Legal Pluralism – *cui bono*?

Edited by

Marju Luts-Sootak
Irene Kull
Karin Sein
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LEGAL PLURALISM SCRUTINISED

Marju Luts-Sootak, Irene Kull, Karin Sein,
Hesi Siimets-Gross

An important part of the narrative of modern law and legal science has been the claim that legal unity possesses many advantages over the legal pluralism of earlier periods. This narrative continues to dominate – legal unification and harmonisation has not only been a goal at the level of the European Union along with the carrying into effect of the associated competences, but has increasingly been extended to areas which initially were to remain part of the exclusive competence of the Member States. In the last ten years, approximately, after the adoption of the Lisbon Treaty, attempts have been made to expand the scope of legal unification into new areas of law. The European law unification processes have by contrast created a new pluralism in several fields, a multi-layered law in many ways.

This is intensified by the great trend of contemporary globalisation and the fact that the whole world is interconnected. It has, altogether, and paradoxically, produced new forms of pluralism stemming from legal fragmentation, the proliferation of rules governing global corporations and the emergence of normative orders remaining beyond the regulatory reach of states or international communities of states. The law "without the state", "beyond the state" etc. are the catchphrases to characterise this new "global law". Here, it is important that global law has not removed the traditional state law – this still exists and flourishes. Global law, rather than being a unified and homogeneous legal order, is an incomplete mixture of the many-faceted fragments and legal layers. It is rather a generic name than an omnipotent legal order.

A strong appeal for a unification narrative, characteristic to modernism, still leads the discourse dictating a narrative of unity at a higher level or beyond the visible legal phenomena. "Unity in diversity" is a motto that has not only guided the official policies of the EU, but has also become a required principle for several research programmes and projects. This collection includes articles from the conference "Legal Pluralism – Cui bono?" organised by the School

of Law of the University of Tartu in 2015, signifying the end of three scientific projects.[1] The aim of our event was to oppose the common discourse of unity in diversity and plurality. Our intention was to squarely face the fact of legal pluralism and not only identify the real dangers and challenges, but first of all the opportunities of legal pluralism. To see legal pluralism better in all its facets the quest included legal history as well as the contemporary legal environment. A further restriction of the topic should be mentioned too. The central issue while addressing legal pluralism in this collection is the perspective of the individual. While plurality of sources of law influences all subjects of private and public law, in our collection we will concentrate primarily on the perspective of the individual historically as well as in the present.

In the first part of the collection very general issues are presented. *Ralf Seinecke* provides an overview of the developments of legal pluralism as a theoretical concept and a rather abstract presentation of the advantages of legal pluralism. *Patrick Praet* also moves at a very general level and delivers a sceptical view of the phenomena of contemporary tendencies of increased pluralism in law overall. The conference also included *Jan Smits* presentation "Legal Pluralism and Choice of Law: Towards an Alternative Understanding of Plural Sources".[2] Smits represents a rather strongly optimistic view by claiming that legal pluralism gives the subjects of law a unique opportunity to choose the most appropriate and profitable law on their own and thereby fortify their legal position. Such an opportunity is much more difficult to use in a homogeneous legal order with strict limits and norms.

The second block of the collection includes treatises on legal history. In the pre-modern period of legal history, legal pluralism was the normal state of legal order – a rule and not an exception. Whether lower classes of society, such as peasants could benefit from this situation is a question that dominates the article by *Katrin Kello* and *Hesi Siimets-Gross*. *Olja Kivistik* discusses the legal pluralism in criminal law in the final decades of the Russian Empire, above all looking at the question of how the courts operated in such conditions. *Marju Luts-Sootak* looks at a case of legal pluralism where the same legal system and

[1] ETF9209 "Legal pluralism as a danger, challenge and opportunity – Estonian experiences in comparative and historical perspectives", led by professor for legal history and philosophy Marju Luts-Sootak; ETF9301 "Modern instruments for regulating contractual relations in multi-level Europe and their influence on Estonian private law system", led by professor for civil law Irene Kull; EMP205 "Topical issues in consumer credit in Estonia and Norway", led by professor for civil law Karin Sein.

[2] The author does not contribute with a new treatise in this collection, but his position is clearly stressed in a earlier article – Jan Smits, S. A Radical View of Legal Pluralism. *Pluralism and European Private Law*, ed. by Niglia, L. Oxford: Hart 2013, pp. 161–171.

the same branch of law include two parallel legal solutions or concepts which, by their character and nature, should exclude one another. In conclusion, the results of this historical block are somewhat ambivalent in answer to the question "Cui bono?" Legal pluralism could benefit public institutions, but seldom individuals. If this was the case, however, the individual was most probably specifically qualified or someone who could afford high-level legal counselling, which has never been a cheap endeavour.

The third block of contributions is dedicated to different aspects of pluralism in civil and in particular in contract law. *Kåre Lilleholt* observes the influence that human rights have on modern consumer contract law in the European Union. He shows that human rights may strengthen and refine consumer protection rules through the balancing of interests and the assessment of proportionality, but they also have the potential to limit consumer protection due to the rights of other individuals. The plurality of contract law sources is discussed by *Irene Kull* in her contribution about the meaning of legal pluralism in European contract law. She looks back on scientific and political codification projects in the area of European contract law to define the main tendencies over the years and assess the latest proposals through the prism of exceptionalism and legal plurality.

Next, two articles are dedicated to the specific contract law concepts where plurality of legal sources raises a number of interesting questions. *Age Värv* discusses the proposal for a directive concerning consumer sales contracts to compare the level of protection the consumer would enjoy under Estonian law and the proposed consumer sales directive in the case of a termination of contract. She concludes that in certain respects, the transposition of the new directive into Estonian law would grant the buyer in consumer sales contracts an advantageous position compared to current Estonian law, in some cases resulting in a lower level of consumer protection. *Piia Kalamees* discusses the nature of a relatively less-researched legal institute of price reduction both in Estonian law as well as in modern European contract law. She concludes that a price reduction can be considered a distinctive contractual remedy making it possible to restore the balance of the parties' reciprocal obligations only if the reduced price is determined using the proportional method. This method seems to be the dominant one in modern European contract law allowing us to talk about unity and not plurality on this particular point. The final contribution is dedicated to pluralism in Estonian private international law. *Maarja Torga* analyses legal pluralism in sources of private international law using the example of the legal assistance treaties concluded by the Republic of Estonia with the Russian

Federation and Ukraine. Her main question is how the legal pluralism described in the article can guarantee equal treatment for all nationals of the different Contracting Parties. Her final conclusion is not very optimistic, although she offers solutions which could change the final outcome of the described treaties in practice. Pluralism in private international law should be avoided and the best way to avoid it is through the judicial interpretation of the relevant treaties.

Our edition provides interesting insights into different aspects of legal pluralism in private law and discussions of numerous intellectual "blind spots". The topic itself will remain relevant in coming years, as new legal instruments, especially at the European level, seem to increase and not diminish the importance of legal pluralism. Therefore, readers will not find so many answers to questions but rather material to help them reach their own conclusions on these issues.

I. GENERAL

WHAT IS LEGAL PLURALISM AND WHAT IS IT GOOD FOR?

Ralf Seinecke

'Legal pluralism' is one of the major buzzwords in contemporary legal theory. The concept is used in legal anthropology, sociology, history, philosophy or theory, and doctrine. From national private law to public international law – legal pluralism is everywhere.[1]

Though people talk about legal pluralism, what it means and what it is good for are still open questions. It even seems that vagueness and openness are part of the concept of legal pluralism. For this reason, the first part of this essay tries to illuminate the term from different perspectives. Part one includes:

- a short and preliminary definition,
- a brief overview of some phenomena of legal pluralism, including its epistemologies, history and family resemblances,
- a general concept of legal pluralism i.e. "legal pluralism as the *nomos* of *nomoi*".

After clarifying the term, part two asks what legal pluralism is good for. We will see that its benefits and risks concern:

- the lifeworld, and the political, legal, economic and social system,
- legal studies (Germ. *Rechtswissenschaft*).

Part three emphasises the fact that there is no simple answer to what legal pluralism is good for.

What is legal pluralism?

There are many reasons why it is not easy to answer this question. After all, the concept is used in several contexts and for different purposes. For example, legal anthropologists talk about different phenomena than international

[1] See Tamanaha, B. Understanding Legal Pluralism: Past to Present, Local to Global. *Sydney Law Review* 30 (2008), p. 375.

public/private lawyers and they all have different intellectual interests (Germ. *Erkenntnisinteressen*). The meaning of legal pluralism also changes inside a discipline or changes the discipline itself – as legal pluralism did for legal anthropology in the 1980s and 1990s.[2] Additionally, legal pluralism is part of a terminological struggle rather than simply a descriptive word. In fact, legal pluralism works as a *Kampfbegriff*. It makes a difference, calling rules 'law' or 'legal' rather than 'habits', 'customs', 'morals' or 'norms'.

Preliminary definition

Although it is difficult to describe legal pluralism, we have to start with a very broad preliminary definition:[3]

> "legal pluralism means that more than one law is observed at the same time in the same space".

This definition highlights four aspects of legal pluralism, including its law, time, space and subjective perspective (i.e. it is observed).

1. Of course, legal pluralism presupposes that there is more than one law. But what does 'law' mean in the context of legal pluralism? One can attach the legal pluralism label to different concepts of law, diverse legal systems, varying codices, competing legal principles, rules or precedents etc. In fact, many things go by the labels of 'law', 'right' or 'legal rule' and they can all be plural.
2. The next challenge to this definition comes from the time of legal pluralism. Legal pluralism describes more than the situation of a valid and contemporary law. It also characterizes legal systems, which historically were influenced by different legal cultures and nowadays establish (more or less) a coherent legal order.[4]
3. Difficulties also arise when describing the space in which legal pluralism takes place: a territory, society, societal system, social field, community or association. Legal pluralism is everywhere, or as Galanter says, it is "in many rooms".[5]

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2 See below.

3 See for other preliminary definitions Seinecke, R. *Das Recht des Rechtspluralismus*. Tübingen: Mohr Siebeck, 2015, pp. 14–20.

4 See e.g. von Benda-Beckmann, F., von Benda-Beckmann, K. *Gesellschaftliche Wirkungen von Recht*. Berlin: Reimer, 2007.

5 See Galanter, M. Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law. *Journal of Legal Pluralism* 19 (1981), pp. 1–47.

4. Finally, this preliminary definition highlights one of the most important insights from the analysis of legal pluralism. Namely, legal pluralism is nothing that is in the world. There is a subjective bias inherent to the use of the term legal pluralism. Legal pluralism is nothing found or ontologically existing but rather something observed and seen. If the phrase 'legal pluralism' is used, the usage creates the same named phenomenon.

Phenomena

This broad definition and insight into the subjective bias of legal pluralism shows there are many phenomena that go by this label.[6] At the phenomenological centre of legal pluralism is non-state law.[7] In modern times, the state proclaims the monopoly of law and displaces pluralist descriptions. However, above the nation state, in its shadow and in premodern worlds, there are many spaces for old and new stateless laws.

The classical field of legal pluralism is 'indigenous' law.[8] Legal pluralism was first observed by legal anthropologists in postcolonial realms that were proselytized by religious communities and dominated by colonial states. They emphasised the differences between the formal law of the state and Ehrlich's "living law".[9] Especially in family law or the law of heritage, legal anthropologists and sociologists noticed a gap between the 'ought' of state law and the 'is' of community or 'real' law. In those arenas, normative traditions or religious laws are more influential than the rules given by the state.[10]

The plurality inside and around religious legal orders is closely related to this legal pluralism. Religious legal pluralism can go along with every religious law from Sharia to canon law. Legal plurality has existed since ancient times, especially in Jewish communities. The Jewish law, the *halakha*, is internally and externally pluralist. Inside the *halakha* pluralism, or as Hidary says "dispute", is maintained "for the sake of heaven".[11] Externally, the Jewish communities must

6 See the summary in Seinecke 2015, pp. 291–300.

7 See e.g. Kadelbach, S., Günther, K. (eds.) *Recht ohne Staat? Zur Normativität nichtstaatlicher Rechtssetzung*. Frankfurt A.M.: Campus, 2011.

8 See e.g. Merry, S. E. Legal Pluralism. *Law and Society Review* 22 (1988), pp. 869–896.

9 The concept of "living law" goes back to Ehrlich, E. *Grundlegung der Soziologie des Rechts*, ed. by Rehbinder, M. 4th ed. Berlin: Duncker & Humblot, 1989.

10 "Social arenas" as the primary space for legal pluralism is emphasized by Tamanaha, B. *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press, 2001, p. 206–208.

11 For the internal Jewish pluralism see Hidary, R. *Dispute for the Sake of Heaven. Legal Pluralism in the Talmud*. Providence: Brown Judaic Studies, 2010.

deal with non-Jewish or even anti-Semitic territorial states, communities, and empires.

A third phenomenon is social legal pluralism.[12] Even in 'modern' societies or nation states, alternative social rules like economic reason or in-group norms, often conflict with state law and undermine it. Sally Falk Moore's famous example from the 1960s New York garment industry, showed how state labour law was surrounded or dominated by rules related to economic necessities.[13] Those economic necessities in no way constituted formal law, but they were far more effective than the official legal rules.

Now, these phenomena mainly concern groups or communities at the level below the state. However, official law can also suffer from legal pluralism. For example, inside modern nation states, the federal system institutionalises plurality.[14] The historical relationship of many federal states is highly contested and is now part of an elaborate order of legal competences or conflict rules and institutions. Besides this internal legal pluralism, a newer field is evolving outside the state borders. One of the major issues of international law is its fragmentation; that is, when international legal regimes like the WTO or the UN (with their own appellate or dispute settlement bodies) develop their own legal rationalities that conflict with each other.[15] Another important example is the supranational law of the European Union and its relation to the sovereignty of the European nation states. In the European legal disorder, there are legislative, executive and judicial powers at supranational as well as national levels that intertwine and conflict. This is a true field of 'interlegality'.[16]

Another group of phenomena contains transnational laws or the new legality of global social systems.[17] The most famous example comes from so-called *lex mercatoria* – an autonomous legal order of transnational merchants and corporations. Many aspects of this order are contested, including its

12 This legal pluralism is called *new legal pluralism* by Merry 1988, p. 872.

13 See Moore, S. F. Law and Social Change: The Semi-Autonomous Field as an Appropriate Field of Study. *Law & Society Review* 7 (1972), pp. 719–746.

14 See Seinecke 2015, pp. 295–296.

15 See e.g. Koskenniemi, M., Leino, P. Fragmentation of International Law? Postmodern Anxieties. *Leiden Journal of International Law* 15 (2002), pp. 553–579.

16 The term "interlegality" is brought up by de Sousa Santos, B. Law: A Map of Misreading. Toward a Postmodern Conception of Law. *Journal of Law & Society* 14 (1987), p. 298.

17 For the legal pluralism of systems theory see Teubner, G. Global Bukowina. Legal Pluralism in the World-Society. *Global Law Without A State*, ed by Teubner, G. Aldershot: Dartsmouth, 1997, pp. 3–28.

history, autonomy and existence.[18] Yet in addition to other postmodern 'leges' (like the so-called *lex sportiva* or *lex digitalis*), *lex mercatoria* seems to be the most elaborate postmodern legal order. It claims validity independently of international private and public law, with its own:

- courts of arbitration like the ICC in Paris or the VIAC in Vienna,
- legal principles and rules.

Epistemology

Those highly divergent phenomena emphasise that legal pluralism is not an object, which we can describe in a simple or straightforward way. Legal pluralism is not a thing found in reality. Rather, it is a way of looking at things. The concept is a lens through which the world is conceived and this subject (with its worldviews) constitutes the legal world in the plural.

If we understand legal pluralism in such an epistemic way, it makes sense to analyse the epistemological side of legal pluralism. There are at least six heuristic types of legal pluralism.[19] This means there are six ways of constructing legal pluralism. The first three epistemologies are primarily descriptive.

The historical or genetic perspective focuses on plural sources, legal regimes or cultural understandings in the evolution of a legal system or during a specific historic period. The most obvious example for legal pluralism in history is status-bound law in the Middle Ages or early modernity. In those times, the principle of personality made it possible for a status-related law and judgement. This meant that a different judgement was applied to different people.[20]

We can draw another example from the studies by Franz and Keebet von Benda-Beckmann of the law of indigenous communities in Indonesia.[21] They show how the law of those communities was formed by at minimum five legal orders:

- their own legal traditions (*Adat*),
- Islamic proselytization (*Sharia*),
- Dutch colonial regime,
- new Indonesian nation state,
- international or even transnational legal orders.

[18] For historical critique see Cordes, A. Article 'Lex Mercatoria', *Handwörterbuch zur deutschen Rechtsgeschichte (HRGdigital)*, ed. by Cordes, A., Lück, H., Werkmüller, D., available at http://www.hrgdigital.de/.download/pdf/lex_mercatoria.pdf (18.2.2017, in German).

[19] See Seinecke 2015, pp. 27–49.

[20] See e.g. Stolleis, M. Vormodernes und postmodernes Recht. *Quaderni Fiorentini* 37 (2008), pp. 547–548.

[21] See v. Benda-Beckmann, v. Benda-Beckmann 2007.

Those studies also exemplify the sociological or anthropological epistemology of legal pluralism. From this point of view, in-group norms coexist alongside official state law and complement or undermine it. These norms are often not valid from the perspective of state law, but people conceive them as legally binding.

The third descriptive type emphasises the cultural or ideological layer in legal orders. Laws not only derive from different realms, but also convey different worldviews or rationalities.[22] The aim of cultural legal pluralism is to reconstruct those political, religious or cultural dimensions.

Alongside the distinct descriptive types of legal pluralism are three normative types. While the institutionalised perspective focuses on the normative order of a pluralistic setting, the chaotic heuristic emphasises its disorder. This institutionalisation of a legally pluralistic setting can be managed via competence norms (as in federal states) or by conflict rules (as in private international law). Conversely, the chaotic type highlights conflicts between different legal realms and focuses on problems that occur when two courts or legal systems claim jurisdiction for the same case. Finally, a critical point of view brings in a second normative layer that facilitates normative evaluation of the pluralistic or non-pluralistic situation.[23]

History

The history of legal pluralism means two things. First, it refers to legal pluralism phenomena in the history of law. Legal history contains many examples of different kinds of legal pluralism like the medieval principle of personality, tensions between roman and canon law, the relationship between *ius commune* and territorial laws etc. However, this history of legal pluralism is not yet written.[24] Secondly, legal pluralism is by itself a historical *and* very young concept.[25] The (legal-)historians John Gilissen and Reinhart Koselleck first used the phrase 'legal pluralism' (*Rechtspluralismus*), but it acquired widespread usage

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[22] See Cover, R. The Supreme Court 1982 Term. Foreword: Nomos and Narrative. *Harvard Law Review* 97 (1983), pp. 4–68.

[23] See e.g. Günther, K. Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem. *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit. Festschrift für Jürgen Habermas*, ed. by Wingert, L., Günther, K. Frankfurt a.M.: Suhrkamp, 2001, pp. 539–567; Günther, K., Normativer Rechtspluralismus – Eine Kritik. *Normative Orders Working Paper* 03/2014, 21 p., available at http://www.normativeorders.net/de/publikationen/working-paper (17.2.17).

[24] For further notes on the history see Seinecke 2015, pp. 30–31, 50–55.

[25] For the history of the concept see Seinecke 2015, pp. 49–65.

via legal anthropology.[26] Authors like Franz von Benda-Beckmann and John Griffiths deployed the concept to provide a better understanding of 'indigenous' cultures and their law.[27] Those first legal pluralists also told their own histories of legal pluralism. Eugen Ehrlich, Max Weber, Bronislaw Malinowski, Karl Llewellyn and E. Adamson Hoebel were called their ancestors.[28] However, those ancestors did not use the phrase 'legal pluralism'. They were only interested in similar phenomena like non-state law, living law, indigenous law, or law in action. In fact, many other lawyers had written about these themes previously, but the legal pluralists did not mention them. However, this story transgresses from the histories of the phenomena and concept of legal pluralism.

Legal pluralism was introduced into legal anthropology in the 1970s and early 1980s, but it took approximately a decade for it to transform from a critical outsider concept into a dominating trend in legal anthropology. Simultaneously in the late 1980s and early 1990s, the term started its career in international legal and political theory. With their essays *Law: A Map of Misreading* and *Global Bukowina*, Boaventura de Sousa Santos and Gunther Teubner opened a new field for legal pluralism.[29] Those essays are still the starting point for many current debates on legal pluralism, transnational law, fragmentation of international law or transnational constitutionalism.[30] The contemporary phenomena from international, transnational or global law give those theories a broad field of application.

[26] See Gilissen, J. (ed.), *Le pluralisme juridique*. Brussels: Editions de l'Université Bruxelle, 1971; Koselleck, R. *Preußen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791–1848*. Stuttgart: Klett, 1967, p. 33. Before them Santi Romano used the word "pluralismo giuridico" in his book *L'ordinamento guridico* in 1918.

[27] See e.g. v. Benda-Beckmann, F. *Rechtspluralismus in Malawi. Geschichtliche Entwicklung und heutige Problematik*. München: Weltforum, 1970; Griffiths, J. What is Legal Pluralism? *Journal of Legal Pluralism* 24 (1986), pp. 1–55.

[28] See Ehrlich 1989; Weber, M., *Rechtssoziologie*. Neuwied: Luchterhand, 1960; Malinowski, B. *Crime and Custom in Savage Society*. London: Paul, 1926; Llewellyn, K., Hoebel, E. A. *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*. Norman: University of Oklahoma Press, 1941.

[29] See de Sousa Santos 1987, Teubner 1997.

[30] Teubner, G. *Constitutional Fragments. Societal Constitutionalism and Globalization*. Oxford: Oxford University Press, 2012.

Family resemblances

Although these short remarks on the phenomena, the epistemologies and the history of legal pluralism suggest there is no chance of defining legal pluralism, there are four family resemblances that are common to the usage of legal pluralism.[31]

1. The most important common ground in legal pluralism talk is a critique of the state or state-centred concepts of law.[32] Legal pluralists do not believe that the concept of law is necessarily bound to the concept of the state. There is law without, over or under, next to, beyond or before the state.
2. Of course, the critique of state law makes a plea for an alternative law. Talking about legal pluralism always presupposes a second law – an indigenous, religious, social or economic law; a supra, inter or transnational law etc.
3. The problem of 'interlegality' arises with those different kinds of alternative law.[33] When there is more than one law, the other laws necessarily have to interact with official law. This interaction has many forms. The second law can compete or conflict with the first, but can also complement or support it. It can even be independent of the dominant law – valid and relevant only for subgroups or parallel societies.
4. Finally, legal pluralism always has a critical bias. Talking about legal pluralism modifies official law and strengthens alternative law. The epistemological claim in legal pluralism is dependent on a subjective decision. It is full of anti-ideological critique, and therefore, part of its own ideological programme. Calling norms or rules 'law', empowers their legitimacy.[34]

Legal pluralism as the *nomos* of *nomoi*

Even though the divergent phenomena and concepts of legal pluralism share widespread family resemblances, there is no uncontested definition of legal pluralism. There are simple reasons for that. Too many phenomena go by the legal pluralism label. Too many disciplines use the concept and too many political or intellectual interests are involved in its usage. So legal pluralism is a vague, open and highly contested concept.

[31] The concept of family resemblances goes back to Wittgenstein, *Philosophical Investigations*. 2nd ed. Oxford: Blackwell, 1958.

[32] See e.g. Griffiths 1986.

[33] See again de Sousa Santos 1987, p. 298.

[34] See e.g. Cover, R. The Folktales of Justice: Tales of Jurisdiction. *Cover, R. Narrative, Violence, and the Law. The Essays of Robert Cover*, ed. by Minow, M., Ryan, M., Sarat, A. Ann Arbor: The University of Michigan Press, 1993, pp. 174–175.

Plurality is part of legal pluralism itself; that is, 'the pluralism of legal pluralisms'[35]. In contrast to this plurality, a final definition of legal pluralism would separate its many dimensions. A definition would establish borders between the phenomena and concepts. Moreover, following the borders, a hierarchy between 'true' legal pluralism and 'unimportant' legal pluralisms would originate.

However, legal pluralism is not about boarders and hierarchy. Instead, it aims to question supremacy and to deconstruct legal paradigms. Therefore, legal pluralism highlights alternative legal worlds and takes an undefined approach to law and legality. With this in mind, the search for legal pluralism must begin with its 'alternity'.[36] Such a theoretical approach to the concept of legal pluralism starts from the concept of law as *nomos*.[37] On this *nomos*, Robert Cover writes:

> "We inhabit a *nomos* – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. ... No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live."[38]

This *nomos* does not stand next to the law, but is an integral part of it. Even though it is not necessarily written down in rules, principles, laws or constitutions – it still constitutes the law. The *nomos* is the legal lifeworld that surrounds the positive norms and shapes meaning. Ideological or philosophical concepts like human rights, democratic principles or the rule of law are closely attached to this *nomos* because their content is undetermined and highly committed to a specific – in this case liberal – worldview. Of course, this 'nomological' concept of law does not deny the central role of positive law or legal institutions. But it does emphasise a second layer in law, on which law and legal pluralism can be observed in an illuminating way.

We can describe legal pluralism in a new way based on this concept of law as *nomos*. It no longer simply means the non-state law, conflict of competing valid norms, or the interaction of independent legal orders. Legal pluralism is now located at the nomological layer in law:

[35] For the "pluralism of legal pluralisms" see e.g. Tamanaha 2001, p. 174.
[36] Cover 1993, p. 176.
[37] For this concept of law see Seinecke 2015, pp. 346–362.
[38] Cover 1983, p. 4; for a reconstruction of Covers concept of law see Seinecke 2015, pp. 260–281.

"Legal pluralism is the *nomos* of *nomoi*."[39]

Legal pluralism phenomena usually occur when a dominating legal worldview is not monist and stable anymore. Describing a situation as legally plural does not only mean that there are two conflicting rules applicable to one case or two sources of law. Instead, it means that the norms applicable to one case can be drawn from different mind-sets, perspectives, worldviews, cultures or rationalities. There is a crack, so to speak, in the *nomos* of law. That's how the other *nomoi* get in. One *nomos* does not make legal pluralism – rather many *nomoi* narrate and constitute the pluralist legal order.

Even though this nomological perspective is usually not explicitly present in legal pluralism talk, it has always been a major topic in legal pluralism. It is central to anthropological studies, which observe the colonisation of indigenous life worlds by proselytising religions, imperial nations and so-called 'modern' law. It is part of the critical agenda of the left-wing social sciences or the legal critique of the state in postmodern times. Legal pluralism is deeply entangled in law's nomological struggles. That is why we must describe legal pluralism as the *nomos* of *nomoi*.

What is legal pluralism good for?

The nomological concept of legal pluralism, gives a definition that grasps the empirical phenomena of legal pluralism via emphasising its normative, worldview-related and ideological layers. Nevertheless, this concept serves highly theoretical interests and focuses on other objectives than simple descriptions of phenomena with the legal pluralism label. That is why an analysis of the benefits and disadvantages of legal pluralism must distinguish between the many empirical phenomena of legal pluralism, and the nomological concept of legal pluralism and law.

While the empirical phenomena must be evaluated with respect to their effects on the lifeworld and the social, political or legal system – the nomological concept primarily has implications for legal studies, and therefore, legal ideology or the legal worldview.

[39] For this concept of legal pluralism, see Seinecke 2015, pp. 362–373.

Phenomena of legal pluralism in the lifeworld

A sufficient analysis of all the opportunities, risks, advantages and disadvantages of the many phenomena of legal pluralism requires far more than a short essay. There are too many types of legal pluralism, so normative evaluation demands a detailed reconstruction of each of them. Ultimately, the question of what legal pluralism is good for in the lifeworld, is practical and political. A general theory cannot give such an abstract and at the same time practical or political answer. The general normative analysis of legal pluralism can only point to normative themes in legal pluralism, but it will not finally evaluate them. These short remarks refer to four of those normative themes:

- the relation between lawmakers and 'lawtakers',
- the separation of powers,
- competition of laws, and
- reflexivity in law and society.

In legal pluralism, communities or groups are responsible for their own norms or laws. This counts for all kinds of communities including local, regional, federal, national, supra, inter, transnational, political, social, economic, religious and cultural. The group's members decide which rules are appropriate for them and which are not. That is why the distance between lawmakers and lawtakers decreases in legal pluralism. Plural legislators are usually familiar with specific regulatory problems, and therefore, probably know the best solutions (Germ. *Sachnähe)*.[40] Being a member of a community or being part of a social practice provides access to information, which often is not accessible to everyone. Of course, those justifications for community or group law are not new to legal theory. Legal sources like customary law or systems of competences are often justified with similar reasons.

While this argument from *Sachnähe* is based on technical and cognitive considerations, discourse theory turns it into a normative one. From this perspective, legal pluralism relates authors and addressees of norms very close to each other.[41] In discourse theory, norms only claim moral validity if everybody effected agrees on them. Of course, democracy translates this idea into the realm of law and politics. If we now look at the phenomena of legal pluralism, we see that the legal justification is questioned on many different levels. Legal pluralism opens new layers, and therefore, opportunities for democracy plus deliberation in law and politics.

40 See Seinecke 2015, pp. 321–323.

41 For discourse theory of law see Habermas, J. *Between Facts and Norms. Contributions to a discourse theory of law and democracy*. Cambridge: Polity Press, 1996.

Like all the benefits of legal pluralism, these cognitive and normative chances contain a dark side. Namely, the many communities, rationalities and worldviews within empirical legal pluralism together with the concept of the *nomos* of *nomoi* – suggest that chaos threatens legal pluralism. However, this threat is not real. Chaos is just another word for true plurality. The real threat arises from those communities and worldviews that are not liberal or plural. They promulgate undemocratic or repressive norms. They come from an extremist or intolerant world with no respect for the 'other'. They aim to destroy legal or societal pluralism. For that reason, legal pluralism cannot guarantee just, moral or legitimate norms. It gives a voice even to anti-liberal, intolerant and anti-democratic worldviews. That is why the most dangerous threat for legal pluralism comes from inside. Legal pluralism shares the powerful word 'law', with the ones who want to banish pluralism and liberalism. Parallel laws as much as parallel societies, become possible. So legal pluralism always needs liberal and democratic allies. But if we have a look at monist legal or political orders, it is obvious that they cannot conceptually guarantee the liberal, pluralistic and democratic worldview either. The latter is highlighted nowadays in the crisis of European and American democracy.

Of course, the modern liberal and monist nation state has mechanisms to defend its values. The rule of law, democracy or the separation of powers serves them and helps to balance powers inside the legal and political system.[42] Legal pluralism now strengthens these mechanisms and philosophical ideas. This not only counts for democracy and deliberation. It also affects the system of checks and balances. In legal pluralism, the number of different communities, legal and political actors increases. It divides the power of law-making horizontally and vertically. The empowered communities monitor each other within the different levels of law. They make sure that others do not violate the principles of pluralism or exceed their authority. Legal pluralism makes a new vertical separation of powers possible.

Conversely, this higher number of actors brings great difficulties for large-scale regulation. The more actors there are in politics, economics, law and society – the more power for resistance is released. However, from the perspective of sociology or political sciences, these complexities of group regulation are as normal as the political struggle. They are part of every political or social community and precede every regulation.

42 See Seinecke 2015, p. 319.

When used as a regulatory tool, legal pluralism also creates spaces for legal competition. Different jurisdictions or legal orders develop varying legal solutions for similar social and legal problems. This redundancy now opens the option to test these legal solutions in certain communities, territories or groups.[43] Other communities can then see or evaluate which legal solutions are effective and which are not. This idea is not new to political or economic theory. It constitutes federalism as much as modern markets. Both arenas empower smaller political or economic units to self-government and allow them to decide what is best for public or private interests.

Again, legal competition or legal pluralism will not necessarily produce just laws, good regulation or adequate norms. Federal or spontaneous orders are not necessarily dedicated to common welfare or liberal values. As with every plural or monist legal order, the quality of legal rules depends on the quality of lawgivers and judges. Legal competition, and therefore, legal pluralism only raises the potential for better laws because it presents more alternatives to legislators, judges and other lawyers. Nevertheless, it must hope for reason in political decisions.

Finally, legal pluralism strengthens tolerance and reflexivity in law and society.[44] The different legal orders in empirical legal pluralism are often linked to different worldviews, rationalities or ideologies. This nomological element connects legal pluralism directly to the idea of tolerance. There is no legal pluralism without respect, liberalism and tolerance. The diversity of worldviews is as essential to pluralism, as it is to tolerance.

The plurality of worldviews now increases the reflexivity of law and society. Legal pluralism challenges the self-conception of communities and their legal thinking. The confrontation with the other almost necessarily gives birth to reflexivity. Dominating as much as dominated societies, strong as much as weak communities, majorities as much as minorities – must justify their own 'otherness' comparatively. In this process, all involved communities reflect their own worldviews and will therefore learn more about themselves than about the other. This relativism that emphasises the relativity of every ideology is a central element in modern democracy.[45] It makes deliberative decisions with respect of

43 For the benefits from legal redundancy, see Cover, R. The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation. Cover, R. *Narrative, Violence, and the Law. The Essays of Robert Cover*, ed by Minow, M., Ryan, M., Sarat, A. Ann Arbor: The University of Michigan Press, 1993, pp. 51–93.

44 See Seinecke 2015, pp. 315–317, 324.

45 See Kelsen, H. Wissenschaft und Demokratie. Kelsen, H. *Verteidigung der Demokratie. Abhandlungen zur Demokratietheorie*, ed. by Jestaedt, M., Lepsius, O. Tübingen: Mohr Siebeck, 2006, pp. 238–247.

and to the other possible. But these well-intentioned ideas of liberal tolerance and reflexivity should never romanticise legal pluralism.[46] Nevertheless, we should remember that the utopian hope for a better world serves the central values of our modern, liberal and democratic world. This hope is very often romantic.

Legal pluralism in legal studies

The nomological concept of law and legal pluralism challenges the established routines in legal studies.[47] It redefines the definition of law and questions what law is. New answers to this perpetual question of legal theory and many new fields for research are emerging.

Firstly, concepts of law cannot simply refer to the state anymore. They must disclose their normative grounds and reveal their intellectual interests. That is why other aspects of law regain new weight like concrete communities, the recognition of norms, effectiveness of rules, social reciprocity, or the structure of law.[48] These are just a few alternatives to state law as the 'essence' of law. All these alternatives to state-centred law concepts make it necessary to reconceptualise law today.

Secondly, the conceptual complexity alters the question itself.[49] The manifold definitions of law show that there is no final definition of law. Therefore, the concept of law turns into a plural; in other words, the 'concepts' of law. In legal pluralism, no concept of law can claim cognitive supremacy. Their use and value depends on the user's intent; in other words, what one wants to show by the concept, which phenomena one wants to analyse, and which problems one wants to resolve.

Every concept of law claims validity in concrete contexts and for specific intellectual interests only. The same goes for the nomological concept of law. It is not a final definition. Instead it is a theoretical concept that serves theoretical interests, emphasising a new second legal layer called the *nomos* of law.

[46] See e.g. Sharafi, M. Justice in Many Rooms since Galanter: De-Romanticizing Legal Pluralism through the Cultural Defense. *Law and Contemporary Problems* 71 (2008), pp. 139–146.

[47] See Seinecke, R. Recht und Rechtspluralismus. Forschungsperspektiven der ‚Rechts'-Wissenschaften und ‚Rechts'-Philosophie. *Junge Rechtsphilosophie*. ed. by Becker, C., Ziemann, S. Stuttgart: Steiner, 2012, pp. 143–158.

[48] See the summary for older concepts of law in Seinecke 2015, pp. 69–165.

[49] See Seinecke 2015, pp. 300–306.

Thirdly, the plural concept of law has fundamental consequences for empirical research in legal studies. Legal pluralism transforms social, economic, religious, or other norms conceptually into law. Therefore, the objective of legal research expands tremendously. Many phenomena that used to be non-legal are now translated into the language of law. The latter can therefore now be subject to legal doctrine, theory, history or sociology.

Of course, legal studies could inquire all these phenomena without the concept of legal pluralism. But the concept fundamentally changes the analysis. The normative status of the phenomena flips upside-down. Calling norms legal is different to calling them moral, conventional or religious. Transforming questions into legal ones changes their normative quality *and* opens new methods for research. The relationship of official and unofficial law becomes crucial and questions the ideological quality of law. Further, the reflexive agenda of legal pluralism opens new fields for critique. Additionally, the idea of legal pluralism as the *nomos* of *nomoi*, fundamentally challenges the structure and idea of modern law.

Concluding remarks

What is legal pluralism? What is legal pluralism good for? Both these questions are difficult to answer.

Regarding the first question, legal pluralism is a highly contested concept that is used for different political and conceptual interests; in other words, it is a true *Kampfbegriff*.

Neither history nor the concept of legal pluralism have been sufficiently examined yet. Legal pluralism describes indigenous or religious legal orders, social norms, economic necessities, supranational plus federal state constellations, public international law and private transnational law. The epistemology of legal pluralism shows descriptive and normative perspectives reaching from historical, sociological or cultural heuristics to instrumental, institutional or critical mind-sets. Legal pluralism is everywhere. Everything is legal pluralism.

Yet there is a general approach to the concept of legal pluralism, which does not negate this ‘pluralism of legal pluralisms’ and still illuminates the concept. The nomological concept of legal pluralism describes it as the *nomos* of *nomoi*. It stresses the cultural perspectives, normative confessions and worldviews inside legal pluralism. From the nomological perspective, we can talk about

legal pluralism whenever the law of a group or community is connected to more than one legal ideology, rationality or lifeworld.

The second question raises similar problems. First, a normative approach to legal pluralism must distinguish between the evaluation of the empirical phenomena of legal pluralism and the consequences of legal pluralism for legal studies. The empirical phenomena of legal pluralism are accountable for at least four advantages in the lifeworld. Legal pluralism brings lawmakers and lawtakers closer together. From a cognitive point of view, this serves *Sachnähe*. From a normative perspective, this increases the discursive legitimation of law. Further, legal pluralism enhances the complexity of the system of checks and balances. It makes a vertical separation of powers in politics possible. Besides that, legal pluralism creates spaces for legal innovation by legal competition. Finally, it increases legal plus societal tolerance and reflexivity. The concept of legal pluralism directly refers to different cultures, societies and worldviews. Of course, all these four benefits have a dark side. The emergence of parallel legal orders and the legitimization of illiberal, non-plural and undemocratic social worlds are just two of their major problems.

Yet in legal studies, legal pluralism challenges established routines and questions the state-centred concept of law. It provokes a crisis within the concept of law and denies the possibility of an essential definition of law. The open concept of law therefore has consequences for empirical legal research. Many phenomena now go by the label law and they can all be subject to legal studies in doctrine, theory, history or sociology.

Although legal pluralism questions many perspectives in legal thinking, it does not change the old, simple plus fundamental insights into law and society. Good laws and a just society, depend on good government together with good people. There will only be innovative and far-sighted legal studies, if there are open minded and smart scientists in the law schools. A single concept like legal pluralism, will not achieve fundamental change. However, the liberal, open minded and reflexive worldview of legal pluralism may help sustain a liberal and plural social practice.

FROM LEGAL PLURALISM TOWARDS PLURAL (IL)LEGALITIES?

Patrick Praet

Be it so. This burning of widows is your custom; prepare the funeral pile. But my nation has also a custom. When men burn women alive we hang them, and confiscate all their property. My carpenters shall therefore erect gibbets on which to hang all concerned when the widow is consumed. Let us all act according to national customs. – Sir Charles Napier[1]

Introduction

The self-understanding of modern states is based upon a number of core constitutional concepts such as the nation-state, sovereignty, legal positivism and unification. The prevailing paradigm is the territorial nation-state that defines its own laws and recognizes no rivalling systems within its boundaries such as personal standing, religious beliefs or foreign legal systems. From this perspective, local law, ethnic minority laws and customs only have normative power to the extent that their rules are recognized by the state.

Therefore, the two core tenets of legal pluralism, the possibility of the coexistence of various legal systems within the same social space[2] and the encompassment of non-legal forms of normative ordering into the legal system[3], must appear anathema.

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1 Answer by Sir Charles Napier, Governor of Sindh Province in 1844, upon being petitioned to allow the Hindu custom of Sati, i.e. burning a widow on the funeral pyre of her husband (Napier, W. F. P. *History of General Sir Charles Napier's Administration of Scinde and Campaign in the Cutchee Hills*. London, Chapman and Hall, 1851, p. 35). Napier was quite a character. When he had captured Sindh against orders, he famously but apocryphally wired to his superiors the Latin pun 'peccavi' (I have sinned, i.e. I have Sindh).

2 Griffiths, J. What is legal pluralism? *Journal of Legal Pluralism* 24, 1986, pp. 1–2.

3 Merry, S. E. Legal Pluralism. *Law and Society Review* 869, 1988, p. 870.

The concept of legal pluralism has its origin in early legal anthropology and sociology[4] but has gradually spread into the vocabulary of contemporary legal discourse[5].

According to Michaels, "The most important reason is globalization: Many of the challenges that globalization poses to traditional legal thought closely resemble those formulated earlier by legal pluralists. The irreducible plurality of legal orders in the world, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position transcending the difference – all of the these topics of legal pluralism reappear on the global sphere." [6]

The somewhat woolly lexicon of pluralism further testifies to the perceived failure of legal grand narratives such as the nation-state and the emergence of new paradigms and external perspectives of law[7]. Indeed, 'to account for the fuzziness of today's reality, a new vocabulary is needed, one that accommodates phenomena such as hybridity, indigeneity, inter-legality, semi-autonomy, unofficiality and others, nicely captured by the pluralist semantic repertoire'[8].

However, in this article we will not concern ourselves with the verbal fireworks of both adherents and opponents of the pluralism paradigm. Instead, in line with the title of the conference, we will turn our attention to the plurality of phenomena that legal pluralists draw upon, in order to determine whether the substance of these 'lived patterns of normative ordering'[9] can still be captured within the encompassing framework of modern state law or whether a new, pluralist order has indeed blossomed outside it.

It is important that we bear in mind the conceptual differences at stake. By legal pluralism, we do not understand the anthropological issue of different

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4 Malinowski, B. *Crime and Custom in Savage Society*. London, Routledge, 1926; Ehrlich, E. *Fundamental Principles of the Sociology of Law*. Harvard University Press, Cambridge (Mass.), 1962.

5 Much to the chagrin of some: "Thus far, there has been scant detailed analysis of the concept of legal pluralism, limited to a handful of articles written by a small circle of scholars. Nonetheless, through the academic practice of repetitive citation and cross-citation, a burgeoning body of legal pluralist works increasingly treats the concept as if it were well established, its basic tenets worked out and now taken for granted. I will argue otherwise". Tamanaha, B. The folly of the 'social scientific' concept of legal pluralism. *Journal of Law and Society* 20, 1993/2, p. 192.

6 Michaels, R. Global Legal Puralism. *5th Annual Review of Law and the Social Sciences* 2009, p. 243.

7 Teubner, G. The Two Faces of Janus: Rethinking Legal Pluralism. *Cardozo Law Review* 13, 1991–1992, p. 1443.

8 Croce, M., Goldoni, M. A Sense of self-suspicion: global legal pluralism and the claim to legal authority. *Ethics & Global Politics* 8, 2015/1, p. 2.

9 Tamanaha 1993, p. 212.

normative orders but rather the contemporary understanding of a given legal system made up of multiple levels and different sources of law; for example, the relationship between international organisations set up by treaties and their signatory states. The main question here is no longer the legal recognition of the subordinate normative orders but the mutual exchange of these overlapping, shared sovereignties.

Plural legalities on the other hand denote the coexistence of multiple legal systems that have no internal linkage and/or are mutually exclusive – e.g. Sharia law in our Western democracies – and therefore simply evolve into illegalities because the foremost, almost tautological, feature of any law-based state is the subjugation of government and people alike to the law (i.e. substantive and procedural legality).

Naturally, no exhaustive study is possible within the framework of a mere paper. We will therefore limit ourselves to a brief glance at three clusters of developments: the (perceived) self-governance of modern commerce and cyberspace, the rise of supra-national law and the challenges to law and order by certain aspects of multiculturalism in many cities in Western Europe. Their choice seems obvious in light of the vast attention that these phenomena enjoy in both academia and politics.[10]

Keeping in line with the question mark in the title of this paper, we will try to examine whether these developments constitute a substantive transformation or not. In other words, is legal pluralism really happening or are we merely witnessing plural (il)legalities galore?

1. The self-governance of modern commerce and Cyberspace

1) The Lex mercatoria as a model of autonomous law

By *lex mercatoria* or 'the law merchant' one understands a set of legal norms, procedures and institutions that are supposedly valid in international trade outside the state and its institutions. This idea of the legal order of transnational commercial law has been both irritating and fascinating to the traditional doctrines of legal sources: one might characterize the experience of an autonomous law merchant as a 'tremendum ac fascinans' because wanting to

[10] A crude indication is the number of online hits which literally run into the hundreds of thousands for all three searches.

transcend the framework of the state both shocks and fascinates legal theorists.[11] While the debate is as old as the *lex mercatoria* itself, the renewed interest in a transnational law merchant dates back to a conference on The New Sources of the Law of International Trade held in 1964 and in particular to the final report by Clive Schmitthoff and the ensuing discussion with Berthold Goldman.[12]

Traditionally, *lex mercatoria* has been characterized by the following features. Firstly, it was developed as a special law for the international merchant class and its transactions. Secondly, it has organically developed from mercantile customs in place as opposed to statutory regulation. Thirdly, justice is administered not by professional judges but by merchants themselves and last but not least, it emphasized freedom of contract.

The concept refers to both an (idealized) historical reality[13] in the Middle Ages, the ancient *lex mercatoria*, and to a new *lex mercatoria* that supposedly governs international trade, the internet and commercial arbitration along inter alia, the lines of Unidroit Principles of International and Commercial Law and the sentences of the International Chamber of Commerce (ICC).

In past decades, many scholars have argued that these phenomena have led to a truly global law without the need for a state because such rules and institutions have achieved a sufficient degree of autonomy,[14] while others

[11] The expression 'Mysterium tremendum ac fascinans' was coined by the German theologian Rudolf Otto to describe the experience of religious holiness (*Das Heilige. Ueber das Irrationale in der Idee des Göttlichen und sein Verhältnis zum Rationalen.* Treuwendt & Garnier, Breslau, 1917). According to Teubner, *lex mercatoria* breaks a double taboo about the necessary connections between law and state. First, it does so by suggesting merely 'private' orders (contracts and associations) produce valid law without authorization from and control by the state. Second, it claims to be valid outside the nation state and its sanctioning power. See Teubner, G. Global Bukowina: Legal Pluralism in the world society. *Global law without a state,* ed by Tubner, G. Darthmouth, Aldershot, 1997, p. 7.

[12] Goldman, B. Frontières du droit et lex mercatoria. *Archives de philosophie du droit et de sociologie juridique* 9, 1964, p. 89, 177; Schmitthoff, C. The Law of International Trade – Its Growth, Formulation and Operation. *The Sources of the law of International Trade,* ed. by Schmitthoff, C. Conference Paper King's College London, 1964, p. 3; Schmitthoff C. Das neue Recht des Welthandels. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 28, 1964, pp. 47–77.

[13] According to Lord Mustill it consisted of only 20 principles. Mustill, M. Lex mercatoria. The First Twenty-Five Years. *Arbitration International* 86, 1988, p. 4. Thirty years on, the systematic online-compilation *TransLex-Principles* now distinguishes well over 130 principles and rules of transnational commercial law.

[14] According to Goldman 1964, p. 192: "One is confronted with the difficulty that the lex mercatoria is not a complete legal system, and one may add that it does not concern a group that is politically organized, which alone can be invested with a irresistible coercive force. But that does not appear as sufficient to contest that certain of those norms of which the lex mercatoria is composed – and in reality all with the exception of those model-contracts drafted by a single

have responded that *lex mercatoria* still does not qualify as such because it remains dependent on the freedom of contract enshrined in state law and the enforceability of arbitral awards by state level courts. Moreover, the notion of legal pluralism within one legal order is a logical impossibility for the adherents of Kelsen's theory that identifies state and law, community and order.[15]

Ralph Michaels has taken up a third position that transcends this dichotomy between national and state law. He has argued that global commercial law is based on functional differentiation, and thereby freely combines elements from both. It is therefore law beyond but not without the state.[16] Indeed, the rules, institutions, and procedures of international arbitration have achieved a sufficient degree of autonomy and of legal character that they might seem to represent a transnational law. However, they still have to rely on national norms for their external validity, for instance the enforceability of arbitral awards in case of non-compliance.

So, while it is undisputed that international standard form contracts, trade usages and generally recognized principles of trade law do exist, the question remains whether we are facing an autonomous legal order distinct from national legal systems.

The first line of argument put forward against *lex mercatoria* as an autonomous body of law is its vagueness, the lack of boundaries and absence of dogmatic clarity: What precisely are these principles, where are they to be found and how can anyone distinguish them? Wherein lies the transition from usage to rule-creation? Moreover, what exactly are these rules and general principles common to a global merchant class belonging to diverse legal traditions?[17] Is there no danger of an "unauthorized substitution of normative preferences for the properly applicable law"?[18] Naturally, these arguments only hold true within

enterprise – are clearly general rules of law (and not simply individual norms 'annexed' to a rule of domestic law which recognizes the binding force of contracts) ...".
(quoted by Berger K., https://www.trans-lex.org/1/_/the-rebirth-of-the-lex-mercatoria-by-the-dijon-school).

15 Kelsen, H. *Allgemeine Staatslehre*. J. Springer, Berlin, 1925, S. 190.

16 See Michaels, R. The True Lex Mercatoria: Law Beyond the State. *Indiana Journal of Global Legal Studies* 14, 2007/2, pp. 447–468. In a later work, Michaels distinguishes different legal pluralisms according to their epistemological and ontological tenets: Michaels, R., Why we have no Theory of European Private Law Pluralism, in Niglia, L. (ed.) *Pluralism and European Private Law.* Hart Publishing, Oxford, 2013, pp. 139–159. Both texts contain a wealth of references.

17 The tone was set by a number of French publications, for an overview see Gaillard, E., Trente Ans de Lex Mercatoria. Pour une application séléctive de la méthode des principes généraux du droit. *Journal de Droit International* 1, 1995, pp. 5–30.

18 Schlosser, P. *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*. Mohr Siebeck, Tübingen, 1989, S. 153.

a paradigm of legal positivism and the centrality of legislation as opposed to the idea of a living law.

The second argument against autonomy is that it does not have binding force per se, and ultimately needs a national legal system to enforce its decisions upon unwilling contract parties. Proponents of the autonomy of lex mercatoria will argue against this idea that in practice coercion is superfluous and that parties generally abide by arbitral decisions without the need for an *exequatur*-procedure before a state court. The same goes for the informal dispute settlements regarding internet domain-names and the like[19]. None less than Ole Lando has argued that the binding force of the lex mercatoria "does not depend on the fact that it is made and promulgated by state authorities but that it is recognized as an autonomous norm system by the business community and by state authorities" [20].

However, it would appear that the most promising avenue of progress is the collaboration between the business community and government initiative. A fine example in point is *The Principles of International Commercial Contracts* published by Unidroit. The widespread use of Incoterms (harmonized trade terms in international commerce, hence the acronym INCO), first published by the International Chamber of Commerce in 1936 and updated every decade since, has been equally successful.[21] These terms, well-known for their household acronyms like FOB (free on board), CIF (cost insurance freight) and so on, denote how the burden of transport, insurance and transfer of risk are organised between buyer and seller. They are used on a daily basis by millions of general conditions worldwide.[22] Although certain states have officially recognized Incoterms, the ICC "has never for a moment contemplated nor is it suggested, that these rules shall serve as a basis for a draft international

[19] E.g. the (private) Internet Corporation for Assigned Names and Numbers (ICANN) that coordinates the Internet Assigned Numbers Authority (IANA) functions that serve the underlying Domain Name System or DNS. The private company Nominet functions as the quasi-official registry for UK domain names.

[20] Lando, O. The Lex Mercatoria in International Commercial Arbitration. *The International and Comparative Law Quarterly* 34, 1985/4, p. 752.

[21] [Anon.] From 1936 to today: The Incoterms® rules, in: www.iccwbo.org/Incoterms_history (10.1.2017).

[22] It is interesting to denote that the Incoterms are not always universal in interpretation but that regional variants are admissible such as the famous bluestone rule in the port of Antwerp being the threshold instead of the ship's railing: "To some extent it is therefore necessary to refer to the custom of the port or of the particular trade or to the practices which the parties themselves may have established in their previous dealings (cf. article 9 of the 1980 United Nations Convention on Contracts for the International Sale of Goods)". Incoterms 2000, *ICC Publication* 560, 1999, p. 20.

convention which Governments would be asked to incorporate in national law and thus force upon the traders in the world. The present Rules have not been framed with this end in view, and in fact they are not meant for Governments at all. They are a private matter between business men themselves."[23]

The rationale behind this is probably not modesty but the insight that the whole process of modifying an international convention will prove too long and cumbersome. For the same reason, the authors of the Vienna Convention on the International Sale of Goods (CISG) have preferred not to enshrine Incoterms in the convention, although they clearly constitute a frame of reference for certain articles.

Nonetheless, the popularity of Incoterms should not obscure the fact that its normative validity ultimately stems from the freedom of contract (implying the validity of general conditions) upheld by state law. The qualification as *soft law* is therefore incorrect: once the parties have referred to the terms in a contract or invoice they become legally binding and enforceable in a national court of law.

We must therefore conclude that lex mercatoria remains firmly rooted in national contractual law settings, and therefore does not constitute an entirely 'autonomous non-national body of law' or a 'legal order in its own right'[24], let alone an illegality.

2) The limits of Cyberspace

The same ambiguity holds true for the internet. There are plenty of authors cherishing the perceived self-regulation of cyberspace (and indeed the absence of regulation all together), but upon closer scrutiny, we find a less spontaneous reality that encompasses scores of statutory initiatives and international treaties. To be true, there is the (private) Internet Corporation for assigned Names and Numbers (ICANN) that handles the applications for a country extension or DLS but the question arises to what extent the internet can be labelled a distinct regulatory space, since there has been "a steady assertion of national jurisdiction over cyberspace and the application of existing legal doctrines to Internet transactions"[25].

[23] Incoterms 1936, *ICC Publicatie* 92 (1936). S. http://www.martintittle.com/publications/Incoterms1936.pdf, 3 (10.1.2017).

[24] Teubner 1997, p. 4 and p. 9 respectively.

[25] Taubman, A. Trips Encounters the Internet: An Analogue Treaty in a Digital Age, or the First Trade 2.0 Agreement? In: Burri, M., Cottier, T. (eds) *Trade Governance in the Digital Age*. Cambridge University Press, Cambridge, 2012, pp. 299–322.

Examples of this legislative encroaching are, amongst others, the EU's Digital Agenda for Europe[26] and the United States (federal) Communications Decency Act that regulates indecency (when available to children) and obscenity in cyberspace. Likewise there is the (federal) Digital Millennium Copyright Act (DMCA) that criminalizes the production and dissemination of technology that could be used to circumvent copyright protection mechanisms as well as the tackling of copyright infringements, the (federal) Children's Online Privacy Protection Act (COPPA) that applies to the online collection of personal information and the (federal) Children's Internet Protection Act (CIPA). On top of these, there are plenty of regulatory initiatives at state level, both in the US and the EU.

This is a far cry from an unregulated territory or a legal pluralism between hard and soft law. Instead cyberspace is being regulated by a number of hugely different national legalities and the numerous illegalities that stem from the divergence in substantial rules (on sexual content, on consent, on fair use vs. piracy, etc.). Ultimately the regulation of cyberspace can be rephrased in terms of conflict resolution between national jurisdictions and the traditional instruments of private and public international law.

From these preliminary findings, it would appear that the utopian vision of a decentralized internet and bottom-up governance is a thing of the past. Scores of hard laws rather than voluntary guidance codes regulate the internet today and the likely big challenges of tomorrow's IT-environment (cloud computing, big data gathering and artificial intelligence) will also be enforced by traditional legal instruments.

Ironically, the only true realm of plural self-regulation seems to be the ... auto-censorship that is now freely wielded by institutions and corporations who may voluntarily choose to limit the content they make available on the internet (e.g. the Facebook policy on nudity) and the galloping use of content-control software by private companies. So here too, there is no such thing as a fully autonomous competing legal system, let alone a legal wasteland to be discerned.

[26] I.a., Directive 2000/31/EC on E-commerce, Directive 2006/123/EC on Services in the Internal Market, Directive 2010/13/EU on Audiovisual Media Sources, Directive 2011/83/EC on Consumer Rights.

2. The rise of supra-national law

1) Challenges to the Westphalian world order
While the concepts of lex mercatoria and internet autoregulation appear not to be at loggerheads with the centrality of the sovereign state, the same cannot be said on the basis of the evolutions that have shaped international public law.

Scholars of international politics have traditionally conceived the Peace of Westphalia[27] as the origin of the sovereign state and the birth of the modern world of international law treaties.

According to Leo Gross, the Westphalian Treaties represented nothing less than the first 'World Charter', a forerunner to the United Nations and other attempts to establish a world order of sovereign states.[28] This Westphalian world system, "the majestic portal which leads from the old into the new world"[29], was characterized by its three governing principles: sovereignty or independence of states, non-intervention in the domestic affairs of other states and legal equality between states.

While this view is not entirely historically accurate[30], it cannot be denied that important historical transitions took place during the sixteenth and seventeenth centuries, leading to the waning of the Holy Roman Empire and the end of the Church of Rome's monopoly on spiritual power. As such, national sovereignty did become the primary governing system among European states for centuries, and it has shaped our understanding of the structure of the international system, territorial sovereignty, and the separation of domestic and international politics. Last but not least, 'Westphalia' placed all independent nations on an equal legal footing, introducing, in the terms of Gross, "a law operating between rather than above states".

Today, this modern paradigm that was the framework of international law for over three centuries, is being challenged by the various conventions and declarations of human rights, the substantive fragmentation of international

[27] The Treaty of Münster (October 24, 1648) and the Treaty of Osnabrück (May 15, 1648).

[28] Gross, L. The Peace of Westphalia 1648–1948. *American Journal of International Law* 42, 1948, p. 1.

[29] *Ibidem*.

[30] 'Westphalia' failed to provide history with the first sovereign nation-states (e.g. France and England had been enjoying sovereignty for centuries by then), and after 1648, German principalities were still required to take an oath of loyalty to the Holy Roman Emperor to name but two. Also, the theoretical concept of political sovereignty, legitimating no external power beyond that of the sovereign, can be traced back to the earlier writings of Grotius, Machiavelli, Bodin and Hobbes. See Teschke, B. *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations.* Verso, London, 2003.

law, the proliferation of international courts (and their judicial activism), the legitimation of humanitarian interventionism and the ascendance of the European Union and its idiosyncratic architecture of competences.[31] Indeed, the transitions[32] in this area have been huge – so huge that some observers have questioned the viability of the sovereign state in light of the frequent trespassing of the core tenets of Westphalian or Vatellian sovereignty.[33]

The ensuing task of contemporary philosophy of law will be to logically reconstruct these interpenetrating, superposed, plural connectivities.

2) The proliferation of international jurisdictions

The first phenomenon that merits our attention is the rampant proliferation of international tribunals. According to a report to the American Society of International Law, more than 50 international courts and tribunals were in existence by the year 2000, most of them established not further back than the nineteen eighties.[34] There is not only the highly mediatised permanent, formal, independent international courts and tribunals (ICC, ICY, WTO, PCA, ITLOS etc.), but there exist at least the same amount of other international institutions that exercise a judicial or quasi-judicial function. This evolution towards plurality keeps pace with the gigantic expansion of international law into domains that were previously either solidly under national jurisdiction (e.g. criminal justice; fundamental rights) or simply did not exist (e.g. the natural resources of the high seas). This truly explosive growth in international tribunals is usually explained from a pragmatic point of view: the new institutions represent a novel form of geo-governance addressing novel problems in an increasingly complex and global world (international arms trafficking, nuclear

[31] Krasner, S. Sharing Sovereignty. *New Institutions for Collapsed and Failing States.* International Security 29.2, 2004, pp. 85–120; Kumm, M. The Legitimacy of International Law: A Constitutionalist Framework of Analysis. *European Journal of International Law* 15, 2004, pp. 907–931; MacCormick, N. *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*. Oxford University Press, Oxford, 2002; Hardt, M., Negri, T. *Empire*. Exils ed., Paris, 2000; Harvard University Press, Harvard, 2001. See also the proceedings of the conference in Tartu, 2007: Kalmo, H., Skinner, Q. (eds.) *Sovereignty in Fragments. The Past, Present and Future of a Contested Concept*. Cambridge University Press, Cambridge, 2010.

[32] Some have even used the term collisions, see Fischer-Lescano, A., Teubner, G. Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law. *Michigan Journal of International Law* 25, 2003–2004, p. 999.

[33] Krasner, S. *Sovereignty: Organized Hyprocrisy*. Princenton University Press, Princenton, 1999.

[34] Alford, R. The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance. *American Society of International Law* 94, 2000, pp. 60–65.

weapons proliferation, mass immigration, genocide, environmental problems) and are therefore inevitable.[35]

However, this plurality of fora, their serious engagement with national constitutional jurisprudence and the subsequent overlapping of the national and international orders, have also substantially transformed international law because the new generation of international tribunals is different in type from its predecessors: their permanent character and compulsory jurisdiction making their impact infinitely stronger. Indeed, the impact by international courts on national courts, the so-called interjudicial dialogue, has increased and there is "evidence that at least some prominent national courts in democratic states have become aware of these consequences and have altered their approach to international law."[36]

In addition, the feature of enforceability is novel since international law used to lack enforcement, whereas the ICC nowadays even claims jurisdiction over non-ratifying states. In other words, "International courts are acting more like ... courts"[37]. Moreover, several of these international courts grant direct or indirect access to non-state actors, which has greatly strengthened their impact on daily life. And last but not least, there is a proliferation of hybrid, ad hoc tribunals that adjudicate crimes in post-conflict states and are often established with a mix of local and international judges, applying a combination of international and national law[38]. As a result, "the emerging system can therefore be described as pluralist because it accepts a range of different normative choices by national governments and international institutions."[39] Indeed, the totality of international fora and legal norms can be conceptualized as a consequence of the traditional doctrine of sovereignty[40] and the view that state acceptance alone can validate legal sources through the binary distinction between legal/illegal.

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35 Buergenthal, T. Proliferation of International Courts and Tribunals: Is It Good or Bad? *Leiden Journal of International Law* 14, 2001, pp. 267–275.

36 Benvenisti, E. Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts. *American Journal of International Law* 102, 2008, p. 241.

37 Martinez, J. S. Towards an International Judicial System. *Stanford Law Review* 56, 2003, pp. 429–452.

38 Burke-White, W. W. International Legal Pluralism. *Michigan Journal of International Law* 25:963, 2004, p. 975.

39 *Ibidem*, p. 977.

40 Koskenniemi, M. *From apology to utopia. The structure of international legal argument.* Cambridge University Press, Cambridge, 2005, p. 303.

3) Constitutional pluralism and the European Union

At the regional level, there is of course the marked ascendance of the European Union. There is no need to explain the self-proclaimed *sui generis*-character of the European Union – a legal system separate from the national laws of the Member States going beyond the traditional instruments of international law.

The ECJ stated as early as 1963 "that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights ... and the subjects of which comprise not only Member States but also their nationals,"[41] thereby introducing the direct effect of EEC-Law and the individual rights for the citizen. The ECJ has also affirmed the so-called precedence of Community law in the landmark case Costa v. ENEL.[42] Through these legal decisions declaring the direct effect and supremacy of European law over national law,[43] the ECJ has laid claim to exclusive jurisdiction, not only regarding all questions relating to the extent of European law but also regarding all conflicting rules of national law, including the fundamental rights provisions enshrined in national constitutions.[44]

Nonetheless, "the EU/EC constitutional treaties do not encompass the constitutional acts of the Member States; the very existence of the Member States' legal systems continues to be a result solely of their own constitutions and their existence does not derive from the EC/EU constitutional treaties. It is therefore impossible to consider that the EU/EC constitutional treaties subsume the national constitutions."[45] But since the supreme courts of the Member States and their legal orders continue to function, there is potential room for conflicting views, in other words legal pluralism[46]. Indeed, there are no less than three different sources of fundamental rights:[47] the Charter of Fundamental Rights that holds the same status as the TEU and TFEU, the recognition of the rights

41 Van Gend en Loos, Case 26/62, [1963] ECR 1.

42 Costa vs. ENEL, Case 6/64, [1964] ECR 585.

43 In the absence of the ratification of the Constitutional Treaty that would have codified the supremacy clause, the supremacy of EU law is still based on the judicial doctrine behind these landmark cases.

44 ECJ, Case 228/69, Internationale Handelsgesellschaft, 1970 ECR 1125, (1972) CMRL, 255. Whilst refusing EC law to be submitted to consistency tests with national constitutions, the ECJ did state that fundamental rights form an integral part of the general principles of EC law.

45 Isenbaert, M. *EC Law and Sovereignty of the Member States in Direct Taxation.* Amsterdam, 2010, IDBF-Publications, p. 179, nr. 440.

46 For an exhaustive overview, see Jaklic, K. *Constitutional Pluralism in the EU.* Oxford University Press, Oxford, 2014.

47 Article 6, Lisbon Treaty (Article I-9 of the defunct Constitutional Treaty).

guaranteed by the ECHR (European Convention on Human Rights) and the constitutional traditions common to the Member States.[48]

How does this pluralism take shape in practice and what does it entail for the legality debate? In the European Union, the legality debate has taken a somewhat specific form. The occasional infringement of essential procedural requirements notwithstanding, legality is tantamount to the question of competence[49] and adequate legal basis, consecutive treaties requiring both the EU and its individual institutions to act within the limits of the explicit and implicit powers conferred upon them.

The main problem here lies within the competence creep through the extensive use of the two general competence articles 95 and 308 ECT (now art. 114 and art. 352 TFEU). With only 'the general framework of the Treaties' as the boundary to its use, it is easy to see how institutional competence could be extended well beyond what was expressly stated in the Treaties. By 2002, no less than 700 legislative measures were adopted under article 308 ECT.[50] At such a pace, it is easy to imagine a shift in the principle of conferral: Member States no longer confer competence but competence becomes self-generating through the mechanism of expansive legal reasoning, an idea which was of course never envisaged by the constitutional principles.[51]

Furthermore, the question then arises which court has the authority to rule on the boundaries of these conferred competences. While there is no (more) discussion that the ECJ is the ultimate judicial authority within the scope of the EU's powers, the question remains unresolved who has the ultimate authority in the case of conflict between the boundaries between the competences of Member States and the EU. Who is a Master of the Treaties and who decides on the "Kompetenz-Kompetenz"? What happens if there is a clash with inalienable aspects of a Member State's constitutional 'identity'?[52]

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48 Pernice, I., Grillern S., Ziller J. (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Springer, New York, 2008.

49 Most cases deal with the correct basis or the competent institution. A rare example of outright lack of EU-competence alltogether was first admitted in Tobacco Advertising I (C-376/98) but later reversed in Tobacco Advertising II (C-380/03).

50 Weller, J. H. H. The transformation of Europe. *Yale Law Journal* 100(8), 1991, p. 2403.

51 Dashwood, A. The institutional framework and the institutional balance, in: Dougan, M., Currie, S. (eds.) 50 *Years of European Treaties: looking back and thinking forward*. Hart Publishing, London, 2009, pp. 1–17.

52 "It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do

In a series of influential articles, Mattias Kumm has considered the possibility of constitutional pluralism by answering who should have the authority to decide about the constitutionality of EU law and who should have the final say when both levels, the ECJ and the supreme courts of the Member States, have jurisdiction.[53] Departing from the assumption that the courts of the Member States as a general rule do not have the requisite jurisdiction to examine the constitutionality of EU law, he advanced the idea that there are three (originally two) areas where an assertion of jurisdiction (i.e. an assessment of sufficient guarantees by the national courts) could nonetheless be considered.

The first fundamental constitutional area is when some interpretation of EU law implicates fundamental rights. He explicitly refers to the standard elaborated by the German *Bundesverfassungsgericht* in Solange II under which the national court is to look whether the replication of the basic rights catalogue exists at the EU-level and to further investigate whether the actual, substantive standards of protection are 'essentially' comparable to the national constitutions. This assertion, however, should only take place in those areas where there exist persistent structural deficiencies.

The second area is the area of legislative jurisdiction. By this he understands the integrity of the practice of political self-determination at the national level. The latter is violated if the ECJ upholds Union legislation for which there is no reasonable jurisdictional basis (e.g. the *Mangold*-ruling[54]).

The third area is the specific constitutional identity of the Member States as enshrined in specific constitutional clauses (e.g. the Irish protection of unborn life).

It remains to be seen whether this theory will prove more than an echo of the evolving positions of the German *Bundesverfassungsgericht* but it has the merit of pointing out the possible scope of legal pluralism in the field of constitutionalism.

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not lose their ability to politically and socially shape the living conditions on their own responsibility". German Federal Constitutional Court, Lisbon Judgment of 30. June 2009, paragraph 228.

53 Kumm, M. Who is the final arbiter of constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice. *Common Market Law Revue* 36, 1999, pp. 351–384; Kumm, M. The jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty. *European Law Journal* 2005, pp. 262–301; Kumm, M., Comella, V. F. The future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty, in Weiler, J., Eisgruber, C. (eds.) Altneuland: The EU Constitution in a contextual perspective. *Jean Monnet Working Paper* 5/04, 2004, pp. 3–29.

54 Case 144/04, Mangold 2005, ECR I-9981.

However, these hypotheses should not distract from the fact that, while there are not many instances of clear illegality whereby the ECJ has upheld manifest illegal instruments and decisions, the entire EU-predominance has historically been shaped through the jurisprudence of a court that has not only empowered itself but the ECJ has virtually always ruled in favour of the European institutions and against the Member States. In other constitutional terms, a constituted power ('pouvoir constitué') has constituted itself over time and has become a constituent power ('pouvoir constitutuant'), which is another way of saying that it has stealthily achieved some form of sovereignty.

4) Judicial activism and the European Court of Human Rights

A fourth evolution that commands our attention is the huge influence of the European Court of Human Rights in Strasburg (ECtHR). Here too, there is a 'living' pluralism in the sense that both national courts and the ECtHR pronounce themselves on the same cases. But the dynamics thereof have proven to be unidirectional.

According to Krisch, the ECtHR has begun to resemble a supra-national constitutional court with an ever stronger anchoring in the domestic legal orders of Member States and general acceptance as the ultimate arbiter of human rights disputes in Europe[55]. Not only has this led to an increased constitutionalisation process, but also there is a marked shift towards so-called judicial activism.[56] There are plenty of examples of this in all fields but the tendency is particularly poignant in asylum cases.

According to the former President of the Belgian Constitutional Court, Marc Bossuyt, "The European Court of Human Rights is exceedingly transgressing its competence in asylum matters. The court takes decisions on behalf of the national authorities, it enforces provisional measures despite not having the competence to do so and demands their immediate execution. It has granted property rights on unemployment benefits and has thus realized something that Karl Marx never could. The court is being buried under new cases, partially caused by the fact that it has sneakily broadened its own competences."[57]

[55] Krisch, N. The open architecture of European Human Rights Law. *Modern Law Review* 71, 2008/2, pp. 183–216.

[56] Epp, C. R. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago University Press, Chicago, 1998.

[57] Bossuyt, M. *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant*. Brussels: Bruylant 2010, p. 3 (Translation: Strasbourg and the asylum seekers: judges on a slippery slope).

Indeed, prior to 2004, the court's decisions were marked by an understanding attitude towards the positions of governments but gradually the jurisprudence has become much more beneficial towards the interests of asylum seekers. This is primarily done by stretching the meaning of articles 3 (prohibition of torture) and 14 (non-discrimination) in combination with article 1 of the First Additional Protocol regarding property rights.

Moreover, the court has introduced mandatory and positive interim measures, neither of which had been foreseen by the European Convention on Human Rights (ECHR). Amongst others, the court has ordered Austria to give emergency financial assistance to a Turkish non-resident in clear deviation from domestic law (*Gaygusuz vs. Austria* , 31st August 1996), ordered France to pay disability benefits to an Ivorian resident *(Koua Poirrez vs. France*, 30th September 2003) and pronounced itself on the different retirement ages between men and women and the subsequent different Reduced Earnings Allowances and Retirement Allowances in Britain *(Stec et alii vs. United Kingdom*, 6th July 2005 and 12th April 2006). Since then, there has been a true explosion of jurisprudence that shifted the balance more. Already prior to the Syrian refugee-crisis of 2015, the court had invalidated decisions to send asylum seekers back to the country of first arrival (usually Italy or Greece) on the grounds that these countries' jails, refugee camps and procedures were tantamount to torture and inhuman treatment, thereby effectively grinding the Dublin-system to a halt.

Naturally, there can be a justified need for interpretation because the ECHR is "a living instrument that needs to be interpreted in the light of the present-day conditions."[58] Nonetheless, the question arises how far judicial review can go before it becomes judicial activism, trespassing on the proper function of government and the legislature in a democracy.[59]

The mix of legal pluralism and judicial activism has proven to be highly unsettling. According to Sweet, the fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court might amount to a juridical *Coup d'État.*[60] He sets forth three conditions to distinguish a fundamental transformation: the founders would

[58] Mahoney, P. Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin. *Human Rights Law Journal* 11, 1990, pp. 57–89.

[59] Sumption, J. Judicial and Political Decision-making: The uncertain Boundary. The F. A. Mann Lecture. *Judicial Review* 16, 2011/4, pp. 301–315.

[60] Sweet, A. S. The Juridical Coup d'État and the Problem of Authority. *German Law Journal* 8, 2007, p. 915; see also Walker, N. Comment, Juridical Transformation as Process: A Comment on Stone Sweet. *German Law Journal* 8, 2007, p. 929.

not have accepted the new constitutional law, the new law drastically changes the way in which the system operates, again in a way not intended by the founders, and finally, the coup changes the separation of powers in favour of the judiciary.

When we consider the intentions of the signatory states in the wake of the experiences of nazism and bolshevism, there is little doubt that the founders did not have this in mind, so the first condition is met. The system, i.e. the asylum framework laid out in the Dublin III Regulation No. 604/2013, is definitely rocked and the whole change is brought about by an unelected judiciary rather than democratic politics. In other words, we are at best facing a different legality here instead of a functioning pluralism.

3. The emergence of parallel (il)legalities in Europe

In our final chapter we will first briefly discuss the rise of muslim communitarianism[61] and the regulation of family law by non-state 'tribunals' followed by the waning of the state monopoly on violence in the public space.

1) Sharia Law and autonomous religious legal bodies

Various large Western European cities now have districts where the muslim population enjoys the majority. Certain elements in these communities tend to not (solely) adhere to the official law of the land but continue to have certain sides of life, especially family relationships (i.e. marriage, polygamy and divorce), governed by Sharia law.[62]

In October 2011, the Institut Montaigne in Paris published a 2,200-page compilation report titled 'Banlieue de la République' (Suburb of the Republic[63]). In it, the fear was confirmed that Aubervilliers, Clichy, Seine Saint-Denis and the other scenes of the Paris riots of October 2005 have become societies where

[61] By communitarianism we do not refer to the Anglo-American philosophical theories of Alasdair MacIntyre, Michael Sandel and the like but rather to the French sociological concept of *communautarisme* denoting the emphasis on ethnicity and religious community rather than individual and state as governing principles of society.

[62] This tendency appears especially prevalent amongst strong Muslim communities such as Pakistani in Britain or Turkish in Germany. Yilmaz, I. The challenge of post-modern legality and Muslim legal pluralism in England. *Journal of Ethnic and Migration Studies* 28, 2002, pp. 343–354. One should also note that modern technical categories such as the separation of public and private law do not apply and there exists no clear distinction between law and ethics, religion and politics.

[63] http://www.institutmontaigne.org/fr/publications/banlieue-de-la-republique-0 (28.4.2017).

secular values are rejected and Sharia law is displacing the common law of the land.

A feature of this evolution is the emergence of so-called Sharia councils operating as informal tribunals run by clerics (imams), settling especially family and financial disputes according to the legal rules of Sharia. Not unlike Western family law, Islamic family law also consists of rules regarding marriage, divorce, mediation, inheritance and child custody.

These tribunals, of which there are now hundreds scattered all over Western Europe (87 registered as arbitration institutes in Britain alone), enjoy a high status within their communities but are fiercely criticized out of concern for the status of women.[64] Indeed the rules and entitlements in Islamic law vary considerably according to the sex of the applicant,[65] thereby undermining basic equality between men and women.

Nonetheless, the acceptance and, conversely, the social pressure of religious marriage and divorce within these communities are such that obtaining a secular divorce from a state court does not suffice to leave one's husband. As a result, muslim women in these communities *volens nolens* need to turn to Sharia councils to obtain a religious divorce as well. Not only do states take no action against these oppressive practices, certain states like Britain actually allow Sharia councils to operate under the guise of arbitration institutions although the voluntary agreement of the parties might be questioned.[66] Indeed, official recognition is the key issue here: arbitration and private dispute resolution are typically not allowed for subject matters regarding the status of individuals.[67] Moreover, there is the problem of voluntary agreement as well as the constitutional and international rules regarding gender equality.

[64] Machteld, Z. Five Options for the Relationship between the State and Sharia Councils. Untangling the Debate in Sharia Councils and Women's Rights in the United Kingdom. *Journal of Religion and Society,* 2014, p. 2.

[65] E.g., a husband wishing to divorce his wife, can unilaterally divorce by pronouncing a formula (talaq). A woman needs to obtain formal release from the imam, who will usually first insist on a trial period and if unsuccessful, might assert the divorce with the fulfillment of certain obligations such as the return of the bridal gift (mahr) and the relinquishing of the right of maintenance. Moreover, grounds for divorce must be proven through testimony and the testimony of a woman is worth only half that of a man.

[66] Shaheen Sardar, A. Authority and Authority: Sharia Councils, Muslim Women's Rights and the English Courts. *Child and Family Law Quarterly* 25, 2013, p. 113.

[67] Amongst others, the Code Civil tradition formally excludes the statute of persons from allowed subject matters, see art. 2060 French Code civil; Courdier-Cuisinier A. S., Gruyot-Dix S. Les arbitres confrontés à la violation de l'ordre public. *L'ordre public et l'arbitrage*, ed. by Loquin E., Manciaux S. Actes du colloque des 15 et 16 mars 2013, Dijon, Lexis Nexis, pp 88-97; Maurer A. G. *The Public Policy Exception under the New York Convention.* Huntingdon, JurisNet, 2012.

In politics and academia alike, there have been strong voices in favour and against state accommodation of the practices of Sharia councils. The argument in favour holds that in a pluralist society, individuals should be able to choose their own jurisdiction and organise their marital law and conflict resolution as they see fit.[68] The argument against not surprisingly holds that Sharia law is a threat to the principles of one law for all and equal rights for women.[69]

The key question here is the development of *quasi* legal pluralism, for there is no legal pluralism in the formal sense; that is, the recognized coexistence of equal legal systems in the same space, because the indigenous Islamic law does not enjoy official recognition within any state and Sharia councils are not on the same footing as state courts.

Moreover, there exists a practical state of pluralism in the context of marital law because muslim law is accepted both at an official level, where recognition might have be given to imports from foreign legal systems because of international private law rules (e.g. respect of a polygamous marriage conducted abroad), and at an unofficial level where the official legal system theoretically withholds its recognition (a domestic polygamous 'marriage' in our example) but de facto often turns a blind eye when it comes to the enforcement of its own rules on bigamy, child marriages and social benefits for the dependents thereof.

This pluralism clearly borders on illegality since all national legislations without exception tend to subject the application of legal standards of another state to a strict compatibility-test with fundamental rights and other domestic rules of Order Public, such as gender equality and the protection of minors.[70]

2) Challenges to the state monopoly on violence

The problems in the ghetto-like suburbs of the major cities in France, Germany, Belgium and Sweden have been building up for years, but until recently the topic was more often than not been shunned in the mainstream media. It was not until the recent flashpoints of conflict in the past decades and especially the tragic events in 2015 and 2016 that full attention is now being paid to

[68] Even the Archbishop of Canterbury has expressed his approval, see Williams, R. Civil and Religious Law in England: a religious Perspective, 2008 February 7th, see http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective (13.3.2017).

[69] Büchler, A. *Islamic Law in Europe? Legal Pluralism and its limits in European Family Laws.* Surrey, Ashgate, 2011; Schachar, A. Privatizing Diversity: A cautionary Tale from Religious Arbitration in Family Law. *Theoretical Inquiries in Law* 9, 2008, pp. 573–607.

[70] E.g. article 6 Introductory Act to the German Civil Code.

the endemic insecurity in the public space in parts of cities like Paris[71] and Malmö.[72]

The list of problems is depressingly similar throughout Western Europe: the existence of so-called 'no-go' zones,[73] gang warfare,[74] riots, torching of vehicles,[75] ritual slaughter of animals, so-called honour killings by relatives, intimidation to wear a veil or niqab, harassment of women,[76] criminality by asylum-seekers,[77] female genital mutilation,[78] vigilantes posing as 'Sharia Police', and most recently, radicalization, propaganda for the Islamic State Caliphate as well as the aiding and abetting of jihadi fighters and terrorists.

These repeated attacks on normality in Western Europe's inner cities and the absence of a firm response by the police brings about a state of lawlessness that can only be interpreted as a radical challenge to the state monopoly on violence and its claim to bring order and justice to society as a whole.

But again, these examples of unlawful behaviour seem alien to the idea of legal pluralities, since there is no alternative legal system concerned, only the negation thereof.

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71 The French Ministry of the Interior identifies no less than 64 'zones de sécurité prioritaire', zones of prioritized security, i.e. hotspots of daily tensions, see http://www.interieur.gouv.fr/Archives/Archives-des-actualites/2013/ZSP (28.4.2017).

72 See http://www.spectator.co.uk/2016/09/how-sweden-became-an-example-of-how-not-to-handle-immigration (13.3.2017).

73 The term, coined by Daniel Pipes, usually refers to Muslim-dominated neighbourhoods that are off limits to non-residents and where the police and other public instances cannot enforce public order without risking confrontation and/or attack (http://www.danielpipes.org/blog/2006/11/the-751-no-go-zones-of-france, 28.4.2017). The whole concept is denounced as a myth by others (https://www.bloomberg.com/news/articles/2015-01-14/debunking-the-muslim-nogo-zone-myth, 28.4.2017).

74 Kenan, M. The Failure of Multiculturalism: Community versus Society in Europe. *Foreign Affairs* 94, 2015, p. 21; Sharafi, M. Justice in Many Rooms since Galanter: De-Romanticizing Legal Pluralism through the Cultural Defense. *Law and Contemporary Problems* 71, 2008/2, pp. 139–146.

75 Youths have torched 804 vehicles in France in Sylvester 2016, see http://www.lemonde.fr/police-justice/article/2016/01/01/804-vehicules-incendies-en-france-le-soir-du-nouvel-an-un-chiffre-en-baisse-de-14-5_4840830_1653578.html (13.3.2017).

76 The number of police-recorded rape offences increased by 36.9 % between 2008 and 2014 in the EU-28, see http://ec.europa.eu/eurostat/statistics-explained/index.php/Crime_and_criminal_justice_statistics (13.3.2017).

77 The German Federal Crime Office (*Bundeskriminalamt*) counted 39.400 cases in the first three quarters of 2016. S. https://www.welt.de/politik/deutschland/article162010093/BKA-registriert-39-400-Straftaten-in-Fluechtlingsunterkuenften.html (30.4.2017).

78 Temmerman, M. Proceedings of the expert meeting on female genital mutilation in Europe, Ghent, November 5–7, 1998. S. http://icrh.org/project/towards-consensus-female-genital-mutilation-european-union (30.4.2017).

However, the permanent suspension of normality has opened the road to temporal-spatial spots of *anomy*, reigns of lawlessness, that urge us to reconsider the birth of sovereign power that, according to Carl Schmitt[79], establishes itself through the production of a juridical-political order based on the exception in which the previous law is suspended and ultimately replaced by a new order.

One needn't adhere to this Schmittian view to realize that the state itself is being put on endless trial by the permanent chaos of repetitive exceptional situations, not to mention the challenge to the ontological normality of society itself.

In observing this slippery slope towards pluralist statehood,[80] one might do well to recall the second part of Saint Augustine's famous dictum "Without justice what are kingdoms if not big bands of robbers and what are robbers' bands if not small kingdoms?"[81]

4. Conclusion: towards a psychological explanation

Our examination of the phenomena on the preceding pages does not confirm the postmodern romanticising of legal pluralism: notwithstanding multiculturalism and different normative, not to say subversive inputs, there exists no local *quasi-law* that replaces the formal centralism of the state legal order: only the discourse of lex mercatoria could, to a certain extent, aspire to being a non-state law and even then there is the question of acceptance and validation through formal, hard state law.

Furthermore, this paper has sought to remind us of the clear-cut illegality[82] of phenomena such as judicial activism, *ultra vires*-decisions and the introduction of Sharia law in Western Europe.

79 Carl Schmitt has famously defined the sovereign as he who decides on the state of exception. If there is a person or institution bringing about a total suspension of the law in a given polity and then normalising the situation through extra-legal force, then that person or institution is sovereign. Therefore, any legal order is based on a sovereign decision and not on a legal norm. *Schmitt, C. Political Theology. Four Chapters on the Concept of Sovereignty* (German original in 1922), translation by G. Schwab. University of Chicago Press, Chicago, 2005, p. 5.

80 Williams, J. Some Thoughts on the Doctrine of Recognition in International Law. *Harvard Law Review* 47, 1934/5, pp. 776–794.

81 Augustinus Hipponiensis, *De Civitate Dei contra paganos libri XXII*, Liber IV: "Remota itaque iustitia quid sunt regna nisi magna latrocinia? Quia et latrocinia quid sunt nisi parva regna?".

82 That is not to say that the binary code of legal assessment is as unproblematic as the scientific code of true or false.

The puzzling question then arises why academia has been too shy and too slow in pointing out these plural illegalities, but has instead generally marvelled at the legal pluralism and has introduced euphemisms such as multi-level constitutionalism in order to save the grand idea.[83]

Why then are so many eminent scholars and politicians alike enamoured with legal pluralism as the normative path forward? Why are there so few defenders of the clear-cut ideals of modern law? We believe that the reason for this 'treason of intellectuals'[84] must be sought outside legal science, in psychological terms such as the mimicry of intellectual fashion, cognitive dissonance or in historical precedent.

One such historical example is the conquest of ancient Greece by Macedonia and Rome and the ensuing crisis in Greek self-understanding. After the battle of Chaironeia (338 BC) the Old Greece of independent city-states or *poleis* by and large ceased to exist as relevant, independent entities of social, military and legal organisation. They lived on in name but came under open or informal domination by Macedonian overlords. Moreover, many poleis gradually lost their Hellenic status through an influx of barbarians (especially so in Sicily). The battle of Corinth (146 BC) ended with Rome finishing off the military and legal self-referentiality of the city-states all together.

The interesting phenomenon here is that this huge loss of self-determination did not give rise to an activist political philosophy but was instead accompanied by the rise of Hellenistic philosophy (Scepticism, Stoa, Epicurism) and its overriding concern for how to live one's private life and achieve eudaimonia or private happiness.

Philosophy no longer offered "anything like a theory of politics or a critique of society (...). The Stoic response to slavery is not to challenge the institution but to argue that even a slave can be virtuous and therefore happy"[85]. In the same period, the foundations were laid for relativism and human equality (the latter later echoed in Christianity and its secularized offspring, today's human rights-ideology).

83 We eagerly await the next euphemism 'alternative legality'.

84 Benda, J. *La trahison des Clercs* (The Treason of the Intellectuals). Paris, 1928. Benda chided the intellectual class for abandoning the Enlightenment ideal of universalism and the extolling of various particularisms. Sixty years later, Alain Finkielkraut argued along the same lines against multicularist and postmodern thinkers (*La défaite de la Pensée* (The Undoing of Thought). Paris, Gallimard, 1988.

85 Sharples, R. W. Philosophy of Life. *The Cambridge Companion to the Hellenistic World,* ed. by Burgh, G. Cambridge University Press, Cambridge, 2007, p. 238.

With the exception of the degree of brutality, there were the same problems of decay of the nation-state, the rise of supra-national overlords and the multiculturalist agenda.

In the same vein, the contemporary advocacy of legal pluralism in these fields can be understood as a mental adaptation by today's stoics to the *New Normal* in our institutions in which a new architecture of overlapping and 'competing' normative and legal orders is said to flourish.[86]

[86] Not to mention forced assimilation by stronger, alien cultures. See Star Trek, First Generation: "We are the Borg. Lower your shields and surrender your ships. We will add your biological and technological distinctiveness to our own. Your culture will adapt to service us. Resistance is futile."

II. LEGAL HISTORY

PLURALITY OF LEGAL SOURCES IN TRIALS CONCERNING A PERSON'S STATUS AT THE END OF THE 18TH CENTURY – *CUI BONO*?

Hesi Siimets-Gross, Katrin Kello

Introduction

This paper deals with the question of how courts in Estonia handled the plurality of legal sources during the "regency era" from 1783 to 1796. Specifically, we focus on the province of Estland/Tallinn, that is, the northern part of present-day Estonia, and analyse court cases concerning the question of whether a person was free or a serf.

Legal plurality was typical of most European legal cultures of the early modern era. Different sources of law were in effect in parallel: local customary law – rights of the estates (privileges), acts issued by the estates themselves or by the authority of the state; and Roman law, or *ius commune* – actually a mixture of Roman, Canon and German law in the Holy Roman Empire. As the Baltic territories belonged until 1564 to the Holy Roman Empire, Roman law was in effect also in the Baltic region as subsidiary law, meaning that it was referred to in questions for which there were neither provisions in local laws nor any clear local legal custom.[1] As Estland was incorporated into the Russian Empire during the Great Northern War in 1710, all local laws, including Roman law, remained in force according to capitulation treaties.[2]

Starting in 1783, the reforms of Russia's empress Catherine II significantly altered the hitherto existing local system of justice. Specifically, Catherine II tried to harmonise the administrative system in the different parts of the

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[1] See, for example, Oestmann, P. *Rechtsvielfalt vor Gericht. Rechtsanwendung und Partikularrecht im Alten Reich.* Rechtsprechung. Materialien und Studien 18. Frankfurt/M: Klostermann, 2002.

[2] See in detail in Luts, M. *Modernisierung und deren Hemmnisse in den Ostseeprovinzen Est-, Liv- und Kurland im 19. Jahrhundert*. Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert, ed. T. Giaro. Frankfurt/M: Klostermann, 2006, pp. 159–200, especially pp. 159–163.

Russian Empire. As between 1783 and 1796, the Baltic provinces were governed by a governor-general or 'vice-regent' as the local state representative, the period is traditionally known as the regency era.[3] In 1796–1797, Catherine's successor, Paul, restituted the earlier privileges to the Baltic nobilities. The regency-era institutional system was partly disestablished and the earlier judicial system revoked. Much of what had been established during the regency period, however, persisted.[4]

The era under consideration is particularly interesting because a breakthrough had taken place – or was taking place – at that time in Europe in attitudes towards slavery and serfdom. The main reason for this was the ideas of the Enlightenment about natural equality and the freedom of persons. These ideas could not accommodate the institution of serfdom as earlier, natural-law, thinking had been able to. Instead, Enlightenment thinking reinterpreted natural-law ideas by stressing the subjective right of a person to personal freedom.[5]

During the 18th century, the peasants in many European territories, especially those east of the river Elbe in Germany, were serfs. That was also true of the Baltic provinces of the Russian Empire. In Estland, normal peasants were presumed to be serfs, and only the upper class and *literati* – mostly of German origin – were definitely of free status. The status of rural craftsmen, manor servants and recent immigrants was often unclear.[6] Due to the subsidiary status of Roman law, the legal status of serfs was often compared with that of Roman slaves, especially in Eastern Europe. The lawyers of early modern Europe – as well as those in the Baltic region, as we see from the court cases examined in this article – argued over the extent to which, and in what instances, the provisions of Roman law concerning slaves and *coloni* (tenant farmers attached to the land) could be applied to the enserfed peasants of their own time. In principle, it was considered possible to apply provisions concerning free men

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[3] See more in Leppik, L. The provincial reforms of Catherine the Great and the Baltic common identity. *Ajalooline Ajakiri* 2012/1/2, pp. 55–78. For law and judiciary, see also Tuchtenhagen, R. *Zentralstaat und Provinz im frühneuzeitlichen Europa*. Wiesbaden: Harrassowitz, 2008, pp. 117–132.

[4] Leppik 2012, pp. 73–75; Tuchtenhagen 2008, pp. 84–86, 128–132.

[5] In natural law theory, it was generally recognised that in the natural state, all people were free. However, representatives of natural law generally did not demand an end to slavery or serfdom: slavery was accepted as an institution of civil society. Franke, B. *Sklaverei und Unfreiheit im Naturrecht des 17. Jahrhunderts*. Hildesheim: Georg Olms Verlag, 2009, for example, pp. 161–162, 222–225, 292, 309.

[6] Linnus, J. *Maakäsitöölised Eestis 18. sajandil ja 19. sajandi algul* [Rural craftsmen in Estonia in the 18th and early 19th centuries]. Tallinn: Valgus, 1975, pp. 26–27.

as well as those concerning slaves (servi), *coloni* and freedmen.[7] What became the dominant legal position on the issue in a concrete region of Europe was influenced by numerous circumstances ranging from the legal situation that had historically evolved to the interpretations of particular individuals – legal scholars, lawyers and courts.[8]

This argument had a practical meaning in trials concerning the status and affiliation of peasants. Specifically, according to Roman law, in court cases concerning the status of free men *versus* that of slaves, *favor libertatis* applied, that is, the principle according to which court judgments were to be pronounced in favour of freedom in cases where the evidence was weighted equally between a person's serfdom or freedom. Another relevant principle in Roman law was *praesumptio libertatis*, according to which what had to be proven was a person's slave or serf status, not his or her freedom. However, in the early modern era in certain regions, including the Baltic area, the "presumption of serfdom" applied instead.[9] This meant that whenever a dispute between an estate owner and a peasant relating to the freedom of the peasant reached court, it was not the estate owner who had to prove that his peasant was a serf; it was the peasant who had to prove his freedom. Thus the peasant had to have some ground such as non-peasant origin or a specific privilege that distinguished him from 'normal' peasants, that is serfs. An interesting feature in Estonia was that normal local peasants could be distinguished from other social groups based on ethnic characteristics – social, legal and ethnic characteristics were intertwined. Upward social mobility presupposed the adoption of 'German' social characteristics, whereas becoming a 'normal peasant' meant assimilation into the Estonian population, at least in the long run. As we will see below, specific legal provision was necessary to fix the serf status of people from other strata who had become peasants, as well as of peasants who had come from

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7 In Estland's court cases, sources referring to both *coloni* and *servi* were mentioned.

8 See more, for instance, in Knothe, H.-G. Zur Entwicklung des Rechts der Gutsherrschaft im deutschen Ostseeraum im Spiegel von Mevius' Abhandlung über die "Bauers-Leute". *Geschichte und Perspektiven des Rechts im Ostseeraum. Erster Rechtshistorikertag im Ostseeraum 8.–12. März 2002*, eds. J. Eckert, K. Å. Modéer. Frankfurt/M: Lang, 2002; Wiese, M. *Leibeigene Bauern und Römisches Recht im 17. Jahrhundert. Ein Gutachten des David Mevius* (= Schriften zur Europäischen Rechts- und Verfassungsgeschichte 52). Berlin: Duncker & Humblot, 2006. See also Blickle, P. *Von der Leibeigenschaft zu den Menschenrechten. Eine Geschichte der Freiheit in Deutschland.* München: Beck, 2003.

9 Knothe 2002, 251–261; Schulze, W. Die Entwicklung des "teutschen Bauernrechts" in der frühen Neuzeit. *Zeitschrift für neuere Rechtsgeschichte* 1990/12, pp. 127–163 (134–154); cf. Troßbach, W. Bauern 1648–1806. *Enzyklopädie Deutscher Geschichte* 19. München: Oldenburg, 1993, p. 7.

other countries – like Finland, Sweden or Germany – that were considered free of serfdom.

In the present paper, we take a close look at six court cases in order to analyse how disputing parties and the courts did or did not cope with the legal plurality of the time. We focus on how different legal sources were used in the claims of the parties and the judgments of the courts, including local versus Roman law, and which arguments and interpretations were drawn upon. We also consider the consequences of legal plurality for the interested parties.

The plurality of legal sources

In the 18th-century province of Estland, one of the most important legal sources (excluding town laws and privileges) was the *Herzogthums Ehsten Ritter- und Land-Rechte* (Law Governing the Nobility and Common Law of the Dukedom of Estland, henceforth *Ritter- und Landrecht*).[10] This collection was codified in 1650 and was applicable as customary law *usu fori.*[11] *The Ritter- und Landrecht* included a separate chapter, "On Peasants", which specified the rights and duties of the estate owner if a peasant left for another estate with the wish to engage in keeping a farm and if the estate owner wanted the return of one of his subjects who resided elsewhere.[12] Thus it only contained provisions concerning changes in ownership and affiliation of peasants, such as the expiry of the right to present a claim after 30 years. However, the chapter included no provision on whether a previously free man could become a serf and how this could happen. Therefore, the presumption of serfdom mentioned above applied in Estland as a legal custom rather than written law.

The *Ritter- und Landrecht* remained in effect during the regency era (1783–1796), but its validity was restricted by the decisions and ordinances of the Russian state authorities, which began supplementing and amending local law more zealously than before. The regency era was the period when Estland was administered in accordance with Russia's Order for the Administration of Provinces (institutions and procedures) issued by Catherine II in 1775.[13] The

10 *Des Herzogthums Ehsten Ritter- und Land-Rechte. Sechs Bücher. 1. Druck. Mit erläuternden Urkunden und ergänzenden Beilagen herausgegeben von Johann Philipp Gustav Ewers.* Dorpat: Meinshausensche Buchhandlung, 1821, pp. 141–481.

11 Bunge, F. G. v. *Beiträge zur Kunde der liv-, esth- und curländischen Rechtsquellen*. Riga/Dorpat: Frantzen, 1832, p. 93.

12 Book IV, Chapter 18 (§§ 1–14), Ewers 1821, pp. 380–385.

13 Leppik 2012, pp. 55–78.

general rule was that Russian laws, ordinances and other legal acts applied to Baltic provinces only if this was expressly provided and promulgated accordingly.[14] For that reason, the Order for the Administration of Provinces, issued in Russia in 1775, went into effect in Estland only in 1783. The Charter to the Towns, issued in both Russia and Estonia in 1785 prescribed the administrative and judicial system of that time.[15] Thus, even though the former provincial law remained in effect in principle, new statewide laws and legislation issued by local representatives of state authority gradually supplemented and replaced it. Statewide laws in particular contained repeated restrictions on the possibility of enserfing hitherto free persons. The manifesto issued on the occasion of victory in the war against Turkey in 1775 was the first to include such a prohibition, banning the registration of freedmen as serfs.[16] Provisions with the same content were enacted (made part of local law) in Estland via provincial patents from 1783 and 1795 that prescribed the poll tax system and the Charter to the Towns of 1785.[17] Due to these ordinances, the question arose in the courts concerning the extent to which these provisions were to be implemented retroactively, and how to relate local custom to the 'spirit of the age' manifested in these laws. On the other hand, previous ordinances of the state authorities, which in their time had prescribed the possibility of legally enserfing free persons, could also be cited.[18]

A third factor, namely the subsidiary Roman law, came into play in addition to the local 'old' law and new state laws. As we shall see below, the judgments often depended on the court's interpretation of the applicability of Roman law

[14] Russian laws generally did not apply in Estland. In the first half of the 19th century, a theoretical discussion developed about the validity of Russian law in the Baltic provinces and about the role of Russian law as subsidiary law compared, for instance, to Roman law. In that discussion, some theorists accepted the validity of some general Russian laws which had general binding power, but that happened rather seldom. For more on the discussion with further references, see Luts, M. *Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus* [Contingent and patriotic: the provincial jurisprudence of F. G. von Bunge]. Tartu: Tartu Ülikooli Kirjastus, 2000, pp. 168–173.

[15] Order for the Administration of Provinces of the Russian Empire from 7 November 1775 (in the publication *Полное собрание законов Российской Империи* [Complete collection of laws of the Russian Empire]; henceforth ПСЗ, 14392); *Stadt-Ordnung (24 April 1785). Auf Allerhöchsten Befehl aus dem russischen übersetzt von C. G. Arndt.* Oberpahlen, 1786.

[16] Imperial clemency manifesto 17 March 1775 (ПСЗ 14275).

[17] Imperial clemency manifesto 17 March 1775 (ПСЗ, 14275) point 46; Senate ukase (henceforth SU) 5 October 1780 (ПСЗ, 15070); ukase issued by Catherine II on 20 October 1783 (ПСЗ 15853); ordinance published in Estland (henceforth EP) 15 March 1784 (Estonian National Archives (henceforth ENA) EAA.7.1.220a, pp. 27–32), p. 19; *Stadt-Ordnung* (1785), § 79.

[18] The court cases under consideration repeatedly refer to a ukase on this topic from 28 May 1754, which is not, however, included in the Complete Collection of Laws of the Russian Empire (ПСЗ).

under local conditions. The validity of Roman law, together with earlier rights and laws in 18th-century Estland, was affirmed in the capitulations agreed upon with the Russian Empire.[19] To be sure, a hierarchy of legal sources did exist and the courts were to rely in the first instance on local laws first and foremost as the point of departure in passing judgment – subsidiary Roman law was to be applied only in cases where there were no appropriate local provisions.[20] This last condition, however, caused confusion in questions where local law and custom were ambiguous. In every specific case, the courts were to decide what should be considered local custom and whether it was necessary to invoke either Roman law or the will of the current ruler, that is, the 'spirit of the age'. Thus the court cases considered below were part of a more general early modern discussion of the applicability of Roman law to local peasants, to which we have referred above.

Cases studied

We analysed six trials from Estland concerning a person's status that either took place or were initiated during the regency era (Table 1).

In addition to the cases listed in the table, we know of the initiation of another two court cases concerning status in the regency era, but the argumentation of the court concerning the content of these cases has not survived.[21] Only three cases concerning similar disputes are known of from Estland prior to the regency era (in the 1710s, the 1740s and the 1770s).[22]

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[19] Die Capitulationen der estländischen Ritterschaft und der Stadt Reval vom Jahre 1710 nebst deren Confirmationen. Mit andern dazu gehörigen Documenten und der Capitulation von Pernau. Winkelmann, E (ed). Reval: Kluge, 1865, pp. 59–74, especially p. 60. For their influence for Roman law, see Siimets-Gross, H. *Das Liv-, Est- und Curlaendische Privatrecht (1864/65) und das römische Recht im Baltikum.* Tartu: Tartu University Press, 2011, pp. 3840.

[20] For further references, see Oestmann 2002, pp. 5–7; Siimets-Gross 2011, pp. 37–38.

[21] For more information about the trials and court files analysed in this article, see Kello, K., Siimets-Gross, H. Kohtuasjad *in puncto libertatis*: isiku staatuse tuvastamise lähtekohad asehaldusaja Eestimaal [Court cases *in puncto libertatis*: criteria of ascertaining a person's status during the regency era (1783–1796) in the province of Estland]. *Ajalooline Ajakiri/ Estonian Historical Journal* 2017 2/3, pp. 257–307.

[22] See more in Kello, K. *Isikliku sõltuvuse piirid ja tunnused 18. sajandi Liivi- ja Eestimaal päriskuuluvuse teket või muutmist käsitlevate kohtuotsuste põhjal* [The boundaries and characteristics of personal bondage in the provinces of Livland and Estland in the 18th century]. MA thesis, supervisor M. Laur. Tartu: University of Tartu, 2003 <http://hdl.handle.net/10062/37462> (accessed 17 July 2015), pp. 73–80, 118–119.

Table 1. Court Cases Considered in this Article[23]

Person or persons of disputed status	**Judgments**		
	From the Court of First Instance	**From the Court of Appeal**	**From the Court of Cassation**
Jacob Nielsohn	Judgment of the Tallinn District Court (*Kreisgericht*), 26 November 1785		
Esko Juhann	Judgment of the Tallinn District Court, 14 November 1788	Judgment of the Tallinn Provincial High Court (*Oberlandgericht*), 18 May 1789	
Sibbi Jürri	Judgment of the Rakvere District Court, 25 November 1792	Judgment of the Tallinn Provincial High Court, 19 November / 21 December 1793[24]	
Carl, Peter and Thomas Eck	Judgment of the Rakvere District Court, 17 June 1793	Judgment of the Tallinn Provincial High Court, 14 March 1794	Judgment of the Tallinn Court of Cassation for Civil Matters (*Revalscher Gerichtshof der Zivilrechtssachen*), 17 August 1794
Jacob, Heinrich and Carl Neumann	Judgment of the Paldiski District Court, 23 December 1792 Judgment of the Harju *Manngericht* (vassal's court) 14 October / 13 November 1797	Judgment of the Provincial High Court of Estland (*Estländisches Oberlandgericht*), 3/12 March 1798	
Hermann Grenberg	Judgment of the Paide District Court, 26 March 1792 Judgment of the Paide District Court, 1 June 1793	24 February 1793 Judgment of the Tallinn Provincial High Court.[25] Judgment of the Tallinn Provincial High Court, 31 January / 10 February 1794	Judgment of the Tallinn Court of Cassation for Civil Matters, 17 August 1794 / 24 January 1795

23 Presented in the order in which the corresponding court cases are examined below.

24 In judgments where two dates are given, the first indicates the date that the judgment was handed down (court session), and the second is the date that the judgment was officially pronounced. In order to facilitate finding these decisions in the often unpaginated archive files, we provide both dates in cases where we know both of them.

25 This judgment of the Tallinn Provincial High Court overturned the preceding judgment of the Paide District Court due to the inadequate composition of the district court panel. For this reason, the Paide District Court handed down two identical judgments.

The rarity of the court cases under consideration arises from the fact that they were relevant to only a small portion of the population of Estland. Of the approximately 200,000 people living in the countryside, only 3.5% were of free status in 1782.[26] They were mainly people such as craftsmen, millers, sextons, innkeepers and manor servants – not common peasants. It is not surprising that among them, there were even fewer of borderline status who could go to court to claim their freedom.

The grounds for suing for freedom were usually that the allegedly free plaintiff had been prevented from moving by the estate owner, or that the estate owner had demanded the return of the plaintiff *post facto*. The plaintiffs brought their cases before the court individually or on behalf of their entire family. Peasant families of foreign origin, families descending from sextons, and a manor servant figure in the court cases. They were mainly the complainant parties in these court cases, claiming to be of free status but unlawfully forced into serfdom, or claiming that they were being threatened with such a fate. In one case – the court case of Carl, Peter and Thomas Eck – the plaintiff was the tenant of a manorial estate who protested against the letters of freedom given by the provincial government to the descendants of a sexton.

The six cases under consideration are interesting precisely by virtue of their rarity, shedding light based on their distinctive perspective on the legal plurality as well as on the diversity of the reality of that time.

Application of legal sources by parties and courts

The court cases analysed in this article vividly demonstrate the possibilities for both the courts and the parties involved in using legal sources in the event of their plurality, as well as which sources provided grounds for the final judgment handed down. Two questions were central in the trials – first, the intentionality of relinquishment of one's freedom, and second, the question of the expiry of freedom. The 'original freedom' of a peasant-like person could be proven by testimonies or a document certifying either the person's free (e.g., foreign) origin, together with some proof that the person's freedom had not been relinquished in the meantime, or certification of their acquired freedom. For instance, the estate owner could grant freedom as a gift or reward to his servant or peasant.

[26] Linnus 1975, pp. 26–27.

In the following we will consider the cases presented according to their similarity to each other.[27]

The cases of Jacob Nielsohn (1784–1787) and Esko Juhann (1788–1789)

The fact that the courts of first instance (as opposed to the court of appeal) referred almost exclusively to Roman law connects the two earliest cases.

In the court case of **Jacob Nielsohn** (1784–1787), the son of a miller's servant, his representative referred to several provisions of Roman law (CI 7.4.14, CI 3.34.9, D 50.17.20) that supposedly stipulated the presumption of freedom. To further substantiate the estate owner's burden of proof, Nielsohn's representative referred to various renowned legal scholars like Stryk, Thomasius and Pufendorf, who wrote about the general burden of proof.[28] The estate owner, for his part, could have referred to other scholars who supported the presumption of serfdom (such as Husanus or Hauschild) and thus the plaintiff's burden of proof. Instead of references to legal sources, the estate owner, who represented himself, focused on the fact that both the plaintiff and his father had been sold to him as serfs together with the estate, and pointed to Nielsohn's "serf-like behaviour", which was manifested by the fact that initially, Nielsohn had tried to solve his problem by running away from the manor and forging a letter of freedom.[29]

The court of first instance, guided by the presumption of freedom, accepted the applicability of the sources of Roman law referred to by Nielsohn's representative and declared Nielsohn a free man on the grounds of an absence of evidence proving his serf status.[30] Specifically, as a descendant of free persons "from Sweden or Finland", Nielsohn had not been registered in the land revision as either a free man or a serf.[31] The estate owner accepted the district court's

[27] Kello, Siimets-Gross 2017 provides a more in-depth overview of the course of the court cases and the arguments of the parties.

[28] ENA EAA.10.1.83, pp. 57–67 (contentions of Riesemann, J. Nielsohn's representative, 18 October 1785).

[29] ENA EAA.10.1.83, p. 17 (contentions of G. W. v. Schwengelm, owner of Jäneda estate and assessor of the Provincial High Court, 3 May 1785).

[30] ENA EAA.10.1.83, pp. 103–107 (judgment of Tallinn District Court, 26 November 1785).

[31] Here consent to being registered among the serfs in the land revision list was equated with relinquishing one's freedom. These land revisions were initiatives undertaken in order to establish the state taxes of the manorial estates. Since the state could not directly tax land belonging to the nobility due to the nobility's privileges, the taxes imposed on manorial estates in Estland were calculated according to the number of bearers of farm duties, that

decision, and all that remained for the Tallinn Court of Cassation for Civil Matters to do was to terminate the court case[32] – thus we do not find out the positions of the courts of higher instance.

In this court case, the court of first instance clearly favoured freedom. It explicitly referred to the *favor libertatis* of Roman law. It is also interesting to note that neither the representative of the plaintiff, the defendant, nor the court had actually either read or at least understood all the norms of Roman law that were being referred to. In fact, of the three sources to which both the plaintiff and the court referred, one deals with servitudes or easements (*servitus*) connected with the right of use related to property law and not of slavery (also *servitus*).

In the court case of **Esko Juhann**, a descendant of a Finn, Esko Juhann's representative produced a certificate from the local pastor verifying his freedom and the corresponding testimony of an official named Hellmann. Additionally, he claimed that the registration of the plaintiff on the land revision list could not remove his inherent right to freedom, invoking CI 7.22.3, according to which an individual's freedom would not expire due to the mere passage of time, even if 60 years passed.[33] The representative of the estate owner requested the application of a 30-year limit based on an analogy with the *Ritter- und Landrecht* IV, 18 §13. The court of first instance, in turn, found that the 30-year limit applied to runaway peasant serfs only, and "for this reason it cannot be applied even analogously"; thus the court preferred to apply Roman law. In this instance, it used Roman law in a more complicated way than in any other case. Specifically, on the one hand, the court declared Esko Juhann "free with regard to his person and property". According to the court, his free descent had been proven and his "natural freedom, extremely favoured and declared untouchable

is, male serfs capable of working. See, for example, Tarvel, E. *Adramaa. Eesti talurahva maakasutuse ja maksustuse alused 13.–19. sajandil* [Haken. The principles of land use by Estonia's peasantry and land taxation in the 13th–19th centuries]. Tallinn: Eesti Raamat, 1972, pp. 157–161. Thus all male serfs had to be counted in Estland's land revision books. Legally speaking, being registered in the census book could be considered proof of the serfdom of the registered individual. First, it could be claimed that the individual had to be aware of his registration in the census book. Second, it allegedly indicated the time lived as a serf under a certain manorial estate. Nevertheless, as we see in the court case below, this was not always sufficient evidence for the court to establish a change in status.

32 ENA EAA.5.1.474, p. 8 (judgment of the Tallinn Court of Cassation for Civil Matters concerning the termination of the court case, 26 February 1787). The same decision can also be found in ENA EAA.5.1.12, p. 22.

33 ENA EAA.10.1.19, pp. 188–196 (judgment of the Tallinn District Court, 14 November 1788). We can only rely on the court judgment in outlining the arguments of the parties in this case, because we have not found the statements of the representatives from the archives.

by laws", could not be affected by registration on the land revision list or expiry. The plaintiff merely had to swear that he had not relinquished his freedom. On the other hand, the court found that since the plaintiff had lived on the estate for 50 years, the defendant had acquired the right to demand that he and his descendants could stay there as tenants "at present and for all future times".[34] Here, the court referred to the Roman law on *coloni* that distinguished unfree peasants who were bound to land from personally free tenants who became bound to land on which they stayed for over 30 years.

This was the only judgment that differentiated between the status of freedom and attachment to the land and also the only decision where the sources about *coloni* were referred to.[35] The court of appeal amended the judgment on the basis of *Ritter- und Landrecht* and added that the highest court – the Governing Senate of imperial Russia, which also had legislative and executive power[36] – had "repeatedly prohibited the administration of justice according to Roman and other foreign laws when local law exists". "As good and suitable as these Roman laws in and of themselves can be deemed", local law existed in this case – *Ritter- und Landrecht* IV, 18 §1[37] – from which "self-evidently and completely without compulsion, it follows that everyone who is not a peasant serf is not under the power of any master, together with his descendants and property, and may go to live elsewhere without the permission and will of the local lord".[38] Thus in this instance of appeal, Tallinn Provincial High Court considered it necessary to apply local law instead of Roman law. Nonetheless, it essentially based its decision on the principle of *favor libertatis* and handed down an even more favourable judgment than the district court concerning Esko Juhann's freedom of movement.

At the time of the deliberation of the court cases of Jacob Nielsohn and Esko Juhann, it was evidently not yet clear to the courts of first instance that they should be careful in applying Roman law as a foreign law. The Senate had "repeatedly prohibited the administration of justice according to Roman

34 Ibid.

35 Ibid. For details about the differentiation between the status of freedom and attachment to the land, see Kello, Siimets-Gross 2017, pp. 259, 266–267, 285–287.

36 The Governing or Ruling Senate (in Russian *правительствующий сенат*) became the highest court and important administrative organ in the Russian Empire in 1711. Appeals to the decisions of provincial courts of Baltic governorates started going to the Senate in 1796. For more, see Tuchtenhagen 2008, p. 120 ff.

37 "Peasant serfs and those born of them, as well as their property and possessions, are at the mercy of their masters and may not go elsewhere without permission".

38 ENA EAA.7.1.253, pp. 449–454v (judgment of the Tallinn Provincial High Court, 18 May 1789).

and other foreign laws". Compared to the judgments handed down a few years later, it is therefore the lower court instance in particular that took Roman law relatively seriously in these cases and applied it rather creatively. As we can see from the following cases, the courts of first instance thereafter tried to be more cautious with 'foreign law'.

The cases of Sibbi Jürri (1792–1794), the Eck Family (1793–1794) and the Neumann Family (1792–1798)

The three subsequent cases were dealt with in courts in the 1790s and had in common the fact that the courts considered both the expiry of freedom and the relinquishment of one's freedom to be lawful. They were, in other words, guided by the presumption of serfdom.

Similarly to the previous cases, **Sibbi Jürri's** representative justified his demand for freedom with the presumption of liberty as well as the claim that according to Roman law, a person cannot make himself a serf and parents cannot sell their children into slavery. He referred to four provisions from the Code of Justinian that stipulate the impossibility of giving children up as slaves (*servi*).[39] Sibbi Jürri's representative also referred to several viewpoints expressed by Catherine II and several Russian laws since 1775 according to which no free man may surrender himself to serfdom: "It would be ludicrous to presume that something may be expropriated by default, the expropriation of which is explicitly forbidden".[40] Responding to the plaintiff's claims, the estate owner's representative stated that in Estland, where barely one in a thousand peasants was free, every person could not presume freedom – the opposite presumption more likely applied. "It is forbidden to use foreign laws, even the subsidiary Roman law, in the event that the laws of our fatherland are sufficient". He stated that in Estland, the case was similar to that in Livland, where a law stipulating enserfment when a person took on land had been in effect since 1668[41]: "according to local customs, common law and the laws of the land, everyone has always had the right to relinquish his freedom and become someone else's subject". He also referred to surrendering himself to serfdom in the land revision, which the relevant ukase from 1754 allegedly allowed.[42]

39 CI 8.46.10; CI 7.16.1; CI 4.43.1; CI 7.16.6.

40 ENA EAA.12.1.249 (claims of Rosenmüller, Sibbi Jürri's representative, 28 April 1792).

41 See, for instance, Arbusow, L. *Die Livländische Landesordnung von 1668* (= Quellen und Forschungen zu baltischen Geschichte 2). Posen: W. F. Häcker, 1942, pp. 1–41.

42 ENA EAA.12.1.249, pp. 81–100 (claims of Overlach, representative of G. H. v. Borg, 2 November 1792).

The estate owner was able to produce a record from a commission that dealt with registering free men and foreigners in 1753 stating that Sibbi Simonsohn, who was born in Swedish Finland and had arrived in Inju about three years previously, wished to become a serf of Inju manor together with his wife Trino and their children.[43] The Rakvere District Court accepted these arguments. The court found that since the records of the revision of 1753 explicitly stated that Sibbi Simonsohn and his children had acknowledged themselves as hereditary subjects of Inju manor, and since this was also explicitly permissible in Estland according to the imperial ukase of 1754, Sibbi Jürri was a serf.[44] Even if the plaintiff's father had relinquished only his own freedom in 1753, that of his children would have already expired in the course of the nearly 40 intervening years, during which they had never once mentioned this in the auditing censuses.[45]

Sibbi Jürri appealed, but the Provincial High Court upheld the district court's judgment. As the Provincial High Court didn't have to justify its decision, we cannot say what its substantial arguments would have been.[46] Prior to the affirmation of the district court's judgment, however, a legal assessment, or report (*relatio* in Latin), meant for use by the court was nevertheless drawn up for the Provincial High Court.[47] The argumentation of the person who drew up the *relatio* differed from that of the court of first instance in that it agreed with the applicability of provisions from Roman law to the extent that they prohibited the enserfment of children: parents do not have the right to surrender to serfdom their underage children who have been born free. Yet on the other hand, it considered the basis for the enserfment of Simo Sibbi's children to be the fact that, after the death of their father, they themselves had allegedly "admitted of their own accord" their serfdom by remaining silent during land revisions and when the ownership of the manorial estate changed hands.[48]

In Sibbi Jürri's case the Rakvere District Court presumed that Sibbi Simonsohn was a serf and accordingly had the burden of proof. As a serf, the court stated, he was not to be compared with Roman slaves, and Roman law could not be applied.

43 ENA EAA.12.1.249, pp. 39–39v (excerpt from the record concerning free men and foreigners in Estland, 10 August 1753).
44 ENA EAA.12.1.249, pp. 102v–104v (Rakvere District Court judgment, 25 November 1792).
45 Ibid.
46 ENA EAA.7.1.260, pp. 435–435v (Tallinn Provincial High Court judgment, 21 December 1793).
47 See more about *relatios* in Beck, J. L. W. *Anleitung zum Referiren und Decretiren.* Leipzig: Knobloch, 1839, *passim.*
48 ENA EAA.12.1.354 (J. H. F. Heuser's *relatio*, not dated).

The district court did not take the opportunity to claim that the children of Simo Sibbi were not aware of giving away their freedom, as thus it could not bind them. Similarly, the court was guided by the presumption of serfdom in the case of the **Eck family**. The tenant of the manorial estate initiated the court case. He submitted a protest to the Rakvere District Court in the autumn of 1792 against the letters of freedom issued by the provincial government in Tallinn to Carl, Peter, and Thomas Eck. He indicated that these people had lived in his estate for 30 years.[49] Rakvere District Court resolved the case with dispatch, and the processing of the case was partially oral. The district court was guided by considerations similar to those that were invoked half a year previously in its judgment on Sibbi Jürri, considering the relinquishment of one's freedom possible at land revisions and referring to the ukase of 1754 (which allowed free persons to become serfs), which had already been used in the previous court case.[50] Thus, relying on the presumption of serfdom, the court decided that the men were serfs.

The descendants of a onetime sexton and later gamekeeper appealed the decision, and the Provincial High Court found that the district court had not followed the requirements of due process and had handed down its judgment prematurely, without giving the defendants the opportunity to prove their freedom. Only the tenant of the estate had been given the opportunity to state his position in writing, while the members of the Eck family were only questioned orally and were not informed of the estate tenant's arguments.[51] The tenant of the estate, in turn, appealed against this decision to the Tallinn Court of Cassation for Civil Matters. The court of cassation found that Eck family's appeal against the district court's judgment presented to the Tallinn Provincial High Court did not adhere to accepted procedure, and thus the district court's judgment had to remain in effect.[52]

Therefore we only know the argumentation of the parties following the first decision of the district court and before the Court of Cassation for Civil Matters had declared the appeal of the Ecks to be void – that is, while the Provincial High Court decision concerning the initiation of a new trial in the district court remained in effect. In addition to the district court's arguments, the representative of the estate's tenant referred to the 30-year expiry limit

[49] ENA EAA.12.1.290, *s.p.* (excerpt from the Rakvere District Court records citing the resolution of the regency government [September 1792] quoting the grievance of C. G. Arpshofen, 21 September 1792).

[50] ENA EAA.12.1.290, pp. 41v–43 (Rakvere District Court judgment, 17 June 1793).

[51] ENA EAA.7.1.261, pp. 179–181 (Tallinn Provincial High Court judgment, 14 March 1794).

[52] ENA EAA.5.1.18, pp. 409–411v (judgment of the Tallinn Court of Appeals for Civil Matters, 17 August 1794). The same decision can also be found in ENA EAA.5.1.505.

prescribed in *Ritter- und Landrecht* and to the enserfing effect of registration in the land revision. He also mentioned the ten-year expiry limit for civil suits established in 1787.[53] The representative of the Eck family, by contrast, denied the land revision book as proof of one's enserfment and referred to the timelessness of freedom. Apart from this, as in the Sibbi Jürri case, he referred to Senate ukases issued since 1775 according to which free persons were not allowed to be registered as serfs.[54] According to the district court judgment, the ukase of 1754 allowed people to surrender themselves to serfdom at land revisions (even though in the case of the Ecks, the district court considered this sort of voluntary enserfment possible but not proven in this case). According to the representative of the Ecks, more recent ukases that prohibited people from enserfing themselves voided that ukase.

If the cases of Sibbi Jyrri and the Eck family are taken together, it seems that it was the Rakvere District Court that preferred the presumption of serfdom and did not follow the previous Provincial High Court decisions that the person should be aware of his enserfment. The same presumption was also true for the next case.

Jacob, Heinrich and Carl Neumann's case dates back to the spring of 1792, when a weaver named Jaak or Jacob, the son of a former sexton, declared at the Paldiski District Court that the estate owner was calling his freedom into question.[55] The plaintiff justified his own free status and that of his brothers with the fact that his grandfather had served in the Swedish Army (a status that was assumed to liberate a person from bondage) and had also served as sexton. He appealed to *favor libertatis* and pointed to his family name as an additional affirmation, since surnames were characteristic of free men.[56] The Paldiski District Court accepted these arguments, now already referring to the Senate ukase of 1791 prohibiting "freedmen, to say nothing of men who have been born free" from surrendering themselves to serfdom.[57] This court of first

53 ENA EAA.5.1.505, *s.p.* (claims presented by Rosenmüller, representative of C. G. v. Arpshofen, 22 October 1793 and 17 May 1794). The expiry limit established in 1787 was enacted by an imperial manifesto issued on 28 June 1787 (ПСЗ 16551) and concerned requirements connected with immovables and movables. As we will see below, the courts indeed did not agree with its applicability to the expiry of free status.

54 ENA EAA.5.1.505, *s.p.* (claims of the representative of C., P. and T. Eck, 5 January 1794).

55 ENA EAA.858.2.2148, vol. III, p. 1 (file in the Provincial High Court of Estland collection). Because of the aforementioned intertwining of ethnic, legal and social characteristics in 18th-century Estonia, it was not unusual that the claimants used the German form of their names (such as Jacob), whereas their opponents referred to them in the Estonian way (such as Jaak) where possible.

56 ENA EAA.858.2.2148, vol. IV, pp. 35–39 (claims presented by Riesemann, representative of the Neumanns, 24 May 1794).

57 ENA EAA.858.2.2148, vol. III, pp. 39–42 (Paldiski District Court ruling, 23 December 1792).

instance did not examine the circumstance more closely. Thus it can be said that even though it did not refer to Roman law, it was nevertheless guided by the presumption of freedom. The manor encumbrancer demanded damages from the manor's mortgager on the basis of the district court judgment. The latter, however, appealed the district court judgment.

The Tallinn Provincial High Court returned the case to the Paldiski District Court on the grounds that the district court had reached its judgment on the basis of the statement from the Neumanns alone without allowing the tenant of the estate to sufficiently defend himself. In the new trial in first instance, the representative of the estate's tenant pointed out that the family had remained silent concerning its alleged freedom for more than 50 years. Furthermore, the manifesto of 1787 had established the ten-year expiry limit of claims. He also denied the validity of the Roman law ban on the expiry of freedom.[58]

As mentioned above, after the death of Catherine II in 1796, regency-era institutions were partly dissolved, and earlier institutions, including the judicial system, re-established.[59] Therefore, Harju *Manngericht* ("vassal's court") handed down the judgment in 1797 as the court of first instance instead of the Paldiski District Court, and the Provincial High Court of Estland pronounced the final judgment in 1798. Both re-established courts considered registration in the land revisions as proof of the relinquishment of freedom.[60] Thus Roman law as a suitable legal source was ruled out of the question in this case as well.

The common features of the last three cases – considering the expiry of freedom and the relinquishment of freedom to be lawful – corresponded to the prevailing understanding among early modern jurists, who considered the relinquishing of one's freedom to be legally possible and even necessary in relation to the peasants of their time. The *intention* to relinquish freedom, however, was important. Additionally, the expiry limit prescribed in the *Ritter- und Landrecht* concerning the affiliation of peasants was applied to the expiry of freedom as well. Instead of Roman law, the three court cases under consideration referred more to ukases issued by the Senate. As mentioned above, it is possible that in the last three court cases, the courts' increased caution regarding Roman law arose from the warning to be cautious with "foreign law" that followed the "excesses" in citing it in the 1780s judgments.

58 ENA EAA.858.2.2148, vol. II, pp. 4–16 (claims presented by Lütkens, representative of G. F. v. Lüder, 26 October 1797).

59 Leppik 2012, p. 73.

60 ENA EAA.858.2.2148, vol. II/II, pp. 14–18 (judgment of the Harju *Manngericht*, 13 November 1797); ENA EAA.858.1.318, pp. 569–572 (judgment of the Provincial High Court of Estland, 3/12 March 1798).

Thus this could have been an indication of an increased emphasis on local law (to which Russian statutes, which had by then also been published in Estland, were considered to belong) in the context of the regency era. Moreover, concern about the growing spirit of rebellion among the peasantry could have had its own effect. Several peasant disturbances had recently taken place, and the influence of the French Revolution was feared in the Baltic provinces.[61]

The case of Hermann Grenberg (1792–1794)

Hermann Grenberg had accompanied one of his masters' sons to the Russo-Turkish War in the late 1760s, thus becoming *de facto* the servant of the latter. His master's brother had promised that in the event of his death, Grenberg would become a free man. The soldier had indeed been killed, but Grenberg had not 'cashed in' his freedom, returning instead to serve as a valet at the manorial estate of the Knorring family, to which Grenberg's family was registered. The dispute arose 19 years later, when the valet finally wanted to get married and move elsewhere, to which the Knorring family did not consent. Grenberg's lawyer claimed that the Knorring family son who had gone to war had gained the right to ownership of everything that was sent along with him when he was sent to war. His property, including the valet, had to be treated as *peculium castrense* (goods acquired while in military service), which also included slaves. The lawyer referred at this point to D 49.17.4[62] and claimed that this was in agreement with the local *Ritter- und Landrecht*[63]: "It has not gone out of fashion that a servant is sent to the battlefield to accompany a young nobleman, nor have those [Roman] laws been annulled; rather, they are in complete agreement with our *Ritterrecht* and common law".[64] The Knorring family's lawyer objected,

[61] See, for example, Laur, M. Pärisorjus 18. sajandil [Serfdom in the 18th century]. *Eesti ajalugu IV: Põhjasõjast pärisorjuse kaotamiseni* [Estonian history IV: from the Great Northern War to the abolition of serfdom], ed. M. Laur. Tartu: Ilmamaa, 2003, p. 200; Stepermanis, M. *Lielās liesmas atblāzma: Latvija franču buržuāziskās revolūcijas laikā 1789–1798* [The glow of the great flame: Latvia during the bourgeois French Revolution, 1789–1798]. Rīga: Zinātne, 1971; Вахтре, С., Пийримяе, Х., Ейнпауль, А. Введение [Introduction]. *Антифеодальная борьба вольных шведских крестян в Эстляндии XVIII–XIX вв. Сборник документов* [Free Swedish peasants' fight against feudalism in 18th- and 19th-century Estland], eds. С. Вахтре, Х. Пийримяе, А. Эйнпаулъ, Ю. Мадиссон. Tallinn: Eesti Raamat, 1978, pp. 7–25.

[62] The fragment reads as follows: "A soldier should be especially entitled to any items that he took into camp with the consent of his father".

[63] Book IV, Chapter 13, § 3 similarly stipulated the right of the son to his military private property.

[64] ENA EAA.5.1.504, pp. 23–24 (claims presented by H. Grenberg's representative Rosenmüller, 17 April 1794).

saying that in accordance with the ten-year expiry limit for civil suits enacted in the manifesto of 1787, Grenberg's claim of freedom had expired in the meantime.

Since the courts considered it a proven fact that the Knorring who went to war had promised to free his servant in the event of his own death, this court case focused on two questions. First was whether a soldier had the right to grant freedom to his servant as a gift. Second was whether the servant's returning to the manor to serve as a valet meant the rejection of this gift – in the event that it was lawful – meaning whether this entailed becoming a serf once again. The Paide District Court and the Tallinn Provincial High Court focused first of all on the first question and found that Grenberg had not managed to prove that the Knorring who went to war was his "actual master" at the time when the promise of freedom was made to him.[65] The Court of Cassation for Civil Matters found instead – referring to Book III, chapter 13, § 4 of the *Ritter- und Landrecht*[66] – that Grenberg belonged to the artillery non-commissioned officer's *"actual peculium castrense*" and that, concerning the use of this, Knorring did not have to give any account whatsoever to his "future co-inheritors".[67] Concerning Grenberg's return to the manor of his origin and his service there as a valet, the courts of the first and second instance found that although the freedom itself of a person proven to be free could not expire, a serf's right to claim the freedom given to him as a gift could expire if he did not accept that gift within the time period specified by law.[68] Grenberg's lawyer had objected in the appeal submitted to the Provincial High Court that this sort of "subtle differentiation" was inherently contradictory: there cannot be a serf to whom freedom has been given as a gift, because when the gift has been given, he is no longer a serf but rather a free man.[69] The Tallinn Court of Cassation for Civil Matters, as the instance of cassation, indeed voided this argument from lower court instances with a sentence from or inspired by Roman law:

65 ENA EAA.7.1.603b, pp. 255–264 (Paide District Court judgment, 26 March 1792), similarly ENA EAA.7.1.261, pp. 67–70v (Tallinn Provincial High Court judgment, 31 January /10 February 1794).

66 This law prescribed that whatever was given to a son as military gear was excluded from the inheritance – and thus was part of the son's own property.

67 ENA EAA.5.1.19, pp. 33–36v (judgment of the Tallinn Court of Cassation for Civil Matters, 17 August 1794 / 24 January 1795).

68 ENA EAA.7.1.261, pp. 67–70v (Tallinn Provincial High Court judgment, 31 January /10 February 1794), similarly ENA EAA.7.1.603b, pp. 255–264 (Paide District Court judgment, 26 March 1792).

69 ENA EAA.5.1.504, p. 31 (H. Grenberg's representative Rosenmüller's appeal to the Court of Cassation for Civil Matters, 17 April 1794).

"according to unquestionable law, a person's freedom does not expire"[70] and added that the absence of an individual from land revision books and from the list of enserfed subjects from the last census creates a "great advantage" in favour of his free origin. Thus the court of cassation was essentially guided by the timelessness of freedom as laid down in Roman law.

The use of Roman law in the Grenberg case is interesting in a number of ways. First, in the question of the Knorring family's son's private military property, the lawyer referred first of all to the norm of Roman law, affirming it just in case with the corresponding provision from the *Ritter- und Landrecht*. This same provision is what the court of cassation used to justify its decision. Additionally, the Paide District Court tried to differentiate the expiry of freedom (which was not considered possible on the basis of Roman law) from the expiry of the right to *claim* freedom. Therefore, this case resembles the Esko Juhann case to a certain extent, where the district court tried to differentiate between the status of freedom and that of being attached to the land, yet neither distinction was accepted by higher instances. Even though the Tallinn Court of Cassation for Civil Matters did not refer directly to Roman law, it was guided by precisely that law.

Conclusion

Two questions were of central importance in the trials considered here – first, the conscious, intentional relinquishment of one's freedom, and second, the question of the expiry of freedom. There was no unambiguous provision in Estland's positive law concerning the enserfment of free persons – a person's relinquishment of his freedom – or the expiry of freedom. At the same time, *Ritter- und Landrecht* prescribed a 30-year expiry limit for the affiliation of runaway peasants. Whether each particular court considered it possible to carry this limit over to the expiry of a person's freedom as well – referring to local custom – depended on the court's interpretation. In the event that it did consider this possible, earlier Russian ordinances permitting the enserfment of free persons supported such a position. At the same time, however, the courts had to take into account the more recent ordinances of the state authorities, which, in harmony with the 'spirit of the age', prohibited the enserfment of free persons. And if a court considered it appropriate to apply the provisions

[70] ENA EAA.5.1.19, pp. 33–36v (judgment of the Tallinn Court of Cassation for Civil Matters, 17 August 1794 / 24 January 1795).

concerning Roman slaves or *coloni* to local serfs, it also had to consider the Roman law prohibition against enserfing free persons.

In fact, the question of the relationship between local custom and Roman law was central for the courts. Based on the court cases examined here, it appears that the courts utilised Roman law alongside local custom in the event that they wished to take the 'spirit of the age' into account. This means that they needed to ground the position that a free man could not have been enserfed even prior to Catherine's ordinances that prohibited enserfment. If the court was of the opposite opinion – or if the application of Roman law was considered inappropriate – judgments were also handed down that did not even refer to Roman law.

The sequence in which the trials were held appears to have had an effect of its own. In the two court cases that took place earlier – the cases of Jacob Nielsohn and Esko Juhann in the 1780s – the court of first instance applied almost exclusively Roman law in justifying its positions. However, starting with Sibbi Jürri's case in the early 1790s, there were also judgments that referred exclusively to local law and to the Russian ordinances that applied at the time of the alleged enserfment of the peasants who were claiming to be free. According to the hierarchy of legal sources, the ordinances of the Russian state authorities that had been instituted in Estland (either issued especially for Estland by the Senate or published in Estland as provincial ordinances) took precedence over Roman law, and beginning with the third court case considered here, this was indeed the case.

Court judgments also differed in terms of whether registration in land revisions was interpreted as voluntary relinquishment of one's freedom. In the Esko Juhann case, it was found that it was not unambiguously certain that all interested parties were aware of how they were registered in the censuses; nor was it certain that 'property' of such great value such as freedom could not have expired one way or another. In the subsequent cases (Sibbi Jürri, the Eck family, and the Neumann brothers), however, the registration of an individual of disputed status in the census was considered sufficient evidence. It was claimed that every individual had to be aware of how they were registered and also that such individuals' freedom had expired in the course of their living as a serf for over 30 years. Thus, in these three court cases, living like a serf for 30 years was seen as evidence either of the expiry of freedom, or of the acceptance of serf status, yet without referring to any specific legal provision. In the earlier Esko Juhann case, however, the district court found that provisions in Roman law for peasants to become tenants attached to the land after 30 years of cultivating

that land were applicable to the expiry of freedom. In this case, the district court expressly denied the relevance of Estland's 30-year limit on demanding the return of serfs. In the Hermann Grenberg case, however, another district court considered it possible for the *submission of claims* for freedom to expire in the course of the ten-year expiry limit for civil suits established in 1787. The court of higher instance voided both of the aforementioned judgments.

The analysed court cases illustrate legal plurality in the province of Estland during the regency era. First of all, they demonstrate how legal plurality functioned: usually the parties cited many different sources so that the courts could choose between them according to their own understanding and positions. In some cases, even norms that had not been brought up by parties were used by the court; in Esko Juhann's case, even a Roman law fragment was used.

In earlier court judgments, it can be seen that the court went along with the enthusiasm for freedom characteristic of the Enlightenment by accepting and adopting the sources of the subsidiary Roman law referred to by the plaintiffs. In the subsequent judgments, however, it appears that the admonitions of the courts of higher instance to refrain from applying foreign laws, that is, Roman law, had achieved the desired result. Thus the courts tended to be guided more by the local presumption of serfdom in place of the Roman presumption of freedom. Thus it can be said that the courts selected 'suitable' legal sources according to which of them contained the principle that they currently considered to be more relevant. While generally legal plurality can generate confusion and may not necessarily be favourable for individuals, in some of the present cases, the plurality of legal sources – in other words, the opportunity to use subsidiary Roman law – benefited particular peasants who claimed freedom. In any case, it took two more decades to abolish the institution of serfdom in the province of Estland in 1816.

"I KNOW! THIS IS THE PLUMBER I KNOW!" CRIMES IN LÈSE-MAJESTÉ IN IMPERIAL RUSSIAN CRIMINAL CODES AND IN THE PRACTICE OF THE TALLINN COUNTY COURT, 1906–1916

Olja Kivistik

Introduction

In the modern Western society, free expression of thoughts and opinions is mostly allowed. Freedom of expression is one of the foundations of democracy; nevertheless, it took many centuries before it became a fundamental human right. People have not always been able to express their opinions about the head of state, a politician or an important leader.

This article will observe the situation in one of Imperial Russia's most Western and European provinces – the Governorate of Estonia – during the last decade of the Empire's existence. This period was characterised by the reformation, however slow and non-radical, of the political and legal institutions. In 1906, Russia obtained its first written constitution. This stated that every individual had the right to express their thoughts as stated by the law.[1] In substance, we could therefore talk about freedom of expression. In reality, however, this freedom of expression was greatly limited. If a simple peasant thought that he disliked the Tsar, then it would not have been very reasonable to express himself loudly in the presence of other people. He could draw the attention of a policeman, who "registered" the case immediately. There were also snitches. Criminal investigations were initiated, investigations

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[1] Art. 37: Within the limits determined by law everyone can express his thoughts orally or in writing, as well as distribute these thoughts through publication or other means. Высочайше утвержденные Основные Государственные Законы [Highest Approved Basic Laws of the Empire], *Полное собрание законов Российской империи* [Complete Collection of Laws of the Russian Empire] (henceforth ПСЗ) 3rd edition, volume 26, part 1, No 27805, 23 April 1906. See also Siimets-Gross, H., Leppik, M. Estonia: first landmarks of fundamental rights. *First fundamental rights documents in Europe: commemorating 800 years of Magna Carta*, ed. by Suksi, M. and others. Cambridge: Intersentia, 2015, pp. 295–308.

carried out and later the courts decided whether the culprit had to pay a fine for expressing critical opinions, or be confined for a number of days, or sent to a forced labour camp.

Between 1903 and 1917, the so called Old and New Penal Codes[2] were in force in Imperial Russia, and therefore also on the territory of present-day Estonia. In this article, these codes are called general penal law acts. Next to them, the military penal law acts applied to soldiers and, in some cases to civilians. General penal law acts and the special penal law act for the military included legal norms in regard to crimes and punishments for insulting and threatening the Tsar and his family. Insulting the Tsar was considered to be a crime that could, according to the Penal Code of 1845, result in up to 12 years of forced labour. By analysing the legal norms in the codes, it has to be admitted that there is no exact definition in the laws of what could be considered offending the Emperor; the assessment for each case had to be carried out by the court.

An analysis and comparison of the articles of the Penal Codes of Imperial Russia concerning offences against the state will now follow. Subsequently, the article will observe their use in practice in the Tallinn County Court. In this article, the chosen period includes an era when the chapter in the New Penal Code (henceforth also "NPC") about crimes against the state had already been implemented. A common estimation claims that the New Penal Code was considerably more liberal and modern than the Old Penal Code (henceforth also "PC"). When the New Penal Code was implemented, the regulations concerning crimes against the state were not entirely annulled; the author can therefore assume as a hypothesis that the court could, in some cases, "fall back" on implementing the stricter punishment ideology of the Old Penal Code. The author came to this conclusion while conducting similar research concerning practice in the Tallinn County Court on crimes against religion during the same period.[3] A decision was made that the NPC will not have any norms that regulate crimes against church property, enacted in the chapter about crimes against religion. While the chapter about offences against property never came into force, the courts continued to apply the PC norms from the chapter on religious crimes. This was done even when the legislator decided to exclude

[2] For more on Old and New Penal Code in chapter „Imperial Russian penal codes: casuistry, plurality and confusion".

[3] Kivistik, O. Kohtuniku ees seisab kaks jumalat, kaks õigust ja kibe tarvidus nii ühte kui teist ehk mõlemaid korraga teenida [Two Gods, Two Laws and the Bitter Need to Serve Both, Stand Before the Judge]. *Juridica* 2012/3, pp. 169–175.

such crimes from the NPC.[4] The comparison of the articles in law and in action (e.g. in court practice) should provide some notion of how the jurisdiction and the individuals within it were influenced by the situation where several different penal codes were applicable at the same time.

Imperial Russian penal codes: casuistry, plurality and confusion

At the beginning of the 20th century, when the territory of present-day Estonia still belonged to the Russian Empire, Imperial Russian penal law was in force over this territory. This was an interesting time, when many different penal codes were implemented at the same time, regulating many different fields or even the same field. The Old[5] and New Penal Code[6], the Penal Code for Peace Courts[7], the Penal Code for Parish Courts[8] and the Military Penal Code[9], all regulated important questions of penal law.[10] On 15 August 1845, Tsar Nicholas I signed an *ukase* that the first systemised penal law act will take effect throughout the Russian Empire on 1 May 1846, including the three Baltic provinces: Estonia, Livonia and Courland. The code did not take effect in the territories of Finland and Poland, but did take effect in Siberia, Central Asia and Caucasia, albeit under different conditions and with certain limits.[11] According to Article 174 of the code, the new regulations were not applicable to the proceedings of church law or military law acts. In 1881, Tsar Alexander III formed a commission to modernise the norms concerning crimes against

4 Kivistik 2012, p. 175.

5 Уложение о наказаниях уголовных и исправительных [Code for Criminal and Correctional Punishments]. ПСЗ 2nd edition, volume 20, part 1, No 19283, 15 August 1845. Henceforth the 1885 version is used: Таганцев, Н. С. *Уложение о наказаниях уголовных и исправительных 1885 года* [Code for Criminal and Correctional Punishments 1885]. Санкт-Петербург: тип. Меркушева, 1899.

6 Уголовное уложение [Penal Code]. ПСЗ 3rd edition, volume 23, part 1, No 22704, 22 March 1903.

7 Устав о наказаниях налагаемых Мировыми Судьями [Code for Penalties Imposed by the Peace Courts]. ПСЗ 2nd edition, Volume 39, part 2, No 41478, 20 November 1864.

8 Временные правила о наказаниях, налагаемых волостными судьями [Temporary Rules for Penalties Imposed by the Parish Courts]. ПСЗ 3rd edition, volume 9, No 6188, 9 July 1889.

9 Войнский устав о наказаниях [Military Code for Penalties]. ПСЗ 1st edition, volume 43, part 1, No 45811, 5 May 1868.

10 See also Sedman, M. The historical experience of Estonia with the plurality of Penal Law Acts. *Juridica International* 2010/XVII, pp. 227–235, available at http://juridicainternational.eu/public/pdf/ji_2010_1_227.pdf (3.3.2017).

11 Art. 173 of the PC and its appendix IV.

the state in the PC.[12] By 1895, the commission managed to create a draft that involved the whole penal law act, not just the crimes against the state. Tsar Nicholas II approved the NPC on 22 March 1903. This, however, did not mean that the NPC took effect immediately; instead, the Tsar promised to inform everyone when the new penal law act would take effect.[13] However, the NPC was never completely implemented – the Tsar implemented the chapter on crimes against the state on 7 June 1904.[14]

There were high hopes that the NPC would be the perfection of the penal law, but it rather brought discord among the penal codes due to many contradictions.[15] There were four penal codes in effect at the same time in Imperial Russia, two of which – the PC and the NPC – included several overlapping parts. The plurality of penal codes made the penal law opaque and confusing, and this situation remained until 24 October 1917.[16]

The Code for Penalties Imposed by the Peace Courts from 20 November 1864 was implemented in the Baltic Governorates during the court reform of 1889.[17] This code ordered punishments for lighter offences and trespassing; crimes against the state were not part of this code. The same was the case with the Temporary Rules for the Punishments by Parish Courts of 1889 (e.g. the Penal Code of Parish Courts), which stayed in effect until the demise of Imperial Russia, but this code did not regulate crimes against the state either.[18] It is important, however, to consider the Military Penal Code as the second significant source next to the general penal law acts. According to Article 277, the martial courts had jurisdiction when the accused was in military service. In

[12] Скрипилев, Е. А. *Развитие русского права во второй половине XIX – начале XX века* [Development of the Russian Law in the Second Half of the 19th Century and in the Beginning of the 20th Century]. Москва: Наука, 1997, p. 177.

[13] Об утверждений Уголовного Уложения [About the Affirmation of the Penal Code]. ПСЗ, 3rd edition, volume 23, part 1, No 22703, 22 March 1903.

[14] О некоторых изменениях в порядке производства по делам преступных деяниях государственных и о применений к оным постановлений нового Уголовного Уложения [About Some Changes in Proceedings in Crimes Against the State and How to Apply the Norms of the New Penal Code]. ПСЗ 3rd edition, volume 23, part 1, No 24732, 7 June 1904.

[15] Veiser, M.-L. *Eesti kriminaalõiguse üldosa reform kahekümnendal sajandil võrdleva analüüsi peeglis* [A Comparative Analysis of Reforming the General Part of the Estonian Penal Law in the 20th Century]. Tartu: Halo, 2006, p. 9.

[16] Grau, K. Tarvidus Uue Nuhtlusseaduse maksmapanemiseks Eesti Vabariigis [The Need to Assert the New Penal Code in the Republic of Estonia]. *Õigus* [The Law] 1921/4, p. 97.

[17] See Anepaio, T. Kriminaalõiguse muutumisest 1889. aasta reformi käigus [Changing of Criminal Law during the Reforms of 1889]. *Tractatus Terribiles. Artiklikogumik Jaan Sootaki 60. juubeliks* [Tractatus terribiles. Proceedings to the 60th anniversary of Jaan Sootak], ed. by Parmas, A. Tallinn: Juura, 2009, p. 145.

[18] Anepaio 2009, pp. 148–149.

addition, according to the Military Penal Code, a civilian could also be judged by the court-martial if they committed the crime within an area under martial law or under a state of emergency. Considering that situations where martial law or state of emergency were applied were not an uncommon phenomenon in Imperial Russia, as later in Republican Estonia as its legal successor,[19] the Military Penal Code would become an important source for the treatment of crimes against the state in practice, equal to the general penal law acts. This article, however, concentrates on the sources of the general penal law, and the Military Penal Code is not analysed. The Military Penal Code was a special penal law act, which was applied in martial courts. This was a completely different judicial situation, where crimes against the state were judged on other grounds.

After Imperial Russia collapsed, the codes were continuously applied in the Republic of Estonia – independent from 1918. A distinguished contemporary barrister, Karl Grau, whose job was to apply these codes daily, has said that the NPC was significantly more scientific, clearer, completer, had lost the archaism in the penal law and reduced the severity of punishments. Grau also noted that the NPC was shorter compared to the PC.[20] Even though this was true for the whole volume, the situation was different when comparing the chapters about crimes against the state. In the PC, the chapter about crimes against the state consisted of 22 articles, whereas the NPC had 35 articles in the equivalent chapter. One of the possible reasons could be that the PC had a long and voluminous description of *corpus delicti,* which actually consisted of many alternative actions. According to Article 253 of the PC, treason was:

1. Betraying the Russian state or part of the state in favour of another sovereign or state;
2. A Russian citizen instigating a foreign country to wage war against the Russian state or other unfriendly activities, or revealing Russian state secrets to a foreign country;
3. During war, supporting the enemy in military or otherwise hostile activities against the Russian state or its ally with their activities or advice; revealing state secrets or other information; hindering the armament of the Russian state or its ally; revealing a city, fortress or other fortified location or harbour,

[19] Sedman, M. Military penal law – not only for Military personnel: developments in Estonian penal law after the First World War. *Unity and Plurality in the Legal History of the Baltic Sea Area.* 6th Conference in Legal History in the Baltic Sea Area, 3rd–5th June 2010 Tartu (Estonia)/ Riga (Latvia), ed. by Luts-Sootak, M. and others. Frankfurt am Main *et al.*: Peter Lang, 2012, pp. 253–273.

[20] Grau 1921, p. 98.

arsenal or ships, sea or river transport, to the enemy; allowing the military or another group to be captured; revealing the location of military supplies or weaponry, the location of a fortress, harbour, arsenal or other fortified location, camp or other military activity to the enemy; providing the enemy with information about the movements, location or situation of the army, or providing the enemy with information about offence or defence; instigating the army against the Russian state or its allies; weakening the loyalty of the subjects of the Russian state or of its allies; accepting manifestos or declarations from the enemy and distributing these in the Russian state or in other allied countries; talking about the enemy's right to a part of the Russian state in public works; gathering people for a hostile military action; transferring to the enemy's army or getting employment in a foreign country if, at first, the relations between this country and Russia are violated and if after that hostile actions are initiated against the Russian state; delivering or providing weaponry, money, necessary items or other items to the enemy; protecting, helping or supporting foreign spies or armies or working as a foreign spy;
4. The actions of a diplomat, who creates a tractate with a foreign country, that damages the Russian state;
5. Stealing, intentional extermination or blandishment of documents by a diplomat, official or subject of the Russian state, if those documents should prove Russia's right to a part of a foreign country or *vice versa* – a foreign country's right to a part of Russia.

The NPC covered these different types of treason in different articles. In a way, this simplified the process of finding the right article but it also increased the general amount of articles.

It should be noted that the NPC included one important change: there were separate *corpora delicti* intended for people who had organised, participated in or agitated crimes, and for people who failed to notify the authorities about a crime against the state that was still in plan or already performed. One possible objective of this kind of distinction might have been the desire to punish every participant of the crime according to their contribution. It has to be noted that the *corpora delicti* in the NPC did, however, go into more detail and were more specific. This clarity and distinction between norms gave judges rules for how to punish certain acts. Organising, participating or agitating are such different forms of crime that it was decided that they have to be separated. Yet, there is no reason to call them casuistic as were the articles of the PC. The case of the NPC was rather more a means to guarantee legal certainty; the NPC used

more distinction to ensure more clarity and control over the application of legal norms.

The adoption of the NPC abolished most of the norms on crimes against the state in the PC. The legislator's task was to correct the errors in material law and fill the gaps. It was odd from the point of view of legislative technique and clarity of law that the *corpora delicti* from the PC, that were still in effect, were not transcribed across into the NPC. This brought about a situation where the majority of the PC's chapters about crimes against the state were invalid; on the other hand, Articles 260[21] and 261[22] were effective simultaneously with the NPC's chapter about crimes against the state until 1917. The abovementioned articles were not cases of *corpora delicti* of insulting the monarch, so it is not possible to state in this paper whether the parallelism in the laws could have had any effect on court practice. It is important to mention, though, that a similar situation arose with crimes against religion. Although the chapter on crimes against religion came into effect in 1906, the articles on crimes against religion from the PC were still used in practice. In particular, the authors of the NPC had left out crimes against the church, which formerly belonged to the chapter about crimes against religion. This decision sent out a message to the citizens and the court that from this moment onwards, crimes against the church's property are no longer crimes against religion, but are punishable according to the general norms of crimes against property. However, the chapter about crimes against property in the NPC never took effect. Since the PC still contained crimes against church property, the courts continued to implement

[21] According to Article 260, Section 1 of the PC, a crime regulated by Article 241, 242, 243, 249, 250 or 253 was punishable if it was conducted against a foreign country or against a foreign sovereign with whom the Russian Empire had benevolent relations. The extent of the punishment depended on the existence of aggravations. If the aggravations existed, the punishment ordered the deprivation of estate class privileges and exile in Siberia. Whereas when no aggravations existed, the punishment ordered also the deprivation of every estate privilege and confinement according to level IV or V of Article 31 of the PC.

[22] According to Article 261, Section 1 of the PC, offending a foreign ambassador, delegate or diplomatic agent with any kind of public deed or statement, if the purpose of this offence was to demonstrate disrespect towards the foreign country and if this action could provoke unpleasant explanations between the countries, was punishable. The punishment for this kind of crime was imprisonment in a castle prison from one year and four months to two years and eight months and according to Article 50 of the PC, deprivation of some estate privileges. According to Article 261, Section 2 of the PC, the same crime was punishable when it was not malevolent and there were no aggravations. In this case the punishment of an imprisonment in a castle prison was four to eight months. The NPC did not contain *corpora delicti* equivalent to Articles 260 and 261 of the PC. At the same time, these deeds were considered so important that they were not decriminalised either.

the norms of the PC, even though the legislator had excluded them from the new code.[23]

The NPC's ideology on punishment differed substantially from the PC. More specifically, while the punishments in the PC were meant to install fear, in the NPC they were rather a means of defence – the emphasis was on treating the criminal and then the punishment could be treated as a means of instilling fear.[24] A good comparison is a decision from 8 August 1866, made by the Court of Justice in Moscow, according to which the accused, who insulted the Tsar by saying: "Should have killed him a long time ago!" and "He deserved it a long time ago," was to be punished with forced labour in a factory for six and a half years, according to Article 246, Section 1 of the PC. The person also lost all his estate privileges.[25] According to Article 246, Section 1 of the PC, a person could be sent to forced labour to a factory for six to eight years, so a sentence of six and a half years was below the average penalty. According to the NPC, however, the punishment for a similar violation could be one day to six months of confinement.

The head of state and his family are obviously protected against any attacks that might endanger their lives or health. Another question is whether those attacks are to be punished by a separate law. In the earlier penal law, crimes against the monarch were separated from other acts and regulated by different rules. The same applied to actions less harmful to health, such as threats and offences. Although most of the NPC norms were not casuistic, legal norms concerning threats and offences in the PC and NPC were extremely detailed and complex. Despite the extreme precision of the legal norms and the multiplicity of listed circumstances, no exact definition of threats or offences were given. Meanwhile, Article 245 of the PC classified several levels of offence. The most serious crime was distribution of offensive materials, mostly since this deed was used to influence other people. Composing offensive materials was a lighter crime. The lightest violation was owning offensive materials if this happened

23 Kivistik 2012, p. 175.
24 Grau 1921, p. 99.
25 Решение Московской судебной палаты. По уголовномы департаменту. Виновный в пройзнесении заочно дерзких слов против Государя Императора только тогда может быть присуждень к наказанию, определенному во 2-й части 246 цт. Улож., когда доказано, что слова те произнесены были в пянстве; в противном случае он подвергается наказанию по 1-й части 246 ст [Decision made by the Court of Justice of Moscow. Criminal Department. Guilty in Lèse-majesté, according to Article 246, Section 2 of the Penal Code, if it is proven that the words were sad out loud while being drunk; otherwise he is guilty according to Article 246, Section 1 of the Penal Code]. *Юридическая Газета Московскаго юридическаго общества* [Review of Juridicial Society in Moscow], 1866/5, p. 8.

inadvertently or out of curiosity. Article 245 of the PC comprised four clauses that ordered a punishment for composing and distributing hand-written or printed texts or pictures. According to Article 245 of the PC, the following actions were punishable:

1. Deliberately distributing offensive or threatening hand-written or printed texts or pictures with the intent of spreading disrespect towards the state or the Tsar – forced labour in a prison castle for 10–12 years;
2. Participating in composing offensive or threatening hand-written or printed texts or pictures and criminally distributing them – forced labour in a prison castle for 10–12 years;
3. Composing offensive or threatening hand-written or printed texts or pictures, although distribution failed – imprisonment in a prison castle from one year, four months to two years, eight months and loss of some estate privileges;
4. Owning offensive or threatening hand-written or printed texts or pictures, if there is no evidence that the government has issued a permit for the possession of these pieces – confinement from seven days to three months, possible police control afterwards from one to three years.

The PC incorporated a separate *corpus delicti* about portraits, statues, busts or projections of the Tsar. According to Article 246, Section 1, a person could be punished with the loss of every estate privilege and six to eight years of forced labour in a factory for offending the Tsar, if this person intended to violate or destroy a public portrait, statue, bust or other projection of the Tsar. According to Article 246, Section 2 of the PC, a person could be punished with imprisonment for two to eight months or confinement from seven days to three months, if the spoken words were said in an intoxicated state. In 1863, Article 246 of the PC was complemented with a third Section ordering a punishment of eight months to one year, or four months in a prison castle, if the person offended the Tsar but the offence was not intended to create disrespect for the Tsar. When considering the *corpus delicti* in question, it was, therefore, important to identify the intention, which had to be directed towards offending the Tsar, but not to create disrespect.

There is no equivalent to Article 245 of the PC in the NPC but the latter, similar to the PC, included several levels of offence. As opposed to the PC, the NPC classified crimes based on their purpose. According to Article 103, Section 1 of the NPC, offending and threatening the Tsar, Tsarina or heir to the throne orally as well as in writing was punishable, if the offending person had the intent to disperse disrespect. The action was also punishable if offensive

pictures or texts were distributed publicly. The punishment for such a crime was forced labour for up to eight years. Article 103, Section 2 of the NPC ordered a punishment for an oral offence, threat or curse in the presence of witnesses, executed publicly or by distributing texts or pictures, if the objective was not to disperse disrespect towards the Tsar, Tsarina or heir to the throne. The purpose of the action was, therefore, highly important. It was significant for Article 103, Section 1 of the NPC to identify the intention and the "special purpose" of the deed; in other words, it had to be made certain that the person was acting deliberately and that their purpose was to disperse disrespect towards the Tsar, Tsarina or heir to the throne. If no such purpose was identified, then the person was to be punished with imprisonment in a prison castle according to Article 103, Section 2. The lightest punishment could be metered to a person who committed the crime, as stated by Article 103, Section 1, being oblivious to it, out of ignorance or intoxication. If this was the case, Article 103, Section 3 of the NPC ordered a confinement as a possible punishment.

According to the NPC, intoxication had great significance in determining the punishment. A leading scholar of penal law in the later years of Imperial Russia, N. S. Tagantsev[26], has drawn much attention to intoxication and explained that consuming alcohol could change a person's physical and mental capabilities. The penal law considered alcohol consumption to be a mitigating circumstance, along with physical anomalies.[27] It was important, at the same time, to identify why the person consumed alcohol. If the person consumed alcohol with the purpose to commit the crime in a state of intoxication to subsequently apply for a lighter punishment, the intoxication was not considered as a mitigating circumstance since alcohol was consumed for a criminal purpose.[28]

Consequently, it is possible to say that offending the Tsar and his family members was a crime against the state according to the PC, as well as according to the NPC, notwithstanding the changes in the degree of the penalties. Norms in the NPC were less casuistic than in the PC, still there were several norms in the NPC that were more detailed than others. That was probably because of

[26] Nikolai Stepanovitch Tagantsev (1843–1923) was a Russian scholar of penal law. In 1862, he obtained education in law in the University of Saint Petersburg, from there he was transferred to Germany to finish his education. He studied there for two years and did research on the reoccurring crimes. In 1870, he defended his dissertation on the topic "Crimes against the Person in the Russian Penal Law". From 1881, he participated in the work of the commission composing the NPC. In 1884, he drafted the project of the general part of the NPC.

[27] See Таганцев, Н. С. *Русское уголовное право. Лекции. Часть общая* [*Russian Criminal Law. Lectures. General Part*], том I. С-Петербург: Государственная типография, 1902, pp. 462–470.

[28] Таганцев 1902, p. 470.

the need for greater clarity and the need to differentiate between different roles in participation in certain crimes. Although mitigating circumstances such as intoxication or mental illness were applicable for offences, there is no reason to conclude that this was a light violation punishable by a fine or a confinement of a few days.

Court cases concerning offending the tsar in the practice of the Tallinn County Court

The chapters of the NPC on crimes against the state were implemented in 1904. In the Tallinn County Court, the first judgement concerning offending the monarch based on this code was reached in 1906. The last judgement in this field, before Imperial Russia collapsed, was passed in 1916. There were 16 verdicts in total concerning offences against the Tsar in the practice of the county court between 1906 and 1916. During the Russian court reform of 1864, a new court system was formed that was extended to the Baltic Governorates in November 1889. According to the reformed system, courts of first instance were peace courts, but they did not process more serious crimes. In the case of serious crimes, that is, felonies and larger claims, the court of first instance was the county court. There was one county court (in Estonian *ringkonnakohus*) in the governorate of Estonia and it was located in Tallinn.[29] Crimes against the state came under the jurisdiction of the martial courts as well, but these were special courts and they had jurisdiction only during a state of emergency. Consequently, this article discusses judgements and their explanations that offer an insight into what the court focused on in administering justice and what evidence was used to acquit or sentence the accused. There are 10 judgements among the decisions of the county court, where the court has not provided explanations.

On 1 December 1906, Tallinn County Court passed a judgement[30] saying that it is fair to punish V. Grigoryev, who offended the Tsar by saying "Why do we need that bloody Tsar?" with a confinement of two weeks according to Article 103, Section 3 of the NPC. It became clear from the verdict that at the time of the offence the accused was intoxicated and his culpability was proven by statements from three witnesses. The court did not focus on the context

29 Schneider, H. *Kohtud Eestis: minevikus ja tänapäeval* [Courts in Estonia: in the Past and Today]. Tartu: Õigusteabe AS Juura, 1994, p. 22.

30 *Дело по обвинению крестьянина В. Григорьева в оскорблении царя* [File of Accusation in Lèse-majesté by Peasant V. Grigorjev]. Estonian National Archives (henceforth ENA). 105.1.10729, p. 25. Here and henceforth, the original titles of files are used.

of the statement but contented itself with acknowledging the event as a fact. An evaluation of the evidence was similarly lacking, as was the reasoning of the sentenced punishment. Confinement of two weeks was a relatively mild punishment, considering that according to Article 21, Section 1 of the NPC, the length of the confinement could have been from one day to six months. According to Article 246, Section 2 of the PC, the punishment could have been two to eight months in the gaol or from seven days to three months of confinement. Therefore, compared to the PC, it is evident that two weeks of confinement was a very mild punishment.

The next judgement is from 27 November 1907 when A. Kris was sentenced to three months of confinement according to Article 103, Section 3.[31] It became evident from the court file that the person had said in an intoxicated state and in the presence of several witnesses that: "Our Tsar Nicholas II is a leech, he will sit or cry and we will end him". The person who overheard him reported the occurrence to the police and fulfilled the compulsory duty to inform. The court decided that Kris's culpability is proven with statements by two witnesses. The court stressed specifically that Kris's statement included a threat and an offence, although this kind of distinction was not important according to the PC, or the NPC. Tagantsev reasoned this distinction by saying that threatening the Tsar transformed into offending the Tsar since making a threat of this kind was automatically offensive towards the Tsar.[32] At the same time, the court did not provide any explanation for why the man was sentenced to a confinement of three months. This was the NPC's average degree of penalty, which according to the PC could have been either five months in gaol or a month and a half of confinement. Depending on which type of punishment the judge had chosen, it could be argued, according to the PC, whether the punishment would have been milder or more severe.

When comparing the abovementioned judgement to another one of 21 December 1907,[33] where K. Grosberg, while intoxicated, said about the ruling Tsar that "I will fuck your Czar", then it could be said subjectively that the text of this offence was considerably more offensive and obscene. Nevertheless, the court sentenced him to only three months of confinement. According to the court, these sayings suggest a potential mental illness, the accused was therefore

[31] *Дело по обвинению мещанина А. Крис в оскорблении царя* [File of Accusation in Lèse-majesté by Citizen A. Kris]. ENA.105.1.10797, the file is non-paginated.

[32] Таганцев, Н. С. *Уголовное уложение 22 марта 1903 г.* [Penal Code from 22 March 1903]. Санкт-Петербург: 1904, p. 396.

[33] *Дело по обвинению К. Гросберг в оскорблении члена царской семьи* [File of Accusation in Lèse of the Family Member of the Majesty by K. Grosberg]. ENA.105.1.9063, pp. 33–34.

not in his right mind when saying these words. On the other hand, the file lacks evidence of an official assessment or of tests done to evaluate the accused's health. The court would have failed to to decide that a demented accused was guilty since the law prohibited from finding a demented person guilty. The same applied to the PC, according to which it was impossible to find a demented person guilty. Despite suggesting that the person was not completely sane, the court still found Grosberg guilty.

In a judgement on 11 July 1908[34], E. Ahven was sentenced to four months of confinement for offending Tsar Nicholas II. According to the verdict, Ahven, had commented on the pictures of Tsar Nicholai II and Tsarina Alexandra Feodorovna in a bookshop, saying: "Whose pictures hang here? I know! This is the plumber I know." The facts that the accused was a common Christian and that he only had a primary education were addressed thoroughly by the court. The latter also stressed that the accused's intellectual capability was quite low. This was a thoroughly researched criminal case, where the opinion was formed that the word "plumber" (in Russian *трубачист*) is offensive to a person who does not practice this profession. On the other hand, the court neglected to stress that this offence was said towards the Tsar. It is important to emphasize that in this case the court attempted to find ways to facilitate the accused's situation with suggestions of his low intellectual and educational levels. The court applied Article 103, Section 3 of the NPC that ordered punishment in situations where the individual's intellectual capability is not high enough or if he is demented. The verdict on E. Ahven was based on testimonials from three witnesses, all of whom confirmed that the accused looked at the Tsar and Tsarina's pictures and said the words mentioned above. Four months of confinement is higher than the average degree of penalty in the NPC, although the confinement could have also been up to three months according to the PC. The punishment was therefore more severe than under the PC. The possibility has to be considered, however, that according to the PC, the punishment for such a deed could also have been eight months in gaol.

According to a judgement from 10 July 1909[35], two people were accused of offending the Tsar while intoxicated. One of the accused, F. Fyodorov, had said in Russian: "Well, the Tsar came to Revel but what benefit is that for us? He eats

[34] *Дело по обвинению крестьянина Э. Ахвен в оскорблении царя* [File of Accusation in Lèse-majesté by Peasant E. Ahven]. ENA.105.1.9135, pp. 30–31.

[35] Дело по обвинению коллежского секретаря Ф. Федорова и дворянина Р. Курковского в оскорблении царя [File of Accusation in Lèse-majesté by College Secretary F. Fyodorov and Nobleman R. Kurskovski]. ENA.105.1.9142, pp. 104–105.

and drinks at our expense. We don't need a Tsar like that, therefore we need to kill him and elect a Tsar like they have abroad. Then life will be better for us." The other accused was R. Kurkovski and he had translated the statement into Estonian. The court conducted a thorough analysis whether translating this kind of offence and threat is a crime or not. It was finally concluded that it was complicity because there was cooperation. The question of culpability, however, was differently resolved by the court. R. Kurkovski who had said the words in Estonian was a retired official, who wore decent clothing when committing the crime, while F. Fyodorov was a "simple employee". The court found that a retired official could have a more substantial effect on those who overheard the offence. The retired official was therefore sentenced to three months in gaol, while the other accused was only sentenced to one month.

Regarding the verdicts, it can be concluded that individuals with more authority in society, were punished more severely for crimes against the state because they belonged to the upper classes, and common people believed them. What is more, Article 103, Section 3 of the NPC foresaw confinement as a punishment but the court sentenced the accused to gaol instead, and therefore a much severer punishment. According to Article 2 of the NPC, the hierarchy of penalties was as follows:

1. death penalty;
2. forced labour;
3. exile;
4. correctional facility;
5. prison castle;
6. gaol;
7. confinement;
8. fine.

Despite the verdict being generally thorough, a clear explanation was lacking as to why the accused were sentenced to gaol instead of confinement. By replacing this punishment, a subconscious shift back to the PC can be observed, the latter allowing a sentence of gaol for offending the monarch.

In a verdict from 13 May 1911,[36] the court found that J. Serg was to be punished with a confinement of two weeks, according to Article 103, Section 3 of the NPC. J. Serg was accused of saying the following offensive and impolite words about the Tsar in the presence of witnesses on the platform of the train station in Haapsalu: "There is no Tsar here, he is a fraud and I am a beggar.

[36] *Дело по обвинению крестьянина Я. Серг в оскорблении царя* [File of Accusation in Lèse-majesté by PeasantJ. Serg] ENA.105.1.9413, pp. 39–40.

Manchuria has been drunk away". The person himself claimed to be innocent and said that he had had a fight with the two witnesses, during which one of the witnesses had said that the accused had "sold away Manchuria". J. Serg additionally claimed that the witnesses had beaten him during the fight and he had notified the police about this incident as well. The court found the witnesses' testimonies trustworthy and convicted the suspect. This verdict also includes a dissenting opinion. In this dissenting, a judge concluded that the testimonies from the witnesses should not be considered completely trustworthy, reasoning that both witnesses were intoxicated during the event. In addition, there was proof that the witnesses had beaten the accused earlier. The judge found that the conviction was premature and that all evidence had not been considered in all seriousness. J. Serg's defence filed an appeal, but the court of appeal left the verdict of the county court as the first instance unchanged. The court would have also handed down a mild sentence according to the PC since the words said by J. Serg were quite mild compared to usual insults directed towards the Tsar.

In a court case on 4 May 1912[37], the court convicted V. Evald for saying during a row: "Tsarina Maria Feodorovna can lick my feet". In the file of the accusation the offence was classified on the basis of Article 103, Section 3. The court acquitted the accused in this criminal case. The reason was probably that it became evident from the testimonials that the man whom the accused had rowed with and who had notified the officials about the offence, had said "I will send you to prison before you send me". The court reasoned this decision by saying that the witness with whom V. Evald had rowed, could have wanted revenge and filed a false complaint about V. Evald.

On 21 February 1913, the Manifesto for Amnesty was issued[38], related to celebrating the 300-year rule of Romanov's dynasty.[39] According to XVIII Chapter 4 of the Manifesto the executors of crimes regulated by Articles 103 (Sections 2 and 3), 104, 106 (Sections 2 and 3) and 107 of the NPC, were released. In a judgement of 4 March 1913,[40] Tallinn County Court referred to

[37] *Дело по обвинению рабочего Сакского пивоваренного завода В. Эвальд в оскорблении члена царской семьи* [File of Accusation in Lèse-majesté by a Sachs-Brewery Employee V. Evald]. ENA.105.1.9412, pp. 44–45.

[38] *О монарших милостях населению по случаю трехсотлетия Царствования Дома Романовых* [About the Royal Favour for the Population in the Occasion of the 300-Year Rule of the Romanov's Dynasty]. ПСЗ 33rd edition, part 1 – 38851, 21 February 1913.

[39] *Всемилостившейщий Манифест по случаю трехсотлетия Царствования Дома Романовых* [Most Gracious Manifesto Issued by the Occasion of the 300-Year Rule of the Romanov's Dynasty]. ПСЗ 33rd edition, part 1 – 38849, 21 February 1913.

[40] *Дело по обвинению арестанта Ревельской губернской тюрьмы № II К. Бутман в оскорблении царя* [File of Accusation in Lèse-majesté by K. Butman Who is Detained in Revel Prison No. II]. ENA.105.1.9560, p. 4.

the above mentioned manifesto and relieved K. Butman of his punishment. According to the file of accusation the person had offended the Tsar by saying: "I will fuck your laws, your Tsar and every one of you". This was the only case in Tallinn County Court where a convict, accused of a crime against the state, was relieved of the punishment. However, the reason was not in the wording of the penal law or in the liberal attitude of the court, but in a singular manifesto of amnesty.

On 19 February 1915, Tallinn County Court passed a verdict[41], sentencing A. Holmberg to a prison castle for one month, according to Article 103, Section 1 of the NPC. Article 103, Section 1 of the NPC allowed to prosecute a person who offended the Tsar aiming to demonstrate disrespect. This was an extraordinary settlement because it is the only one where the court identifies the will and aim of a person's actions, namely to demonstrate disrespect by offending the Tsar. The materials of the criminal record show that the accused had said the following: "Stop showing off with your Emperor – soon, there will be a time when you and your Emperor have bloody noses". While searching the accused's residence, two cameras, a map of Russia, a case of compasses, a pack of hand-written correspondence in Swedish and a box of photographs were found. All of the above mentioned items were kept with the criminal case; there was, however, no record of whether they were relevant evidence. The case file did not show whether these items were used to confirm the accused's culpability. The accused had been in custody during the pre-trial investigation and he was sentenced to one month in a prison castle. The sentence was considered to be served according to the law when the accused was in custody, as was the case with A. Holmberg. The file's materials reveal that Holmberg was taken into custody on 8 November 1914 and the decision was announced on 19 February 1915. The PC lacked a legal norm stating that it was necessary to identify the accused's intention to spread disrespect. However Article 246, Section 3 of the PC allowed sending the accused to a prison castle for eight months to one year and four months. In this case, the court identified that these were offensive words towards the Tsar and their aim was to create disrespect towards him. Significantly different degrees of punishment in sending the convict to a prison castle show a drastic change in sentences. While Article 103, Section 1 of the NPC sentenced the convict to one month in a prison castle, then the PC did not even have the option to hand down such a light punishment.

[41] *Дело по обвинению А. Гольмберга в оскорблении царя* [File of Accusation in Lèse-majesté by A. Holmberg]. EAA.139.1.4373, the file is non-paginated.

The last judgement of the NPC concerning offending the Tsar was passed 24 May 1916[42]. The court had sentenced M. Shakinovskaya to one and a half months of confinement for saying in the presence of witnesses: "Russian Tsar – bloody frog! He took my children and my soul". It is important to stress that the court brought out that the offence towards the Tsar was done out of lack of education. The court, however, did not explain what the essence of Shakinovskaya's lack of education was. The punishment was sentenced according to Article 103, Section 3 of the NPC. The court based its conviction on witness testimonials who claimed that M. Shakinovskaya had rowed with the landlord and had said the words mentioned above. Taking into account that Shakinovskaya's words were said because of her lack of education and comparing the usual insults directed towards the Tsar, the court's decision to sentence her to one and half months of confinement was a low degree penalty.

After analysing the judgements passed by the Tallinn County Court, one has to admit that applying the NPC did not bring any particular legal clarity compared to the period of the validity of the earlier, outdated and unclear law. Some verdicts have clearly implemented milder punishments than they could have under the PC. Therefore, it has to be admitted that a partial liberalisation occurred in legal practice. By analysing the judgements, it became evident that judges usually handed down a punishment that was under the average level of penalty; that is, under 3 months of confinement or up to 8 months in gaol.

Conclusion

The barrister Karl Grau's negative evaluation referred to in the introduction was given from the point of view of a practicing lawyer, and said that the situation in criminal law during the 20th century was sad and impossible. The judge had to use one criminal code in certain types of cases, the other code in other cases and sometimes both codes at once. The relatively small number of cases analysed here included a case where the court implemented a stricter punishment from the PC by default and without specific explanation, whereas the deed was qualified under the NPC. This was an exception.

The larger picture shows, that the plurality of law did not affect court practice much in the proceedings of crimes against the monarch, since the legal norms of the NPC replaced the relevant norms of the PC. This means

[42] *Дело по обвинению мещанки Минны Шакиновской в заочном оскорблении императора* [File of Accusation in Lèse-majesté by Citizen Minna Shakinovskaya]. ENA.416.3.170, p. 46.

that the court mostly applied the NPC and as a result it is possible to say that the hypothesis that the court could "fall back" on implementing the PC was wrong in those cases of Lèse-majesté. Still it is important to point out that in a similar study concerning the practice of Tallinn County Court in regard to crimes against religion the result was different – in those cases we can see one example of "falling back" on implementing the PC .

In cases of crimes against religion, the judges could use both penal laws. But it was different with crimes against Lèse-majesté, where judges mostly applied the NPC, so they were relieved of the task of choosing between different legal acts. Still, the common people faced difficulties in this context. The plurality of laws could confuse them because the common people did not know why there were different penal laws. K. Grau stated that having different penal laws "destroys the respect for the laws".[43] Nevertheless, it is unlikely that the accused gave this much thought, especially when using sharp words about the Tsar while intoxicated or angry.

[43] Grau 1921, p. 100.

PRE-MODERN DIVIDED OWNERSHIP IN THE MODERN LEGAL HISTORY OF ESTONIA

Marju Luts-Sootak

Introduction

Legal pluralism can exist in several different forms. The existence of multiple legal systems in one country or geographical area, or applying to one nation are well-known examples. Legal pluralism also occurs when different laws govern different groups in the same country or when different legal areas are governed by different legal systems. This is not a difficult situation to handle. Things get much more difficult, however, when different legal systems rule over the same legal area. All of these, and even more possibilities were discussed during our conference in Tartu in January 2015, and they are treated in most of the articles in this volume.

This article focuses on the situation where the same legal system and the same branch of law include two parallel legal solutions or concepts which, by their character and nature, should exclude one another. The example for this actual case study is chosen from the field of private law, more precisely, from property law. It will deal with one of the central institutes of property law: ownership. The modern concept of ownership accepts only what is called absolute or full ownership. However, the contemporary legal doctrine has already for some time spoken also of the 'decomposition of property rights': a shift from the modern concept of absolute ownership towards the concept of separated property rights.[1] These are the rights to use or to access property, rather than to own it outright.

This new model for the composition of property rights is structurally similar to the pre-modern concept of divided ownership. In this set of ideas, the upper

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[1] See e.g. Stake, J. E. Decomposition of Property Rights. 1999. *Encyclopedia of Law and Economics*, available at: http://encyclo.findlaw.com/1300book.pdf (23.6.2016) or "Composition, decomposition and recomposition of property rights" by Mackaay, E. *Law and Economics for Civil Law Systems*. Cheltenham, Northampton: Elgar, 2013, p. 238.

owner, *dominus*, had the *dominium directum*; while the lower owner or using owner, in a certain way also *dominus*, had the *dominium utile*. Neither the upper nor the lower owner had full authority over the property. Such forms of divided ownership could vary, but they were based on the theory of *ius commune* that had developed from the *glossatores* of the Middle Ages onwards[2] into a coherent concept of *dominium divisum* or *dominium duplex* in Early Modern legal doctrine.[3]

In the wake of the decline of full ownership in the present day, it is possible that we are now witnessing a renaissance of this old-fashioned divided ownership model. This return to the historically known ways should not necessarily or automatically be considered something false or bad. Perhaps the new use of the old concept of divided ownership may be justified for some specific relationships in property law, and should not displace absolute ownership even for other relationships. When tackling similar issues in our contemporary world, it might be possible to make use of historical experience and wisdom, as well as of the dogmatic schemes already in existence. This can be a valuable way of sparing the energy of lawyers dealing with positive law. As the contemporary 'decomposed property rights' have such clear similarities to divided ownership, this seems to be an opportunity – as well as a challenge – to legal historians in particular. After all, they are the only group of people still alive who are specialists in the dogmatics of divided ownership. At the same time, it is clear that these kinds of benefits for legal scholars and legal historians cannot overrule the interests of the parties of real legal relations, the true object of this study.

The legal history of Estonia, a part of the Baltic provinces of the Russian Empire in the 19th century, includes the parallel existence of full and divided ownership in the legislation. We also know some examples from the 19th and

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2 About the beginnings of the concept of divided ownership in the 13th century see Diestelkamp, B. Frühe urkundliche Zeugnisse für ‚*dominium directum*' und ‚*dominium utile*' im 13. Jahrhundert. *Grundlagen des Rechts. FS für Peter Landau zum 65. Geburtstag*, hg. von Helmholz, R. H., Mikat, P., Müller, J., Stolleis, M. Paderborn: Schöningh, 2000, pp. 391–403; for older literature, see the references in Wesenberg, G., Wesener, G. *Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung*. 4th ed., Wien: Böhlau, 1985, pp. 43 ff and p. 55. About the history of the concept of divided ownership in European legal history see e.g. Strauch, D. Das geteilte Eigentum in Geschichte und Gegenwart. *FS für Heinz Hübner zum 70. Geburtstag am 7. November 1984*, hg. von Baumgärtel, G., Becker, H.-J., Klingmüller, E., Wacke, A. Berlin, New York: De Gruyter, 1984, pp. 273–293 and Grossi, P. Das Eigentum und die Eigentümer in der Werkstatt des Rechtshistorikers. *Rechtsgeschichte und Theoretische Dimension*, hg. von Peterson, C. Lund: Olin-Foundation, 1990, pp. 26–78.

3 See e.g. Dernburg, H. *Die allgemeinen Lehren und das Sachenrecht des Privatrechts Preußens und des Reichs.* Vol. 1, 5th ed. Halle: Buchhandlung des Waisenhauses, 1894, pp. 415–417, for references to contemporary literature, see p. 415.

20th century, when the concept of divided ownership was utilised as a way of solving economic or social problems of the time. In this article I will focus on two such attempts. The first of these concerned the land usage rights of the evangelical clergy in the 19th century. The second was connected to the distribution of land to veterans of the War of Independence and other citizens following the establishment of the Republic of Estonia and the radical land reform, where the concept of divided ownership was again utilised.

Land use rights of the evangelical clergy in the 19th century Baltic provinces

The Baltic governorates of Estonia and Livonia[4] became part of the Russian Empire in 1710 during the Great Northern War.[5] The Russian army command gave their approval to the capitulations of local estates and towns, which were then subsequently also confirmed by the Tsar. The estates in their turn acknowledged their surrender to the new ruler with appropriate homage. It was customary in the international practice of the time that the new ruler would confirm the previous legal, administrative and judicial organisation, as well as previous confessional and church arrangements.[6] In fact, this last concession was more important than the other mentioned provisions or "*capitula*" in Latin. All the capitulations of 1710 begin with a clause promising that in Livonia

[4] Once the largest province of Livonia, it was named after the Finno-Ugric people, the Livonians or Livs, who settled between the Finno-Ugric Estonians and Baltic Latvians. The border between modern Estonian and Latvian republics follows the boundary between linguistic and ethnic Estonians and Latvians. The former Duchy of Estonia is now the northern part of Estonia; the Estonian Republic's southern part is the northern part of the former province of Livonia, of which the southern part in turn constitutes the northern part of present-day Latvia. The former Courland (the name comes from the Baltic tribe of Kurshes) is now the southern part of Latvia. Also Latgalia, which belonged to the province of Vitebsk until the First World War, belongs to Latvia. The third present-day Baltic state, Lithuania, was not included in the Baltic provinces during the tsarist period, but shared a common fate with those areas of Poland, which were added to the Russian empire with the third division of Poland in 1795. A summarized and illustrative history of the Baltic States, emerged from international cooperation: Kiaupa, Z., Mäesalu, A., Pajur, A., Straube, G. *The History of the Baltic Countries*, 3. ed. Tallinn: Avita, 2002.

[5] For an overview of the political and legal history of the Baltic territories with a bibliography, see Luts-Sootak, M. Baltic Nations. *The Oxford international encyclopedia of Legal History*, ed. in chief Stanley N. Katz, vol. 1. New York: Oxford University Press, 2009, pp. 253–257.

[6] See Ungern-Sternberg, J. Europäische Kapitulationsurkunden: Genese und Rechtsinhalt. *Die baltischen Kapitulationen von 1710: Kontext – Wirkungen – Interpretationen*, hg. von Brüggemann, K., Laur, M., Piirimäe, P. Wien: Böhlau, 2014, pp. 17–42.

and Estonia, as well as their capitals and other towns, the evangelical Lutheran church will be preserved with all its rights, belongings and establishments.[7] All that the Russian administration required was that the Orthodox faith would also be allowed in the provinces. In the beginning of the 18th century, only a few small Orthodox congregations existed in the towns – the whole of the rural population, as well as the majority of the population in towns was Lutheran.

Livonia's towns had already been through the reformation during Luther's own lifetime,[8] at the same time as German towns. The breaking point had been in 1521. The Teutonic Order likewise joined the reformation already in the first half of the 16th century.[9] The Order was in possession of most of the Old Livonian territories (Germ. *Alt-Livland*). The Peace of Augsburg, which established the Holy Roman Empire's church organisation and constitution for several centuries, was in 1555 among others also signed by the representatives of the authorities of Old Livonian territories. Three years later, the Russian Tsar, Ivan the Fourth Vasilyevich, better known as Ivan the Terrible or Ivan the Fearsome started the Livonian War or the First Northern War.[10] During this conflict, the Old Livonian confederation of feudal states disintegrated in 1561. The province known as Estland or Estonia became an autonomous duchy in the Kingdom of Sweden. Livonia initially fell under Polish-Lithuanian rule until it, too, was converted to an overseas province of the Swedish empire in 1629. The wars that Sweden fought, initially emerging from them victorious as the new great power of the Baltic Sea region, were mostly wars of religion and the king of Sweden was one of the most important defenders of the reformation both internationally and in his own state. Thereby, Estonia and Livonia were turned into completely Lutheran territories during the Swedish rule.[11]

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[7] Andresen, A. Formal stipulation and practical implementation of religious privileges in Estland, Livland and Courland under Russian supremacy: researching the core of Baltic regional identity. *Ajalooline Ajakiri – The Estonian Historical Journal* 2012/1-2(139–140), pp. 33–54.

[8] See Ruhtenberg, R. Die Beziehungen Luthers und der anderen Wittenberger Reformatoren zu Livland. *Baltische Kirchengeschichte: Beiträge zur Geschichte der Missionierung und der Reformation, der evangelisch-lutherischen Landeskirchen und des Volkskirchentums in den baltischen Landen*, hg. von Wittram, R. Göttingen: Vandenhoeck & Ruprecht, 1956, pp. 56–77.

[9] Wittram, R. Die Reformation in Livland. *Baltische Kirchengeschichte* 1956, pp. 35–56.

[10] For a more detailed overview and summary of this and the following era of military activities in Northern Europe: Frost, R. I. *The Northern Wars: War, State and Society in Northeastern Europa, 1558–1721*. Bingdon, New York: Routledge, 2014. More generally on this period in the Baltic Sea Area, see Kirby, D. *Northern Europe in the Early Modern Period: The Baltic World 1492–1772*. London, New York: Longman, 1990.

[11] Westrén-Doll, A. Die schwedische Zeit in Estland und Livland. *Baltische Kirchengeschichte* 1956, pp. 87–109.

The Lutheran confession was therefore one of the important elements that embodied the autonomy of the Baltic provinces in the Russian Empire, something that Baltic identity could be built upon to the First World War. This was particularly true for the German-speaking upper classes. In the 18th century, the local indigenous peoples, Estonians and Latvians, were almost without exception serfs, and thus devoid of any political rights anyway. But Lutheran church membership included them as well.

The Baltic land churches had one distinctive feature. The lands that had over time come into the possession of the church, and in the Middle Ages also the abbeys, had been distributed among manors of a patrimonial kind. Unlike their Swedish or German colleagues, the Baltic pastors were not dependent on church taxes and donations as their main source of income and means of subsistence. The population density was low, most of the people were extremely poor serfs and peasants – the taxes and donations could not, in any case, have amounted to much. Instead, the pastors earned their living thanks to church manors. The pastors themselves were for most purposes independent manor owners, similar in their status (personal nobility) and circumstances to noble landlords. Some of the pastors managed their lands themselves, some rented them out, yet others employed managers – just as the noble landlords.[12]

In any case, the legal grounds on which the pastors actually occupied and used their manors, the parsonage lands (Germ. *Pastoratsländereien*), needed to be established. In the 18th century, this was not yet seen as problematic. The literature stated that church manors are similar to noble or private manors, with the difference that they do not carry all political and economic privileges attached to noble manors, such as participation in the land diet, or the right to distil spirits (Germ. *Brennrecht*) and the right to run a public house (Germ. *Schenckrecht*). The right to hold fairs, however, also extended to church manors.[13] In the framework of the general codification movement in the 19th century Russian Empire, three volumes of Baltic provincial law were compiled: in 1845, the Code of Authorities (*Behördenverfassung*) and the Code of Estates (*Ständerecht*), and in 1864, the Private Law Code.[14] The codes of Civil and

[12] About the status and mentality of Baltic evangelical clergy, see Lenz, W. Zur Verfassungs- und Sozialgeschichte der baltischen evangelisch-lutherischen Kirche 1710–1914: Der Aufbau der Landeskirchen und die Stellung des Pastors in Liv-, Est- und Kurland. *Baltische Kirchengeschichte* 1956, pp. 114–117, 120–121.

[13] Hupel, A. W. *Von den Rechten der lief- und ehstländischen Landgüter, nebst andern kürzern Aufsätzen*. Riga: Hartknoch, 1790, pp. 29–32.

[14] *Provinzialrecht der Ostseegouvernements. Erster Theil: Behördenverfassung*. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzellei, 1845; *Provinzialrecht der Ostseegouvernements. Zweiter Theil: Ständerecht*. St. Petersburg:

Criminal Proceedings, promised by the central authorities and compiled by the provincial authorities remained without the confirmation of the emperor. The first three volumes of provincial law regulated the church institutions' relations to other official establishments, defined the rights of evangelical clergy as an estate as well as the legal regime of the church manors. The legal form of using rights concerning the parsonage lands was defined in private law.

The Baltic Private Law Act of 1864 included, in addition to the modern concept of absolute ownership, also the definition of pre-modern divided ownership:

> "Art. 942: Wenn das Recht auf die Substanz einer unbeweglichen Sache mit dem Rechte auf die Nutzungen in derselben Person vereinigt ist, so ist das Eigenthumsrecht ein vollständiges und ungetheiltes. Kommt aber Einem nur ein Recht auf die Substanz der Sache, dem Andern dagegen, neben einem Recht auf die Substanz, das ausschliessende Recht auf die Nutzungen derselben zu, so ist das Eigethumsrecht getheilt: jener wird Obereigenthümer (dominus directus), dieser Nutzungseigenthümer (dominus utilis) genannt."

The wording of this definition is very similar to the Austrian General Civil Code paragraph 357. The 10th volume of the Russian Collection of Laws included an identical definition.[15] According to Baltic Private Law, however, its field of application was to be much broader and more varied[16] than in the Austrian case[17]. Baltic Private Law used the model of divided ownership also more extensively than the General Land Law of Prussian States, which had in its turn been a model for the Austrian code in shaping the regulation of divided

Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzellei, 1845; *Provincialrecht der Ostseegouvernements. Dritter Theil: Privatrecht: Liv-, Est- und Curlaendisches Privatrecht*. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzellei, 1864. Although the original of the Baltic Private Law Act was compiled in German, it was immediately also passed an official Russian translation by the imperial department of codification.

15 On the implementation of the Austrian model in the Russian legislation, see Rudokvas, A. The Impact of Austran Civil Code (ABGB) of 1811 on the Concept of Ownership in Russia. *200 Jahre ABGB*, hg. von Geistlinger, M., Harrer, F., Mosler, R., Rainer, J. M. Wien: Manz, 2011, pp. 239–250.

16 On the ever-broadening use of the model of divided ownership in Baltic private law literature and in the Private Law Act, see Luts-Sootak, M. Macht und Ohnmacht der juristischen Begriffe. ‚Geteiltes Eigentum' als Begriff und Phänomen in der modernen baltischen Rechtsgeschichte. *Der allgemeine Teil des Privatrechts: Juristische Systematik, Methodik und Didaktik. Zu juristischen Begriffen und der Begrifflichkeit des Rechts.* Collection of articles of the conference in Stockholm, 29.–31.05. 2014, should be published by Olin-Foundation.

17 Pichler, J. W. Das geteilte Eigentum im ABGB. *Zeitschrift für Neuere Rechtsgeschichte* 1986/8, pp. 23–42.

ownership. In any case, by the time the Baltic Private Law Act was brought into force, the Prussian code had been in force for seventy, the Austrian General Civil Code for more than sixty and the Russian code for at least thirty years. It was an era during which Europe was modernising fast, not only in the fields of economy and society, but also law.[18] The unsuitability of the Baltic Private Law Act regulation in 1865 becomes especially clear if it is compared to the Saxon General Civil Code, brought into force the same year. The Saxon code not only did not include the concept of divided ownership, but prohibited the use of such a concept *expressis verbis*:

> "§ 226. Die im Eigenthume enthaltenen Befugnisse können nicht unter mehreren Eigenthümern so getheilt sein, daß der eine ein Obereigenthum und der andere ein nutzbares Eigenthum hat. /.../ Die Ueberlassung einzelner Eigenthumsbefugnisse an einen Anderen kann nur Rechte an einer fremden Sache begründen."

The contemporary Baltic Private Law Act, however, continued in the spirit of the circa 700-year-old doctrine of divided ownership, with the help of a modern code giving it a firmer footing than any legal scholarship ever could. In addition to divided ownership as a result of an agreement or a will, it also included divided property that had come into being on the basis of legislation. This latter category also contained the right of usage in parsonage manors as *dominium utile*:

> "Art. 945: Kraft gesetzlicher Anordnung gebührt das Nutzungseigenthum (dominium utile) den Predigern an den Pastoratsländereien, sowie den Beamten an den ihnen verliehenen Widmen; während das Obereigenthum an den Pastoraten der betreffenden Kirchengemeinde (dem Kirchspiel), an den Beamtenwidmen der Krone zusteht."

At first sight, the utilising of divided ownership for the establishment of user rights over parsonage land could be regarded as a rather smart or at least a pragmatically reasoned solution – the pastor's right to his church manor is on clear legal grounds, while the church was also reassured that the pastors would not take advantage of their position, for example, by selling the church manor to someone else. The new owner could have claimed to have made a

[18] The German historian Reinhard Koselleck referred to the great era of modernisation from c. 1750 until c. 1850 "Sattelzeit". Koselleck, R. Einleitung. *Geschichtliche Grundbegriffe*, hg. von Brunner, O., Conze, W., Koselleck, R., vol. 1. Stuttgart: Klett, Cotta, 1979, p. XV.

bona fide acquisition, and the church would thereby have lost the manor for good. As the institute and legal dogmatics of divided ownership were already in existence and well-developed, there was no need to develop any new dogmatic legal schemes concerning how the rights and duties, expenditures and risks and so on would be distributed.

The law tried to elaborate who exactly was the upper owner of the parsonage lands, but instead of more clarity, this resulted in more confusion. The church congregation (Germ. *Kirchengemeinde*) was a religious unit, the parish (Germ. *Kirchspiel*) however, an administrative one. It is therefore no wonder that a heated debate arose in the Baltic press about who the church lands actually belonged to. The academic lawyers decisively rejected the viewpoint that the real upper owner was the Russian Empire's evangelical church[19] – such a church did not exist. It only existed as an administrative organisation to supervise and control the actual churches. This control organ could not, however, be the carrier of the church's property rights. Or, as summarised by Carl Erdmann, professor of provincial law at the Baltic university of Dorpat (Est. Tartu): the public right of supervision should not be confused with civil property rights.[20] At the same time, this exclusion did not make it fully clear who was the upper owner of the Lutheran church's land properties in the Baltic provinces. It was impossible to talk even about a provincial-level *Landeskirche* because such a unified church for all Baltic provinces or even for everyone of them also did not exist. Therefore, the only possible upper owner remained the local church itself, which was probably also the intention of the Private Law Act. Professor Erdmann rejected the possibility that the upper owner could be the parish as an administrative unit at the second level, as an obvious error and legal inaccuracy. The only possibility left was the church congregation, but even in this case, different alternatives were possible. Erdmann pointed out three possible variants[21]:

- the church congregation as a group of people who at a certain point in time are members of the local church;
- the manor owner or the association of owners that has the right of patronage over the local church[22];

[19] This was pointed out by a Couronian legal practitioner. See Adolphi, A. Das Eigenthumsrecht an den Pastoratsländereien der Ostseeprovinzen. Erwiderung. *Baltische Monatsschrift* 1882/29, pp. 654–655.
[20] Erdmann, C. Zur Erwiderung. *Baltische Monatsschrift* 1882/29, pp. 772–774.
[21] Erdmann, C. Das Eigenthumsrecht an den Pastoratsländereien der Ostseeprovinzen. *Baltische Monatsschrift* 1882/29, p. 411, note ***).
[22] On the right of church patronage and its historical development in Livonia, see Schmidt, O. Geschichte des Kirchenpatronats in Livland. *Dorpater Juristische Studien* 1894/3, pp. 37–74.

- the local church as an institution and legal person (Germ. *juristische Person*).

It is clear that of the alternatives presented in such a way, the third one could be the only serious one. Either by default, or by reference to Erdmann, this became the dominant viewpoint in the following legal literature: in legal treatises about the property rights[23] and overviews of agrarian reforms of the 19th century[24].

Although Erdmann at the same time also supported the completely legally deviant viewpoint that both the pastor's and the official's right to use the land was only a matter of public law; therefore, a right similar to the right to salary,[25] the dominant viewpoint remained the law-abiding one that the pastor's right to use the land was only a part of divided ownership – the lower ownership or the ownership of usage, *dominium utile*. Professor Erdmann's example invalidates the hypothesis, which I initially raised, that the enactment of the model of divided ownership could have been viewed favourably by legal scholars, if no one else. Erdmann was namely sharply critical of the solution of Baltic Private Law Act, where both absolute and divided ownership were valid in legislation side by side.[26] His example was also generally followed by later scholars and commentators.[27]

Even the authors who in principle accepted Erdmann's thesis about the public law character of the pastor's right of land use[28] could not ignore the more particular restrictions that the Private Law Act imposed on the possessor and

[23] Kupffer, V. Das unbewegliche Vermögen der evangelisch-lutherischen Landkirchen Livlands. *Baltische Monatsschrift* 1891/38, pp. 452–460; Невзоров, А. *Краткое изложение курса местнаго права Прибалтийских губерний [A short compendium of the local law of the Baltic governorates]*, vol. 1. Jurjev: Mattiesen, 1909, pp. 99–100; Буковский, В. *Свод гражданских узаконений губерний Прибалтийских* [Baltic Civil Law Act], vol. 1. Riga: Hempel, 1914, p. 409, note б).

[24] E.g. Tobien, A. *Die Agrargesetzgebung Livlands im 19. Jahrhundert*. Bd. 2: Die Vollendung der Bauernbefreiung. Riga: Löffler, 1911, p. 315.

[25] Erdmann 1882, p. 420.

[26] About Erdmann's criticism and his proposed alternatives in more detail, see: Luts-Sootak, Macht und Ohnmacht.

[27] Casso, L. *Обзор Остзейскаго гражданскаго права* [Overview about the Baltic Civil Law]. Jurjev: Mattiesen, 1896, p. 83; Nevzorov, A. *Краткое изложение курса местнаго права Прибалтийских губерний* [A short compendium of the local law of the Baltic governorates], 2nd ed. vol. 1, Jurjev: Mattiesen, 1919, p. 99; Tjutrjumov, I. *Гражданское право* [Civil law], 2nd ed. Tartu: Laakman, 1927, p. 176 all claim, quoting Erdmann, that these are merely different forms of *iura in re aliena*. At the same time, all of the authors used in their overviews the sub-title „Divided Ownership", just as in the code. Erdmann himself did the same, but he displayed his distaste already in the title. § 115 bears the sub-title „The so-called Over- and Usage Ownership (Germ. Das sog. Ober- und Nutzungseigentum)". Erdmann, C. *Das System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland*, vol. 2. Riga: Kymmel, 1891, p. 15.

[28] E.g. Seraphim, F. Nachträgliche Erörterung einiger Fragen in Betreff des s. g. Gnaden- oder Trauerjahrs nach dem Gesetze für die Evangelisch-Lutherische Kirche in Rußland. *Dorpater Juristische Studien* 1893/1, p. 109.

user of parsonage lands. It is clear that the pastor was not allowed to sell or give away the land he had received to use, neither wholly nor partially. The law, however, also prohibited servitudes and mortgages – just as with the noble so-called knight manors (Germ. *Rittergut*). The noble landlords were soon awakened from their feudal slumber and managed to get the sale and mortgage prohibitions of the code overturned in a matter of a few years. Thereby, their lands were soon capitalised, and included in general economic circulation. In the case of church manors, however, these pre-modern restrictions on ownership remained in force until the end of the tsarist empire. This meant that about a tenth[29] of all manors in Baltic governorates remained outside the modern real estate market.

There was yet another important restriction connected to church manors, which concerned, above all, the peasants living within their territory. As already said, the peasants of the Baltic provinces at the beginning of 19th century were still serfs, and also ethnically separate from the upper classes. In Estonia and northern Livonia, the peasants were Estonians, in southern Livonia and Courland they were Latvians. From 1816 onwards, the peasants of the Baltic provinces were emancipated from serfdom and became personally free. At the same time, corvée was to be abolished as the peasants' main duty, which corresponded to the duty of the manors to provide them land to live on. In the subsequent agrarian reforms, a clearly identified part of the lands of the manors was separated and divided into farmsteads that peasants could rent from the manor owner in return for agreed payment. Initially, this payment was still in the form of obligatory day work that had no apparent difference from the earlier corvée. Gradually, however, money rent became prevalent and in the second half of the 19th century, the practice of selling farmsteads off to peasants gained ground.[30] In this way, in a matter of decades, European-style small land ownership took root in the Baltic provinces. In this way the Baltic provinces again turned out to be very different from the inner governorates of

[29] The number of church manors of all the manors was 9.4%, but land-wise, they were much smaller, covering only 2.23% of all manor lands. See Rosenberg, T. Kiriku maaomand ja maakasutus Eestis 19. sajandil ja 20. sajandi algul [The land ownership and land usage by the church in Estonia in the 19th century and at the beginning of the 20th century]. *Vene aeg Eestis. Uurimusi 16. sajandi keskpaigast kuni 20. sajandi alguseni* [The Russian time in Estonia. Studies from the middle of the 16th century to the beginning oft the 20th century], ed. by Tannberg, T. Tartu: Estonian Historical Archive, 2006, p. 281.

[30] See Laur, M. Der Bauernlandverkauf in Livland – das entscheidende Kapitel der Bauernbefreiung im 19. Jahrhundert. *Zeitschrift für Ostmitteleuropa-Forschung* 2003/52, pp. 85–94; for further literature see Lust, K. The Impact of the Baltic Emancipation Reforms on Peasant-Landlord Relations: A Historiographical Survey. *Journal of Baltic Studies* 2013/44, pp. 1–18.

Russia where serfdom was finally abolished in 1861, but the land remained the property of the village community.[31] The landlords as the former upper owners were thereby replaced by the village community as the new upper owner. Single peasants only gained the usage right over a so-called soul land, for which the village lands were regularly redistributed every few years.

The peasants of Baltic provinces, however, received modern absolute ownership of the land that they had paid for, and thereafter they had even more rights than the Baltic German landlords they had envied for centuries. This envy and hatred existed not only because of the fine homes and higher standard of living of the landlords, but mainly because back in the Middle Ages the ancestors of the landlords had taken the land that had belonged to Estonians and Latvians. While the 19th century industrialisation had caused the so-called escape from the land (Germ. *Landflucht*) and migration from rural areas to towns in the rest of Europe, the direction – and the dream – of migration for Estonian peasants was from countryside to countryside. The difference between the countrysides was that where the peasants came from, they did not have their own land in ownership or in possession, whereas where they were going, such land was available. In the vast reaches of the Russian Empire, there were many areas where Estonian peasants with their Lutheran upbringing could soon enough reach an acceptable standard of living. At the end of the 19th century, a little more than a tenth of the Estonian population (approximately 110 000) was already living in several Russian governorates as settlers.[32]

The ownership of land played an enormous role in particular in the dreams and life plans of Estonian peasants. In Latvia, industrialisation and urbanisation had proceeded somewhat faster and the dream of land ownership played a less prominent role. In Estonian family traditions, however, the stories about grandfathers or their fathers who had fully paid their dues and become independent owners of farmsteads are still a proud feature.

Such stories, however, cannot be told about forefathers who accidentally happened to live on the territory of a church manor. It remained forbidden to sell off farmsteads from parsonage lands, even though this option began to be discussed immediately after the enactment of the Private Law Act in 1865.[33]

31 See Moon, D. *The Abolition of Serfdom in Russia, 1762–1907*. London: Routledge, 2001.

32 Arens, I. *Die estnische Rußlandkolonisation im 19. und 20. Jahrhundert und die Trans-Peipus-Esten unter dem Zaren- und Sowjetregime 1861–1941*, vol. 1–3. Bonn: Baltisches Forschungsinstitut, 1964–1971.

33 Masing, G. Ueber den Verkauf der Pastoratsländereien. *Baltische Monatsschrift* 1865/11, pp. 205–239; Brasche, G. Ueber den projectirten Verkauf des Pastoratsbauernlandes. *Baltische Monatsschrift* 1865/12, pp. 83–86.

The last law proposal with such an aim was presented to the Russian Imperial State Duma as late as 1914.[34] The wish that farmsteads could be sold off from the church lands – or rather that they could be bought – was also one of the recurring demands that the activists of the Estonian nationalist movements posed to both local and imperial authorities.[35] All such initiatives, that came either from the pastors themselves or from the peasants, were rejected either by the knighthoods as local authorities or by the Russian administration, or alternatively, they were postponed due to more extensive reforms being planned.[36] The latter, however, were never realised. The public debate also included some people who rejected the sale of farmsteads. One was the pastor and sociological writer Fedor Schmidt, who used the pseudonym Dr. F. S. Warneck from Courland, and who, among other things, pointed out the potential of the church lands to forestall social conflicts. Warneck thought that some of the land should be left outside the selling-off process and made available for rent to those peasants who lacked – or had not yet acquired – enough wealth to buy a farmstead. The farmsteads rented from church manors should thereby form a kind of buffer to facilitate social mobility from the lowest level, the ranks of farmhand and servant. Warneck also claimed that the church manors are relatively equally distributed across the land, which meant that such a buffer would help bridge social differences everywhere.[37] Perhaps it held true for Courland that the parsonage lands were relatively equal in size and evenly distributed, but in Estland and Livland, the church manors were of very different sizes and their percentage among other manors could vary widely. At the same time, Warneck left unnoticed that the sale or rent of a single manor's lands was available only to peasants listed among the members of the same manor community. A poor peasant coming from somewhere else could not therefore rent a farmstead from a church manor without complicated bureaucratic proceedings. Therefore, one could not take seriously Warneck's claim that the reserve of rental farmsteads at church manors would ensure competition and further the entrepreneurial spirit of capitalism – unlike the farmsteads that had already been sold to someone and that Warneck thereby considered to have left the market.[38] Since these rental plots were not available

[34] Karjahärm, T. *Ida ja Lääne vahel: Eesti-Vene suhted 1850–1917* [Between East and West: The Estonian-Russian Relationship 1850–1917]. Tallinn: Eesti Entsüklopeediakirjastus, 1998, p. 386.

[35] Karjahärm 1998, p. 272.

[36] *On the contemporary reform initatives and movements see Pistohlkors, G. v. Ritterschaftliche Reformpolitik zwischen Russifizierung und Revolution*. Göttingen: Musterschmidt 1978.

[37] Warneck, F. S. Landbesitz der Kirche in seinem Princip und den praktischen Consequenzen. *Baltische Monatsschrift* 1881/28, pp. 126–129.

[38] Warneck 1881, p. 130.

to just anyone, there was no free competition involved. Rather, it was the other way around: just as with church manors in general, the farming land that belonged to them was left outside the general marketization and economic mobilisation. The recurring reform initiatives and discussions show that such a situation was far from good and satisfactory. I should also mention as a remark that the peacemaking function of Courland's church manors was seriously put into question by the revolutionary events in 1905. This was particularly true in the territories populated by Latvians; that is, in Courland and the southern part of Livonia, where the peasants acted most violently against their manor owners, as well as pastors. Estonian peasants sent numerous letters and petitions to the governor and the central administration, but they were not inclined to kill or torture the manor owners.

Therefore, the use of divided ownership in order to justify the usage rights over parsonage lands did not lead to a result that the counterparts of those relationships would have been happy with. In reality, both pastors and peasants were interested in selling off farmstead plots from church manors, but the concept of divided ownership rendered it impossible. Similarly, as we have seen, legal scholars were not at all satisfied with the solution upheld in the Baltic Private Law Act, but rather supported putting the usage rights of church manors on a public law basis.[39] In addition to restrictions on sale, the parsonage lands were burdened with other pre-modern restrictions. Economically, a particularly considerable hindrance proved to be the restriction on mortgages – while private manor owners and land-owning peasants could restructure and modernise their agricultural production with the help of loans guaranteed by the mortgage, this was prohibited in the case of church manors.

It is nevertheless probable and believable that the farmsteads of church manors would have eventually been sold off; if not, then WWI and revolutions ultimately brought an end to the tsarist empire and created a completely new political and legal situation.

[39] In addition to Erdmann, in more detail about the standpoints of other Baltic, Russian and Estonian legal scholars, see Luts-Sootak, Macht und Ohnmacht.

Divided ownership as a guarantee of Estonian national liberty and social peace – the experience of the Estonian Republic between the World Wars

When Bolshevist Russia exited the Great War, Estonian soldiers were finally able to return home from the army and start cultivating the land. This, of course, only holds true for those of them who already owned or had rented a piece of land.

The peace did not last for long, however.[40] The Baltic German nobility and town patrician who had ruled the land for centuries were not at all inclined to accept the existence of the new republic, which had been declared by Estonians in February 1918, immediately before the land was occupied by imperial German troops. The *Landeswehr* formed by Baltic Germans in the territory of Latvia also included among its membership those German soldiers from the Eastern Front who did not want to leave the war behind. From the east, the young Estonian republic was threatened by the Bolshevik Red Army. But the Temporary Government of the Estonian Republic could appeal to those who had not yet been able to fulfil their particularly Estonian kind of dream – to have a farmstead. Land was promised in return for defending the homeland, and this was instrumental in mobilising the men to the War of Independence.[41]

For Estonians, the war ended with a glorious victory – a chance to secure their own statehood. After the war, this state had to make good its wartime promise to distribute land either to men who had participated in the war, or the families of those who had fallen. In order to create the national land fund, most of the manor lands were expropriated, leaving the previous manor owners with plots comparable in size to larger farmsteads.[42] In addition to the veterans of the War of Independence, land was also distributed to the agrarian proletariat or landless men, in order to integrate them also into the Estonian national state as loyal citizens. There were different viewpoints on the land question, but the labourists and national liberals were able to reach a compromise, and as in

[40] For a good overview of Estonian and Baltic history, with emphasis on the 20th century, see Kasekamp, A. *A history of the Baltic states*. Basingstoke, New York: Palgrave Macmillan, 2010.

[41] Ajutise Valitsuse määrus [Decree of Provisional Government] 20.12.1918. *Riigi Teataja* [The State Gazette] 1918/9.

[42] See Mertelsmann, M., Mertelsmann, O. *Landreform in Estland 1919. Die Reaktionen von Esten und Deutschbalten*. Hamburg: Kovač, 2012, for a short overview of the reform pp. 10–11 and a historiographical overview pp. 19–22; Rosenberg. T. Agrarfrage und Agrarreform in Estland 1919: Ursachen, Voraussetzungen und Folgen. *Eesti Teaduste Akadeemia Toimetised. Humanitaar- ja sotsiaalteadused* [Proceedings of Estonian Academy of Sciences. Humanities and Social Sciences] 1994/3, pp. 326–335.

many other places in Europe at the time[43], a Land-to-the-Tiller reform was carried out in Estonia.

The legal basis of the Republic of Estonia's land reform was the Land Law from 10th October 1919,[44] which only in very vague terms talked about "giving" and "receiving" land, leaving completely open the form of ownership or usage rights that the redistributed land would take. The land plots for farmsteads were measured out and even redistributed fast enough. At the same time, no one knew precisely in which legal meaning the land was "given" by the state and "received" by the former soldier, widow of the soldier, farmhand, manor worker, or previous renter on manor land. Legal clarity first arrived in 1925 with the law of the redistribution of state lands[45]. This regulated both the transfer of ownership as well as the distribution of plots on the basis of "permanent use". Of course, "permanent use" was a similarly imprecise term in any legal sense. The legislator, however, elaborated in § 11 its aims by specifying that these ownership relations were to be based on the norms of the Baltic Private Law Act that concerned divided ownership in general (art. 942 ff) and permanent lease in particular (art. 1324 ff). Permanent lease was a legal institution known in German as *Erbzins* or *Grundzins*. It had its beginnings in medieval towns and its functional equivalent should thereby have been the *superficies* of Roman law, but the rural institution of *emphyteusis* is rather named as the Roman law equivalent in the Baltic code. The essential difference from these Roman law institutions was that in Ancient Rome, they were considered merely *iura in re aliena*, and not a separate form of ownership. However, they were one of the core forms of divided ownership in medieval towns, in the Baltic Private Law Act and in the Republic of Estonia in the third and fourth decade of the 20th century.

At first sight, it might seem to have been a rather elegant solution to use divided ownership as a way of carrying out the land reform in the young Republic of Estonia: 1) the rent to be paid for the permanent lease was very

[43] For a good comparative analysis with a focus on Estonia and the economic consequences, see Kõll, A. M. *Peasants on the world market. Agricultural Experience of Independent Estonia 1919–1939*. Stockholm: Centre for Baltic Studies, Stockholm University, 1994; with focus on the East Central Europe, see Roszkowski, W. *Land Reforms in East Central Europe after World War One*. Warsaw: Institute of Political Studies, Polish Academy of Sciences, 1995. Another comparative study where Estonian land reform is analysed among others is Jörgensen, H. The Inter-War Land Reforms in Estonia, Finland and Bulgaria: A Comparative Study. *Scandinavian Economic History Review* 2006/54, pp. 64–97.

[44] Maaseadus [Land Law]. *Riigi Teataja* [The State Gazette] 1919/79–80.

[45] Riigimaade põliseks tarvitamiseks ja omanduseks andmise seadus [Statute on the Transfer of State Lands in Permanent Use and Ownership]16.6.1925. *Riigi Teataja* [The State Gazette] 1925/109–110.

small, and therefore convenient for a class of people who could not have afforded to pay more anyway; 2) as the upper owner of the land, the state retained a degree of control over the plots redistributed and if the permanent leaseholder owed three years worth of rent, the state could reclaim the land again; 3) as the permanent leaseholder contracts did not need to be renewed periodically like regular rental contracts, which were valid for up to six years, the state's management costs were lower as a partner in permanent leases. Until 1926, more than 25,000 plots (25,530) were already given to permanent lease and only a little more than 6,000 plots (6,189) were rented out by the state.[46]

In any case, the upper owner's means of control and decision-making were much more restricted than was the case with regular rental contracts between the absolute owner and the renter. One of the main ideas that Estonian land reform was built on was the viability principle. On the one hand, viability was supposed to mean that the redistributed land plots had to be large enough to make profitable cultivation possible or at least provide the subsistence needs of the family using it. On the other hand, however, viability also meant that the land acquirer and future user needed to have the necessary prerequisites and abilities to cultivate the land effectively and in a profit-oriented way.[47] In order to ensure that both sides of the viability principle are fulfilled, the state closely cooperated with local institutions of self-government. While in the case of a careless renter, the state could refuse to sign the rental contract for the next period, it had no such power over a permanent leaseholder – the institution of divided ownership made this impossible. An additional problem was again connected to the availability of credit. It was impossible to burden the permanently-leased land with mortgages. Without credit, however, it was also impossible to develop intensive and technologically innovative agriculture. In 1926, the so-called reform farmers or settlers (Germ. *Siedler*) formed their own political party. One of their first and most important demands had to do with increased credit possibilities,[48] something that was severely restricted precisely because of the divided ownership issue, and which hindered access to credit on the basis of the guarantee offered by the land plot itself. In this way,

[46] Janusson, J. Maareformi teostamine 1919–26 [The Realisation of Land Reform 1919–26]. *Eesti Statistika, ilmub üks kord kuus/Requeil Mensuel du Bureau Central de Statistique de l'Estonie*, 1928/3, p. 173.

[47] For more about the details of the idology of viability by the Estonian land reform: Kõll 1994, pp. 50–52.

[48] Asunikkude, riigirentnikkude ja väikepõllupidajate koonduse põhilaused. Vastu võetud 1. üleriiklisel koonduse kongressil 21. ja 22. veebruaril 1926. aastal [The general principles of the coalition of settlers, state leaseholders and small farmers. Passed on the first general meeting of the coalition on the 21st and 22nd February 1926]. *Maa* [The Land] 1926/2, 3.3.1926, p. 4.

the institution of divided ownership, meant to ensure social peace, turned out to be a fresh source of social discontent. Unfortunately, we cannot evaluate the Estonian legal solution from the comparative perspective. There are very good comparative works by contemporary authors and from post-war researchers as well.[49] But, contemporary works are usually politically biased and later research is limited to economic, political, social historic or similar perspectives and backgrounds. The question of the legal basis and form of land redistribution and land usage has usually remained outside the scope of attention, or the historians have not considered it an important factor influencing social and economic processes. All the same, the question of land capitalisation and the availability of credit, based on mortgage, should also be important enough for historians of economy, who should pay attention to the downsides of divided ownership.

Unfortunately, it is also impossible to give a balanced judgement of the land law solutions used by the Republic of Estonia from the Estonian point of view. On the one hand, we have the necessary historical distance; on the other hand, we do not have the historical continuity, which is also necessary for such an evaluation. Economic and property relations were disrupted by the Soviet occupation of 1940. However, after re-establishing the independent Republic of Estonia in 1991, and the new land reform on the basis of the principle of the reprivatisation of land to its former owners or their descendents, the divided property model was abolished completely. The former permanent leaseholders received full ownership of the land and the problems with credit and land capitalisation are now solved. Although the Republic of Estonia was re-established on the basis of the ideology of the continuity of statehood,[50] there were major differences during the 1990s in the larger international framework (globalisation, European Community or Union, harmonisation of European law etc.), as well as in the state's inner structures (since the 1960s, there had been rapid urbanisation and migration from the countryside to the towns; the Soviet collectivist and state-led agriculture had destroyed the old economic and administrative structures). Therefore, the new solutions used in Estonian

[49] For a detailed historiographical overview, see Rosenberg, T. Zur estnischen Agrarreform von 1919 in Geschichtsschreibung. *Nationale und ethnische Konflikte in Estland und Lettland während der Zwischenkriegszeit*. Lüneburg: Carl-Schirren-Gesellschaft, 2009, pp. 25–44. See also note 42 and 43.

[50] Mälksoo, L. *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR*. Leiden, Boston: Nijhoff, 2003.

law cannot be regarded either as a continuation of the republic's interwar legal order, nor as an attempt to learn from its lessons.[51]

In hindsight, it seems that between the two world wars, the Republic of Estonia was able to use divided ownership as a relatively successful tool to regulate the land question mainly for two reasons. Firstly, the state was in possession of a rather large amount of land to be redistributed[52] and new land amelioration technologies even made extensive bog and woodlands cultivable. The state was also able to solve the unemployment problem following the international economic crisis by creating new settler farmsteads and leasing them out for "permanent use".[53] The other reason is directly connected to the short existence of the Republic of Estonia (1918–1940) in the interwar period and the radical social and political rearrangements following World War II across Eastern Europe.

Therefore, we only have indirect evidence that the preservation of the institution of divided ownership in Estonian law was nevertheless not seen as useful in the long run. It was stated in the legal literature that "by its juridical construction, permanent lease is one of the most controversial and confused problems in the property law part of the Baltic Private Law Act".[54] Neither was the institution of divided ownership – in addition to modern complete ownership – legislated in the draft for the Civil Code, which by 1940 had been debated in the parliament, but due to the Soviet occupation was never passed. The section of drafts on restricted property laws did in fact include a property law called permanent rent, which in some aspects was reminiscent

[51] About the historical context and role models for private law reform in the Republic of Estonia post-1991, see Luts, M. Die estnische Privatrechtsreform zwischen den Vorbildern aus der Geschichte, aus Deutschland und aus der europäischen Zukunft. *Deutsch-Estnische Rechtsvergleichung und Europa*, hg. von Oksaar, S. I., Redecker, N. Frankfurt am Main: Peter Lang, 2004, pp. 51–68; idem, Die neue estnische Privatrechtskodifikation zwischen Geschichte und Zukunft von Europa. *Die Kodifikation und die Juristen*, hg. von Peterson, C. Stockholm: Olin- Foundation, 2008, pp. 133–156.

[52] The Estonian land reform has been called one of the most radical in Europe, since the 1919 reform transferred into the national land fund 2.3 million hectares of land, which was 96.6% of the previous large land holdings by manors.

[53] For an overview of the Estonian settlement policy in connection with the economic crisis and new state policies, see Lutsepp. E. Asunduspoliitikast Eesti Vabariigis: Asundusameti tegevus 1929–1941 [The policy of settlement in the Republic of Estonia: the activities of the Settlement Committee in 1929–1941]. *Ajalooline ajakiri: Eesti talurahva ja põllumajanduse ajaloost* [The Estonian Historical Journal: The history of peasantry and agriculture in Estonia] 2007/3-4(121/122), pp. 443–462.

[54] Grünthal. T. Otsese omaniku õigustest kruntrendile (obrokile) antud kinnisvara suhtes [On the rights of the direct owner on the real estate on permanent lease]. *Õigus* [The Law] 1931/8, p. 358.

of permanent lease: it was a form of a temporally unlimited right of usage (§ 1129); the amount of yearly rent again could not be changed unilaterally, but deviating from the Baltic Private Law Act, the Civil Code included an option for concluding the agreement with terms describing how this point could be changed later on (§ 1138). The main reference to pre-modern divided ownership seems to be the rule whereby, if the permanent renter has left the rent unpaid for three consecutive years, the owner of the property burdened by permanent rent could demand the sale of the permanent renting rights at auction, where even he could also participate (§ 1139). Therefore, it was not an automatic case of the owner's *ius recadentia* – the restitution of the property into the full authority of the owner as per divided ownership. The Civil Code also allowed the permanent renter to burden his permanent rent right with servitudes and mortgages without the agreement of the owner of the property; although, the rights of the owner could not thereby be infringed (§ 1135). The purpose of this regulation was probably to hinder the previous divided ownership's restrictions on the capitalisation of the land. Unfortunately, how this new solution, chosen by the Estonian legislator, would have functioned in practice remains unknown.

Conclusions

The presented examples from the modern history of Estonia, which show that the use of pre-modern institutions alongside those of modern law might at first sight seem like a justifiable measure. On the other hand, the example of church manors already shows that the restrictions connected to divided ownership do not fit modern free-market conditions. The original intention of usage ownership had been to strengthen the legal situation of the pastors and church manors, but in the end, it put both the manors and the peasants living on parsonage lands in a rather unequal and less than beneficial position. The lawyers, also, did not care much for the chance to save their dogmatic energy, but criticised the use of the institution of divided ownership – in addition to full ownership – both from the legal dogmatic and legal political perspective. The lawyers of both the Russian Empire and the Republic of Estonia rather preferred the solution already known from Ancient Rome: property ownership is absolute and complete, and all other ways of using it by others are merely *iura in re aliena*, and in each separate case, an appropriate legal dogmatic needs to be developed. So it seems that the only true winner emerging from the use of two

parallel forms of property ownership was the Republic of Estonia between 1919 and 1940 – the idea of divided ownership helped to solve the ever-present "land hunger" issue, a very efficient and economically viable solution was found both for the recipients and the providers of the land (the state), and the otherwise socially volatile proletariat – both rural and urban – was engaged in small and medium-sized farmsteads, which helped to defuse the politicization that had followed urbanisation and could have endangered the elites; for example, after the authoritarian coup d'etat in 1934. At the same time, we cannot ignore the fact that the survival of the Republic of Estonia between the wars was short-lived, and we do not actually have a way of evaluating the justifiability of the choices made at that time from a long-term perspective.

III. CIVIL LAW

HUMAN RIGHTS ASPECTS OF CONSUMER PROTECTION UNDER EU LAW

Kåre Lilleholt

Consumer protection, human rights and principles

This chapter discusses how human rights have influenced and may come to influence consumer protection under EU law. Human rights may strengthen and refine the rules protecting consumers, but they can also potentially limit consumer protection due to individuals' rights.[1]

In EU law, 'fundamental rights' is a more common category than 'human rights'. The terminology is now firmly established by the Charter of Fundamental Rights of the European Union (EU CFR). The Charter includes certain rights, freedoms and principles that are also established in international human rights instruments – not least the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which the Charter explicitly refers to.

Other rights and principles in the Charter are not commonly thought of as human rights. Among these is the principle of "a high level of consumer protection" in Article 38 of the Charter.[2]

'Consumption' and 'consumers' are economic concepts. The consumer is a kind of market player. We are all consumers; it is one of our roles in society. *Consumer* has also become a legal concept and consumer protection rules specifically protect us *as* market players. For example, rights to dignity, life, integrity, personal security, freedom of thought and expression are not

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1 For obvious reasons, only a few issues can be dealt with here. A comprehensive discussion of human rights and EU consumer law can be found in Benöhr, I. *EU Consumer Law and Human Rights*. Oxford: Oxford University Press, 2013.

2 But see the discussion on a new generation of human rights, Benöhr 2013, pp. 46–50.

consumer rights. Rather, these rights belong to everyone, regardless of role or situation.[3]

Even if the right to consumer protection cannot be categorised as a human right – certain aspects of human rights may still influence consumer protection.

In EU law, consumer protection comprises more than economic interests. It also covers health, safety, information, education and the right to organise.[4] This paper concentrates on protecting the consumer's economic interests as a contract party, thus leaving aside product liability for example. Regulation of contractual relationships constitutes the bulk of EU law on consumer protection. This is natural because the role of the consumer as a market player, implies these relationships with other market players.

Consumer contract legislation consists of different rules.[5] Some rules are meant to ensure that the consumer receives information and explanations prior to a contract's conclusion. Many provisions in the Consumer Credit Directive and the Consumer Rights Directive are important examples of this.[6] Such rules are based on the presumption that when equipped with sufficient information, the consumer is best placed to decide on the contract's content and terms.[7]

Other rules are meant to limit the contract's content and terms. Under the Unfair Contract Terms Directive,[8] unfair terms are not binding on the consumer – even if the consumer agreed to the terms with full knowledge of their content and potential consequences. The consumer and trader cannot agree to devalue the rights of the consumer, which are ensured by the Consumer Sales Directive.

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[3] For some policy aspects, see Hesselink, M. W. European contract law? A matter of consumer protection, citizenship, or justice? *Liber amicorum Guido Alpa. Private Law Beyond the National Systems,* ed. by Andenas, M. *et al.* London: British Institute of International and Comparative Law 2007, pp. 500–525.

[4] Treaty of the Functioning of the European Union, Article 169(1).

[5] See for example, Reich, N., Micklitz, H.-W. Economic law, consumer interests and EU integration. *European Consumer Law,* ed. by Reich, N. *et al.*, 2 ed. Cambridge Antwerp Portland: Intersentia, 2014, pp. 1–65.

[6] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC; Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC; Directive 97/7/EC of the European Parliament and of the Council.

[7] The effectiveness of such rules has been much discussed. For a recent critique, see Ben-Shahar, O., Schneider, C. E. *More than you wanted to know. The failure of mandated disclosure*. Princeton and Oxford: Princeton University Press, 2014.

[8] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

Another example is the Mortgage Credit Directive, where the creditor cannot give credit to a consumer assessed as unlikely to meet the credit agreement's obligations.[9]

A third set of rules aims to secure remedies and procedural rights (for example, through dispute resolution mechanisms and injunctions).[10] Human rights seem most relevant to the rules on content, contract terms plus procedure and least relevant to rules about receiving information before entering a contract.

Rules on consumer protection cover a wide range of situations and interests. If I have to wait one extra week for my new sofa, I may indeed have a remedy under consumer contract law. But, it is not likely that the situation will ever bear relevance to human rights. Likewise, breaching a consumer credit contract will quite often have trivial consequences for the consumer. But conversely, irresponsible lending may entail enduring dramatic changes to the consumer's home, family, livelihood and health. Whether or not human rights influence consumer protection law depends more on the case circumstances than the rule type.

Remedies and procedure

EU CFR Article 47 secures the right to an effective remedy and fair trial. The article confirms and expands on corresponding rights in human rights instruments like ECHR Article 6.[11] The provisions of the Charter apply to Member States, but "only when they are implementing Union law" (Article 51(1)). For the most part, procedural law in individual disputes between individuals is not harmonised by EU law. Even so, Article 47 has been discussed

[9] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property; amending Directives 2008/48/EC and 2013/36/EU; Regulation (EU) No 1093/2010, Article 18(5)(a). For a discussion of the rule, see Kalamees, P. *et al*. Responsible Lending in Estonian and Norwegian Law. *Journal of European Consumer and Market Law*, vol. 4, no. 1–1, 2015, 29–38.

[10] See for an overview, Reich, N. Legal protection of individual and collective consumer interests in *European Consumer Law* (ed. N. Reich, *et al.*) 2 ed. Cambridge Antwerp Portland: Intersentia, 2014, ch. 8, pp. 339-392.

[11] Article 47 has been characterised as perhaps the most important provision of the Charter (apart from Article 51). *The EU Charter of fundamental rights. A commentary,* ed. by Peers, S. *et al.* Oxford and Portland, Oregon: Hart Publishing, 2014, No. 47.42.

in relation to private law and was recently referred to in a case on consumer protection (*Sánchez Morcillo*[12]).

Sánchez Morcillo is one of several cases before the Court of Justice of the European Union (CJEU), concerning enforcement of security rights in residential properties in Spain. In these cases, the Court ruled that the Unfair Contract Terms Directive Article 7[13] precludes national rules. The latter do not allow for effective review of the terms of the underlying credit agreement, in the course of enforcement proceedings.[14] In *Sánchez Morcillo*, there was an additional issue regarding asymmetric rules on appeal. The creditor could appeal a decision to stay the enforcement proceedings, while the consumer could not appeal a decision not to stay the proceedings. The Court found these national rules were precluded by the Unfair Contract Terms Directive, Article 7, 'read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union' (para. 50). In its reasoning, the Court referred in particular to the 'principle of equality of arms or procedural equality' (para. 48). Equality of arms is not explicitly mentioned in EU CFR Article 47 or in ECHR Article 6, but the Court pointed out as 'settled case law' that:

> "the principle of equality of arms, together with, among others, the principle *audi alteram partem*, is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent (para 49)".[15]

Article 7 of the Unfair Contract Terms Directive deals specifically with 'means to prevent the continued use of unfair terms'. The cases on enforcement of security rights, seem to deal with the validity of certain terms in the credit agreements

12 C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* (ECLI:EU:C:2014:2099). As for other cases, see Mak, C. Rights and Remedies. *Constitutionalization of European Private Law*, ed. by Micklitz, H.-W. Oxford: Oxford University Press, 2014, pp. 236–258 (obviously written prior to the judgment in *Sánchez Morcillo*).

13 This requires Member States to ensure effective means to prevent continued use of unfair terms.

14 Sein, K., Lilleholt, K. Enforcement of Security Rights in Residential Immovable Property and Consumer Protection: An Assessment of Estonian and Norwegian Law. *Oslo Law Review*, vol. 1, no. 1, 2014, 20–46, at 22–27. See also Negra, F. D. The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: Sánchez Morcillo and Kušionová. *Common Market Law Review*, vol. 52, 2015, 1009–1032.

15 The Court refers to C-199/11 *Europese Gemeenschap v Otis NV and Others* (ECLI:EU: C:2012:684) and C-472/11 *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai* (ECLI: EU:C:2013:88). See also, Peers *et al.* 2014, Nos. 47.206–208.

more than preventing continued use of the terms. But regardless of Article 7 of the directive, review would have been possible under the well-established test of equivalence and effectiveness in the protection of rights under EU law.

As for the Unfair Contract Terms Directive, the Court hold that the directive must have equal standing with rules relative to public policy under national law.[16] In real terms, the Court has reviewed the Spanish rules on enforcement of security rights.[17]

A principle of equality of arms is not readily found in Article 7 of the Directive and it is questionable whether this principle can be based on the test of effectiveness. One might say that:

- the test of effectiveness has resulted in procedural rules becoming relevant at the EU level and,
- this rather indirect relevance of procedural rules, opens the door for Article 47 of the Charter (including a principle of equality of arms).[18]

EU CFR Article 47 may provide future guidance in assessing national civil law remedies for enforcing individual consumer rights in other contracts, like the buyer's remedies against the seller in consumer sales. But it is doubtful whether Article 47 is relevant to enforcement of consumer protection by administrative bodies, as is the case for enforcement of the Consumer Credit Directive in several Member States.[19]

Protecting the consumer's home

Security rights have drawn considerable attention, because they involve a potential forced sale of the consumer's residential property, subsequent eviction from the dwelling and thus the loss of home for the consumer and his family.

Losing your home is one of the most severe consequences an individual can face in their role as debtor, be it as debtors for contractual claims or other claims like taxes or extra-contractual liability for damages. In several cases before the European Court of Human Rights (ECtHR), the right to protect one's home has been successfully invoked.[20] Article 8 of the ECHR states that "everyone has the

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16 See, for example, C-40/08 *Asturcom Telecomunicaciones SL and Cristina Rodríguez Nogueira* (ECLI:EU:C:2009:615).

17 See also Negra 2015, p. 1031.

18 This development was not unexpected; see Mak 2014, p. 16.

19 See on these rules, Kalamees *et al.* 2015, pp. 35–38.

20 See for some aspects of this, Lilleholt, K. The Right to Housing and its Impact on Contract Law. *Velferd og rettferd. Festskrift til Asbjørn Kjønstad 70 år*, ed. by Ketscher, K. *et al.* Oslo: Gyldendal Juridisk, 2013, pp. 363–373.

right to respect for his private and family life, his home and his correspondence". The parallel in the EU CFR, is Article 7 stating "everyone has the right to respect for his or her private and family life, home and communications". In the *Kušionová* case, the Court explicitly referred to EU CFR Article 7 (called a 'right to accommodation') as a fundamental right that must be taken into account in the implementation of the Unfair Contract Terms Directive.[21]

As indicated earlier, the enforcement of security rights is regulated by the law of the Member States and is not harmonised under EU law. The Spanish cases have shown that EU law may require modifications to national procedural rules, to make realistic review of the underlying contract terms possible.

Further, in the *Aziz* case,[22] the Court provides some guidelines regarding the assessment of the possible unfairness of acceleration clauses in credit contracts (guidelines that seem to involve the requirement of a proportionality test).[23] In the same vein, it is stated somewhat vaguely in the Mortgage Credit Directive that Member States must encourage creditors to "exercise reasonable forbearance before foreclosure proceedings are initiated" (Article 28(1)). A proportionality requirement for the acceleration of payment and a requirement of 'reasonable forbearance', may be characterised as rules on procedure *and* substance.

Substantive rules protecting the debtor's home in the enforcement of security rights, or in debt collection more generally, can of course easily conflict with strong opposing interests. Creditors providing loans against security rights in immovable property will typically tie considerable weight to:

- the ability to act early in the case of a default and,
- enforce security rights at the *right* time, when a sale is expected to bring the highest revenue.

Protecting the debtor too much may make it difficult to obtain loans for residential purposes long-term. Regarding non-contractual claims, it might be considered controversial if individuals are allowed to invest in residential property that is not available for satisfaction of the owners' general creditors.

[21] C-34/13 *Monika Kušionová v SMART Capital a.s.* (ECLI:EU:C:2014:2189), para. 65. In Negra 2015, this reference is regarded as "ground breaking" (p. 1011). EU CFR Art. 7 is further mentioned in para. 46 of Order of the Court of 16 July 2015 in case C-539/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* (ECLI:EU:C:2015:508).

[22] C-415/11 *Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (ECLI:EU:C:2013:164).

[23] Sein, Lilleholt 2014, p. 24.

The fundamental right to protection of the home must be balanced against opposing interests of this kind.

The European Court of Human Rights' case law concerning protection of the home in enforcement situations, is summed up in the 2013 *Rousk* case.[24] Mr. Rousk's house was sold by forced sale as part of recovery of a EUR 800 tax debt. The Court made the following general remarks on ECHR Article 8 and enforcement:

> "137. In this respect, the Court has held that the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention (ibid. [*Zehentner v. Austria* (no. 20082/02), § 54, 16 July 2009] § 59, and *McCann v. the United Kingdom*, no. 19009/04, § 50, ECHR 2008). The decision-making process leading to the measures of interference must also have been fair. The Court will therefore attach particular weight to the existence of procedural safeguards.
> 138. Thus, while the Court accepts that it will sometimes be necessary for the State to attach and sell property, including an individual's home, in order to secure the payment of taxes due to the State through enforceable debts, it emphasises that these measures must be enforced in a manner which ensures that the individual's right to his or her home is properly considered and protected."

The Court considered the procedural safeguards in particular. This is aligned with the reasoning in *McCann*, referred to by the Court and several other cases relating to termination of tenancies. On the other hand, the procedural safeguard in question was the possibility 'to have the proportionality of the measure determined'. In other words, the case law presupposes that a forced sale *may* be considered disproportionate. In the *Rousk* case, the sale was also assessed under Protocol 1 Article 1 on protection of property. The latter was found disproportionate and in violation of that provision. This was not due to procedure but rather a forced sale for such a small debt "imposed on an individual and excessive burden on the applicant" (para. 127).

The creditor in the *Rousk* case was the State, while in *McCann* and several other cases relating to use of the property for residential purposes, the owners were public bodies. In principle, the protection under ECHR Article should be

[24] *Rousk v. Sweden*, 25 July 2013 (ECLI:CE:ECHR:2013:0725JUD002718304).

the same if the other party is an individual. We will return to that issue in the final section of this article.

It remains to be seen to what extent the protection of 'home' in Article 7 of the Charter, will play a role in assessment under the Unfair Contract Terms Directive of enforcement of security rights. So far it has been mentioned as relevant in *Kušionová*, but in that case the proportionality test was left to the referring court. In the Spanish cases, the severity of the consequences for the consumer have been mentioned by the CJEU in its assessment of the right to a remedy and the guidelines regarding assessment of the underlying contract.[25] The protection of the consumer's home has therefore been considered in these cases, without explicit reference to EU CFR Article 7. A forced sale of the consumer's home may have dramatic effects, even where the underlying credit contract is perfectly fair. In such cases, it seems problematic to invoke the Unfair Contract Terms Directive.[26]

Protection against discrimination

The Charter confirms the principle of equality before the law (Article 20) and prohibits discrimination 'on any ground' (Article 21). The prohibition of discrimination is exemplified by a list of unacceptable grounds for discrimination (i.e. "on any ground such as ...", German version: "inbesondere wegen ... "). Exceptions may be made, according to the general rules in Article 52(1):

- "subject to the principle of proportionality" and,
- "only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

In secondary EU legislation, there are directives on equal treatment:

- of persons irrespective of racial or ethnic origin,
- in employment and occupation,
- of men and women outside the labour market.[27]

[25] See, for example, *Aziz* para. 61. See also C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV* (ECLI:EU:C:2013:341) on the unfairness test in a case concerning a residential tenancy agreement.

[26] The rules seem to have been applied in *Sánchez Morcillo*; see Negra 2015, p. 1031.

[27] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing

There are also rules on non-discriminatory access to services of general economic interest, like electricity and gas.

Protection against discrimination is recognised in international instruments on human rights, such as ECHR Article 14.[28]

The principle of non-discrimination can influence consumer protection in important ways.[29] Traditionally, market players have been free to choose with whom to conclude a contract and when.[30] This is no longer a tenable principle. People's well-being and daily activities fundamentally depend on being able to access markets for goods and services. This is not just the case for services of 'general economic interest'. Access to a basic bank account illustrates the point.[31] Nowadays, being denied such access is a serious constraint when engaging in many everyday activities, from paying one's bills to buying a bus ticket in a reasonable and convenient manner. Strong tensions in many societies (e.g. based on ethnic origin and religion), may lead to discrimination. Additionally, inequality of economic resources and living standards seem to be growing.[32] A principle of non-discrimination in markets for goods and services, may turn out to be an effective basis for legal protection of typically weaker parties.

Article 21 of the Charter was discussed in the *Test-Achats* judgment, in which a provision in a directive was held to be invalid because it allowed different insurance premiums for men and women.[33] It remains to be seen whether Article 21 may be invoked in the assessment of contract terms under the Unfair Terms Directive.

the principle of equal treatment between men and women in the access to and supply of goods and services. See also COM(2008) 426 final. Proposal for a council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

[28] For other sources, see Peers *et al.* 2014, Nos. 21.14–25.

[29] See also Benöhr 2013 at pp. 131–133 and 111.

[30] See the discussion in Collins, H. On the (In)compatibility of Human Rights Discourse and Private Law in *Constitutionalization of European Private Law* (ed. H.-W. Micklitz) Oxford: Oxford University Press, 2014, pp. 26–60, at 51–55.

[31] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features. Cherednychenko, O. O. Fundamental Rights, European Private Law, and Financial Services. *Constitutionalization of European Private Law*, ed. by Micklitz, H.-W. Oxford: Oxford University Press, 2014, pp. 170–209, at 190–191.

[32] Growing inequality in society is a topical issue among economists. See for example Atkinson, A. B. *Inequality. What can be done?* Cambridge, Massachusetts, London, England: Harvard University Press, 2015.

[33] C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* (ECLI:EU:C:2011:100).

Protection of property

Protection of the consumer in a contractual relationship usually means restricting the rights of the other party to the contract. In some situations, human rights or other fundamental rights may prevent such restrictions of the other party's rights. Protection of property is an example. Under Article 1 of the first Protocol to ECHR, "every natural or legal person is entitled to the peaceful enjoyment of his possessions". The corresponding provision in the EU CFR is Article 17, where "everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions". Infringement of this right is only allowed under certain conditions. ECtHR case law shows that the scope of this protection is much wider than the expressions 'property' and 'possessions' suggest. In real terms, it is a protection of certain economic positions, including the rights under a contract. The explanations to the Charter confirm that the meaning and scope of the right in EU CFR Article 17, are the same as in the Protocol to the ECHR.[34] It is also explained that the protection of property is a fundamental right recognised in the case law of the CJEU (even prior to the Charter), starting with *Hauer* in 1979.[35]

The protection of rights in contractual relationships is of interest mainly when contract law regulations have a retroactive effect. In such situations, new regulations may change the balance between the reciprocal rights under the contract, contrary to the expectations of one of the parties. This also explains why the issue of protecting contractual rights will normally only arise in long-term contracts. In new contracts, both parties must respect the law as it stands when the contract is concluded.

There have been several cases before the ECtHR concerning regulation of rent in residential tenancies and restrictions on the right to terminate the tenancy. In some cases, the Court found that the regulation violates the owner's rights under Protocol 1 Article 1.[36] A violation was also found in a case against Norway concerning ground lease contracts for residential and holiday home purposes. In new legislation, the lessee was given the option to prolong the lease

[34] See for detail, Peers *et al*. 2014, Nos. 17(1).15–23.

[35] C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* (ECLI:EU:C:1979:290).

[36] *Hutten-Czapska v. Poland*, 19 June 2006 (ECLI:CE:ECHR:2006:0619JUD003501497); *Bittó and others v. Slovakia*, 28 January 2014 (ECLI:CE:ECHR:2014:0128JUD003025509); *Scollo v. Italy*, 28 September 1995 (ECLI:CE:ECHR:1995:0928JUD001913391); *Immobiliare Saffi v. Italy*, 28 July 1999 (ECLI:CE:ECHR:1999:0728JUD002277493). See further, *EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, hg. von Grote, R. *et al.* Tübingen: Mohr, 2013, No. 22 102.

period, without any time limit and without rent adjustment.[37] In all these cases, the purpose of the legislative intervention was to protect what may be called consumer interests: the interests of tenants in rental housing and the owners of houses on leased ground. These interests were protected under ECHR Article 8 and at least in the ground lease case – also under Protocol 1 Article 1. The opposing sets of interests had to be balanced. It must be added that regulation of tenancies and ground leases has been accepted in other cases.[38]

It seems that there are no examples in EU law, where consumer protection rules have been held to violate protection of property. Regulation of rental contracts or ground leases is not part of EU law, even if general rules such as the Unfair Terms Directive also apply to these.[39] Credit contracts may be regarded as long-term contracts, but the issue of the retroactive effect of EU legislation has not come up. It is possible that protection of property may become an issue as certain standards of consumer protection develop in case law. For example, Spanish creditors asserting that their economic position as holders of security rights, is violated by the development of procedural and substantive protection of consumers under the Unfair Terms Directive. Retroactive effect may be the result of legislation *and* case law. The realistic view is that case law does not merely state the law as it is – it also develops the law and this may in principle interfere with the economic positions of parties to existing contracts.[40] In this sense the protection of property may also in principle, limit the possibility to expand the protection of consumer interests.

General observations

We have noted the CJEU' discussion of the right to an effective remedy and a fair trial in its assessment of consumers' rights under the Unfair Contract Terms Directive (in relation to the enforcement of security rights). We have also seen

[37] *Lindheim and others v. Norway, 12 June 2012 (ECLI:CE:ECHR:2012:0612JUD001322108).*

[38] See for example *Mellacher and others v. Austria*, 19 December 1989 (ECLI:CE:ECHR:1989:1219JUD001052283); *James and Others v. the United Kingdom*, 21 February 1986 (ECLI:CE:ECHR:1986:0221JUD000879379).

[39] C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV* (ECLI:EU:C:2013:341).

[40] The ECtHR has held that there is a right to *une jurisprudence constante* (*Unédic v. France*, 18 December 2008 (ECLI:CE:ECHR:2008:1218JUD002015304), para. 74. On the other hand, see *Marckx v. Belgium*, 13 June 1979 (ECLI:CE:ECHR:1979:0613JUD000683374) and, in particular, *Ferreira Santos Pardal v. Portugal*, 30 July 2015 (ECLI:CE:ECHR:2015:0730JUD003012310), where incoherent case law was deemed to create a legal uncertainty that violated ECHR Article 6.

that the right to protection of one's home is a relevant basis for assessing the consumer's rights in similar situations. Further, the right not to be discriminated against is important for consumers – even if it has not been explicitly included in legislation on consumer protection. Lastly, we have illustrated that the right to protection of property may impose limits on consumer protection.

There is an ongoing and comprehensive scholarly discussion on the influence of fundamental rights on private law, including the issue of so-called direct or indirect effect on private law relationships.[41] No attempt is being made to sum up that discussion here, but some comments are added on mandatory regulation of contracts.

The principles that contracts are legally binding and that individuals are free to regulate their reciprocal legal relationships as they wish, are well established. But freedom of contract has never been unlimited. Contract conclusion is often subject to formal requirements e.g. contracts based on fraud or coercion are not accepted as legally binding.

There have also been restrictions regarding the content of the contract, like rules on *laesio enormis*, usury and contracts with an immoral purpose. Such limits have been established in both legislation and case law.[42]

During the 20th century in particular, contract legislation with the purpose of securing social interests was developed in most European countries. The legislator intervened for example in the law relating to employment contracts, rental contracts, instalment sales contracts or hire-purchase contracts and insurance contracts. It was intended to protect the weaker party – the party with a weaker bargaining position, or insufficient resources or information to achieve a balanced contract alone. The century's last quarter also saw a new legislative approach and terminology, on consumer contracts. The parties to the contract were now identified by their role as market players: as consumers and traders.

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[41] Seminal works are Cherednychenko, O. O. *Fundamental rights, contract law and the protection of the weaker party: a comparative analysis of the constitutionalisation of contract law, with emphasis on risky financial transactions*. München: Sellier, 2007; *Fundamental rights and private law in the European Union*, ed. by Ciacchi, A. C. *et al.* Cambridge: Cambridge University Press, 2010; Mak, C. *Fundamental rights in European contract law: a comparison of the impact of fundamental rights on contractual relationship in Germany, the Nederlands, Italy and England*. Alphen aan den Rijn: Kluwer, 2008. See for an update, Micklitz, H.-W. *The Constitutionalization of European private law*. vol. vol. 22/2, Dordrecht: M. Nijhoff, 2014. A recent comment is provided in Reich, N. General Principles and Fundamental Rights in EU Civil Law. *Revista Română de Drept European* no. 4, 2014, 88–104.

[42] Freedom of contract and regulation of contracts throughout the centuries are recurring themes in Gordley, J. *The jurists. A critical history*. Oxford: Oxford University Press, 2014.

As noted earlier, consumer legislation in the EU has more than one purpose. It is part of the regulation of a functioning market, thus indirectly benefiting the consumer because resources should theoretically be used more efficiently in such a market. But consumer protection is also a question of securing the interests of the typically weaker party, pursuing what might be termed a social purpose. This has been stated clearly by the CJEU in several cases concerning the Unfair Terms Directive, for example in *Mostaza Claro*:[43]

> "(36) The importance of consumer protection has in particular led the Community legislature to lay down, in Article 6(1) of the Directive, that unfair terms used in a contract concluded with a consumer by a seller or supplier 'shall ... not be binding on the consumer'. This is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.
> (37) Moreover, as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory (see, by analogy, concerning Article 81 EC, *Eco Swiss*, paragraph 36)."

There is a strong link between modern consumer legislation and traditional legislation protecting tenants, employees and other typically weaker parties. Modern consumer legislation has a wide scope and contracts with consumers are economically more important than they used to be.

Consumer protection is about curbing contractual freedom. The values underpinning human rights are relevant in the process of drafting consumer contract legislation. They are also relevant in the application of legislative standards and general clauses in such legislation, like rules on unfair contract terms. The same values may influence general doctrines of contract law. So the influence of human rights on consumer protection will be effective through contract law and civil procedure law, via what has been called the indirect effect of fundamental rights. In most cases, there is no need to search for a so-called

[43] C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* (ECLI:EU:C:2006:675). See also Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* (ECLI:EU:C:2009:350), para. 26; C-618/10 *Banco Español de Crédito SA v Joaquín Calderón Camino* (ECLI:EU:C:2012:349), para. 67; C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV* (ECLI:EU:C:2013:341), para. 43.

direct effect – implying that consumer rights might derive directly from human rights, independent of civil law.[44]

Bringing human rights aspects into contract law plus the law of procedure, is similar to the protection of typically weaker parties under traditional legislation and case law. The human rights issue typically comes up in conflicts between individuals. But the question is still whether the state – legislator or courts – provides sufficient protection.

The development of modern human rights legislation, case law and doctrine may enrich plus refine the reasoning in consumer protection law, through the balancing of interests and the assessment of proportionality.

44 See in particular the reasoning in Collins 2014 at pp. 42–46. For procedural rights, see Mak 2014, p. 242.

EUROPEAN UNION CONTRACT LAW AFTER CESL

Irene Kull

1. Introduction

In the context of global competition[1] between different regulatory instruments, the choice of a general policy in providing a regulatory regime for cross-border contracting, and especially on the digital market, may become decisive. Recent developments after a decade of intensive work on European private law instruments like the Draft Common Frame of Reference (DCFR)[2] and the Proposal for a Regulation on a Common European Sales Law (CESL)[3] have focused on the sector-based regulation of European contract law. The Digital Single Market Strategy,[4] adopted by the Commission on 6 May 2015, announced a legislative initiative on harmonized rules for the supply of digital content and online sales of goods. In 2015, two proposals for directives were published; in particular the proposal directive on certain aspects concerning

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1 There are a number of competing processes going on in elaborating proper instruments for international/global markets. For example, work which has been done by the Organization for the Harmonization of Business Law in Africa, OHADA. See: The Uniform Act on General Commercial Law. Available at: http://www.ohadalegis.com/anglais/tableaudrtcomgb.htm (30.09.2017). The Harmonisation of Asian contract law is based on the contract law of five countries and covers the general part of contract law, including the validity of contracts. About the Principles of Asian Contract Law (PACL) see Han, S. Principles of Asian Contract Law: and Endeavor of Regional Harmonization of Contract Law in East Asia. *Villanova Law Review* 58, 2013, pp. 589 ff.

2 *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR),* ed. by Bar, C. *et al.* Outline Edition. 2009. Available at: http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf (30.09.2017)

3 Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law. COM(2011) 635 final – 2011/0284 (COD).

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe. Brussels, 6.5.2015. COM(2015) 192 final.

contracts for the supply of digital content,[5] and a proposal directive on certain aspects concerning contracts for online and other distance sales of goods.[6] In 31.10.2017 European Commission published amended proposal on certain aspects concerning contracts for the online and other distance sales of goods extending its scope to all contracts of sale concluded between a seller and a consumer.[7] The proposals are intended to encourage cross-border transactions, benefit both consumers and businesses, eliminate the key contract law-related barriers, reduce uncertainty based on the complexity of the legal framework, increase consumer trust and provide uniform rules with clear consumer rights. These two new instruments are evidence of the change in regulatory policy from the harmonizing of the general rules of contract law back to a sector-based regulation. A number of questions can be raised concerning this new strategy. For example, is it a step backwards or the only reasonable way to move forward with policy goals in the field of the digital single market; will the sector-based regulation tailored for digital content and digital contracting remove the barriers from cross-border transactions and the uncertainty in the rights and obligations of consumers and businesses. Taking into account these questions, I would like to elaborate in my contribution first on legal pluralism, and then on the manifestation and consequences of exceptionalism through examples of the concept of digital content, the hierarchy of remedies and restitution, and finally, bring some arguments on the consequences of changing the paradigm of codification.

2. European contract law and legal pluralism

Pluralism of European contract law can be understood as the co-existence of territorial (domestic) private law orders with post-territorial functional orders (European and global private law).[8] People belong to different groups such as

[5] The proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, 9.12.2015, COM(2015) 634 final.

[6] The proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, Brussels, 9.12.2015, COM (2015) 635 final.

[7] Amended proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council, 31.10.2017, COM (2017) 637 final.

[8] See more in: *Pluralism and European Private Law,* ed. by Niglia, L. Hart Publishing, 2013.

nation-states, countries, towns, and so on, and may be bound by the norms of these different groups. Legal pluralists study "those situations in which two or more state and non-state normative systems occupy the same social field".[9] The process of the harmonization of general contract law was not as successful as initially planned by the European Commission and could have been predicted after several academic projects. Globalization is a challenge to contract law, while today the digitalization of contractual relations brings into focus the interrelations between different laws, including non-state law.

The CESL as a new instrument became a symbol after its publication of the end of legal pluralism in Europe, and a direct danger to the national legal systems and their peaceful and reasonable co-existence with the EU, and international and 'private' contract law. On 11 October 2011, after less than a year of intense work, the CESL[10] was published. In its nature, the CESL was meant to be an optional instrument[11] to be applied on a voluntary basis to cross-border B2C and B2B sales contracts and related services provided that at least one of the parties is a small or medium-sized enterprise (SME).[12] Since its publication, discussion of the proposal has appeared to focus on its development as an instrument to distance contracts and particularly online contracts applicable also to the transactions with digital content.[13] This approach had been approved by the European Parliament in the first reading and specified

[9] I am quoting here P. S. Berman who explored the modern legal pluralism in his article 'The New Legal Pluralism' publiched in Annual Review of Law and Social Science, 2009, Vol. 5, pp. 225–242 (see p. 227). Available at SSRN: https://ssrn.com/abstract=1505926. Function of law is to transform conflicts in the society into answerable legal questions (questions iuris). Teubner, G., Korth, P. Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society (June 8, 2009). *Regime interaction in international law: facing fragmentation*, ed. by Young, M. New York: Oxford University Press, 2010. Available at SSRN: https://ssrn.com/abstract=1416041.

[10] See also: Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, OJ 105, 27 April 2010, 109.

[11] CESL, Art. 3.

[12] CESL, Art.-s 4 and 7.

[13] For example European Law Institute (ELI) supported this approach in its statements on the proposal in 2012 and 1st supplement to it in 2014. See: Statement of the European Law Institute on the Proposal for a Common European Sales Law COM (2011) 635, 2012. Available at: http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf (30.09.2017); Statement of the European Law Institute on the Proposal for a Common European Sales Law COM(2011) 635.1st Supplement: Response to the EP Legislative Resolution of 26 February 2014. Available at: http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/CESL_1st_Supplement.pdf (30.09.2017).

in the amendments to the Proposal in 2013[14] made by the Committee of Legal Affairs of the European Parliament.

In the Commission's Work Programme for 2015, called "A New Start",[15] the Digital Single Market was defined as one of the narratives fostering jobs, growth, innovation and social progress. The European Commission's Digital Single Market Strategy focuses on six strands: building trust and confidence, removing restrictions, ensuring access and connectivity, building the digital economy, promoting e-society and investing in world-class ICT research and innovation. The digital single market has to be supported by a simplification of the rules for consumers making online and digital purchases in addition to the facilitation of e-commerce. As a result of changes in legislative policy, the CESL was included in the list of withdrawals or modifications of the modified proposal[16] in order to fully unleash the potential of e-commerce in the digital single market. Instead of the idea of adapting the set of general contract law rules, the sector-based regulation was preferred. Now, the competition between private law instruments seems to be based on a new quality. It is not so much about the coherence, simplicity and acceptability of the instrument, but more about the utility of the instrument. The future European contract law will not consist of a core contract law, but rules, which most likely arise in specific sectors of market activity, especially in the sector of online contracting and transactions with digital content.[17]

The Digital Single Market Strategy[18] adopted by the Commission on 6 May 2015 announced a legislative initiative on harmonized rules for the supply of

[14] European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)).

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2015. A New Start. Strasbourg, 16.12.2014 COM (2014) 910 final. Available at: http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf; http://ec.europa.eu/atwork/pdf/cwp_2015_en.pdf (30.09.2017).

[16] *Ibid*, Annex 2.

[17] Hugh Beale already asked in 2013: "Do we need an instrument which consists of core or general contract law, or rules 'covering issues most likely to arise under a contract for sale'?" See also Beale, H. The CESL Proposal: An Overview. *Juridica International* 20, 2013, p. 23. In 2016 H. Beale proposed very optimistically that the CESL could be treated as a soft law instrument. See more in: Beale, H. Chapter 6. Art. 66–68: The Sources of Contract Terms Under the CESL. *Contents and Effects of Contracts* – Lessons to Learn from The Common European Sales Law, ed. by Ciacci, A. C. Springer, 2016, p. 77.

[18] See: European Commission. Commission staff working document A Digital Single Market Strategy for Europe – Analysis and Evidence. SWD (2015) 100 final, 06.05.2015, p. 52. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015SC0100&from=EN (30.09.2017).

digital content and the online sale of goods. This initiative is composed from a proposal on certain aspects concerning contracts for the supply of digital content (Digital Content Proposal, hereinafter referred as DCP), and a proposal on certain aspects concerning contracts for the online and other distance sale of goods (Sales Proposal, hereinafter referred as DSP). Both proposals require full harmonization, which means that Member States shall not maintain or introduce provisions diverging from those laid down in the proposals including more or less stringent provisions to ensure a different level of consumer protection. As a result, pluralism in the application of the existing contract law rules on contracts concluded online or concerning digital content depends on the technique used in implementation processes by national legislators. The Estonian legislature has chosen a technique for the codification of directives, bearing in mind the need to ensure the substantive consistency of laws and the uniformity of their application. Both proposals shall be transposed into the Law of Obligations Act[19] as it was done with previous "contract law" directives. However, sector regulations based on the exceptional character of the internet will bring additional uncertainty in the application of the rules by judges. This is especially the case, taking into account that the DCP and DSP will not fully harmonize any rules on unfair terms, which means that Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts will not be replaced or amended and has to be adapted to the new rules concerning digital content and distance contracting.[20] Here the pluralism will hold its strong position, taking into account that in general there are a small number of individual terms in contracts concerning digital content. In any case, the plurality of laws – EU, national law and privately established rules – will also play an important role in court practice.

If we look closer at the content of the proposals, we see that problems based on the plurality of legal systems may even grow after adapting the two proposed directives. The DCP lays down certain requirements concerning contracts for the supply of digital content to consumers; in particular, rules on the conformity of digital content with the contract, remedies in the case of the

[19] Võlaõigusseadus [Law of obligations Act], adopted on 26.09.2001, in force from 01.07.2002. Available in English at: https://www.riigiteataja.ee/en/eli/522082017003/consolide (30.09. 2017).

[20] See also critical remarks on the exclusion of standard terms from the scope of the directive mentioned in the position paper by BEUC: Proposal for a directive on contracts for the supply of digital content. BEUC preliminary position, EUC-X-2016-036–12/04/2016, p. 8. Available at: http://www.beuc.eu/publications/beuc-x-2016-036_are_proposal_for_a_directive_on_contracts_for_the_supply_of_digital_content.pdf (30.09.2017).

lack of such conformity and the modalities for the exercise of those remedies, as well as on the modification and termination of such contracts.[21]

According to Article 3 (1), the DCP shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data, and also any contract for the supply of a digital product developed according to consumer's specifications. The directive shall apply to any tangible medium incorporating digital content if not used otherwise as the carrier of the digital content.

The DSP lays down certain requirements concerning distance sales contracts and also to face-to-face sales concluded between the seller and the consumer, in particular rules on conformity of goods, remedies in case of non-conformity, and the modalities for the exercise of these remedies.[22] The DSP shall not apply to distance contracts for the provision of services except in cases where sales contracts also provide services. In this case, the DSP shall apply to the part relating to the sale of goods.[23] If a durable medium incorporating digital content has been used exclusively as a carrier for the supply of the digital content to the consumer, content to the consumer, the rules on DCP will apply. [24]

Neither proposal will affect national general contract law rules on the formation, validity or effects of contracts, including the consequences of the termination of a contract.[25] In that way, private law pluralism based on the Directives and interpretative modes of national jurisprudence and living constitutional private law will be kept.[26] This does mean that national legal systems could regulate these spheres of contractual relations on the bases of the principles of their own national legal systems.

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21 DCP, Art. 1.
22 DSP, Art. 1(1).
23 DSP, Art 1(2).
24 DSP, Art. 1 (3).
25 DCP, Art. 3(9); DSP, Art. 1(4).
26 About the different strategies for dealing with the plurality of laws, see more in: Plurality of Sources in European Private Law, or: How to Live with Legal Diversity? The Foundations of European Private Law. In: Brownsword, R., Micklitz, H.-W., Niglia, L., Weatherill, S. (eds.), Oxford, 2011, M-EPLI, Working Paper 2011, no. 4, pp. 323–335.

3. Exceptionalism in EU contract law

The national provisions transposing the European Union legislation on consumer's contract law significantly diverge today on essential elements of a sales contract, such as the absence or existence of a hierarchy of remedies, the period of the legal guarantee, the period of the reversal of the burden of proof, or the notification of the defect to the seller. Rules on pre-contractual information requirements, the right of withdrawal and delivery conditions have already been fully harmonized. Other key contractual elements such as the conformity criteria, and the remedies and modalities for their exercise for goods which do not conform to the contract are subject to minimum harmonization in Directive 1999/44/EC.

According to the new proposals, the justification of exceptionalism in the regulation of the digital environment seems to be the founding principle. However, accepting that the internet is special, unique and different, the exceptional regulation shall be justified and avoid distorting the marketplace between web enterprises and off-line enterprises.[27] Both proposals follow the model of sector-based regulation and use a similar concept for consumers, suppliers and sellers as parties to the contracts.[28] There is a hope that the proposals would significantly reduce compliance costs for traders, while granting consumers a high level of protection.[29] However, the new proposals will produce the same problem for businesses which was under discussion in the case of the CESL, which is the obligation to check whether the other party satisfies the definitions provided in the Directive (in the case of these proposals, the definition of the consumer).

In accordance with the EU Monitor, the majority of respondents from the consumer side recognize that harmonization may improve cross-border e-commerce, but they would only support full harmonization as long as existing consumer protection levels across Member States are not reduced. One of the main concerns is the risk of creating different regimes depending on the sales channel and the object of the contract, which may bring uncertainty in

[27] Tushnet, M. Internet Exceptionalism: An Overview from General Constitutional Law. *William & Mary Law Review* 56, 2011, issue 4, p. 1641.

[28] Consumer means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession. Supplier in the proposals means any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for the purposes relating to that person's trade, business, craft, or profession (See DCP, Art. 2 (3); DSP, Art 2 b).

[29] EU Monitor. Context of the Proposal, p.2.2. Available at: https://www.eumonitor.nl/9353000/1/j4nvhdfdk3hydzq_j9vvik7m1c3gyxp/vjzqfzm2wova#footnote6 (30.09.2017).

finding the applicable law, especially if national laws will regulate contracts with digital content as part of already codified private law. Business organizations are usually interested in avoiding, as much as possible, a sector-based approach that could lead to diverging rules for online and off-line sales and for goods and digital content. The large majority of the associations of legal professions would favour harmonized EU rules and the same regime for B2C and B2B contracts.[30] However, the fragmentation of contract law will be one of the basic principles of the European legislator. The most essential substantive provisions of the proposals follow the consumer mandatory rules which were adopted by Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

The question of exceptionalism should be seen in the perspective of technological developments. This is a question of how technology will influence general contract law and will there be any future for civil codes that consist of general rules applicable to all factual situations if there are no specific rules. In the DCP, recital 17 provides that:

> "Digital content is highly relevant in the context of the Internet of Things. However, it is opportune to address specific issues of liability related to the Internet of Things, including the liability for data and machine-to-machine contracts, in a separate way. This means that the regulation shall also apply to machine-to-machine transactions. In that context, the directives on unfair terms in consumer contracts and the unfair commercial practices Directive are due to be reviewed as part of the Regulatory Fitness and Performance programme."

The commission's approach, as described above, seems to be targeted towards un-exceptionalism in regulating contractual relations.

For example, one of the most criticized concepts in the DCP is digital content. Consumer associations advocated as broad a definition as possible of digital content and stated that protection extended to consumers in the digital content contracts should not differ substantially from those of consumer sales contracts.[31] Associations also advocated as broad a definition as possible of digital content and stated that the protection extended to consumers in the digital content contracts should not differ substantially from those of

[30] EU Monitor. Context of the Proposal. Available at: https://www.eumonitor.nl/9353000/1/j4nvhdfdk3hydzq_j9vvik7m1c3gyxp/vjzqfzm2wova (30.09.2017).

[31] Manko, R. European Parliamentary Research Service. Contracts for supply of digital content. A legal analysis of the Commission's proposal for a new directive. Mai 2016. PE582.048, p. 11.

commodity contracts. In an analysis submitted by Beale to the Commission, it is noted that the regulation of digital content should not be left to the general rule and the Court's interpretation. This would lead to the result that the law would be too difficult to apply and too hard for consumers to understand their rights and the obligations of traders. In addition, Beale has noted that the standards developed for non-digital goods (or services) may not always be compatible with the nuances of digital content.[32]

In order to meet rapid technological developments and to maintain a generally applicable and long lasting notion of digital content, it should be given a broader definition than in Directive 2011/83/EU. Helberger pointed out that it should cover services that allow the creation, processing or storage of data and apply to all digital content independently of the medium used for its transmission. She thinks that differentiating contractual relations into certain types is not desirable because then it would hardly be possible to avoid discrimination between suppliers.[33] As the proposal does not regulate the question of qualifying digital content, Member States have a duty to provide their own specific content to guarantee harmonized regulation across the Union. The Directive applies to all digital content contracts covered by the scope of the Directive. Different contract types can be defined in different ways and concluded also under different rules in every Member State. Rules for drafting and validating contracts have been left to the national legislator. This regulation, which is contract-type neutral, has been assessed in general as a positive development.[34] In its report, the European Parliament's Committee on the Internal Market and Consumer Protection has introduced two options: in transposing the Directive, Member States should enter it into force to create *sui generis* rules for digital content contracts in national law, or integrate the provisions of the Directive into existing types of contracts. In both cases the problems associated with the transposition of the directives have to be resolved

[32] Beale, H. The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content. Workshop of JURI-Committee of the European Parliament, January 2016, PE 536.493, p. 7.

[33] Loos, M., Helberger, N. *et al.* Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts, Final Report, 2011, pp. 8–9. Available at: http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf (30.09.2017).

[34] See for example G. Spindler. Contracts for the Supply of Digital Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content. *ERCL* 12 (3), 2016, p. 208; Mak, V. The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content. In-depth analyses. *European Parliament*, 2016, p. 7

by the Member States and exceptionalism or un-exceptionalism will provide in any case uncertainty in regard to the consumer's rights and obligations.

4. Post-codification – some examples of exceptionalism

4.1. Hierarchy of remedies

In the case of consumer contracts, the supplier of digital content has two basic contractual obligations: to hand over to the consumer the digital content, and the obligation to transfer such digital content which complies with the conditions laid down in the contract or law. Both proposals take over from Directive 1999/44/EC the idea of a 'hierarchy of remedies', meaning that in the case of non-conformity, consumers are barred from terminating the contract or claiming a reduction in price without asking for a remedy for the non-conformity. The consumer would be entitled to termination or price reduction if the seller does not repair or replace the goods within a reasonable time. Only in the case of non-supply of digital content or in cases where the trader modifies the digital content, and in long-term contracts, do consumers have the right to terminate immediately (Art. 12 of the DCP).

The proposals will clarify certain features of the current Directive 1999/44/EC, providing greater protection for consumers in many respects. One of the most decisive elements of the rules regulating the new area of contractual relations is digital technology. The CESL was heavily criticized for provisions that create space for the opportunistic behaviour of consumers.[35] These were rules providing the exclusion of the right of sellers to remedy or a functional equivalent, such as the hierarchy of remedies privileging repair or replacement by the original seller.[36] Under the CESL, the consumers could immediately terminate the contract after a nonconforming delivery, or resort to any other remedy without any restriction imposed by the right of the sellers to offer a remedy. Gómez and Gili-Saldaña labelled the provisions of the CESL as too consumer friendly, and not concerned enough about preserving the value of

[35] See Gómez, F., Gili-Saldaña, M. Termination as a Remedy in the Common European Sales Law: A Law and Economics Approach. *ERCL* 10, 2014, pp. 331–364.

[36] About the system of remedies open for consumers under the CESL see: Schulte-Nölke, H., Zoll, F. Remedies for buyers in B2C contracts: general aspects. Policy Department C: Citizens' rights and constitutional affairs. *European Parliament* (June 2012); Wagner, G. Termination and Cure Under the Common European Sales Law: Avoiding Pitfalls in Contract Remedies (July 12, 2012). Available at SSRN: http://dx.doi.org/10.2139/ssrn.2083049 (30.09.2017).

the contractual relationship.[37] They warned that if consumers can terminate the contract immediately, use any other remedy of their own choice without any restriction imposed by the right of the sellers to offer a remedy, the consumers will terminate too often and sacrifice the correction or elimination of non-conformity through repair or replacement in favour of termination. The Commission took this warning seriously, and the hierarchy of remedies has not been replaced by the freedom of consumers to choose remedies. This might be reasonable, as consumers do not assess which remedy is more profitable for the markets in general and the result may be an inefficient market. The DCP consists of rules the aim of which is to balance the interests of the consumer to be able to use the digital content for its contractual purposes (Art. 12(1)(b)). The requirement for full harmonization obliges countries to include specific rules on the termination of digital content contracts, and therefore create parallel regimes for contracts involving digital content, irrespective of the type of contract the national law system puts into place for one or another specific contract.[38] The establishment by a directive of such a hierarchy in all the European Union Member States would have brought about a reduction in the level of the protection of consumer rights.[39] A number of Member States, such as Greece, Croatia, Lithuania, Hungary, Portugal and Slovenia do not recognize a hierarchy between remedies. In addition, there are a number of countries where the hierarchy is modified or where other remedies are provided like the rejection of goods within a short period.[40] The exceptionalist regulatory mechanism will lead to the situation where in a number of countries at least

[37] At the same time, the termination regime applicable to transactions between traders has been considered by them as a legitimate heir to the efforts carried out previously by the drafters of CISG, PECL and DCFR. See more in Gómez, Gili-Saldaña 2014, pp. 331–364.

[38] Under Estonian law there is no hierarchy between the remedies as such. In general, the consumer can choose between different remedies (§ 101(2) of the LOA). The same applies to French law. See more in X. Fauvarque-Cosson. The new proposal for harmonised rules for certain aspects concerning contracts for the supply of digital content (termination, modification of the digital content and right to terminate long term contracts). Workshop of JURI-Committee of the European Parliament, January 2016, PE536.495, p. 9. Study on all mandatory rules applicable to contractual obligations in contracts for sales of tangible goods sold at a distance and, in particular online, June 2016. European Commission. Available at: http://ec.europa.eu/justice/contract/files/final_report_study_on_all_national_mandatory_rules_applicable_to_contracts_for_sales.pdf

[39] Lilleholt, K. Notes on the Proposal for a New Directive on Consumer Rights. *European Review of Private Law* 3, 2009, p. 338.

[40] See more in the Study on all mandatory rules applicable to contractual obligations in contracts for sales of tangible goods sold at a distance and, in particular online, June 2016. European Commission. Available at: http://ec.europa.eu/justice/contract/files/final_report_study_on_all_national_mandatory_rules_applicable_to_contracts_for_sales.pdf (30.09.2017).

two different legal regimes will apply to consumer sales and provide uncertainty which has to be avoided with the mandatory nature of the Directive.

Under Estonian law, there is no direct hierarchy of remedies.[41] Probably the bases for such assumptions are the preconditions or using legal remedies by the buyer. According to § 101(2) of the LOA, in the case of non-performance, the buyer may resort to any remedy separately or resort simultaneously to all remedies which arise from the law or the contract, and which can be invoked simultaneously, unless otherwise provided by the law or the contract. In spite of the general principle, the use of a legal remedy may be limited to the conditions required for the use of that remedy. For example, the right for a price reduction is limited to cases where the goods have a price and there is a difference between the value of the goods with and without non-conformity (§ 112 para 1 of the LOA). The price may not be reduced if the seller has repaired or replaced the goods or, as a result of the cure, the value of the goods has not reduced or if the buyer is unjustifiably refused to allow a cure of the non-conformity (see § 224 of the LOA). There are other examples in Estonian law where the contracting party may not, in the event of a non-conformity of goods, use remedies without allowing the seller to cure the non-conformity. For example, the obligation to grant an additional term for a cure may be the result of an application of the general principle of good faith (§ 114 of the LOA). As Kalamees put it very nicely, the Estonian solution is "balanced, provided that the remedies used by the buyer are not in hierarchy but the buyer's opportunity to resort to any of the remedies is limited solely by the seller's right to cure his non-performance." [42] This solution provides the opportunity to protect the buyer's interest in keeping the goods and starting to use them immediately and the interest of the seller to offer repair or replacement and avoid a loss of money and as opposed to Directive 1999/44/EC, the consumer would also have the right to terminate in the case of minor defects.

In general, there is no guarantee that consumers will not win from the hierarchy of remedies. In the proposed DSP, the consumers are unable to obtain a refund until they have first pursued other remedies (repair; replacement;

[41] The EC Consumer Law Compendium sets out that Estonia has adopted the hierarchy of remedies that enables the consumer first to request only replacement or repair. See *EC Consumer Law Compendium. The Consumer Aquis and its Transposition in the Member States*, ed. by Schulte-Nolke, H., Ebers. Sellier 2008, p. 427. The same is repeated in the comments of the Law of Obligations Act. See Varul, P. *et al*. Võlaõigusseadus II. Kommenteeritud väljaanne [Law of Obligations II. Commented Edition]. Tallinn: Juura, 2007, p. 37 (in Estonian).

[42] Kalamees, P. Hierarchy of Buyer's Remedies in the Case of Lack of Conformity of the Goods. *Juridica International* 18, 2011, p. 64.

full or partial refund if a repair or replacement cannot be provided within a reasonable time and without significant inconvenience to the buyer) unless the retailer decides to provide more generous conditions. Taking into account the different purposes of the use of digital content, the need to provide quick access and the need for continuous and uninterrupted use, any delay may reduce the value of the digital content and thus harm consumer interests.

Similar concerns have arisen with regard to the absence of a provision that imposes on consumers the obligation to give notice of termination within a reasonable period of time after they have become aware of non-conformity. In practice, it will make the position of the consumer more certain and the use of remedies less burdensome. However, the uncertainty cannot be prevented while, in cases of distance sales, time limits of two years for the availability of the remedies provided for in the Directive 1999/44/EC have remained (Art. 14 of the DSP). In addition, consumer rights to use remedies may be limited by establishing limitation periods, which can be defined by Member States. This may lead to the creation of a "diverse landscape of national rules on a central issue of consumer protection".[43]

However, the liberal termination remedies for consumers can be argued also in its favour if the price of the goods is low. If the price of the digital content is very low and the deficiencies are not high enough, consumers may prefer to reduce the price. However, the use of digital content has become part of everyday life, and therefore it cannot be assumed that the consumer would agree to use defective digital content, and prefer a price reduction to a termination of the contract.

Under Article 10 of the DCP, the supplier shall be liable to the consumer for any failure to supply the digital content and any lack of conformity which exists at the time the digital content is supplied and where the contract provides that the digital content shall be supplied over a period of time, and any lack of conformity which occurs during that period. Where the supplier has failed to supply the digital content in accordance with Article 5, the consumer shall be entitled to terminate the contract immediately (Art. 11 of the DCP). It is therefore important for the consumer to answer two questions: Has the digital content been transferred to the consumer and does the digital content correspond to the terms of the contract?

Finally, exceptionalism in the method of regulation may lead to a non-exceptionalist regime of remedies in off-line and online contracts. Separate

[43] See Spindler 2016, p. 213.

harmonizing of rules on distance sales, digital goods and off-line sales bear the risk of adding new and different rules regarding consumer contracts.[44]

There are a number of problems concerning the regulation of contractual relations on the basis of the object of the contract and technical aspects of concluding the contracts. Firstly, should technological management bear the regulatory burden between providers and purchasers of consumer goods and services, leaving the rules to be re-directed at those who design the technological infrastructures? Secondly, do we need special rules in the future on face-to-face contracts? Neither the e-commerce Directive nor other Directives are drafted to regulate the next phase in the evolution of the consumer marketplace – the development of 'smart' shopping, where we have fully the automated supply of consumer goods and services, where humans are largely taken out of the transactional equation, and where technological management takes over securing compliant performance. Finally, taking into account future technological developments, the non-exceptionalist approach might be not the best way to provide a working set of rules for new factual situations and interests to be protected.

In the end, the attractiveness and value of contract law in particular depends on how easy (or complicated) it is to enforce the rights it grants consumers (such as the right to withdraw, reverse a transaction, or obtain damages under certain circumstances), and the costs such enforcement is associated with. In any case, the exceptional approach to digital content and electronic contracting will pose a number of questions concerning the structure of legal acts. The main question would be, whether the new regulation should be added to existing rules, which brings the need to repeat similar rules in different places or to reference the legal act, or to adapt specific laws, in which case legal certainty could be at risk.

4.2. Restitution

According to article 13(2)(a) of the DCP, if the consumer terminates the contract, the supplier shall reimburse the price paid to the consumer without undue delay and in any event, not later than 14 days from receipt of the notice. From the first sight, the obligation to repay money provided for in the DCP is regulated rather rigidly in favour of the consumers as the transferor has a

[44] See more about the problems concerning regulation of goods and digital content in Sein, K. What Rules Should Apply to Smart Consumer Goods? Goods with Embedded Digital Content in the Borderland Between the Digital Content Directive and "Normal" Contract Law. *JIPITEC* 8, 2017, 96 para 1.

fixed deadline for the repayment of the price, but there is no fixed deadline for obligations for consumers provided for in Article 13(2) of the DCP, except where the digital content was supplied on a durable medium. According to article 13(2)(e)(i) of the DCP, the consumer shall upon the request of the supplier, return, at the supplier's expense, the durable medium to the supplier without undue delay, and in any event, not later than 14 days from the receipt of the supplier's request.

However, it might be difficult for consumers to prove the receipt of the notice of the termination from the content provider as mentioned by Spindler. This is mainly because the obligation to reimburse the price to the consumer becomes due from the receipt of the notice and as the consumer may exercise the right to terminate the contract by notice given by any means (Art 13(1) of the DCP) it might be difficult to prove that there was any notice to the supplier.[45] Assuming that the contract with digital content will be terminated by digital means, the court practice concerning using digital evidences might be decisive and may vary in different countries.[46] For example, in Estonia, the court practice has moved in the direction that makes this concern expressed by Spindler, realistic. According to the Estonian Supreme Court, the receipt of the notice by the addressee has to be proved by the sender, if the notice was made by e-mail or using other electronic methods.[47]

Although the contracts concerning digital content are essentially reciprocal contracts, the proposal does not provide the right of refusal from the performance until the other party fulfils his or her obligation. This must not be taken as a gap in the regulation. It has been clarified in the explanatory notes to the Consumers Rights Act of the UK that the "concept of return does not easily sit with digital content (data produced and supplied in digital form), and therefore to provide for a return of the digital content would not be practical"[48]. One must not forget the principle of practicability in cases where there is a great

[45] *Ibidem*, p. 208.

[46] Consumer Rights Act of the UK (2015) provides diferent regulation: Section 45. Right to Refund. (3) A refund must be given without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund. Available at: http://www.legislation.gov.uk/ukpga/2015/15/section/45/enacted (30.09.2017).

[47] If the sender did not request confirmation of receipt of the e-mail, the sender must prove that the message reached the addressee by the deadline. The sender cannot verify the sender's e-mail with the e-mail message, as it does not prove that the email is reaching the recipient. A reliable proof may be, for example, a statement from third-party provider of server services that an email arrived at a certain time on its server. See Judgment of the Estonian Supreme Court from 8.04.2015 no. 3-2-1-8-15, p. 13.

[48] See Consumer Rights Act of the UK, 2015. Explanatory notes to Section 45. Available at: http://www.legislation.gov.uk/ukpga/2015/15/notes/division/3/1/4/4/4 (30.09.2017).

danger that rules will not work in real life. In addition, the supplier cannot always be sure that the consumer is not using the purchased digital content any more. The illegal use (after termination of the contract) of digital content will be treated as a breach of intellectual property rights and not as a contractual matter.

If the right to withhold the performance is a general rule or if it is accepted by court practice as a generally applicable principle, the interests of the parties are ensured with the exceptions to the general rule. For example, Estonian law does provide the right to withhold as a remedy applicable to all types of contracts (§ 111 of the LOA). The right to withdraw is important not only in the case of the performance of the contract but also in the case of the termination of the contract. The DCP provides that, where the consumer terminates a contract as a whole or in relation to some of the goods delivered under the contract, the seller shall reimburse to the consumer the price paid and the consumer shall return, at the seller's expense, to the seller the goods without undue delay. [49] In both cases it shall happen in any event not later than 14 days from receipt of the notice. Such a regulation puts the consumer in a more precarious position because he has to return what was obtained before he receives the money paid. As far as the proposal for an DSP is concerned, the corresponding provisions of the DCP distribute risks between the consumer and the transferor more equitably. The DCP provides a fixed deadline to the provider of the digital content to fulfil the obligation to return the money without seeing the consumer, a deadline for fulfilling his obligations except in cases where the transferor has filed a claim for repayment of the transferred durable medium. This deadline is later than the date of the obligation for the transferor to repay under Article 13(2)(a) and (2) of the DCP. That is, the transferor cannot claim the return of a durable medium before the termination notice is received.[50] In conclusion, the proposed regulation will deprive consumers of one of the most important rights guaranteed by the national legal regimes in cases of synallagmatic contracts, which is the right to withhold the performance[51]. However, this solution might

[49] DCP, Art. 13(3)(a), (b).

[50] Notaries of Europe. Position Paper on the proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM (2015) 635) and a Directive on certain aspects concerning contracts for the supply of digital content (COM (2015) 634), part II. Available at: http://www.notaries-of-europe.eu/files/position-papers/2016/Contract-Law-CNUE-Position-Paper-11-03-16-en.pdf (30.09.2017).

[51] Under the Estonian law, the right to withdraw is provided for in the 111 of the LOA as a general remedy applicable to all contracts. See also DCFR III.-3:401. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Edited by C. von Bar. *et al*. Available at: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf (30.09.2017).

be reasonable as long as the reason is that the party who has received a notice of withdrawal (i.e. usually a business, e.g. a distance seller of IT hardware) and who had also already received the purchase price, might block the restitution by exercising the right to withhold performance. As the withdrawing party (i.e. usually a consumer) also has the right to withhold performance (i.e. returning the goods) in such a case, the contractual relationship might not be unwound for a long time; for example, until the end of the litigation. This could factually secure the economic profit of the other party (i.e. the seller) despite the withdrawal, as the withdrawing party might have to pay; for example, for the reduction in value of the benefit received (e.g. a laptop).

5. Future pluralism and the de-codification of contract law

The process of de-codification (or re-codification) in the form of a revolving continual enactment of special laws in different matters of private law or rewriting of the private law codes, inserting new articles and leaving intact the existing numerical sequence of articles continues.[52]

Technological developments became a challenge for private law. Increasing use of e-commerce and many forms of the supply and use of digital products lead to questions of the applicability of traditional concepts of private law to new situations. Do we need new rules, detailed specifications and extensions of principles on the conclusion of contracts, the performance of contracts, the remedies for non-performance, and so on?[53] The DCFR and CESL extended general contract law rules to electronic contracting and the digital content of the contracts,[54] which means that established legal concepts were modified where necessary and where exceptions were unavoidable. There is a possibility that exceptions will become general rules to be applied to all contracts. Plurality in regulations at the level of national law will appear and at the end disappear

[52] About the development of the age of de-codification see Niglia, L. *The Struggle for European Private Law. A Critique of Codification*. Oxford and Portland: Oregon, 2015, pp. 54–58.

[53] Schulze, R. Changes in the Law of Obligations in Europe. *The Law of Obligations in Europe. A New Wave of Codifications*, ed. by Schulze, R., Zoll, F. Munich: sellier european law publishers, 2013, p. 13.

[54] At the European level the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a community framework for electronic signatures, OJ 2000 L 13/12; Directive 2000/31/EC of the European Parliament and of the Council of8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, i.e. the internal market, OJ 2000 L 178/1; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communication sector, OJ 2002 L 201/37.

in favour of the new rules meant to provide solutions to legal questions arising in connection with new technological opportunities.

Legal pluralism based on the co-existence of national and EU law will continue to exist, especially due to the application of EU contract law on only some parts of contractual relations. Both proposals shall not affect general national contract laws such as rules on the formation, validity or effects of contracts, including the consequences of the termination of a contract.[55] This does mean that the provisions of the respective directives shall apply only to the part of the contract that is covered by the Directive, while the remaining part of the contract is governed by the otherwise applicable national law. The proposals remain silent as to how to deal with mixed contracts where only part of the contract is covered by one of the directives, and the contract will be terminated by the consumer.[56] Arguably, the details concerning the consequences of termination in the case of mixed contracts are now for the Member States to decide.

Both proposals also apply to mixed contracts and consist of special rules concerning situations where more elements are involved in the contractual relations. For example, the Digital Content Proposal provides that where a contract includes elements in addition to the supply of digital content, this Directive shall only apply to the obligations and remedies of the parties as supplier and consumer of the digital content. In the case of sales contracts providing both for the sale of goods and the provision of services, the DSP shall apply to the part relating to the sale of goods (Art. 1 (2)).

6. Conclusions

The basic purpose of the CESL was to encourage cross-border transactions and remove the barriers caused by the legal complexity in cross-border trade.[57] The two proposals and the CESL are based on general objectives like reducing the uncertainty faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences

[55] DCP, Art. 3(9); DSP, Art. 1(5).

[56] Article 9 of Annex I to the CESL addressed this issue.

[57] See the CESL "(6) Differences in national contract laws therefore constitute barriers which prevent consumers and traders from reaping the benefits of the internal market. Those contract-law-related barriers would be significantly reduced if contracts could be based on a single uniform set of contract law rules irrespective of where parties are established. Such a uniform set of contract law rules should cover the full life cycle of a contract and thus comprise the areas which are the most important when concluding contracts. It should also include fully harmonized provisions to protect consumers."

in contract law, and increasing consumer trust, and providing uniform rules with clear consumer rights. One of the main differences between the proposals and the CESL is the scope of the regulation, which brings new dimensions to legal pluralism.

The aim of the proposals is to fill the gap in the consumer *aquis,* which can be seen at EU level regarding certain contractual aspects for which there are currently no rules. Both proposals are targeted towards creating a business-friendly environment and making it easier for businesses, especially when selling cross-border. Businesses should be given legal certainty and the possibility to avoid the unnecessary costs caused by differing national laws when selling goods and digital content outside their domestic market.[58]

The basic assumption of the two proposals is that technological and commercial changes have brought about changes not only to how a contract is concluded but also in terms of products that have become digital, which have not been taken into account in the development of the existing Directives. Both proposals recognize that the online environment is different from the off-line environment, which means that the two proposed directives can be characterized as new exceptionalism. However, the Commission's two proposals provide special rules not because of the vulnerability of consumers but more because of the needs of the digital economic strategy.

The internal market is defined by Article 26(2) TFEU as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. But this falls far short of a complete explanation of what is intended by an 'internal market'.

Here we have to recognize that conceptual differences between national legal principles may mask functional similarities. Market actors may be indifferent to divergent legal formulations provided they lead to outcomes that match their preferences. It does not matter for the market actors why a specific performance or compensation of pure economic loss is granted or not, they are interested in the outcome and its costs. Converging does depend also on the institutional structure and legal culture in given jurisdiction. Also, preferences of different market actors may be different.

Contract law has been classified as a homogeneous legal product[59] that provides a mechanism for ensuring mutually desired outcomes. Here both

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58 See Explanatory Memorandum of the DCP.

59 Ogus, A. Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law. *International and Comparative Law Quarterly* 48, 1999, p. 410.

parties are interested in lowering transaction costs. It must then be quite easy to reach agreement on instruments and concepts. And, even if the reduction in information and the other costs of harmonizing legal principles may be substantial, "such benefits may be outweighed by the costs of formulating uniform principles, reaching agreement on them, and subsequently adapting national legal systems to them. We should note that private law is still more problematic than regulatory law, since it is generally deeply entrenched in legal culture".[60]

For economists, it is clear that productivity and exports have a two-way relationship: the most productive firms self-select to export markets and exporters improve their technology due to international expansion. The theory of learning by exporting[61] proves that by increasing export trade, productivity and innovation will also be increased.[62] All economic transactions are based on contracts – mainly in national law – which may have substantive differences. For traders, these differences generate additional complexity and costs, notably when they want to export their products and services. This is true especially concerning SMEs. For consumers, differences in contract law make it more difficult to shop in countries other than their own, a situation, which is particularly felt in the context of online purchases. However, differences in tax laws, language problems, licensing and registration requirements and, particularly, the difficulties involved in litigating cases and enforcing judgments in other jurisdictions will also remain at least as significant, after the adoption the new proposals, as the possibility that technology will pose additional legal questions without clear answers in existing directives in regard to the sector-based and exceptional regulation of contractual relations.

[60] *Ibidem,* p. 416.
[61] Bernard, A. B., Jensen, J. B. Exceptional exporter performance: Cause, effect, or both? *Journal of International Economics* 47, 1999, pp. 1–25
[62] Serwach, T. Why Learning by Exporting May Not Be As Common As you Think and What it Means for Policy. *International Journal of Management, Knowledge and Learning* 1, 2012, pp. 157–172.

BUYER'S RIGHT TO TERMINATE AN ONLINE CONSUMER SALES CONTRACT FOR NON-PERFORMANCE

Age Värv

Introduction

In October 2011, the European Commission launched a proposal for a regulation on a Common European Sales Law[1] (CESL). As an optional instrument, the CESL was meant to be applied upon agreement between parties to a cross-border contract. The CESL aimed to create an autonomous system of contract law that would provide an alternative to those of the national laws of the member states of the European Union.[2] It was stated that the rules of the CESL should maintain or improve the level of protection that consumers enjoy under the Union consumer law.[3] In December 2014, in its 2015 Work Programme, the European Commission withdrew the proposal for the CESL in order to modify it to fully unleash the potential of e-commerce in the Digital Single Market.[4]

A year later, the Commission presented two new proposals: a proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods[5] (hereinafter 'online sales directive, OSD') and a proposal for a directive on certain aspects concerning contracts for the supply of digital content[6] (hereinafter 'digital content directive, DCD'). Being part of the Commission's Digital Single Market Strategy to eliminate obstacles to cross-

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[1] Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law. COM(2011) 635 final.

[2] Kull, I. Euroopa ühine müügiõigus – uus instrument Euroopa lepinguõiguses (Common European Sales Law – New Instrument in European Contract Law). *Juridica* 2013, No. 3, p. 156.

[3] CESL, recital 11.

[4] Communication from the Commission of the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2015. A new start. COM(2014) 910 final, Annex 2.

[5] Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods. COM(2015) 635 final.

[6] Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content. COM(2015) 634 final.

border e-commerce[7], these two new directives would complement the rules set by the consumer sales directive[8] from 1999 (hereinafter CSD), which would remain applicable to consumer contracts that are concluded face-to-face in shops. Both proposals for new directives envisage full harmonization (article 3 OSD, article 4 DCD), which means that the Member States may adopt neither more nor less stringent provisions.

If a seller delivers to the buyer goods that do not conform to the sales contract, the buyer may have a recourse to several legal remedies. Depending on the circumstances of the case, the buyer might be interested in terminating the contract. The new directive proposals as well as the CESL contain rules that address termination in a much more detailed way than the consumer acquis currently in force. Therefore, this article focuses on the rules on termination. In particular, it scrutinises the norms envisaged in the proposed directive for online sales and aims to identify the similarities and differences between the online sales directive and Estonian law. The scope of the article is on the consumer's right to terminate an online sales contract in the case of the seller's non-performance and it will explore whether and to what extent the level of consumer protection in Estonia would change after the transposition of this directive. The notion of 'non-performance' is used to mark situations falling under the scope of application of the OSD, namely the lack of conformity of the goods with the contract (articles 4, 5, 6 and 7 of the OSD). Since the new proposal is viewed as a follow-up to the CESL[9], the relevant provisions of the CESL are explored in order evaluate the norms of the proposed directive.

1. The nature and form of termination

In Estonian law, the termination of a contract as a remedy for non-performance is provided in the Law of Obligations Act[10] (LOA) § 116. The termination of a contract requires sending a notice to the other party (LOA § 188 (1)). This means that termination is a one-sided right: no agreement by the parties is

[7] Communication on a Digital Single Market Strategy for Europe. COM(2015) 192 final.

[8] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. OJ L 171, 07.07.1999, pp. 12–16.

[9] Maultzsch, F. Der Entwurf für eine EU-Richtlinie über den Online-Warenhandel und andere Formen des Fernabsatzes von Waren. *Juristenzeitung* 2016, No. 5, p. 236.

[10] Võlaõigusseadus [Law of Obligations Act]. – *Riigi Teataja (RT)* I 2001, 81, 487; RT I, 01.07.2017, 1 (in Estonian). Available in English at https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/522082017003/consolide (20.09.2017).

needed to end the contract, nor is the end of the terminated contract dependant on a court judgement. Shortly after the enactment of the LOA, some Estonian authors suggested that the notice of termination should be made in the same format as the contract.[11] The court practice, however, has not followed this line of argumentation and stresses that the right of termination of contract may be exercised in any form.[12] What matters is the unambiguity of the party's declaration: it must be clear that the party wishes to end the contract.[13] This means that the legal consequence of the notice of the termination does not depend of the correct choice of wording. Moreover, it is also accepted that termination may be implicit. For example, the Estonian Supreme Court has found that a party's request for compensation for damages in lieu of a performance obligation may be interpreted as the termination of a contract.[14]

Similarly, the CESL stated that termination is to be exercised by way of giving notice to the other party (article 118 and 138 CESL). The CESL also stated that no formal requirements regarding the notice of termination were needed: article 10 (2) stipulates that notice may be given by any means appropriate to the circumstances. Like the CESL, the online sales directive proposal provides that the contract be terminated by a notice, which may be given by any means (article 13 (1) OSD).

As to the question of when the notice becomes effective, Estonian law follows the receipt theory: the General Part of the Civil Code Act[15] (GPCCA) provides that a declaration of intention directed at a certain person (recipient of the declaration of intention) shall be expressed by the party making the declaration and enters into force upon receipt (GPCCA § 69 (1), first sentence). The same could be said about the CESL, which stated that a notice becomes effective when it reaches the addressee, unless it provides for a delayed effect (article 10 (4) CESL). The online sales directive proposal does not specify the moment the notification becomes effective, thus leaving it for the Member States to decide.

Based on the above it may be said that the nature and form of a termination coincide in the Estonian law and in the proposal for the online sales directive:

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11 Kull, I., Käerdi, M., Kõve, V. *Võlaõigus I. Üldosa* (Law of Obligations I. General Part). Tartu, Juura, 2004.

12 CCSCd 12.06.2006, 3-2-1-50-06, paragraph 23. *RT* III 2006, 24, 222 (in Estonian); CCSCd 04.04.2011, 3-2-1-8-11, paragraph 13 (in Estonian).

13 CCSCd 01.12.2008, 3-2-1-110-08, paragraph 12 (in Estonian).

14 CCSCd 21.05.2008, 3-2-1-31-08, paragraph 16 (in Estonian). CCsCd 05.06.2012, 3-2-1-42-12, paragraph 10 (in Estonian).

15 Tsiviilseadustiku üldosa seadus [The Law of General Part of Civil Code]. *RT* I 2002, 35, 216; *RT* I, 12.03.2015, 5 (in Estonian). Available in English at https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/528082015004/consolide (20.09.2017).

it is a one-sided right that becomes effective after the contract party's form-free declaration. Since the proposed directive does not regulate the moment when the notice becomes effective, national rules remain applicable. Therefore, it can be concluded that regarding the nature and form of termination, the level of consumer protection in Estonia will not be affected when the online sales directive is transposed into Estonian law.

2. Termination in the system of remedies

According to the Estonian Law of Obligations Act the remedies available to the buyer include claims for specific performance in the form of replacement or repair (LOA § 222), the right to withhold one's own performance (LOA § 111), the right to reduce the price (LOA § 112), claims for compensation for damage (LOA § 115), and the right to terminate a contract (LOA § 116). These remedies may be applied either separately or cumulatively (LOA § 101 (2)), unless otherwise provided by law or the contract. Cumulative application may also be excluded by the nature of the remedies. For example, termination and performance cannot be used at the same time.[16]

A controversial issue in Estonian law is the relationship of termination to other remedies (e.g. the hierarchy of remedies), especially with the claim for performance. The court practice is controversial in this respect: in some cases the Supreme Court has found that before terminating the contract the buyer must give the seller additional time for performance[17] whereas in some cases the opposite view is given[18].

In Estonian legal literature, some authors hold the view that the right to terminate the contract is normally available to the creditor only after the additional time for performance has lapsed. This is explained by the need to balance the parties' interests: whether the negative consequences of the breach could be healed by other remedies at the creditor's disposal should be considered.[19] This view relies on the general norms regulating the prerequisites of termination, in particular on LOA § 116 (4), which prescribes that the creditor is required to grant additional time in circumstances where the

16 Varul, P. *et al. Võlaõigusseadus I. Kommenteeritud väljaanne* [Law of Obligations I. Commented Edition]. Tallinn: Juura, 2016, p. 478 (in Estonian).
17 CCSCd 12.10.2010, 3-2-1-80-10, paragraph 12 (in Estonian); CCSCd 01.04.2009, 3-2-1-18-09, paragraph 14 (in Estonian).
18 CCSCd 30.03.2010, 3-2-1-11-10, paragraph 11 (in Estonian).
19 Kull *et al.* 2004, pp. 228–229.

debtor's damage from termination would be disproportionate in comparison to the costs incurred in the performance or preparation for the performance of the obligation. It is therefore suggested that since the buyer is often not able to foresee the extent of the seller's damage in the case of termination, the buyer should give the seller additional time to remedy the breach.[20] However, according to the LOA, immediate termination is possible if the debtor declares that there will not be a performance (LOA § 116 (4), second sentence), or if the creditor's continued interest in the performance depends on the strict compliance with the contract (LOA § 116 (2) 2)). The Supreme Court of Estonia has found that non-conformity of a user manual may in certain occasions be considered an example of the breach described in the LOA § 116 (2) 2); for instance, if the seller is aware that the buyer has bought a digital camera with the aim of using it in a specific time or under specific conditions.[21] In summary, this approach suggests that in general, the buyer should first give the seller an opportunity to remedy the breach, except in certain specific cases.

In contrast, other authors convincingly suggest that no hierarchy is found in the system of remedies in Estonian sales law.[22] This view is based on LOA § 223 (3) which is deemed to be a special norm in relation to LOA § 116 (4). LOA § 223 (3) prescribes that the buyer may terminate the contract immediately if the fundamentality of the breach is based on LOA § 223 (1) or LOA § 223 (2); for example, in the case of the impossibility of or failure to repair or replace the goods, refusal of repair or replacement or unreasonable inconvenience caused to the buyer. Another argument supporting this view is drawn from EU law and stresses that requiring the buyer to always claim performance before terminating the contract would contradict the consumer sales directive from

[20] Varul *et al.* 2016, p. 610.

[21] CCSCd 01.12.2008, 3-2-1-110-08, paragraph 13 (in Estonian).

[22] Sein, K. Millal saab ostja müügieseme puuduste tõttu lepingust taganeda? Kommentaar Riigikohtu otsustele tsiviilasjades 3-2-1-11-10, 3-2-1-80-10 ja 3-2-1-147-11 [When Can the Buyer Withdraw from a Contract due to Deficiencies in the Object of Sale? Comments on the Supreme Court Decisions in Civil Matters 3-2-1-11-01, 3-2-1-80-10 and 3-2-1-147-11]. *Juridica*, 2012, No. 9, pp. 717–722; Kalamees, P. Müügilepingust taganemise õigus asja lepingutingimustele mittevastavuse korral. Kommentaar Riigikohtu otsusele tsiviilasjas 3-2-1-11-10 [The Right to Withdraw From a Contract of Sale in Case of Non-Conformity of Goods with the Contract Conditions. Commentary on the Judgment of the Supreme Court in Civil Case 3-2-1-11-10]. *Juridica*, 2010, No. 10, pp. 796–799; Kalamees, P. Hierarchy of Buyer's Remedies in Case of Lack of Conformity of the Goods. *Juridica International*, 2011, No. XVIII, pp. 63–72; P. Varul *et al. Võlaõigusseadus II. Kommenteeritud väljaanne* (Law of Obligations Act II. Commented Edition). Tallinn: Juura, 2007, p. 64; Pavelts, A. *Kahju hüvitamise nõue täitmise asemel ostja õiguste näitel* [*A claim for damages in lieu of performance based on the example of the buyer's rights*]. Doctoral thesis. Tartu: 2017, p. 137 (in Estonian).

1999, which does not oblige the buyer to give the seller additional time for performance.[23]

As in the LOA, the CESL listed different remedies (articles 106 and 131) and states that these remedies that are not incompatible may be applied cumulatively (articles 106 (6) and 131 (4)). No general obligation of the buyer to give the seller the chance to remedy his non-performance was to be found in the CESL. Article 115 of CESL contained the principle that a non-fundamental delay in delivery may justify termination of the contract after the additional term has expired. This rule was comparable to the one stipulated in LOA § 116 (2) 5) but it only concern delay and not the other categories of non-performance. It follows that the proposed CESL would have granted the buyer in consumer contracts an immediate right to termination in all cases of non-insignificant breach.[24]

In contrast, the proposed online sales directive clearly follows the principle of the hierarchy of remedies: article 9 (3) resorts to termination and price reduction only if the buyer has demanded repair or replacement and this claim has not been satisfied for different reasons. The idea behind this approach is to balance the buyer's otherwise extensive rights and offer the seller an opportunity to perform the contract.[25] This solution has been found particularly burdensome, since in the case of an online purchase it could be quite complicated for the buyer to have a discussion about the specifics of the non-conformity of the goods, especially when the seller is situated in another country.[26] In summary, it must be said that when transposed into Estonian law, the proposed directive limits the buyer's freedom to decide on the contractual remedy.

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23 Kalamees 2011, p. 69.

24 See also Sein, K. Tarbijate õiguste kaitse Euroopa müügiõiguse eelnõus: kas kõrgem tase Eesti tarbija jaoks? [Protection of Consumer Rights in the Draft of the European Sales Law: a Step ahead for the Estonian Consumers?] *Juridica*, 2013, No. 1, p. 71.

25 Smits, J. New European Proposals for Distance Sales and Digital Contents Contracts: Fit for Purpose? *Zeitschrift für Europäisches Privatrecht*, 2016, No. 2, p. 321.

26 Zoll, F. The Remedies in the Proposals of the Online Sales Directive and the Directive on the Supply of Digital Content. *European Common Market Law Review. Journal of European Consumer and Market Law*, 2016, No. 6, pp. 252; Smits, J. The New EU Proposal for Harmonised Rules for the Online Sales of Tangible Goods (COM (2015) 635): Conformity, Lack of Conformity and Remedies. European Parliament Committee on Legal and Parliamentary Affairs, briefing note PE 536.492, European Union Publications Office, February 2016, p. 10.

3. Fundamental non-performance

As a remedy, right of termination is applicable if the other party is in breach of a contract. Since termination is directed to undoing the contract, this remedy should not be available to the creditor too easily.[27] This approach was already applied in the consumer sales directive, which deprives the buyer the right to rescind the contract if the lack of conformity is minor (art 3(6) SCD).

In Estonian law, this principle is expressed in section 116 (1) of the LOA, which requires *fundamental non-performance* of a contractual obligation as a prerequisite of termination. The prerequisite of fundamental non-performance as grounds for termination applies both to B2B (business-to-business) and B2C (business-to-consumer) contracts.

An illustrative[28] list[29] of examples of fundamental breaches is provided in LOA § 116 (2) and complemented by LOA § 223, which applies to sales contracts. According to LOA § 223 (1) there is fundamental breach *inter alia*, if the repair or replacement of a thing is not possible or fails, or if the seller refuses to repair or replace a thing without good reason or if the seller fails to repair or replace a thing within a reasonable period of time after the seller is notified of the lack of conformity. LOA § 223 (2) further contains a specific provision on consumer sales, stipulating that any unreasonable inconvenience caused to the buyer by the repair or replacement of a thing is also deemed to be a fundamental breach of contract by the seller. This particular occasion is considered a fundamental breach only if the buyer has demanded from the

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[27] Chen-Wishart, M., Magnus, U. Termination, Price Reduction, and Damages, p. 647. *The Common European Sales Law in Context. Interactions with English and German Law*, ed. by Dannemann, G., Vogenauer, S. Oxford University Press, 2013, pp. 647–686.

[28] Kalamees 2011, p. 65; Kõve, V. DCFR and Estonian Law of Obligations. *Juridica International* 2008, No. XIV, p. 204.

[29] LOA § 116 (2) A breach of contract is fundamental if:

1) non-performance of an obligation substantially deprives the injured party of what the party was entitled to expect under the contract, except in cases where the other party did not foresee such consequences of the non-performance and a reasonable person of the same kind as the other party could not have foreseen such consequences under the same circumstances;
2) pursuant to the contract, strict compliance with the obligation which has not been performed is the precondition for the other party's continued interest in the performance of the contract;
3) non-performance of an obligation was intentional or due to gross negligence;
4) non-performance of an obligation gives the injured party reasonable reason to believe that the party cannot rely on the other party's future performance;
5) the other party fails to perform any obligation thereof during an additional term for performance specified in § 114 of this Act or gives notice that the party will not perform the obligation during such term.

seller performance of the obligation (LOA § 222 (1)) or the seller has undertaken to cure the breach at his own initiative (LOA §107).[30]

LOA § 116 (2) 5) allows the party to terminate the contract if the other party fails to perform any obligation contained in the contract during an additional term for performance. This provision seems to suggest that after the additional time for performance has lapsed, the contract may be terminated irrespective of the severity of the breach; for example, even in cases of a minor breach. However, this interpretation is not supported in the legal literature, which deems the wording of this provision problematic and finds that terminating the contract for a minor breach could violate the principle of good faith.[31] The latter view is also supported in recent court practice.[32]

Quite similarly, the drafters of the CESL had made the buyer's right to terminate the contract dependant on the fact that the seller's non-performance under the contract was fundamental (article 114 (1)). But if the seller's non-performance in consumer sales contracts consists in non-conformity of the goods, the requirement for termination under article 114 (2) was not that the breach be fundamental but *non-insignificant*. Such a distinction has been criticised for two reasons. First, it requires distinguishing between the types of breaches of consumer sales contracts, thus ignoring the advantages of a uniform approach to non-performance.[33] And second, the CESL did not list any criteria that could be used in deciding whether a non-performance is insignificant or not. It was found in the literature that this approach could ultimately lead to confusing and contradictory interpretations by the national courts.[34]

The concept of a fundamental breach is not to be found in the proposed online sales directive. Article 9 (3) of the OSD lists the situations in which the buyer may terminate the contract, and it does not refer to the nature of the breach. On the contrary, it reads in recital 29 of the OSD that the consumer should also enjoy the right to terminate the contract in cases where the lack of conformity is minor. This increase of the level of consumer protection has been

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[30] Kalamees 2011, p. 67.

[31] Varul *et al.* 2016, p. 611.

[32] CCSCd 19.04.2017, 3-2-1-16-17, paragraph 31 (in Estonian).

[33] Zöchling-Jud, B. Rechtsbehelfe des Käufers im Entwurf eines Gemeinsamen Europäischen Kaufrechts, p. 341. *Ein einheitliches europäisches Kaufrecht?* hg. von Schmidt-Kessel, M. 1. Aufl. München: sellier european law publishers, 2012, pp. 327–346.

[34] Schopper, A. Verpflichtungen und Abhilfen der Parteien eines Kaufvertrages oder eines Vertrages über die Bereitstellung digitaler Inhalte (Teil IV CESL-Entwurf). In: *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts. Zum Verordnungsentwurf der Europäischen Kommission vom 11. 10. 2011 KOM(2011) 635 endg.*, hg. von Zochling-Jud, B., Wendehorst, C. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2012, p. 135.

both welcomed and criticised in the literature. It has been said that the ease of termination of distance sales contracts protects the buyer against complications which may arise because of the remoteness of the parties.[35] On the other hand, this approach may turn out to be too costly and burdensome for the seller.[36]At the same time, it must not be forgotten that the directive would only cover distance sales. It has therefore been suggested in the literature that the differences between online sales and face-to-face sales regarding termination prerequisites could influence the balance of market shares between these two types of sales and change the result that would have been established by free competition.[37]

Comparing current Estonian law and the OSD, it appears that the new directive broadens the right to terminate the contract and puts the buyer in a more favourable position than that under the current Estonian law. This may be concluded because under the OSD, the buyer's right to terminate does not depend on the severity of the breach.

4. Restitution of performances after termination of contract

4.1. Applicable regime of restitution

Estonian law differentiates between several regimes for the restitution of contracts. First, a special set of norms is provided for unwinding contracts that are terminated under *ex nunc*. In such cases the return or compensation of what was transferred under the contract is covered by the contract law and is regulated in the general provisions of the LOA (LOA §§ 188–194). Termination has an *ex nunc* effect. In Estonian law, this can be concluded from the wording of LOA § 188 (2) and the relevant court practice[38]. Termination does not unmake the contract but transforms it to a legal relationship for the restitution of performances already made under this contract.[39] The parties are discharged from performance of the contract but in other respects the contractual agreements (penalty clauses, agreements concerning limitation of

[35] Zoll 2016, pp. 5–6.

[36] Lehmann, M. A Question of Coherence: The Proposals on EU Contract Rules on Digital Content and Online Sales. *Maastricht Journal of European and Comparative Law*. 2016, No. 23, p. 763.

[37] Lehmann 2016, p. 763.

[38] CCSCd 30.11.2011, 3-2-1-110-11, paragraph 13 (in Estonian): only a valid contract can be terminated. Termination does not render the contract invalid.

[39] Varul *et al.* 2016, p. 624 (in Estonian); CCSCd 01.12.2005, 3-2-1-129-05, paragraph 25. *RT* III 2005, 43, 426 (in Estonian).

liability) will continue to operate.[40] The second regime of restitution is applied to unwinding contracts which are void or avoided; for example, ineffective *ex tunc*. In particular, the norms of the LOA on the restitution of performances (LOA §§ 1028–1036: unjustified enrichment arising from performance of non-existing or ceased obligation) will apply. Under Estonian law, a party in certain situations may choose between termination and avoidance, and this may be relevant, as the legal consequences may be somewhat different.[41] And finally, a third set of norms applies when the consumer has exercised his statutory right to withdraw from an off-premises contract (LOA §§ 46 – 51) or distance contract (LOA §§ 52 – 62). These provisions basically grant the consumer the right to change his mind within 14 days (LOA § 49 (1) and § 56 (1)) in situations in which it is presumed that he has not had a chance to carefully think through the decision to enter into a contract, or has not had an opportunity to inspect the goods before purchasing them. Therefore, this right of withdrawal does not presuppose a breach of contract, and does not fall under the scope of this article.

Article 8 (1) of the CESL defined termination as bringing to an end the rights and obligations of the parties under the contract with the exception of those arising under any contract term providing for the settlement of disputes or any other contract term which is to operate even after termination. The CESL aimed at regulating both the termination and avoidance of contracts, and intended to allocate the legal consequences of these situations to a single set of norms (Part VII, articles 172–177).[42] The CESL also provided for a second

[40] Kõve, V. Lepingu ühepoolse lõpetamisega seotud küsimused võlaõigusseaduses [Issues Regarding the Unilateral Termination of an Agreement in the Context of the Law of Obligations Act]. *Juridica* 2003, No. 4, p. 232.

[41] For a detailed analysis in this respect see Saare, K., Sein, K., Simovart, M. A. The Buyer's Free Choice Between Termination and Avoidance of a Sales Contract. *Juridica International* 2008, No. XV, pp. 43–53. It has been proposed in Estonian legal literature that the two regimes should be analysed in depth and unified in the extent necessary, and only the differences that are justified, should be maintained, see Kõve, V. Varaliste tehingute süsteem Eestis [The System of Proprietary Transactions in Estonia]. Doctoral thesis. Tartu: 2009, p. 283.

[42] This solution has been saluted by several authors. It has been said that the unified approach is justified in both economic terms and from the point of view of the values behind the restitution of contractual performances, see Zimmermann, R. Perspektiven des künftigen österreichischen und europäischen Zivilrechts. *Juristische Blätter* 134 (2012), p. 12; Sirena, P. The Rules about Restitution in the Proposal on a Common European Sales Law. *European Review of Private Law* 6/2011, p. 982; Eidenmüller, H. *et al.* Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, *Juristenzeitung* 6/2012, p. 278; Lehmann, M. Chapter 17. Restitution. Art. 172, No. 19. *Common European Sales Law (CESL). Commentary*, ed. by Schulze, R. Baden-Baden: Nomos, 2012, pp. 679–721; Mörsdorf, O., Brinkmann, J. Die Rückabwicklung von Kaufverträgen gemäss Art. 172 ff des Verordnungsentwurfs für ein gemeinsames Europäisches Kaufrecht (GEK) – Ein kritischer Vergleich mit den deutschen Regelungen. *Gemeischaftsprivatrecht* 4/2013, p. 190.

regime of unwinding contracts in articles 43–45. These norms would have been applicable in situations when the consumer has exercised his statutory right to withdraw from the contract.

The proposed online sales directive also provides for the legal consequences of termination upon breach of a contract by the seller. This is a novelty because the scope of existing EU consumer sales law only concerns the prerequisites but not the effect of termination. These norms, however, do not cover the whole process of restitution, as will be demonstrated below. Article 1 (4) of the OSD states that in so far as it is not regulated therein, the directive shall not affect national general contract laws such as rules on the formation, validity or effects of contracts, *including the consequences of the termination of a contract*. This leads to the conclusion that Member States may stick to the regime of restitution provided by national law, provided that the principles laid down in article 13 of the OSD are followed. In addition, taking into account the scope of the proposed directive, it does not affect the buyer's right to choose between termination and avoidance in cases where the prerequisites of both remedies are satisfied.

4.2. The principle of restitution in natura

The aim of the principle of restitution is to restore the *status quo ex ante,* which means putting the parties in a situation which would be as if they had not concluded the contract.[43]

Estonian law follows the principle of restitution *in natura*: the LOA § 189 (1) provides that in the event of the termination of a contract, the parties may claim the return of that which was delivered to the other party under the contract. The obligation of the parties is thus primarily aimed at returning (in contrast to compensating) the received item or benefit in kind.

The same path was taken by CESL article 172 (1), and is also apparent in the online sales directive proposal, which states in article 13 (3) (b) that the consumer shall return the goods to the seller.

The directive does not contain a provision similar to CESL article 173 (1), which allowed the recipient to opt for compensation of the value in a situation where a return is possible but would cause unreasonable effort or expense, provided that this would not harm the other party's proprietary interests. It follows that if the return of the goods would be too burdensome for the buyer,

[43] Lehmann 2012, Art. 172, No. 2.

he will be allowed to claim compensation for its value instead. This provision in the CESL evidently benefits the buyer, taking into account that especially in cross-border transactions considerable costs may occur in returning the goods to the seller. The compatibility of this norm with the rules of restitution has been questioned because in the case of the seller's breach, the buyer is normally not interested in keeping the goods or paying their value, and even if he does, this result can be achieved more easily by reducing the price or claiming for damages.[44]

Estonian law does not give the recipient such an option, nor is it found in the online sales directive. On the other hand, the directive clearly states that the return of goods shall be made at the expense of the seller (art 13 (3) (b) OSD). According to Estonian law, an obligor shall bear the costs of the performance of the obligor's obligations (LOA § 90), which means that the buyer would have to bear the costs of the return of the goods. It follows that in this respect (e.g. the costs of restitution) the application of the new directive in Estonia would improve the consumers' position.

4.3. Compensation of the monetary value of goods

If the performance received under the contract cannot be returned, the recipient is obliged to compensate its value. In Estonian law, this principle is provided in LOA § 189 (2). The reasons it is impossible to return the performance may differ: the item could be destroyed (physical impossibility), stolen, or the ownership of the goods may be transferred to third persons (legal impossibility).

The same principle was stipulated in CESL article 173 (1), and it is in a somewhat limited form also applied in the online sales directive: namely, article 13 (3) (c) directs the buyer to compensate the monetary value of the goods, but only in the case where the goods cannot be returned because of destruction or loss. It must be concluded that if the reason for it being impossible to return the goods is other than destruction or loss, the issue will be solved only on the basis of national law.

Article 173 (5) of the CESL also contained rules which would apply when the recipient has received a substitute in exchange for the goods. This provision has been interpreted as extending the claim to price (money) as well as objects

[44] Wendehorst, C. *Restitution in the proposal for a Common European Sales Law*. European Parliament, 2012, p. 17.

received for goods.[45] It lays down the principle that if the recipient who is in bad faith has received a substitute, the other party may claim either the substitute or the monetary value of the substitute (CESL article 173 (5), first sentence). In fact, this is the rule on the disgorgement of profits.[46] Compared to that, Estonian law does not allow a claim for substitutes in the sense of items received in exchange for the goods[47], nor does it provide for disgorgement of profits in the framework of contractual relationships.

When addressing the issue of the monetary value of the goods, one must ask how the value should be calculated. In Estonian law, reversal of contracts after avoidance (e.g. under the rules of unjustified enrichment) follows the objective standard of calculation[48], whereas restitution after termination is based on a subjective standard – based on what the parties had agreed.[49] The application of the subjective standard balances the parties' interests and helps to avoid complicated disputes regarding the value of the goods, and also prevents the seller who has sold the goods cheaply from claiming a compensation that exceeds the agreed price.[50] Only if it is not possible to derive the value of the goods from the parties' agreement, does the objective standard apply.[51]

Article 173 (2) of the CESL stipulated that the monetary value of goods is the value that they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date. Based on the wording which talks about the 'value that the goods would have had', it has been suggested in the literature that the CESL refers to the objective standard as a measure for calculating the value of the goods (which in most cases would be the market value).[52] The wording

[45] Sirena 2011, p. 993.

[46] Wendehorst 2012, p. 19.

[47] A reference to 'substitute' can be found in the norms of unjustified enrichment (LOA § 1032 (1)) but the understanding of what constitutes a 'substitute' differs in Estonian law and the CESL. According to the LOA, a substitute is a monetary claim for damages or insurance indemnity, whereas when the recipient has sold the object or bartered it for an another object, it is not considered a substitute and may not be claimed by the creditor. See Värv, A. Restitution of Performances after Avoidance of Contracts under the CESL and Estonian Law. *Juridica International* 2013, No. XX, pp. 41–51.

[48] LOA § 1032 (2): if it is impossible to deliver that which is received due to the nature thereof or for any other reason, the recipient shall compensate the usual value thereof at the time when the right to reclaim was established.

[49] LOA § 189 (3): if the price of that which was received is set in the contract, the price is deemed to be the value of that which was received.

[50] Varul *et al* 2016, p 937.

[51] Varul *et al* 2016, p. 630.

[52] Lehmann 2012, Art. 173, No. 37; Mörsdorf, Brinkmann 2013, p. 199; Looschelders, D. Das allgemeine Vertragsrecht des Common European Sales Law. *Archiv für die civilistische Praxis*, 2012, p. 676.

chosen by the drafters of the online sales directive is quite similar: article 13 (3) (c) speaks about the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without destruction or loss until that date, unless the destruction or loss has been caused by a lack of conformity of the goods with the contract. This wording also suggests the objective approach.

In the author's view, the approach chosen by the drafters of the CESL and the new directive does provide for potential disputes over the value of the goods even if this has been determined by the parties. It is hard to see why agreement by the parties on the price (e.g. the value) of the goods should be overruled while the agreements on penalty clauses or dispute settlement are left untouched. In the cases of online sales between parties from different countries, the attempt to determine the objective (market) value of the goods may be especially complicated.

Another issue is the decrease of the value of the goods. According to Estonian law, the buyer must reimburse the decrease in the value of the goods, unless the decrease is the result of the regular use of the goods (LOA § 189 (4)), or has been caused by circumstances which are listed in § 190 (2) of the LOA[53]. The purpose of these norms is to restrict the restitutionary liability of a party who cannot return the goods for reasons that are not related to his fault.[54] A decrease in value is also addressed in the online sales directive, which exempts the buyer from the obligation to compensate the decrease, which has been caused by regular use (article 13 (3) (d)) or the non-conformity of the goods (article 13 (3) (d)). It follows from the comparison of the two sets of norms that Estonian law provides for more situations where the buyer is not obliged to bear the costs of the decrease in value of the goods, and therefore it may be said that under Estonian law the consumer would enjoy a better position than under the directive.

[53] (1) A party is not required to compensate for the value of that which was received by the party in lieu of return or delivery thereof if:
1) the circumstances on which withdrawal is based become evident only upon processing the thing;
2) deterioration or destruction occurred due to circumstances dependent on the other party or due to circumstances the risk of which is borne by the other party, or if the damage would also have occurred if that which was received had been in the possession of the other party;
3) upon exercising the right of withdrawal arising from the law, that which was received has deteriorated or been destroyed although the party exercised such care as the party would exercise in the party's own affairs.

[54] Varul *et al.* 2016, p. 942; CCsCd 30.05.2013, 3-2-1-34-13, paragraph 15 (in Estonian).

4.4. Fruits, use and interest

The principle that the parties should be put in the situation *ex ante* means that the obligation to restitution concerns all benefits that the parties have received as a result of the performances they have made. In line with this, LOA § 189 (1) obliges the parties to deliver the fruits and other benefits received. The idea behind this provision is that because the parties have taken advantage of the goods of the other party, the process of restitution should focus on putting both of them in a position as if they had used those goods themselves.[55] The recipient's obligation to pay for the use of the goods can be deducted from LOA § 189 (2) 1) which states that a party shall compensate for the value of the *use* of a thing. According to LOA § 189 (1), interest shall be paid on money refunded as of the moment of the receipt of the money. This obligation does not depend on the actual benefit received from the money, nor does it have any importance if the money has been used in adherence to the requirements for regular management.[56] If the parties have not agreed on the interest rate, LOA § 94 (1) applies.[57] Therefore, the buyer has the right to demand from the seller the price paid for the goods, plus interest.

The obligation to return any natural and legal fruits was also addressed in the CESL (article 172 (2): the obligation to return what was received includes any natural and legal fruits derived from what was received). This provision deserved some criticism because there were no definitions of 'natural and legal fruits', since the understanding of 'fruits' differ in the Member States.[58] The CESL also contained a special norm dedicated to the conditions in which a party must pay for the use of goods (article 174 (1)). This article was criticised for following the principle of restoring the *status quo ex ante*.[59] An explanation for the CESL's approach, which restricted the obligation to pay for the use of the goods, could be that most Member States do not recognise claims for use.[60] The CESL also ordered the recipient of money to pay interest, but only if the other party is obliged to pay for use (article 174 (2) (a)).

That said, it must be noted that the proposed online sales directive does not address the issues of fruits, use or interest in the case of a termination of

[55] Varul *et al.* 2016, p. 934.
[56] Varul *et al.* 2016, p. 934.
[57] LOA § 94 (1): the interest rate shall be applied on a half-year basis and shall be equal to the last interest rate applicable to the main refinancing operations of the European Central Bank before 1 January or 1 July of each year, unless otherwise provided by the law or the contract.
[58] Wendehorst 2012, p. 20; Lehmann 2012, Art. 172, No 47.
[59] Critically also Mörsdorf, Brinkmann 2013, p. 193; Sirena 2011, p. 998.
[60] Lehmann 2012, Art. 174, No. 8.

contract. Article 10 (3), following the rationale of the Weber-Putz judgement,[61] releases the consumer from the obligation to pay for any use made of the goods but this article only concerns the case of the *replacement* of goods. It must therefore be concluded that in relation to compensation for the use of the goods in the case of a termination of contract, the norms of Estonian law remain intact and the consumer is obliged to pay for the use of the goods prior to the termination.

4.5. Time limits for restitution

Unlike Estonian law or the CESL, the proposed directive compels the parties to fulfil their restitutionary obligations within a certain time limit: the buyer must return the goods within 14 days from sending the notice of termination, and the seller must reimburse the price within 14 days from receipt of the notice (article 13 (3) (a) and (b)). These articles resemble articles 13 and 14 (1) of the 2011 consumer rights directive[62]; for instance, the solution chosen under the regime of restitution upon the consumer's use of his statutory right of withdrawal (see 4.1 above). Setting a clear term for fulfilling the restitutionary obligations will bring clarity to the parties' relationship, and may be thus regarded as favourable to both parties of the sales contract.

This means that the norms of LOA § 189 will have to be amended for cases of online and other distance sales, which in turn creates a discrepancy between distance sales and face-to-face sales: in the latter case, the return of the goods must be made within a reasonable time.[63] Depending of the specific facts of a case, the notion of a 'reasonable time' for returning the goods might be longer than 14 days. Therefore, the proposed directive may not in all cases increase the level of consumer protection in Estonia. However, this aspect is balanced by the seller's obligation to return the money within 14 days.

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[61] Joined Cases C-65/09 and C-87/09 Gebr. Weber GmbH v Jürgen Wittmer, Ingrid Putz v Medianess Electronics GmbH. ECLI: EU: C: 2011: 396.

[62] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, pp. 64–88. The directive has been transposed into Estonian law in 2013, see LOA § 56^1 and 56^2.

[63] LOA § 82 (3); CCsCd 12.10.2010, 3-2-1-80-10, paragraph 15 (in Estonian); CCsCd 20.06.2011, 3-2-1-57-11, paragraph 35 (in Estonian).

4.6. Reciprocity of restitutionary claims

Under Estonian law, the restitutionary obligations of the parties are reciprocal (synallagmatic). Therefore, LOA § 189 (1) stipulates that obligations arising from termination shall be performed by the parties simultaneously, and refers in this respect to LOA § 111. According to LOA § 111 (1), if the parties have mutual obligations arising from a contract (mutual contract), a party may withhold performance until the other party has performed, offered to perform, secured or confirmed the performance. In this way, it will be assured that a party who faces the claim for returning that which was received, would not find himself in a position where the fulfilment of his counterclaim could not be secured.[64]

In contrast, no reciprocity between the parties' restitutionary obligations was provided in the CESL. The approach of the CESL, which ignores *synallagma* between the performances of the parties, has been criticised by several authors[65], and for good reason: the purpose of this principle is to avoid the situation in which a party is under obligation to give back that which was received without any security that the performance of his own claim for restitution will be guaranteed.

Neither does the proposed online sales directive provide for reciprocity of obligations after termination of a contract. This is surprising because here too, article 13 of the 2011 consumer rights directive could have been used as a model.[66] However, this omission is curable; relying on article 1 (4) of the proposed directive, it must be concluded that this gap may be filled by the national law, e.g. by LOA § 111.

Conclusions

The aim of this article was to compare the level of protection the consumer would enjoy under Estonian law and the proposed online sales directive in the case of a termination of contract.

The analysis revealed that while the Estonian Law of Obligations Act and the proposed directive share a common understanding of the nature and form

[64] CCsCd 20.06.2011, 3-2-1-57-11, paragraph 31 (in Estonian).

[65] Lehmann 2012, Art. 172, No. 43; Mörsdorf, Brinkmann 2013, p. 191.

[66] Article 13 (3) of the consumer rights directive provides that Unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back, or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest.

of termination, although the solutions concerning the grounds for termination and the specifics of restitution vary in the details.

In certain aspects, the transposition of the new directive into Estonian law would grant the buyer in consumer sales contracts an advantageous position compared to current Estonian law. For example, unlike the LOA, the directive does not make the buyer's right to terminate the contract dependant on the severity of the breach. Another improvement of the consumer's situation is the directive's provision which explicitly puts the costs of the restitution of goods on the seller, whereas under current Estonian law these costs would have to be paid by the buyer.

In some respects, however, transposing the directive into Estonian law would lower the level of consumer protection. For instance, after transposing the directive into Estonian law, the buyer's freedom to decide on the contractual remedy would be more limited in the case of a breach of an online consumer sales contract by the seller. This will be the result of the directive's rule that termination is available only after the failure of a claim for replacement or repair. In addition, it also appears that in comparison to the proposed directive, Estonian law currently provides for more situations where the buyer is not obliged to bear the costs of a decrease in the value of the goods.

There are situations in which the proposed directive provides more clarity in the parties' relationship, as in the case of the obligation to return the goods and the money within 14 days. And finally, there are some issues (like payment for the use of the goods) which, following the proposed solutions concerning other remedies in the proposed directive could have been also addressed in the norms concerning termination, but instead have been left for the national law to regulate.

THE PROPORTIONATE AND ABSOLUTE METHODS FOR DETERMINING A REDUCED PRICE

Piia Kalamees

Introduction

Article 12 (3) of the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content[1] (DCDir) states that the consumer shall be entitled to a proportionate price reduction among other remedies. The reduction in price shall be proportionate to the decrease in the value of the digital content which was received by the consumer compared to the value of the digital content that is in conformity with the contract (art 12 (4)). This method for determining the reduced price is called a proportional method and according to it, the price is to be reduced by the value of defective performance. The same calculation method is used for example in the German Civil Code[2] (BGB), United Nations Convention on Contracts for the International Sale of Goods[3] (CISG) and in the Estonian Law of Obligations Act[4] (LOA).[5]

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1 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content. COM(2015)634final. Available: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015PC0634 (13.09.2017).

2 Bürgerliches Gesetzbuch. Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738). Zuletzt geändert durch Art. 1 G Einführung des Rechts auf Eheschliessung für Personen gleichen Geschlechts vom 20.7.2017 (BGBI. I S. 2787).

3 United Nations Convention on Contracts for the International Sale of Goods (1981). Adopted 11.04.1980. Available: http://www.cisg.law.pace.edu/cisg/text/treaty.html (14.09.2017).

4 Võlaõigusseadus. 26.09.2001.a. *RT* I 2001, 81, 478; RT I, 01.07.2017, 1 (in Estonian). English text available at https://www.riigiteataja.ee/en/eli/522082017003/consolide (14.09.2017).

5 Varul, P. *et al.* Võlaõigusseadus I. Üldosa (§§ 1–207). Kommenteeritud väljaanne [Law of Obligations Act I. General part. Commentary]. Tallinn: Juura, 2016, p. 549.

However, there is also a second method known in Europe for determining the reduced price, which is called the absolute method. According to it, the reduced price is the result of an arithmetic subtraction operation (absolute method).[6] Of the two methods, the proportional method has found more use.[7] This method is preferred not only according to art 12 (4) of the DCDir, but also § 112 (2) of the LOA, § 441 and § 638 of the BGB, art 50 of the CISG, art 8:101 of the PECL and art III-3:601 of the DCFR. However, methods based on arithmetic subtraction are used as well[8] and using these methods has also been considered in systems previously using the proportional method to calculate the reduced price.[9]

As described above there is plurality concerning the method of calculating the reduced price under different laws and model laws. Using different methods to determine the reduced price brings about different outcomes. Therefore, the method chosen also defines the primary purpose of this remedy. Based on the method used for determining the reduced price it is therefore possible to decide whether the goal of price reduction is to restore the balance of the parties' obligations or to provide compensation for the creditor for the diminished value of the contract object.[10]

The results of using proportional and absolute methods are shown below. The purpose of this comparison is to determine the goals these different methods allow to achieve. After comparing different methods, it is possible to determine whether price reduction has a different goal from damages claim (which is by its results closest to price reduction) or is it just a modified form of the latter. The purpose of this article is to determine which method for calculating the reduced price is suitable if price reduction is to be regulated as a separate remedy in the DCDir.

6 *EC Consumer Law Compendium: The Consumer Aquis and its Transposition in the Member States*, ed. by Schulte-Nolke, H., Twigg-Flesner, C., Ebers, M. Munich: Sellier, 2008, p. 409, 436. See also Huber, P., Mullis, A. *The CISG. A New Textbook for Students and Practitioners*. Munich: Sellier, 2007, p. 251.

7 *The Max Planck Encyclopedia of European Private Law*, ed. by Basedow, J. *et al.* New York: Oxford Univeristy Press 2012, p. 1315; Sivesand, H. *The Buyer's Remedies for Non-Conforming Goods: Should there be Free Choice or are Restrictions Necessary?* Munich: Sellier, 2005, p. 66.

8 E.g. in France. See Schwartze, A. *Europäische Sachmangelgewährleistung beim Warenkauf.* Tübingen: Mohr Siebeck 2000, p. 233.

9 E.g. in Germany. See Canaris, C. W. Das allgemeine Leistungsstörungsrecht im Schuldrechtsmodernisierungsgesetz. *ZRP* 2001, Heft 8, p. 335; Holm, A. *Die Pflichtverletzung im System des Leistungsstörungsrechts als Modell de lege ferenda: eine systematische Darstellung, untersetzt durch alternative Vorschläge unter besonderer Berücksichtigung kaufrechticher Bestimmungen.* Berlin: Duncker & Humblot 2001, p. 457.

10 Schwartze 2000, p. 228.

The purpose of price reduction achieved via the reduced price formula

The proportional method for determining the reduced price

The proportional method is characterised by the following formula:

$$\frac{\textit{reduced price}}{\textit{stipulated price}} = \frac{\textit{value of defective performance}}{\textit{value of conforming performance}}$$

As a result of the equation above the following formula is used to determine the reduced price:

$$\textit{reduced price} = \frac{\textit{value of defective performance x stipulated price}}{\textit{value of conforming performance}}$$

The proportional method allows the creditor to reduce the price in the amount that reflects the decrease in the value of the contract object (caused by the non-conformity of the latter) and also the initially agreed price is taken into consideration.[11] The proportional method takes into account the fact that the creditor would not have agreed to pay the same price for a defective good as he agreed to pay for conforming goods.[12] Therefore, it can be concluded that by using the proportional method to determine the reduced price, it should be possible to place the creditor in a situation he would have been in, when he would have wanted to conclude a contract having in mind from the start the defective performance (at a lesser value).[13] When using the said method, the balance of the bargain that was disrupted earlier by defective performance is restored in a situation where the creditor agrees to accept the defective performance.[14] This means, inter alia, that if the reduced price is to be established in the described manner, the profitability of the contract must be retained for the creditor.[15]

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[11] Zamir, E. The Failure of the Remedy of Reduction in Israeli Law – Causes and Lessons. *Israeli Law Review*, 1989, vol 23, no 4, p. 476; *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht. Kommentar*, hg. von Schmidt-Kessel, M. München: Sellier, 2014, Rn. 29.

[12] Schlechtriem, P., Schwenzer, I. *Commentary on the UN Convention on the International Sale of Goods (CISG)*. 23rd ed., New York: Oxford University Press, 2010, p. 771.

[13] Flechtner, H. M. More U.S. Decisions on the U.N. Sales Convention: Scope, Parole Evidence, "Validity" and Reduction of Price under Article 50. *Journal of Law and Commerce* 1994–1995, vol 14, p. 174.

[14] SCCCd 30.11.20015, 3-2-1-131-05, 08.02.2012, 3-2-1-156-11, p 23, 28.03.2012, 3-2-1-17-12, p. 12; Jansen, S. Price Reduction Under the CISG: A 21st century Perspective. *Journal of Law and Commerce* 2014, vol 32, no 2, p. 366.

[15] *Münchener Kommentar zum Bürgerlichen Gesetzbuch.* 6. Aufl. Bände 1–11. München: C.H. Beck, 2012, § 441, Rn 12.

There are some minor differences present in the regulations in different countries' acts and model laws regarding the proportional method for calculating the reduced price,[16] but generally, the method is quite similar in all of them.

Absolute methods for determining the reduced price

Regarding the absolute method, there is much more variety. In legal literature, two distinct absolute methods for price reduction are known. According to the first absolute method, in order to determine the reduced price the difference between the values of the conforming and defective performances is subtracted from the original price.[17] The second absolute method suggests that the reduced price should amount to the value of the defective performance.[18] For example, this method was considered as a price reduction under CISG.[19] In practice, the absolute method is being used to reduce the price under French law.[20] The main critique regarding the use of absolute methods for reducing the price has been that they do not offer the possibility to balance the bargain,[21] but are more orientated towards compensating for the damage that occurred due to the lower value of the performance.[22] In order to study the outcomes of proportional and absolute methods used for price reductions, the author applies the methods to individual cases.

Examples of results achieved by using different methods for determining the reduced price

Value of the conforming performance equal to the agreed price

As an example it is practical to use a sales contract where the object of the contract is non-conforming and the buyer wants to reduce the price based on the defects in the object. Let us imagine a situation where the object of the sales

[16] E.g. there are differences in the moment when the value of conforming and defective performance is determined. Compare e.g. LOA § 112 and BGB § 441.

[17] Rabel, E. *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung*. 2. Band. De Gruyter, 1967, S. 232.

[18] Hirner, M. *Der Rechtsbehelf der Minderung nach dem UN-Kaufrecht (CISG)*. Frankfurt/Main *et al.*: Peter Lang, 2000, p. 314.

[19] Bianca, C. M., Bonell, M. J. *Commentary on the International Sales Law. The 1980 Vienna Sales Convention*. Giuffrè 1987, p. 370.

[20] Schwartze 2000, p. 233.

[21] Canaris 2001, p. 335.

[22] Hirner 2000, p. 314.

contract is an immovable property and the price agreed by the parties for this property is 500,000 euros. The agreed price has already been paid by the buyer and he has received ownership of the property. After having discovered the defects in the property, the buyer has had a professional to assess it. According to the assessment by the evaluator, the property with defects is worth 20% of the purchase price less. Therefore, the value of the defective performance is 400,000 euros. If the value of the conforming performance was equal to the agreed purchase price, the outcome of the price reduction would be the same, regardless of the price reduction method used. If the proportional method for determining the reduced price was used, the reduced price would be 400,000 euros (400,000 x 500,000/500,000 = 400,000). In this case the seller would have to return 100,000 euros (500,000 – 400,000 = 100,000) to the buyer. Using the first absolute method leads exactly to the same result. The reduced price would be 400,000 euros (500,000 – (500,000 – 400,000) = 400,000) and the seller would have to return 100,000 euros. The second absolute method for determining the reduced price has the same outcome – the reduced price would be 400,000 euros (reduced price = the value of the defective performance) and the buyer would have the right to claim back 100,000 euros. Therefore, it can be concluded, that if the parties to a contract have agreed on the price that is equal to the value of the conforming performance, the outcome is exactly the same despite the price reduction method used.[23]

Value of the conforming performance higher than the agreed price

The situation is very different though, when the value of the conforming performance is higher than the agreed purchase price. In our example, let us assume that the value of the property was 550,000 euros. This means that the buyer would have made a profitable transaction, as he would have received an immovable property with a value of 550,000 euros for 500,000 euros. If the buyer now wants to reduce the price and the proportional method was used to determine the reduced price the results would be as follows. The reduced price would on this occasion be 363,636,36 euros (400,000 x 500,000/550,000 = 363,636.36) and the buyer would be able to claim back 136,363.64 euros (500,000 – 363,636.36 = 136,636.64) of the paid purchase price. The result would be rather different upon using the absolute methods. According to the first absolute method the reduced price would be 350,000 euros (500,000 –

[23] Hirner 2000, p. 315.

(550,000 – 400,000) = 350,000) and the buyer could claim back 150,000 euros (500,000 – 350,000 = 150,000) from the seller. As a result of using the second absolute method the reduced price would be equal to the value of the immovable property with defects (400,000 euros) and the seller should reimburse 100,000 euros (500,000 – 400,000 = 100,000).

As evident from the results shown above, after using the proportional method for reducing the price, the buyer is still required to pay the seller a price that is lower than the value of the immovable property. It can be assumed that this is the ratio that the buyer had expected to pay on signing the contract. Therefore, the transaction remains as profitable to the buyer as it would have been if the property had been conforming.[24] Initially, the buyer was willing to pay 90% of the value of the property, and after he has received the property with defects, he has an obligation to pay 90% of the property's value to the seller. However, when using the first absolute method for determining the reduced price, the balance of the bargain does not remain the same. After the price has been reduced using this method, the buyer has an obligation to pay 87% of the property's value to the seller. The transaction remains profitable to the buyer, but it has become even more profitable after reducing the price. The balance of the bargain does not remain unaffected – the seller is obliged to give the buyer a more valuable property for a lower price than was agreed upon in the initial contract. The situation is somewhat different when the second absolute method is used – the buyer must pay the seller exactly the value of the non-conforming property (100%). According to the contract, the seller was initially willing to pay less than the value of the immovable property. After reducing the price using the second absolute method, the initial balance of the bargain does not remain the same and it becomes unprofitable for the buyer.

Value of the conforming performance lower than the agreed price

If the buyer has made an unprofitable transaction, the proportional method for reducing the price is the only one that makes it possible to preserve the balance of the bargain. Having in mind the previous example, let us imagine that the value of the conforming performance would have been 480,000 euros, but the parties would have still agreed upon the price of 500,000 euros. The

[24] Twigg-Flesner, C. The E.C. Directive On Certain Aspects of the Sale of Consumer Goods and Associated Guarantees – All Talk and No Do? *The Journal of Current Legal Issues* 2000, no 2; Markesinis, B. S., Unberath, H., Johnston, A. *The German Law of Contract. A Comparative Treatise.* 2nd ed., Hart Publishing, 2006, p. 510.

value of the immovable property with defects would still be 400,000 euros. Using the proportionate method for reducing the price, the reduced price would now be 416,666 euros (400,000 x 500,000/480,000 = 416,666) and the buyer could claim back 83,884 euros (500,000 – 416,666 = 83,884) paid in excess of that sum. Upon signing the contract, the buyer agreed to pay 4% more to the seller than the property's actual value. This ratio also remains the same after reducing the price according to the proportional method. The transaction is as unprofitable for the buyer as it was supposed to be if the property had conformed to the contract. After using the first absolute method the reduced price would be 420,000 euros (500,000 – (480,000 – 400,000) = 420,000) and the buyer could claim back from the seller 80,000 euros (500,000 – 420,000 = 80,000). Therefore, the buyer would now be obliged to pay the seller 105% of the value of the non-conforming immovable property. After reducing the price in this way the transaction becomes even less profitable for the buyer than it initially was. In addition, the balance of the bargain has changed. The second absolute method does not make it possible to preserve the balance of the bargain either. According to this method the reduced price is 480,000 euros and the buyer can claim back 20,000 euros of the price initially paid. As the reduced price is equal to the value of the defective property, the buyer is obliged to pay the seller 100% of its value. The transaction becomes more profitable for the buyer than the initial agreement would have allowed.

The goal achieved by reducing the price using different methods

Due to the above, it can be concluded that the only method that allows for the restoration of contractual balance even in a situation where the parties have stipulated a price that differs from the value of the conforming performance, is the proportional method.[25] With the first absolute method the difference resulting from the diminished value of the contract object is compensated while overlooking the mutual relationship of the parties arising from their performance.[26] As shown in the previous examples, after using this method for reducing the price, the balance of the bargain is shifted even more but not restored. Therefore, this method brings about a situation equivalent to that of compensation for damages.[27] The second absolute method disregards both the contractual balance as well as the value of the conforming performance. It

[25] See also Canaris 2001, p. 335.
[26] Hirner 2000, p. 317.
[27] Hirner 2000, p. 313.

results in the buyer having to pay its exact value for the defective performance and the profitability of the bargain is not maintained. Again, the effect is quite similar to compensation for damages. In this case it is not the balance of the bargain that is restored but the aim is rather to protect the buyer's interest in the performance.[28]

The analysis carried out with regard to the results of various absolute methods allows us to believe that with the said methods the balance of the bargain cannot be restored. This outcome resembles that of compensation for damages, where the diminished value of the performance is compensated to the creditor. However, the purpose of price reduction should not be to compensate for damages caused to the creditor.[29] Different remedies should facilitate the process of the creditor accomplishing different aims, otherwise one cannot speak about price reduction as an independent remedy but ought to treat it rather as a case of compensation for damages. This in turn would result in the so-called hybrid remedy type, enabling, in principle, a party to claim compensation for damages if all the substantive requirements for a price reduction are met.[30] This position is apparently also supported by the drafters of the LOA, CISG, BGB, DCFR and DCDir, as all these instruments favour the proportional method for price reduction. According to the Consumer Sales Directive, this should also be the method of choice when determining the reduced price for the consumer.[31]

In addition, the reduced price cannot be determined using a method where expenses incurred to cure the defective performance are subtracted from the stipulated price.[32] The Estonian Supreme Court has stressed this also.[33] First, also in this case, the contractual balance achieved during the formation of a contract is neglected and neither is it restored following the obligor's breach of contract. Second, this method does not make it possible to reduce the price in cases where the expenses incurred to cure the defective performance would exceed the stipulated price. It appears to be yet another calculation aimed at compensating the damage caused.

[28] Gaier, R. Die Minderungsberechnung in Schuldrechtsmodernisierungsgesetz. *ZRP* 2001, p. 338.

[29] Bianca, Bonell 1987, p. 370.

[30] Gaier 2001, p. 339.

[31] *Das Recht der Europäischen Union*, hg von Grabitz, E., Hilf, M., Nettesheim, M. C.H. Beck, 2010, art 3, Rn 71.

[32] Liu, C. *Price Reduction for Non-Conformity: Perspectives from teh CISG, UNIDROIT Principles, PECL and the Case Law*, comm 5.1. Available: http://www.cisg.law.pace.edu/cisg/biblio/chengwei2.html#v (14.09.2017); Jansen 2014, p. 356.

[33] SCCCd 19.06.2007, 3-2-1-71-07, p. 15.

The proportional and absolute methods for determining the reduced price in extreme cases

The value of defective performance considerably higher than the agreed price

Only the proportional method makes it possible to achieve the contractual balance in extreme cases. However, using the absolute methods might lead to absurd outcomes in some of these situations. For instance, where the value of non-conforming performance is considerably higher than the purchase price. Let's assume that the parties have agreed on a purchase price of 100 euros. The value of the conforming goods would be 200 euros. This means that the buyer has achieved a very profitable agreement. Unfortunately, the goods have defects and because of these the value of the goods is only 120 euros. If the buyer wishes to reduce the price and the proportional method is used, the reduced price will be 60 euros (120 x 100/ 200 = 60). This allows the buyer to pay the seller 40 euros less than initially agreed. Despite the fact that the buyer receives still more valuable goods than the agreed purchase price, it is possible for him to reduce the price. As shown before, this enables him to restore the balance of the bargain: he had hoped the deal to be profitable (60%) and the transaction remains as profitable for him after reducing the price. The absolute methods for reducing the price do not enable such balancing of the bargain in the described situation.[34] Using the second absolute method would even create a situation where the buyer would have to pay some additional amounts to the seller after reducing the price, because the value of the defective performance is higher than the agreed purchase price (100 – 120 = -20). This example illustrates the fact that the second absolute method is not suitable for reducing the price in extreme cases. The first absolute method, on the other hand, would make the bargain even more profitable for the buyer than it initially was. The reduced price would be 20 euros (100 – (200–120) = 20). The buyer would be compensated for the lower value of the goods but the bargain would still be imbalanced.

The defective performance is without any value

In cases where the value of the defective performance is 0, the proportional method for reducing the price makes it possible to restore the balance of the

[34] Hirner 2000, p. 314.

bargain. If the situation is the same as described previously, but the value of the defective performance is 0 euros, the reduced price is 0 euros when using the proportional method for reducing the price. Considering that the buyer receives valueless goods, it is not of any importance how profitable the transaction was supposed to be initially.[35] Using the first absolute method under the given circumstances would lead to a situation where the buyer should pay some additional amount to the seller, despite of the goods being valueless. Namely, the reduced price would be –100 euros (100 – (200 – 0) = -100). Subtracting this from the initially agreed price the result would be that the buyer, after reducing the price, is obliged to pay 200 euros to the seller. This price reduction outcome is absurd. The buyer receives worthless goods, for which he has to pay 100% more than the initially agreed purchase price. The second absolute method has an equally odd outcome – after reducing the price the buyer would still be obliged to pay the seller the agreed purchase price of 100 euros (100 – 0 = 0). Therefore, it can be concluded that neither of the absolute methods is suitable for reducing the price in such extreme cases. Regarding both of the absolute methods it is not possible to talk about the creditor's right to use a contractual remedy, the goal of which is to eliminate the negative effects of the breach of the seller's duties.[36]

The value of the defective performance equals the value of the conforming performance

In addition to the above described cases, it is possible to imagine a case where the value of the non-conforming performance equals the value of the conforming performance or even exceeds it.[37] For example, under Estonian law (§ 217 section 1of the LOA) the goods delivered to the buyer shall conform to the contract, in particular in respect to quantity, quality, type, description and packaging. Therefore, if the seller delivers a larger quantity of goods or goods of higher quality to the buyer than agreed in the contract, this constitutes a breach of contract. An example of this situation is when according to the contract the seller is obliged to deliver laminate parquet for a price of 100 euros. The value of the conforming parquet would be 90 euros. However, the seller delivers the same amount of natural parquet with a value of 200 euros. Using

35 Hirner 2000, p. 322.
36 Varul 2006, p. 549.
37 Heilmann, J. *Mängelgewährleistung im UN-Kaufrecht*. Berlin: Duncker & Humblot, 1994, p. 449.

the proportional method for reducing the price, the reduced price will be 222 euros. The reduced price would therefore exceed the initially agreed price and the buyer would not have the incentive to use this remedy. Using the absolute methods the results would be as follows. Applying the first absolute method to reduce the price would lead to the reduced price amounting to 210 euros (100–(90–200)) and using the second absolute method a reduced price of 200 euros. Similar to using the proportional method the use of the absolute methods leads to results that will make applying the price reduction as a remedy practically useless. Therefore, it can be concluded that the balancing of the bargain via a price reduction can only be achieved when the value of the conforming performance is higher than the value of the non-conforming performance.[38] The method used for reducing the price in these situations is irrelevant.

Suitability of different methods for determining the reduced price in extreme situations

Based on the examples above, one may state that to balance the bargain in extreme cases the proportional method for reducing the price is most suitable. The outcomes when using absolute methods on some of these occasions are simply absurd and do not support the goal of balancing the bargain. The proportional method, however, allows the parties to shape the balance of the bargain according to their wishes without changing the proportions of the transaction.[39]

Therefore, it is argued that if price reduction is to be regarded as a separate remedy, then only the proportional method is suitable for determining the reduced price. Resorting to this remedy alone would strike a balance between the stipulated price and value received by the creditor, therefore, allowing for an equitable allocation of risks.[40] This is due to the fact that the stipulated price should reflect the distribution of risks, expenses and benefit in a particular transaction.[41] The other methods introduced in this chapter would render the price reduction nothing more than a case of compensation for damages at best, and would not even be available in all circumstances as such methods could in extreme cases bring about unacceptable consequences.

[38] Hirner 2000, p. 177.
[39] Gaier 2001, p. 339.
[40] Bianca, Bonell 1987, p. 371.
[41] Zamir 1989, p. 477.

Problems using the proportional method

Despite the fact that the proportional method, as shown previously, is the most suitable from among different methods, it still has some problems. The main concern about the proportional method has been that it is too complicated.[42] On the one hand, it is often difficult to determine the value of the non-conforming performance because there are usually no comparable transactions with similar non-conforming performances. Also as the reason for reducing the price is not usually a major non-conformity of the performance, hiring an expert to evaluate the performance could be unreasonably expensive.[43] On the other hand, determining the value of the conforming performance at the time of the performance might be even more complicated. In this case the debtor has to prove the value of a performance that never took place. Therefore, one has to assume the nature of the conforming performance and after that evaluate it.[44]

The problem described here is not so decisive if the value of the conforming performance equals the agreed price. In this situation it is only necessary to determine the value of the defective performance and the agreed price.[45] This is the case often in practice. Under these circumstances, to determine the sum to be withheld or the amount to be refunded it is only necessary to subtract from the agreed price the value of the non-conforming performance.[46] Therefore, there is essentially no difference where the price reduction methods are being used, as all of them would lead to the same result.[47] As described above, determining of the value of the non-conforming performance might still prove to be difficult. However, the value of the non-conforming performance needs to be determined in order to use any of the above described methods. To use the second absolute method though, determining the value of the conforming performance is not necessary.

Therefore, the use of the first absolute method is not less complicated than the proportional method for calculating the reduced price. If the values of conforming and defective performance and the agreed price are determined, it is equally easy to perform a subtraction operation as it is to perform a dividing

42 Peters, F. Praktische Probleme der Minderung bei Kauf und Werkvertrag. *Betriebs-Berater* 1983, Heft 31, p. 1951; Sivesand 2005, p. 67.

43 Peters 1983, p. 1952.

44 *Beck'scher Online-Kommentar BGB.* Stand 01.08.2014, 35. Aufl. Available: https://beck-online.beck.de.ezproxy.utlib.ee/default.aspx?vpath=bibdata/komm/BeckOK_ZivR_35/BGB/cont/beckok.BGB.p441.glV.gl1.htm (14.09.2017), § 441, Rn 10.

45 Hirner 2000, p. 339.

46 Kötz, H. *Vertragsrecht.* Tübingen: Mohr Siebeck 2009, p. 396, Rn 975.

47 See chapter 2.

operation.[48] One could say that to calculate the reduced price, the use of the second absolute method would be the least complicated. As shown in the previous chapter, however, this method is not suitable for calculating the price reduction.

The author is of the opinion that it is not appropriate to consider the proportional method too complicated for reducing the price, as exactly the same difficulties are present in calculating damages if the received value is lower than the one agreed upon.[49] In this situation, it is also necessary to determine both the value of the conforming and the defective performance.[50] In addition to previous arguments one must not underestimate the fact that the proportional method has been used for reducing the price for centuries.[51] If the problems in determining the values of performance were insurmountable, the proportional method would not have been chosen for use in the CISG, DCFR or the DCDir. Therefore, it must be concluded that the difficulties related to determining the value of the performance are not as extensive as to question the practicability of the proportional method for reducing the price.

Conclusions

The only appropriate method for reducing the price is the proportional method, if one wishes to add a distinctive remedy to the catalogue of other contractual remedies under the DCDir. Using this method for determining the reduced price requires comparing the proportions of conforming and defective performance with the price agreed upon by the parties. The goal of using this method for determining the reduced price is to restore the balance of the parties' reciprocal obligations, which was lost due to the defective performance of the debtor and in a situation where the creditor is willing to accept the defective performance. If either of the two absolute methods for finding the reduced price were to be used, the outcome of the price reduction to be reached would rather be compensation for damages incurred by the creditor. Therefore, the price reduction can be considered a distinctive remedy only if the reduced price is determined using the proportional method. Upon using the absolute method for determining the reduced price, the price reduction would constitute a special type of compensation for damages. In this case the

48 Hirner 2000, p. 339.
49 See Sivesand 2005, p. 67.
50 Varul 2006, p. 657.
51 Gaier 2001, p. 338.

claim for compensation for damages would not be contingent on the non-excusability of the breach of obligation. Therefore the method for determining the reduced price according to art 12 (4) of the DCDir allows balancing the parties obligations and allows the price reduction to be a distinctive remedy with its own nature and goal.

The difficulties related to determining the values of the performance are not as extensive as to question the practicability of the proportional method for reducing the price. First, in practice, the value of the conforming performance mostly corresponds to the price agreed by the parties, making it unnecessary to determine the value of the conforming performance separately. In these situations the operation for finding the reduced price is also simply a subtraction. Second, exactly the same difficulties arise in calculating damages if the received value is lower than the one agreed upon, and yet both of the remedies have been used for centuries.

DIFFERENT RULES FOR DIFFERENT NATIONALS – PLURALISM IN ESTONIAN PRIVATE INTERNATIONAL LAW

Maarja Torga

Estonian private international law is characterised by a multiplicity of legal sources – rules on international jurisdiction, applicable law and the recognition and enforcement of foreign judgments are scattered around in international conventions, European regulations and national legislation. What is somehow surprising is that the application of these rules often depends on the nationality of the parties involved in particular proceedings. Namely, in order to fulfil Estonian international obligations, Estonian courts have to apply different rules in international civil proceedings in relation to Russian and Ukrainian nationals compared to the rules that they would apply in relation to Estonian nationals. Ironically, the original reasoning behind such a unique treatment of Russian and Ukrainian nationals was the idea that such litigants should be guaranteed the same treatment in front of Estonian authorities as Estonian nationals.[1] The purpose of this article is to analyse whether the pluralism in the sources of Estonian private international law has helped to achieve this aim or whether it would have been more beneficial for different nationals to benefit from one single legal regime. In order to do this, the article first introduces the reader to the legal regime applicable in Estonian courts in relation to Russian and Ukrainian nationals and then proceeds to critically evaluate two areas of private international law (jurisdiction and applicable law), where the existence of such a regime does not serve the aim of guaranteeing equal treatment for different nationalities.

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[1] See articles 1 in the Estonia-Russia legal assistance treaty: Eesti Vabariigi ja Vene Föderatsiooni leping õigusabi ja õigussuhete kohta tsiviil-, perekonna- ja kriminaalasjades [Legal assistance treaty between the Republic of Estonia and the Russian Federation]. – *Riigi Teataja (RT)* II 1993, 16, 27 (in Estonian); Eesti Vabariigi ja Ukraina leping õigusabi ja õigussuhete kohta tsiviil- ning kriminaalasjades [Legal assistance treaty between the Republic of Estonia and the Ukraine]. *RT* II 1995, 13/14, 63 (in Estonian).

1. Legal assistance treaties concluded with the Russian Federation and Ukraine

Soon after its independence was restored in 1991, the Republic of Estonia started concluding various international treaties in order to strengthen the recognition of Estonia as an independent state. Such treaties included the Estonia-Russia legal assistance treaty, signed by the Contracting Parties on 26 January 1993,[2] and the Estonia-Ukraine legal assistance treaty, signed by the Republic of Estonia and Ukraine on 15 February 1995.

The legal assistance treaties or the 'mutual legal assistance treaties' or 'bilateral judicial assistance treaties' as these types of treaties are sometimes called in international legal literature[3] are not uniquely Estonian, but have been concluded by (and often between) various members of the former Soviet bloc.[4] These kinds of treaties traditionally cover all aspects of private international law. For example, the treaties concluded between Russia and Estonia and Ukraine and Estonia include rules on determining international jurisdiction and applicable law, the recognition and enforcement of foreign judgments and the cooperation between the courts and other authorities of the Contracting Parties, such as the cooperation relating to the cross-border service of documents and taking of evidence.

Although the Republic of Estonia has also concluded similar treaties with the other Member States of the European Union (a treaty with Poland[5] and a treaty with Latvia-Lithuania[6]), these treaties do not have much relevance for the purposes of this article, as the rules contained in these treaties have for

[2] The treaty is as amended by the additional Protocol added to the treaty in 2001: Eesti Vabariigi ja Vene Föderatsiooni vahel 1993. aasta 26. jaanuaril sõlmitud lepingu "Õigusabi ja õigussuhete kohta tsiviil-, perekonna- ja kriminaalasjades" juurde kuuluv protokoll [Additional protocol 'On legal aid and legal relationships in civil-, family- and criminal matters' to the treaty concluded between the Republic of Estonia and the Russian Federation on 26 January 1993]. *RT* II 2002, 14, 58 (in Estonian).

[3] See correspondingly: Kucina, I. The measure of quality of mutual legal assistance treaties. *International Scientific Conference. The Quality of Legal Acts and its Importance in Contemporary Legal Space. 4–5 October 2012*. University of Latvia Press 2012, pp 529–539; Anthimos, A. Recognition of Russian personal status judgments in Greece: A Case Law Survey. *Russian Law Journal*. Vol II 2014, Issue 3, pp 49–61.

[4] These treaties are too numerous to name. The Republic of Estonia has concluded such treaties with Latvia-Lithuania, Poland, Ukraine and Russian Federation.

[5] Eesti Vabariigi ja Poola Vabariigi vaheline leping õigusabi osutamise ja õigussuhete kohta tsiviil-, töö- ning kriminaalasjades [Legal assistance treaty between the Republic of Estonia and the Republic of Poland]. *RT* II 1999, 4, 22 (in Estonian).

[6] Eesti Vabariigi, Leedu Vabariigi ja Läti Vabariigi õigusabi ja õigussuhete leping [Legal assistance treaty between the Republic of Estonia, the Republic of Lithuania and the Republic of Latvia]. *RT* II 1993, 6, 5 (in Estonian).

the most part been replaced by various European regulations.[7] The European regulations cannot, however, replace the Estonia-Russia and Estonia-Ukraine legal assistance treaties in Estonian courts. This position can be derived from article 351 of the Treaty on the Functioning of the European Union (TFEU),[8] which provides that the rights and obligations arising from agreements concluded before the date of accession of Estonia to the European Union, between the Republic of Estonia on the one hand, and one or more third countries on the other, shall not be affected by the provision of the TFEU and the Treaty on the European Union (TEU).[9] Hence, Estonian courts have to apply the legal assistance treaties concluded with the Russian Federation and Ukraine if the conditions for the application of these treaties are met regardless of there existing any European regulation, the conditions for the application of which are fulfilled at the same time.

Unfortunately it is not entirely clear in which situations the Estonia-Russia and Estonia-Ukraine legal assistance treaties should be applicable. Such ambiguity is caused by the lack of any clear provisions contained in the legal assistance treaties as to the scope of the application of these treaties, and has so far not been conclusively solved by case law.[10] Based on the first articles[11] of the legal assistance treaties concluded with the Russian Federation and Ukraine it can, however, be presumed that the treaty rules on determining international jurisdiction and applicable law should be applied by Estonian courts in situations involving the nationals of the relevant Contracting Parties and the treaty rules on the recognition and enforcement of judgments should be applied if the judgment in question emanates from a Contracting Party to the relevant

7 See for example art 69 of the Brussels I (recast) regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). – OJ L 351, 20.12.2012, pp 1–32. As an example, see also: art 59(1) of the Brussels II bis regulation (Council Regulation (EC) No 2201/2003 of 27 November concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. – OJ L 338, 23.12.2003, pp 1–29.

8 Consolidated version of the Treaty on the Functioning of the European Union. – OJ C326, 26.10.2012, pp 47–200.

9 Consolidated version of the Treaty on European Union. – OJ C326, 26.10.2012, pp 13–46.

10 Estonian case law on the applicability of legal assistance treaties is ambiguous – courts generally apply the treaties without explaining the scope of the application of the treaties.

11 For example, the first sentence of art 1(1) of the Estonia-Russia legal assistance treaty provides the following: "The nationals of one Contracting Party have the same legal protection for their personal and material rights in the territory of the other Contracting Party as the nationals of the other Contracting Party".

treaty.[12] For example, in a civil case where a claimant or a defendant is a Russian national, the Estonian court should determine international jurisdiction and applicable law under the Estonia-Russia legal assistance treaty, and if an applicant seeks to recognise an Ukrainian judgment in Estonia, the Estonian court should generally[13] decide upon the possibility of such recognition based on the Estonia-Ukraine legal assistance treaty.

As derived from the first articles of the Estonia-Russia and the Estonia-Ukraine legal assistance treaties, the main purpose of these treaties is to guarantee that the nationals of one Contracting Party would enjoy the same legal protection as the nationals of the relevant other Contracting Party. It is, however, questionable whether the treaty rules help to achieve such an aim. This can be illustrated by critically evaluating two types of rules contained in the legal assistance treaties: the rules dealing with the determination of international jurisdiction and the rules dealing with the determination of applicable law.

2. Determining international jurisdiction under legal assistance treaties

The rules on determining international jurisdiction contained in the legal assistance treaties concluded by the Republic of Estonia with the Russian Federation and Ukraine distinguish between general, special and exclusive grounds under which a person can be sued in Estonian courts. These grounds are worded almost analogously in the Estonia-Russia and Estonia-Ukraine legal assistance treaties.

Under the general grounds for jurisdiction, a Russian or a Ukrainian national can be sued in Estonian courts if he or she has a 'place of residence'[14]

[12] For such position see: Sein, K. and others. *International Encyclopedia for Private International Law Estonia*. Alphen aan den Rijn: Kluwer Law International 2013, pp 33–34; Torga, M. Õigusabilepingute kohaldamine tsiviilvaidluste lahendamisel Eesti kohtutes [Applying legal assistance treaties in Estonian courts]. *Kohtute aastaraamat 2012* [Yearbook of Courts 2012]. Riigikohus 2013, pp 77–80 (in Estonian).

[13] It is doubtful whether the Ukrainian judgments concluded before the date of entry into force of the Estonia-Ukraine legal assistance treaty should fall in the scope of application of the Estonia-Ukraine legal assistance treaty. Such position has, however, been favoured by the Estonian Supreme Court. See: SCCCo 10.11.2000, 3-2-1-125-00, Turtšin (in Estonian). For the critique of such position, see: Vallikivi, H. *Välislepingud Eesti õigussüsteemis: 1992.a. põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus* [International conventions in Estonian legal system: the validity and applicability of foreign treaties concluded under the 1992 constitution]. Tallinn: Õiguskirjastus 2001, pp 88–89 (in Estonian).

[14] On the meaning of this concept, see: Torga, M. Characterisation in Estonian Private International Law – a Proper Tool for Achieving Justice between the Parties? *Juridica International* XVIII, 2011, p 84, 86–87.

in Estonia. If the defendant does not have a place of residence in Estonia, the claimant can still sue the defendant in Estonia if some of the special grounds of jurisdiction provided by the legal assistance treaties exist. For example, under article 40(3) of the Estonia-Russia legal assistance treaty, a claimant who is seeking compensation for an unlawful damage can still sue a defendant without a place of residence in Estonia in Estonia if the act or other event giving rise to damages occurred in Estonia. In such a case, the claimant can also sue the defendant in the Contracting Party where the defendant has his place of residence, which means that the claimant has a choice between the two *fora* – the Contracting Party where the place of residence of the defendant is located and the Contracting Party where the act or other event giving rise to damages occurred.

In contrast, the exclusive grounds of jurisdiction contained in the legal assistance treaties determine the courts of the Contracting Party, which can exclusively deal with certain civil and commercial matters. For example, under article 25 of the Estonia-Russia treaty in matters related to limiting the active legal capacity of a person or declaring a person incapable, only the courts of the Contracting Party of defendant in question are competent to hear such a case and the courts of the other Contracting Party have to decline jurisdiction if an application in such a case is submitted to their court. The rules on exclusive jurisdiction contained in the legal assistance treaties, therefore, generally do not offer any choice for the applicant as to which court he or she can turn to.[15]

The aim of the rules on jurisdiction contained in the legal assistance treaties is to ensure that the most appropriate forums would deal with solving civil and commercial disputes. For example, just as it is the case with similar European equivalents,[16] the purpose behind article 40(3) of the Estonia-Russia legal assistance treaty, which allows the claimant to sue the defendant for causing unlawful damages to the claimant in the place where the act or event giving rise to the damages occurred, probably lies in the fact that the evidence of the relevant act, event or damages is most likely located in such a place. Therefore,

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[15] There are some exceptions to that rule, for example, under art 28(1) of the Estonia-Russia legal assistance treaty, a spouse who wishes to divorce can choose between filing for a divorce in the courts of the Contracting Party whose nationals both spouses are or in the courts of the Contracting Party in whose territory both spouses reside.

[16] Namely, the Brussels I (recast) regulation art 7(2) and its predecessors Brussels I regulation art 5(3) and Brussels convention art 5(3). For the Brussels I regulation and the Brussels convention, see correspondingly: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. – OJ L 012, 16.01.2001, pp 1–23; 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. – OJ L 299, 31.12.1972, pp 32–42.

it can be presumed that the courts of such a place are in the best and most convenient position to gather and evaluate the relevant evidence.[17] This more particular aim of the rules on jurisdiction contained in the legal assistance treaties could, however, conflict with the aim of the treaties in general, which was to guarantee that the nationals of one Contracting Party be treated equally to the nationals of the other Contracting Party in front of the authorities of the first Contracting Party. This conflict occurs most often in cases where the rules on exclusive jurisdiction are applied by the authorities.

The rules on exclusive jurisdiction generally use the nationality of the party or parties as the main connecting factor. Although the idea behind such a choice has probably been to guarantee that the nationals of one Contracting Party have free access to the courts which are, from their perspective, the most appropriate forums, in practice, it is often possible that due to the nationality of the person being used as the main connecting factor, the nationals of one Contracting Party are left in a position where they cannot enforce their rights in a suitable forum. This can be illustrated by the following case:

> *A child with Russian nationality*[18] *has lived in Estonia for the whole duration of his life. His father (who is not married to his mother) is an Estonian national living in Finland. The child wishes to sue his father for maintenance.*

Since one of the parties in this case (the child) holds Russian nationality, the Estonian courts would have to determine whether they have jurisdiction in this case according to the Estonia-Russia legal assistance treaty. This treaty contains rules determining jurisdiction in the cases of a 'legal relationship between a child born out of wedlock and his parent' (Estonia-Russia legal assistance treaty arts. 31–32). According to these rules, the courts of the Contracting Party, whose nationality the child in question is, would solely be competent to hear the disputes over such relationships. If one considers the obligation of a parent to pay maintenance for his child to form part of a 'legal relationship between the child and his parent' within the meaning of articles 31–32 of the Estonia-Russia legal assistance treaty, it would not be possible for the child in the example given above to sue his father in Estonia, because the treaty rules

[17] At least such has been the presumption by the European Court when interpreting similar European rules. See for example: Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA. Case 21-76. Judgment of the Court of 30 November 1979, p 1735, para 17.

[18] According to the 2011 poll, there were 89,913 Russian nationals and 4,707 Ukrainian nationals living in Estonia. See: Statistics Estonia (Statistikaamet). Rahva ja eluruumide loendus – Rahva ja eluruumide loendus 2011 – Esialgsed andmed. Available at: http://www.stat.ee/sab-uuendus?db_update_id=13543 (01.06.2017) (in Estonian).

would allow him to sue his father only in the Contracting Party the nationality of which, he as the child in question, holds (i.e. Russia). This is not a very good solution for the child in question, as he has to enforce his rights in a distant forum and in a state where he might not be very familiar with the legal system. Ironically, in a very similar case where the child in question holds Estonian nationality, he could, under the then applicable European rules,[19] sue his father in Estonia. Hence, by applying the treaty rules instead of the otherwise applicable European rules, a child with Russian nationality is deprived of his right to sue his maintenance debtor in Estonia, whereas a child with Estonian nationality in a similar situation would have no problem enforcing his rights in the Estonian courts. This kind of case is only one example of how the rules on jurisdiction contained in the legal assistance treaties deviate from the general purpose of these treaties – to guarantee the same treatment for different nationals in front of the Estonian authorities.

Treating Estonian and Russian nationals differently when determining international jurisdiction in Estonian courts is due to the fact that the connecting factors used in the legal assistance treaties (and especially in the context of the rules on exclusive jurisdiction contained in these treaties) often deviate from the connecting factors used in the other legal acts applicable in Estonian courts, which deal with the determination of international jurisdiction. The main connecting factor used in the legal assistance treaties in the context of the rules on exclusive jurisdiction is the nationality of the party or parties. In contrast, the most favoured connecting factor in European law for similar disputes is the habitual residence[20] of a person. For example, under the relevant European rules (the Brussels II *bis* regulation art 8), the courts of the habitual

[19] That is, art 3(b) of the Maintenance Regulation: Council Regulation (EC) No 4/2009 of 18 December on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. – OJ L 007, 10.01.2009, pp 1–79.

[20] With the exception of the Brussels I Regulations, the European private international law instruments (but also various Hague conventions) generally use 'habitual residence' as the main personal connecting factor for determining jurisdiction and applicable law. On this concept, see further: C. Ricci. Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes: from Brussels II-bis to Rome III. *The External Dimensions of EC Private International Law in Family and Succession Matters*, ed. by Malatesta, A., Bariatti, S., Pocar, F. Padova: CEDAM 2008, pp 207–219; Bogdan, M. The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law. *International Family Law for the European Union*, ed. by Meeusen, J. *et al*. Antwerpen: Intersentia 2007, pp 303–317; Lamont, R. Habitual Residence and Brussels IIbis: Developing Concepts for European Private International Family Law. *Journal of Private International Law* 2007, Vol 3, No 2, pp 261–281; Rogerson, P. Habitual residence: the new domicile? *The International and Comparative Law Quarterly* 2000, Vol 49, No 1, pp 86–107; Stone, P. The concept of habitual residence in private international law. *Anglo-American Law Review* 2000, Vol 29, No 3, pp 342–367.

residence of the child[21] should as a general rule, hear disputes over parental responsibility, while under the rules contained in the legal assistance treaties such disputes should generally be heard by the courts of the Contracting Party whose nationality the child in question holds.[22] If the connecting factors used in the two types of instruments differ, it is often possible that the treaty rules, if applied instead of the European or Estonian national rules, put Russian and Ukrainian nationals in a considerably weaker position than Estonian nationals in terms of access to (Estonian) court.

In addition, since the rules on jurisdiction contained in the legal assistance treaties provide for very limited types of cases where the claimant can choose between various forums (i.e. the rules on jurisdiction contained in the legal assistance treaties do not generally provide for any special grounds of jurisdiction), the Russian or Ukraine nationals often have a more limited choice as to which country's court they can turn to compared to Estonian nationals involved in similar situations. For example, under the Brussels I (recast) regulation articles 4(1) and 7(1)(b) the claimant could, in a dispute over a sales contract, choose whether to sue the defendant in a court in the Member State of the defendant's domicile or in a court in the Member State where, under the contract, the goods were delivered or should have been delivered. In contrast, under the legal assistance treaties, the claimant could, in a similar contractual dispute, generally sue the defendant only in the Contracting Party where the defendant has his place of residence. The lack of any generous rules on special jurisdiction in the legal assistance treaties therefore also considerably exacerbates the position of Russian and Ukrainian nationals in front of the Estonian courts as compared to the position of Estonian nationals in relation to whom the legal assistance treaties are usually not applicable.[23]

Lastly, the application of the rules on jurisdiction contained in the legal assistance treaties could put the Russian or Ukrainian nationals in a less favoured position compared to Estonian nationals due to the very limited regime of *lis pendens* contained in the legal assistance treaties. More specifically, under article 21(3) of the Estonia-Russia legal assistance treaty, when the same proceedings between the same parties on the same issue and on the same

[21] On this concept as interpreted by the European Court of Justice, see: Barbara Mercredi v Richard Chaffe. Case C-497/10. Judgment of the Court (First Chamber) of 22 December 2010, p 14309, paras 41–57; Case, A. C-523/07. Judgment of the Court (Third Chamber) of 2 April 2009, p 2805, paras 30–44.

[22] Estonia-Russia legal assistance treaty arts 30(2), 31 and 32, Estonia-Ukraine legal assistance treaty arts 28(3)–(5).

[23] Provided of course that no other participant in the proceedings holds Russian or Ukrainian nationality.

grounds are brought to the courts of both Contracting Parties and both courts are competent under the Estonia-Russia legal assistance treaty, the court which initiated the proceedings later must terminate the proceedings. This provision does not allow the Estonian court to terminate or stay the proceedings in favour of the proceedings already taking place in a third state. Such termination or stay would, however, be possible under various European and Estonian national rules applicable in situations where Russian or Ukrainian nationals are not involved in Estonian proceedings.[24] Hence, it is possible that the legal assistance treaties oblige the Estonian court to proceed with a case, which is already being heard by a foreign court, and which can lead to the possibility of irreconcilable judgments being made in the same case by the courts of different states. This might make it harder for the (Russian or Ukrainian) participants of the proceedings to enforce the relevant foreign judgments later in Estonia, since the irreconcilability of the judgments is a common ground for refusing to recognise or enforce a foreign judgment.[25]

3. Determining the applicable law under the legal assistance treaties

As was the case with determining jurisdiction under the legal assistance treaties, applying the treaty rules on the applicable law can lead to the unequal treatment of different nationals in front of the Estonian authorities. This is firstly due to the treaty rules using different connecting factors than the otherwise applicable European or Estonian national rules, and is secondly due to the legal assistance treaties not allowing as wide a party autonomy as do the other conflict of law provisions applicable in Estonian courts.

As in the rules on jurisdiction contained in the legal assistance treaties concluded with Russia and Ukraine, the rules on applicable law contained in these treaties often use different connecting factors than the corresponding European or Estonian national rules. This can lead to different nationals being treated differently in front of the Estonian authorities. For example, under the Estonia-Russia legal assistance treaty article 42(2) the law of the Contracting Party in whose territory the immovable in question is situated governs the

[24] For a overview on such rules, see: Torga, M. Välisriigis toimuva tsiviilkohtumenetluse mõju Eesti tsiviilkohtumenetlusele [The impact of foreign proceedings on Estonian court proceedings]. *Juridica* 9, 2014, pp 680–689 (in Estonian).

[25] See, for example, Estonia-Russia legal assistance treaty art 56(2), Estonia-Ukraine legal assistance treaty art 43(2).

succession to such immovable. Therefore, in a succession dispute involving a Russian national, the Estonian court might need to apply different foreign laws to different parts of the estate if the estate includes an immovable. In contrast, under the corresponding European rules[26] the law of the last habitual residence of the deceased would generally be applied and such law would apply to the succession as a whole. Since it is the responsibility of the participants involved in Estonian court proceedings to submit evidence on foreign law,[27] the solution found in the legal assistance treaties could turn out to be considerably more burdensome (and possibly more expensive) for the Russian national involved in succession proceedings than it would be for the Estonian national involved in the proceedings where the Estonian court applies Estonian law or (only) one single foreign law.

Besides the inequality that may stem from the use of the different connecting factors in the legal assistance treaties on the one hand, and the European and Estonian national rules on the other, the unequal treatment of different nationals is further accentuated by the lack of provisions on party autonomy in the legal assistance treaties. In particular, the legal assistance treaties provide considerably fewer options for the parties involved in particular proceedings to agree upon the applicable (foreign or Estonian) law. For example, while under European rules, parties to proceedings can choose the applicable law to a contract,[28] a non-contractual obligation[29] or a divorce,[30] no similar autonomy is

[26] Namely, art 21(1) of the Succession regulation: Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. – OJ L 201, 27.07.2012, pp 107–134

[27] This derives from art 234 of the Estonian Code of Civil Procedure (Tsiviilkohtumenetluse seadustik). *RT* I 2005, 26, 197; *RT* I, 26.05.2017, 5 (in Estonian). English text available at: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516062015009/consolide (01.06.2017). See on this principle further: SCCCd, 21.12.2016, 3-2-1-133-16, Roba Metals B. V. v. Avotini Estonia OÜ, para 16.

[28] See art 3 of the Rome I regulation: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 177, 04.07.2008, pp 6–16.

[29] See art 14 of the Rome II regulation: Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). – OJ L 199, 31.07.2007, pp 40–49.

[30] See art 5 of the Rome III regulation: Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. – OJ L 343, 29.12.2010, pp 10–16. Although the Republic of Estonia is currently not bound by the Rome III Regulation, it has been announced by the Estonian government that joining the Rome III regulation is to be expected in the near future. See: Vabariigi Valitsus, 'Eesti Euroopa Liidu poliitika 2011–2015 tegevuseesmärgid (eelnõu

provided by the legal assistance treaties. This could considerably limit the rights of Russian and Ukrainian nationals involved in Estonian court proceedings to design the legal relationships in which they are involved compared to Estonian nationals in similar situations. Undoubtedly, such limitations do not help achieve the main aim of the legal assistance treaties; that is, the equal treatment of different nationals in front of the authorities of the relevant Contracting Parties.

4. Conclusions

The pluralism in the sources of Estonian private international law has not helped achieve the aim of guaranteeing equal treatment for the nationals of different Contracting Parties to the legal assistance treaties. The main reason for this is the use of different connecting factors in the legal assistance treaties on the one hand, and in the European and Estonian national rules on the other. However, the unequal treatment of different nationals is further accentuated by the lack of any generous provisions on special jurisdiction, on *lis pendens* or on party autonomy in the legal assistance treaties. For example, the rather restrictive treaty rules on *lis pendens* can lead to the occurrence of irreconcilable judgments making it possibly harder for Russian or Ukrainian nationals to enforce foreign judgments in Estonia. In addition, the lack of provisions on party autonomy in the legal assistance treaties could deprive Russian and Ukrainian nationals of the possibility of shaping the legal relationships where they are involved. By comparison, such problems would not concern Estonian nationals in situations where the legal assistance treaties are not applicable. Hence, instead of devising elaborate rules on international jurisdiction or the applicable law, the Contracting Parties to the treaties could rather have limited themselves to agreeing only on the first declaratory articles of the legal assistance treaties, which seek to grant the nationals of one Contracting Party the same rights as to the nationals of the other Contracting Party.

25.11.2011)' 2011 [The Government of the Republic of Estonia. 'Priorities of Estonian politics on the European Union 2011–2015 (draft 25.11.2011)]. Available: http://valitsus.ee/UserFiles/valitsus/et/riigikantselei/euroopa/eesti-eesmargid-euroopa-liidus/ELPOL_2011-2015_tegevuseesm%C3%A4rgid.pdf (in Estonian) (01.06.2017).

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