charged with a criminal offence does not need to prove the existence of injury, but went on to note that the person was deprived of legal assistance which could have helped him in his attempt to secure an unqualified acquittal.

[79] Article 50 of the ECHR provides: "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Filing a complaint regarding ineffective assistance of counsel does not necessarily guarantee a person's right of defence.*[80] The required standard of proof alone may render a successful claim of ineffective assistance of counsel almost impossible. Secondly, the materials in a criminal case may not provide a court hearing such a complaint with sufficient information about counsel's actions over the course of the proceedings.*[81] Thirdly, there is some question as to who should file such a complaint or appeal. A defendant may file an appeal with a circuit court on his or her own, but, pursuant to § 344 (1) 2) of the CCP, an appeal in cassation may be filed with the Supreme Court only by defence counsel, who must be an advocate. But how likely is it that one advocate would be willing to file an appeal alleging the ineffective assistance of another advocate? And if the accused chooses to file an appeal with a circuit court him- or herself to avoid any possible confrontation between two advocates, is the accused capable of filing a sufficiently well-drafted appeal and of making the relevant claims in the appeal? We must also consider that annulling a judgment and ordering a new hearing of the case is always a decision that must be weighed carefully, as new proceedings mean new costs, and there are no guarantees that the quality of evidence has been maintained (e.g., witnesses may have forgotten what they saw).*[82] It is, understandably, more effective if a court can react to the ineffective assistance of counsel immediately in the course of the proceedings. This, however, raises the question of whether the court has the right to interfere with counsel's activities, since defence lawyers are independent in the performance of their duties, which has also been emphasised by the ECtHR. Yet, as noted above*[83], the ECtHR has stated that if counsel is unable, for whatever reason, to fulfil his or her duties, the domestic court is obliged to replace counsel or compel counsel to perform his or her duties.

On the one hand, there is nothing prohibiting the court from ordering counsel in the course of the proceedings to study the case file, confer with the client, etc. The obligation of counsel to become familiar with a criminal case is even set out separately in § 273 (4) of the CCP. The court may adjourn a court session for up to 10 days and order that the expenses related to the criminal proceedings due to the adjournment of the session be paid by the lawyer in question, if counsel is not familiar with the matter. An equally or even more important duty is, of course, the obligation to participate in court sessions in accordance with § 270 (2) of the CCP. The Code of Criminal Procedure does not impose any other obligations on counsel in the provision of assistance, which means that even if a court issues an order to counsel regarding his or her work, the court is not able to do anything should counsel fail to comply with the order.*[84] It should also be noted that if a court finds that counsel has failed to present an important piece of evidence, the court may under § 297 (1) of the CCP order the collection of additional evidence on its own initiative. The Supreme Court has in numerous judgments held that the exercise of this right by the court is nevertheless an exception.*[85]

If counsel fails to perform his or her duties, despite receiving repeated instructions from the court, the issue of removal of counsel may arise. Naturally, consideration must be given to the fact that removal of counsel constitutes a serious infringement of the principle of independence of counsel. Pursuant to §§ 54 1) and 2) of the CCP, a person may not serve as counsel and must be removed if her or she has been subject to criminal proceedings on another basis in the same criminal matter, or if, in the same or a related criminal matter, he or she has previously defended or represented a person whose interests are in conflict with the interests of the person to be defended. If counsel does not remove him- or herself on these bases, the court shall remove counsel by a ruling on its own initiative or at the request of a party to the court proceeding (§ 55 (1) of the CCP). The court shall also remove counsel if it becomes evident in a proceeding for removal that counsel has abused his or her status in the proceedings by communicating with the person being defended, who was detained as a suspect or arrested, in a manner that may encourage the commission of another criminal offence or violation of the internal rules of the custodial institution (§ 55 (2) of the CCP). Thus, the Code of Criminal Procedure does not provide the possibility to remove incompetent counsel. The State Legal Aid Act does, however, provide for a change of provider of state legal aid in case of ineffective assistance of counsel. Under the first sentence of § 20 (3^1), the court shall, at the request of the recipient of legal aid or on its own initiative, remove an advocate from the provision of state aid by means of a ruling if the advocate has shown himself or herself to be incompetent or negligent.*[86] The State Legal Aid Act does not specify what constitutes incompetence or

[80] W. G. Genego (Note 24), p. 201.

[81] P. W. Tague (Note 72), p. 148.

[82] Identifying and Remedying Ineffective Assistance of Criminal Defence Counsel: A New Look after United States v. Decoster (Note 51), pp. 772–773.

[83] See p. 256 of this article.

[84] Subsection 267 (4) of the CCP provides that if counsel violates order in a court session, fails to comply with the orders of a judge or acts in contempt of court, a fine of up to one hundred minimum daily rates may be imposed on him or her by a court ruling. An order of a court should be understood to mean only such orders as are issued to maintain order in the court. The heading of § 267 CCP is after all "Measures applicable to persons who violate order in court session."

[85] CCSCd 26.09.2006, 3-1-1-67-06 and 3-1-1-91-07.

[86] The version in force from 1 January 2009 to 1 January 2010 required the consent of the accused to remove counsel; however, as of 1 January 2010, this is no longer required. It would appear that this amendment was intended to regulate situations in which the accused need not yet be aware that counsel's assistance is ineffective, or the defendant is aware but for some reason fails to demand that counsel be removed. In such case, the court must intervene on its own initiative. Nevertheless, no comment has been made concerning these amendments in the explanatory

negligence, from which we can conclude that these concepts will be interpreted by the court as the court sees fit in view of the particular circumstances of the case. The second sentence of § 20 (3^1) provides that the court may, in advance, request the submission of explanations or a report from the recipient of state legal aid and the advocate. Thus it can be seen that in the area of legal aid, an important step forward has been taken toward guaranteeing the effective protection of counsel to all defendants. The State Legal Aid Act does not, of course, regulate contractual representation of counsel, but this situation is somewhat simpler. If the accused can see that counsel does not meet his or her expectations*[87], the accused can always hire another advocate.*[88]

If counsel has failed to perform his or her duties competently and the accused or the court has for some reason not reacted to this in the course of proceedings in the court of first instance, the accused in Estonia may, pursuant to § 339 (2) of the CCP, file an appeal and later an appeal in cassation against the judgment of the court of first instance. Under that provision, the court may find that there has been a material violation of criminal procedural law other than as set out in § 339 (1) of the CCP, if the violation results in or may result in an unlawful or unfounded judgment. When ruling on an appeal under § 339 (2) of the CCP, the court must first ascertain that a violation (i.e., errors by counsel) has taken place and thereafter must weigh whether the violation resulted in or may have resulted in an unlawful or unfounded judgment. Thus, the test for ineffective assistance in Estonia is not a one-part test. The review of an appeal under § 339 (2) of the CCP is indeed more similar to the US approach: for a finding of breach of the right to counsel, it must first be determined that counsel's errors may have influenced the lawfulness of the judgment.*[89] The Estonian and US approaches cannot, however, be considered the same, since neither § 339 (2) of the CCP nor the practice of the US Supreme Court to date requires that the violation might have changed the outcome of the proceeding in order for it to be considered a material violation of criminal procedural law, as is required under US precedent. In any case, Estonia should in developing its test consider that, according to the case law of the ECtHR, a person charged with a criminal offence does not have to prove the element of harm.

Requiring a person charged with a criminal offence to prove the existence of harm would appear, in the context of Estonia and upon closer examination, to contravene the nature of criminal proceedings and the principles underlying the participation of counsel in such proceedings. Pursuant to § 47 (2) of the CCP, counsel is required to use all those means and methods of defence that are not prohibited by law in order to ascertain the facts that vindicate the person being defended, prove his or her innocence, or mitigate his or her punishment, and to provide other legal assistance necessary in relation to a criminal matter to the person being defended. We can conclude from this provision that the objective of counsel's work is to provide the person being defended with all legal assistance necessary in a criminal case. If the success of an appeal concerning a breach of right of counsel were to require that the appellant prove that the outcome of the proceedings would have been different with the assistance of competent counsel, this would be tantamount to admitting that in cases where counsel has no evidence that vindicates the person being defended, proves his or her innocence, or mitigates his or her punishment—that is, where participation of counsel of whatever quality will not change the conviction of the person or the punishment imposed on him or her—the accused could just as well be left without any assistance of counsel at all. Therefore, in an appeal concerning ineffective assistance of counsel, by imposing on the accused the burden of proving that the outcome would have been different had counsel performed his or her duties (e.g., the accused would have been acquitted or would have received a lighter sentence), we would be negating the obligation of counsel to provide effective assistance in so-called hopeless cases.*[90] This approach would place the accused in an unequal position and would clearly breach the ECHR and the provisions of the Code of Criminal Procedure. The accused also naturally has the option, if counsel has breached his or her duties and if the accused is unable to prove harm himself or herself, to appeal to the Court of Honour of the Bar Association or to claim damages from counsel, but here the accused reacts after

memorandum. (See the Advokatuuriseaduse ja sellega seonduvate seaduste muutmise seadus. Seaduseelnõu 253 SE (Act to Amend the Bar Association Act and Other Related Acts. Bill 253 SE). Available at http://www.riigikogu.ee/?op=ems&page=eelnou_otsing (3.03.2010) (in Estonian).

87 It is of course another matter whether the accused understands this.

88 The question of whether the removal of counsel due to incompetency should be possible only with respect of appointed counsel or also with respect of contractual counsel merits separate and thorough consideration. According to the Code of Criminal Procedure, contractual counsel shall participate in the proceedings only so long as he or she has the approval of the accused. It can thus be said that currently, the wishes of the accused concerning contractual counsel are considered important in criminal proceedings. There may nevertheless be situations where the accused does not (cannot) see what the court can see: that counsel is not performing his or her duties correctly. Granting a court the right to remove contractual counsel in cases where the accused does not agree to removal is very problematic. This would infringe both the independence of counsel and the choice of the accused to freely choose counsel.

89 The issue of burden of proof is somewhat more complicated. In the US, the defendant must prove that the result of the proceeding was different due to the error of counsel. In Estonia, the accused (or his or her (new) counsel) must at least note in an appeal why the violation may have resulted or did actually result in an unlawful or unfounded judgment. Thus, on first view it would appear that whereas in the US the burden of proof is very clearly imposed on the defendant, in Estonia the situation is not nearly so clear. The accused in Estonia should nonetheless indicate the errors in counsel's performance and somehow prove them. If the accused does not do so, there is nothing for the court of appeal or court of cassation to consider.

90 W. G. Genego (Note 24), p. 200.

the end of his or her criminal proceedings and therefore is not assisted in ensuring that the criminal proceedings are conducted with the participation of counsel who can provide effective assistance. It should also not be forgotten that criminal proceedings must not only be fair but appear to be fair, not only with regard to a particular person accused of a criminal offence but with regard to all persons charged with a criminal offence. For this reason, an appeal or appeal in cassation should not depend on whether the person would have been convicted or acquitted had counsel's assistance been effective, or on the punishment that would have been imposed if counsel had performed his or duties correctly.[*91] It must also be noted, as mentioned above, that proving harm is by its very nature practically impossible.[*92]

It is also debatable whether counsel can perform his or her duties so incompetently that the person being defended could claim that counsel has not participated in the criminal proceedings at all, which constitutes a violation of criminal procedural law under § 339 (1) 3) of the CCP. This provision does not require consideration of whether the violation resulted or may have resulted in an unlawful or unfounded judgment; rather, the judgment is annulled automatically once the violation is ascertained. The author of this article is of the opinion that the ineffective assistance of counsel could be alleged on the basis of § 339 (1) 3) of the CCP only where counsel has been so ineffective during the proceedings that one could speak of his or her not participating in the criminal proceedings at all (e.g., where counsel has participated in court sessions without being familiar with the criminal matter). In other cases, claims regarding ineffective counsel should under valid law be based on § 339 (2) of the CCP. Currently in practice, however, a judgment can be appealed on the basis of § 339 (1) 3) of the CCP only where counsel has not physically participated in the criminal proceedings.

If a standard were established in Estonia concerning the requirements for assistance of counsel, there would be no need to divide the concept of ineffective assistance of counsel such that certain violations are considered to be material violations of criminal procedural law in the meaning of § 339 (1) 3) of the CCP and others in the meaning of § 339 (2) of the CCP. If an adequate standard existed, failure by counsel to perform his or her duties according to that standard—e.g., the standard that Estonian society agrees upon as the minimum required of counsel—could be deemed to be a material violation of criminal law. In such cases, there would be no need to debate the meaning, in the context of ineffective assistance of counsel, of the provisions of § 339 (2), under which a material violation of criminal procedural law is one that results in or may result in an unlawful or unfounded judgment. If a standard existed, it would make no difference whether substandard assistance of counsel were considered a material violation of criminal procedural law in the meaning of § 339 (1) 3) or § 339 (2) of the CCP, as both would result in clear breach of the right of counsel—that is, ascertainment of failure of counsel to provide assistance in accordance with the standard and an order to return the criminal matter to the court of first instance for a new hearing, by a different court panel.[*93]

4. Conclusions

The author of this article is of the opinion that, in addition to *ex post* evaluation, Estonian courts must be able to act operatively and to remove counsel who does not provide effective assistance from criminal proceedings. Of course, granting the courts the right to remove ineffective counsel from criminal proceedings does not automatically mean that all problems related to ineffective assistance of counsel would disappear. First, the question arises whether courts should have the right to remove appointed counsel only in case of ineffective assistance, as set out in § 20 (3^1) of the SLAA, or contractual counsel as well. In any case, the Code of Criminal Procedure does not currently allow for contractual counsel to be removed as a result of ineffective assistance. It must be considered that whereas appointed counsel is appointed by a competent authority to provide assistance and the person being defended may have no say in the choice of advocate, contractual counsel is chosen by each defendant him- or herself, in exercise of the right to choose counsel as provided for in Article 6 3 (c) of the ECHR. Even if the assistance of contractual counsel has been ineffective, if a court intervenes, the question inevitably arises as to whether this violates the right of the person charged with a criminal offence to choose counsel as provided for in Article 6, paragraph 3 (c) of the ECHR. Does a person charged with a criminal offence not have the right to decide whether to discontinue or continue co-operation

[91] A. Soo. Ebaefektiivne kaitse kriminaalmenetluses: mõiste ja probleemistik (Ineffective Defence in Criminal Procedure: Concept and Range of Problems). – Juridica 2007/6, pp. 368–369 (in Estonian).

[92] See page 257 of this article.

[93] Pursuant to § 341 (1) of the Code of Criminal Procedure, if material violation of criminal procedural law is ascertained in the course of a court session pursuant to § 339 (1), the circuit court shall annul the judgment of the court of first instance and return the criminal matter to the court of first instance for a new hearing by a different court panel. Pursuant to the second subsection of that section, the circuit court shall also annul the judgment of the court of first instance and return the criminal matter to the court of first instance for a new hearing by a different court panel if material violation of criminal procedural law is ascertained in the course of a court session pursuant to the procedure provided for in § 339 (2) of the Code and the violation cannot be eliminated in the court session. It is clear that ineffective assistance of counsel cannot be remedied in the higher court, rather the person must be accorded the opportunity to participate in proceedings where he or she receives effective legal assistance from counsel.

with counsel who has been proved to be ineffective? If it is indeed only the accused who can make this decision, does the court at least have an obligation to draw the attention of the accused to counsel's ineffective performance—that is, an obligation to make sure that the accused understands that the performance of counsel is substandard? Removal of appointed counsel, particularly counsel appointed with due consideration of the opinion of the accused, without the consent of the accused is also somewhat questionable. Is it indeed permissible for the court to decide on removal of counsel without the consent of the accused as set out in the current wording of § 20 (3^1) of the SLAA? On the one hand, this ensures that the court will react in situations wherein the accused has no comprehension that his or her rights have been breached, yet, on the other hand, the court will be intervening very intensively in the relationship between counsel and the accused.

Additionally, there is no way to skirt the issue of whether Estonian judges would even dare to infringe the independence of counsel and evaluate an advocate's work. And if they do dare, on what would they base such evaluation? Should a court remove counsel if the court feels that counsel has been ineffective, or should a court base removal on a particular legal norm (be it provided for in the Code of Criminal Procedure, the State Legal Aid Act, or even the Bar Association Act or the Code of Ethics of the Bar Association)? And what should a court do if current legal norms are too general? This raises the question of whether guidelines should be laid down for the assistance of counsel as has been done in the United States (in the form of the ABA Guidelines). On the one hand, establishing guidelines is complicated, as each criminal matter requires a unique approach by counsel. On the other hand, however, it is easier for the courts to evaluate the work of counsel if guidelines for counsel have been established (and the existence of the ABA Guidelines proves that this is possible), and there is less of a chance that the courts will infringe the independence of counsel without good reason. In any case, the establishment of an effective counsel standard that would assist the court in evaluating the performance of counsel both during a criminal proceeding and also retrospectively in appeal or cassation proceedings should also be considered in Estonia. The existence of a standard would mean that in appeal and cassation proceedings the circuit courts and the Supreme Court would not have to analyse separately whether the ineffective assistance of counsel resulted in or may have resulted in an unlawful or unfounded judgment by the lower court. In order to ascertain that a material violation of criminal procedural law has taken place, it would suffice for the higher court to determine that the assistance of counsel in the lower court did not meet the established standard.

Abbreviations

RT	*Riigi Teataja* (State Gazette)
RTL	*Riigi Teataja Lisa* (Appendix to the State Gazette)
ÜNT	*Ülemnõukogu Teataja* (Supreme Council Gazette)
SCALCd	Decision of the Administrative Chamber of the Supreme Court
SCALCr	Regulation of the Administrative Chamber of the Supreme Court
CCSCd	Decision of the Civil Chamber of the Supreme Court
CCSCr	Regulation of the Civil Chamber of the Supreme Court
CLCSCd	Decision of the Criminal Law Chamber of the Supreme Court
CLCSCr	Regulation of the Criminal Law Chamber of the Supreme Court
OJ	Official Journal of the European Union (formerly Official Journal of the European Communities)
ECJ	European Court of Justice