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100 Years Later

Personal Freedom in Estonian Marriage Law between 1918 and 1940

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Community of Property – Back to the Roots

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Ivo Pilving, Monika Mikiver



Dear reader,

The last time I addressed our readers was 20 years ago in the *Juridica International* issue 'Legislation and Legal Policy'.

This year, all eyes on the legal landscape have been turned to the celebration of the 100th anniversary of the first Constitution of Estonia. The adopting of the Constitution of the Republic of Estonia on 15 June 1920 provided Estonia with a source document that was used to direct life towards a state based on justice and the protection of democracy, fundamental rights and the rights of ethnic minorities.

The 100th anniversary of the Constitution is the central theme of the major forum of the Estonian legal community – Estonian Lawyers' Days. The conference kicks off with plenaries and the days will continue with sixteen panels. Under the guidance of experienced moderators more than eighty presenters will take the stage. The programme can be found in this issue.

Publication of the thoroughly updated commented edition of the Constitution holds a special place in the event programme dedicated to the 100th anniversary of the first Constitution of Estonia.


Commented editions of the 1992 Constitution of the Republic of Estonia have been published since 2002. The above is a collection of scientific articles, which brings together knowledge on constitutional law that has been accumulated over the years, including looks back at history, a comparison to other legal systems, Estonian and international case-law. Over the course of the past few decades, dozens of lawyers have participated in the preparation of comments on the Constitution; their aim has been to create and constantly update the guide to understanding the Constitution, by means of cooperation and debates. Since 2012, the comments have been published by the Iuridicum Foundation as a web publication, and they are freely available to the public.

Some of the scientists who commenced commenting on the Constitution in 2002 have since retired, departed, or distanced themselves from the field. Their duties have been taken over by researchers of a younger generation and practitioners with an academic background who are specialised and competent on the topic of the commented section or chapter. Completely new comments have been written in several parts in an interdisciplinary manner, expanding the legal-philosophical dimension. It is of the utmost importance to primarily continue with the approach introducing different points of view.

The target audience of the comments are not just lawyers, but the whole of the Estonian public. The fifth edition of the comments on the Constitution will be presented on 21 December 2020.

A selection of articles has been presented on the cover of this year's issue of *Juridica International* – from the century-old approach to personal freedom in Estonian Marriage Law, to finding answers to the question of whether it is possible, at the current level of artificial intelligence, to delegate making atypical and more complex administrative decisions to *kratts*. It is of particular pleasure to note that this time a number of contributions from doctoral students at the beginning of their research careers have made it into this issue of the journal – the future belongs to young people who are able to change the world.

Thank you to everyone who, with their initiative and activities, have significantly contributed to the maintenance and development of Estonian rule of law. Happy 100th anniversary of the Constitution of the Republic of Estonia!


Peep Pruks

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Personal Freedom in Estonian Marriage Law between 1918 and 1940

Introduction

Recently, the Republic of Estonia celebrated its centennial, 100 years since declaring its independence in 1918. Although the first, very modern and liberal Constitution of Estonia^{*1} was established in 1920, many of the old, conservative laws that came before it from the time of the Russian Empire, such as the Baltic Private Law Code (BPLC)^{*2}, remained in force during Estonia's first era of independence, in the 1920s and 1930s. Estonian lawyers and politicians swiftly began work to develop a new civil code.^{*3} Different opinions collided in discussions about reforming the country's private law, including its family law and institution of marriage.

Marriage establishes a very tight personal and legal connection between two persons, and sometimes interests of a family can come into conflict with the personal freedom of one or the other spouse. In this article, the concept of personal freedom is understood thus: being free within society from oppressive restrictions and having the opportunity to conclude contracts or change one's legal status without undue constraint. Accordingly, one goal for those compiling a new Civil Code of Estonia was to find balance between modern, liberal ideas of personal freedom and traditional ideas about stability of marriage. Although there are a few publications about Estonian family law in the interwar era,^{*4} none of them analyses the compromise between personal freedom and family stability in greater depth.

¹ Eesti Vabariigi põhiseadus – RT 1920 113/114 (in Estonian).

² There were official versions of the BPLC in both German and Russian. In German: *Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht. Liv-, Est- und Curländisches Privatrecht.* (Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II, Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei, St. Petersburg 1864). The Russian version used for this article: Владимир Буковский, *Сводъ гражданскихъ узаконений губерний прибалтийскихъ* (Томъ 1, Рига 1914). This was the latest version made available and includes commentary, although it was not the official Russian version.

³ For more about the BPLC and attempts to modernise private law in interwar Estonia, see: Hesi Siimets-Gross, Marju Luts-Sootak, and Katrin Kiirend-Pruuli, 'The Private Law Codification As an Instrument for the Consolidation of a Nation from Inside – Estonia and Latvia between Two World Wars' in Michał Gałędek and Anna Klimaszewska (eds), *Modernisation, National Identity and Legal Instrumentalism* (Studies in Comparative Legal History, vol 1: Private Law Brill, Leiden). DOI: https://doi.org/10.1163/9789004417274_013.

⁴ Most of the publications are in Estonian – for example: Katrin Kiirend-Pruuli, 'Abikaasade isiklike suhete õiguslik korraldus Eesti esimesel iseseisvusperioodil: tee kaheliikmelise parlamendi suunas' (Legal Regulation of Personal Relationships between Spouses during the First Period of Independence: a Way towards a Two-Member Parliament) [2017] *Annales Litterarum Societatis Esthonicae* 205; Toomas Anepaio, 'Varühisus – kas nõukogulik igand' (Common Property – a Relic from the Soviet Times?) [2002] 3 *Juridica* 193; Katrin Roosileht, *Vaestlastekohtud* (Orphans' Courts) (Eesti Ajalooarhiiv, Tartu 2003); Merike Ristikivi, Marju Luts-Sootak, and Heli-Triin Räsä, 'Kohtuniku amet on liiga raske neile: Eesti naisjuristide pürgimisest kohtunikuks kahe maailmasõja vahelisel perioodil' (A Judge's Profession is Too Difficult for Them: on the Aspiration of

In the 1920s, Estonian family law was quickly liberalised in some respects. Estonia was one of the first countries in the region to legalise consensual divorce, doing so in 1923, and civil marriage was established in 1926.^{*5} The interesting question in this connection is whether the new, modern and liberal ideas had any influence on personal and proprietary relations between spouses during the marriage as represented in the drafts for the civil code. This article examines the personal freedom of spouses from two perspectives: how much freedom the state gave the spouses to regulate their personal and proprietary relations and how much personal freedom the wife had when compared to the husband. For pinpointing the breadth and limits of personal freedom in marriage, the family law in force in the 1920s and 1930s – the BPLC – will be analysed and compared with the Estonian Civil Code drafts. The drafts and related discussions help to illuminate the form and extent of personal freedom that was considered suitable for the new and modern state.

1. Personal freedom in personal relations between spouses

Personal relations between spouses were regulated by the BPLC's Article 11, stating that 'by marriage, the husband becomes a guardian (adviser or assistant) of the wife'. So the husband was the legal guardian of his wife. For example, the husband had the right to represent her in court proceedings, file claims on behalf of his wife without her authorisation, and participate in criminal proceedings when she was a victim (under Article 8). According to Article 7, the spouses were obliged to live together, and Article 8 entitled the husband to demand spousal obedience from his wife and choose the place of family residence.

In the course of the 1920s and 1930s, several political, social, legal, and economic changes took place. The role of women in the public sphere changed considerably. While Article 6 of the Constitution of 1920 declared that all citizens are equal before the law, with men and women therefore being alike in this regard, that norm was applied only in public-law matters.^{*6} The principle of equality between men and women in public law did exert pressure, though, encouraging demands for more equality in family law, and discussions frequently stressed arguments for a new position of women in public law.^{*7}

The first committee on record charged with drafting an Estonian Civil Code in place of the outdated BPLC was formed in 1923.^{*8} It was not long before the Estonian Women's Union sent a note to the committee who were drafting the civil code. They strongly advised using the more modern and egalitarian Swedish

Female Estonian Lawyers to Become a Judge in the Period Between the World Wars) (2017) 2/3 *Ajalooline Ajakiri* 309. DOI: <https://doi.org/10.12697/aa.2017.2-3.05>; Marelle Leppik, 'Soolise võrdõiguslikkuse küsimus Eesti Vabariigi põhiseadustes ja riigikohtu praktikas 1920–1940' (The Issue of Gender Equality in the Constitution of Estonia and the Case Law of the Supreme Court in 1920–1940) (2017) 2/3 *Ajalooline Ajakiri* 341. DOI: <https://doi.org/10.12697/aa.2017.2-3.06>. Some aspects of Estonian family law are analysed in: Katrin Kiirend-Pruuli and others, 'Die Mesalliance des liberalen Eherechts mit dem konservativen Familienrecht im Estlands Recht der Zwischenkriegszeit' in Martin Löhning (ed), *Kulturkampf um die Ehe – Die Reform des europäischen Eherechts nach dem Großen Krieg* (Mohr Siebeck, Tübingen, forthcoming in 2020) (in German). DOI: <https://doi.org/10.1628/978-3-16-159305-5>.

⁵ See more about reforms in marriage and divorce law in: Katrin Kiirend-Pruuli and others (n One of the reforms IDD brought about was that regulation of the duty to give information was extended to cover not only insurance intermediaries but also insurers themselves – prior to IDD, regulation of the insurer's duty to give information to a customer was left mostly to national legislators. A noteworthy element in the IDD rules concerning the insurer's duty to give information is that the directive contains a detailed list of issues that must be notified to the customer (art 20(8) IDD). This legislative technique corresponds to that adopted in Directive 2009/138/EC on taking up and pursuing the business of Insurance and Reinsurance (Solvency II) in the field of life insurance (see art 185(3)) as well as that adopted in art 2:201 of the Principles of European Insurance Contract Law ('PEICL') as generally applicable. On the other hand, this technique deviates from the one customarily utilized in Nordic countries, where the content of the insurer's duty to give information has been defined with compact general clauses.).

⁶ Article 6 states that there 'cannot be any public privileges or prejudices derived from birth, religion, sex, rank or nationality. In Estonia there are no legal class divisions or titles'. For more, see: Hesi Siimets-Gross and Marelle Leppik, 'Estonia: First Landmarks of Fundamental Rights' in Markku Suksi and others (eds), *First Fundamental Rights Documents in Europe* (Intersentia 2015). DOI: <https://doi.org/10.1017/9781780685281.024>.

⁷ Malka Schliefsstein, 'Uus perekonnaõigus tsiviilseadustiku ümbertöötamise komisjonis' (New Family Law in the Committee for Redrafting the Civil Code) [1930] 4 *Naiste Häääl* 51, 58; Boris Sepp, 'Naise eraõiguslik seisukord Balti eraõiguse ja uue eraõiguse kava järel' (Woman's Position according to the Baltic Private Law and the Draft of the New Private Law) [1929] 2 *Naiste Häääl* 25 (both in Estonian).

⁸ About the drafting process and the various committees involved in preparing Estonian Civil Code drafts, more details are provided in: Marju Luts-Sootak, Hesi Siimets-Gross, and Katrin Kiirend-Pruuli, 'Estlands Zivilrechtskodifikation – ein fast geborenes Kind des Konservatismus' in Martin Löhning and Stephan Wagner (eds), *Nichtgeborene Kinder der Liberalismus? –*

family law as a model and abolish husbands' guardianship over wives.^{*9} The drafters, exclusively male in that time, were far more conservative on the matter and preferred taking the BPLC and the significantly more conservative German and Swiss family law as models.

In 1926, the first draft of a family law was published as part of a draft civil code.^{*10} The draft of 1926 did not state expressly the concept of guardianship over wives, but its Section 358 provided that the husband is the representative of common life and the household. The *de facto* guardianship over the wife was limited to proprietary rights and representation in court proceedings, though (per §358's Subsection 2 and §380). The husband had the right to choose the family residence and decide on day-to-day matters, but the wife did not have to obey him when the husband abused his rights (§356).^{*11}

The above-mentioned principles were discussed during Estonian Lawyers' Days in 1930. Outspoken female lawyer Elise Aron^{*12} heavily criticised the draft, she considered it outdated, impractical, and incompatible with real life and everyday needs.^{*13} Member of the draft committee Jüri Uluots^{*14} explained in response that the law has to protect the family, which is 'an important building block of society', and that regulation is to strike a compromise between the interests of the husband and those of the wife.^{*15} The compromise between 'family stability' and personal freedom is clearly evident here. The perspective of personal freedom was addressed even more clearly by Ants Piip^{*16}, who stated that Estonian laws regulating women's rights were among the most liberal in the world and that the foundation of marriage is formed not by an individual and his or her interests but by stability, as 'capricious demands for great personal freedom are unbecoming in married life'.^{*17} A more extreme-sounding statement in this regard was made by legal practitioner August Leps^{*18}, who said: 'It is unfeasible to demand that a family would be like a two-member parliament. In a family, it is necessary that the stance of one spouse be decisive and dominant.' However, he was more open to modern ideas than many others. He concluded that, when registering their marriage, the couple should be able to choose which of them will become the head of the family.^{*19} In summary, personal freedom was often seen as incompatible with gender equality in 1920s family law; nonetheless, some changes were made.

At first glance, the next draft, published in 1935,^{*20} seems to have been a huge step forward. Firstly, it did not dictate a man's guardianship over his wife. Secondly, the draft also stated that the husband and wife are equal in their right to choose the place of residence and decide on day-to-day matters (per §264's

Zivilgesetzgebung im Mitteleuropa der Zwischenkriegszeit (Mohr Siebeck, Tübingen 2018) (in German). DOI: <https://doi.org/10.1628/978-3-16-156292-1>.

⁹ 'Kirjavahetus Eesti tsiviilseaduse eelnõu väljatöötamise ning sama komisjoni isikulise koosseisu küsimuses' (Correspondence on the Matters Regarding Drafting of the Draft Civil Code and the Composition of the Respective Committee), material from 15 January 1920 – 3 March 1921, Estonian National Archives (ENA) ERA.76.2.333 (in Estonian).

¹⁰ *Tsiviilseadustik: üldosa ja perekonnaõigus (Civil Code: General Part and Family Law)* (Tallinn 1926) (in Estonian).

¹¹ Personal relations between husband and wife during the interwar period are analysed in greater depth in the work of: Katrin Kiirend-Pruuli, 'Abikaasade isiklike suhete õiguslik korraldus Eesti esimesel iseseisvusperioodil: tee kaheliikmelise parlamendi suunas' (Legal Regulation of Personal Relationships between Spouses during the First Period of Independence: a Way towards a Two-Member Parliament) [2017] *Annales Litterarum Societatis Esthonicae* 205 (in Estonian, with English summary).

¹² Elise Aron (1896–1982) was a primary-school teacher in 1916–1920, after which she headed the Office for Legal Persons at the Ministry of the Interior until 1940. She actively criticised the civil code drafts.

¹³ Elise Aron, 'Abikaasade õiguslike vahekordade korraldamisest' (On Regulating Legal Relationships Between Spouses) in Jaanika Erne (ed), *Õigusteadlaste päevad 1922–1940 protokollid* (Juura 2008) 460–463 (in Estonian).

¹⁴ Jüri Uluots (1890–1945) was Professor for Legal History with the University of Tartu's law faculty (1925–1940), Dean of the Faculty of Law (1924–1931 and 1942–1944), and a member of the Constituent Assembly and Estonia's parliament (Riigikogu).

¹⁵ Jüri Uluots, 'Tsiviilseadustiku eelkava alusmõtteist. Kokkuvõte referaadist' (On the Main Principles of the Preliminary Draft of the Civil Code. Abstract Summary) in Jaanika Erne (ed), *Õigusteadlaste päevad 1922–1940 protokollid* (Juura 2008) 456–457 (in Estonian).

¹⁶ Ants Piip (1884–1942) held the title Professor of International Law at the University of Tartu (1924–1940) and held various political offices: Prime Minister in 1920; State Elder (head of state) in 1920–1921; and Minister of Foreign Affairs in 1921–1922, 1925–1926, 1933, and 1939–1940.

¹⁷ Ants Piip in discussion about the Conference of Estonian Lawyers in: Jaanika Erne (ed), *Õigusteadlaste päevad 1922–1940 protokollid* (Juura 2008) 484 (in Estonian).

¹⁸ August Julius Leps (1896–1972) was an attorney and member of the Estonian parliament.

¹⁹ August Leps in discussion related to the Conference of Estonian Lawyers in: Jaanika Erne (ed), *Õigusteadlaste päevad 1922–1940 protokollid* (Juura 2008) 488 (in Estonian).

²⁰ *Tsiviilseadustiku 1935. a eelnõu* (Draft Civil Code, 1935) (Tallinn 1935) (in Estonian).

Subsection 1). However, the husband and wife still did not become completely equal. If the spouses were of diverging opinions, the husband's remained decisive and his wife's only recourse was to appeal to the court of custody^{*21} to change the decision (under Subsection 2). This strange compromise was harshly criticised by women's organisations, who considered it unsatisfactory.^{*22} Others supported the regulation, with Viljandi Circuit Court, for example, finding that absolute equality between husband and wife in all spheres of life would damage family stability.^{*23} The regulation remained unchanged in the drafts of 1936^{*24} and 1939.^{*25} The last draft version was discussed by the parliamentary committee on civil law in 1940,^{*26} but the regulation was still to go unchanged. Regrettably, Soviet occupation reached Estonia in June 1940, before the Parliament of Estonia had finished discussing the draft, so a new civil code was never adopted. In practice, the BPLC remained in force throughout the first era of independence of Estonia.

The wife's right to dispute a decision by her husband before the court of custody is one of the most noteworthy compromises found in the drafts, a compromise between conservative traditions and liberal modernity, between personal freedom and family stability. However, it would have given this committee a very important role in regulating personal matters and created a possibility of intervening in family life. As the final decision would have been made by the state, the compromise would have restricted the personal freedom of both spouses. Newspaper reports stated that 'according to the BPLC, the wife was under the guardianship of her husband, but according to the draft, the husband is under the guardianship of the court of custody'.^{*27}

2. Aspects of personal freedom in the statutory matrimonial property regime

In the BPLC, the above-mentioned guardianship over the wife extended to proprietary relations. On account of matrimonial guardianship, the husband also administered all family property, including both the property his wife had owned before marriage and property that the spouses acquired during the marriage (per Article 12). Objects of property administered by the husband were deemed to be the husband's property, and the wife had to prove that any given item was hers in the event of a dispute (per Article 13). She was allowed to conduct only smaller transactions, related to day-to-day needs.^{*28} These were general rules applicable to all of the various matrimonial property regimes that could be applied.

According to the BPLC, more detailed regulation addressing the matrimonial property regime depended on the region and the estate in question.^{*29} As there were many regional exceptions to the BPLC, only two most important regimes remaining in force in the Republic of Estonia are analysed here. The first, called universal community property (*varaühisus, Gütergemeinschaft*), was the statutory matrimonial property

²¹ The court of custody was not an ordinary court but an administrative committee dealing with specified family matters, such as guardianship over minors or disabled people. For further discussion, see: Katrin Roosileht, *Vaeslastekohtud* (Orphans' Courts) (Eesti Ajaloarhiiv, Tartu 2003) 6–7 and 60–67; Merike Ristikivi, Marju Luts-Sootak and Heli-Triin Räis, 'Kohtuniku amet on liiga raske neile: Eesti naisjuristide pürgimisest kohtunikuks kahe maailmasõja vahelisel perioodil' (A Judge's Profession is Too Difficult for Them: on the Aspiration of Estonian Female Lawyers to Become a Judge in the Period Between the World Wars) (2017) 2/3 *Ajalooline Ajakiri* 327–329 (both in Estonian).

²² *Tsiviilseadustiku 1935. aasta eelnõu arvustusi ning täiendus- ja parandusettepanekuid* (Opinions on and Suggestions for Amendment and Review of the 1935 Draft Civil Code) (Tallinn 1935) 31; Olinde Ilus, 'Mõnda meie perekonnaõiguse väljatöötamisest ja naiste osast selles' (On Drafting of Our Family Law and the Women's Role in It) *Päevaleht* (Tallinn, 23 November 1935) 10 (both in Estonian).

²³ *Tsiviilseadustiku 1935. aasta eelnõu arvustusi* (Opinions on the 1935 Draft Civil Code) (n 22) 89–90.

²⁴ *Tsiviilseadustiku 1936. a. eelnõu* (1935 Draft Civil Code) (Tallinn 1936) (in Estonian).

²⁵ *Ibid.*; *Tsiviilseadustik: Vabariigi Valitsuse ettepanek 11. XII 1939* (Civil Code: 11 XII 1939 Proposal of the Government of the Republic) (Tallinn 1939) (in Estonian).

²⁶ Lembit Saarnits (ed), *Tsiviilseadustik* (Civil Code). 1940 (Tartu 1992) (in Estonian).

²⁷ 'Juristid jätkasid tsiviilseadustiku kawa arvustamist' (Lawyers Continue to Criticise the Draft Civil Code) *Postimees* (Tartu, 29 October 1936) 7 (in Estonian).

²⁸ BPLC arts 56, 88, and 133.

²⁹ The BPLC was not classical codification, as various old regional differences between town laws and land laws were preserved. For details, see: Toomas Anepaio, 'Varaühisus – kas nõukogulik igand' (Common Property – a Relic from the Soviet Times?) [2002] 3 *Juridica* 193 (in Estonian); on the regional differences and estate varieties under the BPLC in general, see: Marju Luts, 'Private Law of the Baltic Provinces As a Patriotic Act' [2000] 5 *Juridica International* 157, 160–163.

regime for those subject to the jurisdiction of Livonian town law (see Article 79)^{*30} and Narva town law (see Article 109). Before gaining of independence, similar regulation was applicable for Livonian rural clergymen who did not belong to the noble class (see Article 67). There were some minor distinctions between regions, but, in general, all property of the spouses, irrespective of whether it was acquired before *versus* during the marriage, formed ‘one conglomerate of property’^{*31} – an aggregate entity that was jointly owned by the two spouses (see articles 68 and 80). The husband administered the common property that was considered to be universal community property (under articles 71 and 82), but he could not sell or pledge real estate without his wife’s consent (per articles 72 and 83). When a marriage ended, each spouse was entitled to half of the common property (under Article 69).

The regime termed ‘administration and usufruct’ (*varäühendus, Verwaltungsgemeinschaft*) was the statutory matrimonial property regime applied in territories where Estonian town law^{*32} or Estonian and Livonian land law were applicable. Here, the spouses’ property did not form an aggregate entity, and both spouses owned their property separately. Nonetheless, the wife’s property was administered by the husband in this case too. He could not only administer but also use his wife’s property, whether it was acquired before or during the marriage (see articles 41 and 96–98). The wife’s rights to administer her property on her own were put ‘on hold’ (under Article 53), although in this regime too the husband could not sell or pledge her real estate without her consent (see Article 99). When a marriage ended, both spouses were entitled to their own property (see articles 60 and 102).

The husband’s right to use and administer the wife’s property was universal and even encompassed a right for the husband to file a claim against his wife for that property. According to one ruling of the Estonian Supreme Court, from 1933, in cases of the wife and husband having separate places of residence and the wife leaving, taking some movable items belonging to her, the husband was entitled to file a claim to demand restoration of possession. As the husband decided on the mutual place of residence and had a right to administer the property, he had the right to determine the location of his wife’s property.^{*33}

Some exceptions were applicable in both property regimes. The husband was not permitted to administer his wife’s ‘special property’, under articles 27 and 41. This category included everything that 1) the wife had expressly reserved for her own administration and use from the property she brought into the marriage; 2) was given to her, by whomever, on condition of her own administration and use; 3) the wife acquired for herself with her husband’s permission by using her own money or otherwise via her work or handicraft skills; 4) she received from her husband as ‘pocket money or needle money’^{*34}; and 5) she saved from the fruits and income arising from this special property of her own.

According to commentary on the BPLC, the wife could make a unilateral declaration that she intended to reserve some of her property as her special property, without the husband’s consent being necessary. Lawyers were not unanimous on whether this declaration had to be expressed in a marital property contract or could be in some other form^{*35}, but the Estonian Supreme Court resolved the matter by stating in 1931 that a marital property contract was indeed needed for this.^{*36} Although a wife generally did not need her husband’s authorisation for contracts, she was not totally independent in administration of her own property. The above-mentioned unilateral declaration to reserve some items as her special property could be expressed only on the occasion of entering into marriage. Later, the husband’s consent was needed for this action. Also, items that the wife acquired through her own work or otherwise via handicraft skills were deemed the wife’s special property only if the husband had previously consented to

³⁰ The cities of Tartu, Viljandi, Võru, and Valga, all in the southern part of Estonia; Pärnu, in the West; and Kuressaare, on the island Saaremaa.

³¹ The concepts of *einzig Masse* (art 68) and *gesamte Masse* (art 80) are used in the German-language version.

³² Estonia’s capital, Tallinn (Toompea hill excluded), plus Haapsalu and Rakvere, in the northern part of the country.

³³ A. Peep (ed), *I Abieluseadus Riigikohtu tsiviilosakonna seletustega, II perekonnaõiguse (Balti Eraseaduse I. r §§ 1–528) alal antud Riigikohtu tsiviilosakonna seletusi* (I Marriage Act with the Explanations from the Civil Chamber of the Supreme Court, II Explanations from the Civil Chamber of the Supreme Court on Family Law (Baltic Private Law Code I. r §§ 1–528) (Tallinn 1937) 45 (in Estonian).

³⁴ Pocket money or needle money (*Taschen- oder Nadelgeld*) was a small amount of money paid by the husband that the wife could use for her personal expenses.

³⁵ Владимир Буковский, *Сводъ гражданскихъ узаконений губерний прибалтийскихъ* (Томъ 1, Рига 1914) 45, статья 27 пункты (б), (л) (in Russian).

³⁶ A. Peep (n 33) 47.

this being so.^{*37} In addition, a wife needed her husband's consent if wishing to work outside the household (per Article 4194), and if she wanted to conclude a contract to encumber immovables included in her special property, her husband also had to sign the contract or at least authorise this later (see Article 29). In the absence of the husband's signature, the contract was not void *per se*, but the wife could refuse fulfilment of her duties.^{*38}

For the draft of 1926, based mostly on the BPLC, some modifications were made, with Swiss and German laws adopted as models. In the 1926 draft, the statutory matrimonial property regime mandated was 'administration and usufruct' (§379), which was very similar to the administration and usufruct regime specified in the BPLC. A wife could own property, but her rights to administer her property during the marriage were, again, 'on hold'. The husband administered the family property, and the wife was not permitted to conclude any contracts, even with property she owned before getting married, with the exception of small-scale contracts for meeting day-to-day needs (see §380 *sq.*, §395, and §358, Subsection 2).

In a similarity to the BPLC system, a husband could not administer his wife's special property (§367 *sq.*), where the concept of the wife's special property remained mostly the same. The only difference from the BPLC was that his consent was not needed for working outside the household^{*39} or for the wife's transactions with immovables belonging to her special property.

As noted above, the draft of 1926 was heavily criticised. Some female lawyers even considered it unconstitutional.^{*40} Women's organisations found that the statutory matrimonial property regime should allow the two spouses to administer the marital property equally,^{*41} but justness and 'marital unity' were also considered important.^{*42} In 1931, a campaign to collect signatures against the outdated family law in force and for drafting of a new code was initiated. Ultimately, 32,000 signatures were obtained, which was more than expected. The signatures were sent to the Ministry of Courts with an explanatory letter and demands for more modern family law.^{*43}

Those amendment proposals by women's organisations that pertained to the matrimonial property regime were more successful than the ones addressing personal relations. The draft of 1926 was sent back to committee for changes. As proposals from women's organisations were taken into account and Hungarian law was supposedly used as a model^{*44}, the statutory matrimonial property regime was changed to the 'community of acquests and gains' system (per §285) in the 1935 draft. This regime was seen as a combination of separate property and common property. In this system, each spouse was allowed to conclude contracts with his or her own property while married, regardless of whether it was acquired before marriage rather than in the time since (see §§ 284 and 292). In the event that the marriage ended, the wife was to receive half of the assets acquired by the husband in the course of the marriage and the husband, likewise, would get half of the assets she acquired during the marriage. In cases of a childless marriage, this amount was set to a quarter instead of half (see §297). Female lawyers opined that having separate property during the marriage and sharing the acquests and gains if the marriage ends should help to harmonise personal freedom between the spouses and promote the family's unity.^{*45}

³⁷ For example, if the wife had established a tailor's shop with her husband's consent: Владимир Буковский (n 35) 45, статья 27 пункты (а), (г).

³⁸ И. М. Тютрюмов, *Гражданское право* (второе издание, Тарту, Типография Г. Лаакманъ 1927) 516 (in Russian).

³⁹ Elmar Ilus, *Tsiviilõiguse eriosa: autoriseeritud konspekt* (Special Part of the Civil Code Act: Authorised Notes) (Tartu: Akadeemiline Kooperatiiv 1938) 20 (in Estonian).

⁴⁰ Elise Aron (n 13) 463–464; Helmi Jansen, 'Miks on meil vaja uut perekonnaseadust?' (Why Do We Need a New Family Law?) [1927] 2 *Naiste Hää* 30–32; Malka Schlieffstein (n 7) 55 (in Estonian).

⁴¹ See page 1 of: Väljavõte Eesti Üleriikliku Naiskongressi poolt 2. novembril 1930. a vastu võetud resolutsioonidest (Extract of Resolutions Taken by the National Womens' Congress on 2 November 1930). ENA. ERA 76.2.148.

⁴² Elise Aron (n 13) 471.

⁴³ 'Naiskoondiste märgukiri Vabariigi Valitsusele uue perekonnaõiguse eelnõu vastu' (Memorandum of Womens' Associations to the Government of the Republic Opposing the New Draft Family Law) [1931] 7/8 *Naiste Hää* 99–100; Timotheus Grünthal, 'Märkmeid eesti perekonnaseaduse eelnõu kohta. Abikaasade isiklikud ja varanduslikud vahekorrad' (Notes on the Draft of Estonian Family Law. Personal and Pecuniary Relationships Between Spouses) [1932] 4 *Õigus* 145, 148–149 (both in Estonian).

⁴⁴ Jüri Uluots, *Seletuskiri tsiviilseadustiku 1935. aasta eelnõu nelja esimese raamatu juurde* (Explanatory Memorandum to the First Four Books of the Draft of the 1935 Civil Code) (Tartu 1936) 50 (in Estonian).

⁴⁵ Vera Poska-Grüntal, 'Ungari perekonnaõiguse eelnõu osa abikaasade varaõiguse kujundamisel Eesti uues perekonnaõiguses' (The Part of Draft Family Law of Hungary in Shaping the Proprietary Rights of Spouses in Estonia's New Family Law) [1934] 8 *Õigus* 374, 375 (in Estonian).

Although the new system seemed fair and modern, it prompted considerable discussion and critique. Opponents considered the system incompatible with the real world, complicated, strange and unknown.^{*46} Some of them even suggested opting for separate property as the statutory matrimonial property regime since this solution would be at once modern and the easiest to understand.^{*47} Arguments related to personal freedom were not explicitly used in these discussions. The criticisms notwithstanding, the community of acquests and gains remained the statutory matrimonial property regime articulated in the following drafts (see §278 of that from 1936 and §315 of the 1940 version). A separate property system would indeed have been easier to understand, and it would have given the spouses even more personal freedom in the proprietary sphere, but it also might have led to unjust consequences. If one spouse had a farmstead and the other worked there and helped to increase the value of the farm, application of a separate property system would leave the latter spouse not entitled to any compensation after divorce.

In the BPLC and in the draft of 1926 both, the wife's personal freedom in the proprietary sphere was highly restricted. While she possessed a right to own property, the statutory regimes restricted her capacity to conduct transactions, whether with her own property or involving marital property. Although the regulation of wife's special property increased wife's personal freedom, it often did not have great practical importance. Only in the richest families did the wife hold personal real estate or other expensive items; for most people, the wife's special property consisted only of her personal belongings used for everyday needs. Also, any opportunities for a wife to accrue further personal property during the marriage, by such means as working outside the home or starting a business, were subject to her husband's consent. Hence, the wife was still dependent on her husband and lacked personal freedom with regard to property. The new matrimonial property regime found in the 1935 draft, the community of acquests and gains, was more equitable, as both spouses could freely conclude transactions with their property.

New responsibilities were accompanied by new rights. As the wife's legal capacity was extended in respect of marital property, she became responsible for maintaining the family besides husband. This marks a contrast against the BPLC, under which the husband was the primary party responsible for this, seeing to his wife and children's needs irrespective of the wife's financial position. Husband also could not use gains derived from his wife's property entirely as he pleased – their use had to be dedicated to satisfying the family needs.^{*48} Regulation remained similar to the latter in the draft of 1926 (per §§ 359, 369, and 370) but changed markedly with the 1935 one, under which the responsibility was shared between husband and wife. Both spouses had to maintain the family to the best of their ability (see Subsection 1 of §269).

3. The marital property contract as a tool to increase personal freedom

The possibility of concluding a marital property contract can be seen as a way of granting more personal freedom to both spouses in that the contract gives them an opportunity to regulate their proprietary relations differently than in the manner pursuant to a particular statutory matrimonial property regime. Under the BPLC, marital property contracts were to regulate only proprietary relations (per Article 37). Conditions regulating personal relations, such as terms freeing a husband of his duty to maintain the family or eliminating the wife's duty to follow her husband to his chosen place of residence, were void.^{*49} According to the BPLC's Article 37 *sq.*, the spouses were free to design the conditions of the contract: the contract did have to be in accordance with good morals, the aim of the marriage, and legal norms, but there were no other restrictions. With regard to community property, it was possible to declare some items special property of the husband or wife (see articles 70, 82, and 94). Eliminating the condition of the husband's guardianship

⁴⁶ Hugo Vihalem, 'Abikaasade varavahekord Tsiviilseadustiku 1935. a. eelnõu järgi' (Proprietary Relationships of Spouses According to the 1935 Draft Civil Code) [1935] 9 *Õigus* 404, 422–424 (in Estonian).

⁴⁷ Hugo Vihalem, 'Abikaasade varavahekord Tsiviilseadustiku 1935. a. eelnõu järgi' (Proprietary Relationships of Spouses According to the 1935 Draft Civil Code) [1935] 10 *Õigus* 459, 462–463; Leo Leesment, 'Tsiviilseadustiku 1936. a. eelnõuse puutuvaid küsimusi' (Issues Regarding the 1936 Draft Civil Code) [1937] 3 *Õigus* 133, 135–136 (both in Estonian).

⁴⁸ BPLC art 9 and art 199, Владимир Буковский (п 35) 55 статья 41 пункт (б); 149 статья 199 пункт (б); И. М. Тютрюмов (п 38) 512.

⁴⁹ Владимир Буковский (п 35) 52–53 статья 37 пункты (б), (е).

over his wife in the proprietary sphere was possible too,^{*50} as was agreement that the wife would administer the marital property in the husband's stead or that the property would be administered partly by the wife and partly by the husband.^{*51} Concluding marital property contracts became more popular as the era of independence progressed. Before 1918, there were only a few marital property contracts each year. These contracts became more popular after gaining of independence and by the end of 1930 there were more than 2,500 of them.^{*52} Marital property contracts were more common amongst richer people, but they did gain popularity for farmers in rural areas. For the most part, couples opted for the separate property system since the statutory matrimonial property regime was considered unjust and too difficult to understand.^{*53} There have been suggestions also that general changes in society might be the reason behind the latter choice. Getting a divorce became easier, ties between husband and wife weakened, and women grew more independent and had greater opportunities for self-realisation, so wives did not want husbands to administer their property.^{*54}

The marital property contract was also regulated in the draft of 1926, similarly, the contract had to be in accordance with good morals and the purpose of married life, and it had to regulate only proprietary relations (under §375). In one difference from the BPLC, the spouses were obliged to choose one of the matrimonial property regimes specified by law (see §372's Subsection 2). Instead of the statutory matrimonial property regime (the regime of "administration and usufruct") it was possible to choose, alternatively, separate property,^{*55} universal community property^{*56}, or limited community property^{*57} as the regime. Thus, the draft of 1926 was in at least one respect more restrictive than the BPLC: the spouses' freedom to pick the manner of their proprietary relations was limited to the regimes presented in the law. It was not possible to 'invent' new property regimes. The model for the latter change was Swiss law, and arguments to do with protecting third parties and providing legal clarity were cited as reasons for the change.^{*58}

The principle remained the same in the draft of 1935 (see Subsection 2 of §288). Instead of statutory matrimonial property regime (the community of acquests and gains), a couple could choose the regime 'community of personal and marital property'^{*59}, separate property, or a system of universal community property^{*60} (§286). Just as under the previous draft it was not allowed to 'invent' new property regimes. The main motivation cited for these restrictions was similar to that indicated for the 1926 draft: protecting third parties.^{*61} The same possibilities remained in the drafts of 1936 (§§ 278–279) and 1940 (§§ 315–316).

A marital property contract can be regarded as a tool to increase the spouses' personal freedom, especially that of the wife, at least in the proprietary sphere. However, the partners' personal freedom to determine the conditions of the contract was restricted in the drafts of the civil code. The reasons behind the restriction were stated to be the above-mentioned desire for legal clarity and need to protect third parties.

⁵⁰ *Ibid*, 52–53 статья 37 пункт (б).

⁵¹ *Ibid*, 53 статья 38 пункт (б).

⁵² Mihkel Uesson, 'Abielurahva varanduslik vahekord ja abieluvaranduslikud lepingud' (Proprietary Relationships and the Respective Contracts Between Spouses) [1930] 5 *Õigus* 221, 223 (in Estonian).

⁵³ Hugo Vihalem in 10 *Õigus* 459) (n 47) 459; Timotheus Grünthal, 'Märkmeid Eesti perekonnaseaduse eelnõu kohta. Abikaasade isiklikud ja varanduslikud vahekorrad' (Notes on the Draft Family Law of Estonia. Personal and Proprietary Relationships Between Spouses) [1932] 4 *Õigus* 145, 158 (in Estonian).

⁵⁴ Mihkel Uesson (n 52) 223–224.

⁵⁵ Separate property ('varalahusus'; see §§ 405 and 406) – both spouses independently owned and administered all property they had before marriage or that they gained in the course of the marriage.

⁵⁶ Universal community property ('üldine varaühisus'; see §§ 413 and 415) – all property acquired by the spouses before or during the marriage was owned jointly by both spouses and administered by the husband.

⁵⁷ Limited community property ('piiratud varaühisus'; see §§ 435 and 436) was similar to universal community property except that some items of property or some types of things (e.g., real estate) were excluded from community property by matrimonial contract. It was also possible to limit community property to items acquired by the spouses during the time of marriage.

⁵⁸ Page 102 of: 'Tsiiviilkomisjoni koosolekute protokollid nr 151-350: pärandusõiguse, asiõiguse, perekonnaõiguse lugemine J. Uluotsa ettekandel' (Minutes No. 151-350 of the Civil Chamber's Meetings: Readings on Inheritance Law, Real Right, Family Law by J Uluots) materials, 21 May 1926 – 4 April 1929. Archive of Jüri Uluots. F 164, s 8, protocol 285.

⁵⁹ The 'community of personal and marital property' system was a new regime. All property the spouses had before marriage or acquired during the marriage constituted their marital property. Both spouses remained owners of the property they held before being married, while property acquired during the time of marriage was jointly owned by the two spouses. All the marital property was administered by the husband, but the wife's consent was needed for transactions in the wife's real estate or securities (per §§ 313–318 and 320).

⁶⁰ The regulation of separate property and universal community property remained mostly the same.

⁶¹ Jüri Uluots (n 44) 52.

Although a marital property contract could increase personal freedom, it was considered too liberal and, in this, somewhat dangerous. The possibility of choosing from among four distinct matrimonial property regimes was sometimes regarded as too difficult and even harmful for the average citizen, as comparing regimes and choosing between them could prove to be the first step toward breaking up the marriage, should the spouses later be dissatisfied with their choice. Leo Leesment^{*62} even offered the criticism that having so many proprietary systems in the law is ‘an exaggerated expression of unlimited liberalism’.^{*63}

Conclusions and final remarks

In the first decades of the twentieth century, personal freedom in the marital sphere was quite restricted in Estonia, especially for the wife. Under the BPLC, the husband was the legal guardian of his wife and also had the right to decide on day-to-day matters and administer the family property. It was possible to grant the wife more personal freedom in the proprietary sphere by concluding a marital property contract, but personal relations could not be legally modified.

The new social and economic situation emerging in this young state in the 1920s and 1930s, the strong mark of the new Constitution of Estonia in 1920, equal rights in the public sphere, and liberal Scandinavian model laws encouraged demands for more personal freedom in family law. In discussions about amendment proposals argument of protecting family’s stability was often employed to restrict the personal freedom of one or both spouses. Nevertheless, many changes took place as legislators found a new balance between personal freedom, on one hand, and state interests, family stability, and legal clarity, on the other.

Firstly, matrimonial guardianship over women was abolished, yet the husband kept his leading role in deciding on everyday matters of family life. Why didn’t the committee drafting the civil code go a step further and grant the husband and wife completely equal footing? In general, ideas connected with equal rights were widely accepted, but the conservative models of German and Swiss family law, coupled with conservative personal opinions of influential politicians and drafters of law, held Estonia back from moving toward more modern family law. Too much equality was considered threatening to family stability, so compromise between personal freedom and family stability became evident in this regard.

Secondly, the statutory matrimonial property regime was changed with the draft of 1935. Establishing the community of acquests and gains in place of the ‘administration and usufruct’ regime was a significant advancement toward more equality and personal freedom for the wife in family law – both spouses could now conclude contracts involving their property. It is significant also that the matrimonial property regime established in the 1935 draft did not just increase the wife’s personal freedom. It also expanded her duties, in that the wife also became responsible for providing maintenance to family.

The personal freedom of spouses diminished in drafts of civil code only with regard to marital property contracts: the spouses became restricted to choosing one of the four property regimes set forth by law. Even the freedom to choose from among this array of regimes was considered somewhat dangerous. That said, the change was considered necessary to protect third parties and increase legal clarity.

From the perspective of personal and proprietary relations between spouses, numerous changes were stated by the final draft of the Estonian civil code relative to the BPLC. Most of these affected the legal position of the wife, among them abolishing legal guardianship over wives and changing the statutory matrimonial property regime. If the draft Estonian Civil Code had been adopted as law, the resulting family law would have been equal, free, and liberal in comparison with the BPLC, although there would still have been room for improvements to meet the demands of women’s organisations.

⁶² Leo-Johann Leesment (1902–1986) was a lecturer and associate professor of civil law at the University of Tartu.

⁶³ Leo Leesment (n 4747) 136. He suggested that there should be only one matrimonial property regime – separate property in addition to which a possibility could be offered to conclude a marital property contract.



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Community of Property – Back to the Roots

1. Introduction

In Estonia, the statutory matrimonial-property regime is community of property (*varäihisus*), according to §24 (2) of the Family Law Act (FLA)¹. According to §25 of the FLA, the joint property (*ühisvara*) of the spouses comprises only objects acquired during the application of the regime, while objects acquired before marriage do not form part of it². Therefore, this regime can be characterised as limited community of property. One of the most commonly cited traits of a community-of-property regime is that it creates a strong proprietary bond between the spouses, which obliges the partners to decide on matters related to joint property together, per §28 (1) and §29 (1) of the FLA.

Estonia's regulation was designed at the same time to protect the weaker spouse³, presuming that marriage is for life⁴. However, as a marital-property regime, community of property should also provide some flexibility for balancing the rights and duties of the spouses and their creditors⁵. That is not a strong point of the existing regime. The strong proprietary bond, due to which the spouses are obliged to act jointly, is so rigid and all-encompassing that spouses can hardly ever act independently. It is questionable that protection of the weaker spouse demands such extensive restrictions.

The strong proprietary bond between the spouses is expressed mainly in the fact that the spouses hold joint ownership and have to administer the joint property jointly. The two have joint ownership (*ühisomand*) in the sense employed in §70 (4) of the Law of Property Act (LPA)⁶. Ownership belongs to the spouses 'in undefined shares', which means that the ownership belongs to each of the spouses at the same time in its entirety⁷. Since full ownership belongs to each of the spouses simultaneously, the only way of exercising their

¹ Family Law Act (FLA), *perekonnaseadus*: RT I 2009, 60, 395; RT I, 09.05.2017, 29. Available in English at: <https://www.riigiteataja.ee/en/eli/ee/507022018005/consolide/current> (accessed on 4 August 2020).

² A brief overview of the Estonian limited community of property regime is given by: S Liin, 'National Report of Estonia' in L Ruggeri, I Kunda, and S Winkler (eds), *Family Property and Succession in EU Member States: National Reports on the Collected Data* (Faculty of Law in Rijeka 2019) 189–90 Available in English at: https://www.euro-family.eu/news-89-psefs_e_book_with_national_reports_from_28_member_states (accessed on 4 August 2020).

³ See the discussion of the draft FLA (55 SE), of 12 September 2007: *XI Riigikogu stenogramm II istungjätk. Kolmapäev, 12. september 2007, kell 14:00* (transcript from 12 September 2007). Available in Estonian at: <http://stenogrammid.riigikogu.ee/200709121400#PKP-594> (accessed on 4 August 2020).

⁴ K Kullerkupp, 'Statutory Marital Property Law *de Lege Lata* and *de Lege Ferenda*' [2001] 1 *Juridica International* 81 https://www.juridicainternational.eu/public/pdf/ji_2001_1_78.pdf (accessed on 4 August 2020).

⁵ *Ibid.*, 79–80.

⁶ Law of Property Act (LPA), *asjaõigusseadus*: RT I 1993, 39, 590; RT I, 22.02.2019, 11. Available in English at: <https://www.riigiteataja.ee/en/eli/ee/529082019011/consolide/current> (accessed on 4 August 2020).

⁷ See discussion of §70 (3.3.1.1 and 3.4.1) by: P Varul, in P Varul, I Kull, V Köve, M Käerdi, T Puri (eds), *Asjaõigusseadus. I kommenteeritud väljaanne* (Law of Property Act. I: Commented Edition) (Tallinn: Juura 2014).

rights as joint owners is to do so unanimously. Neither of them may dispose of any share of the ownership independently. Accordingly, under §31 (1) of the FLA, a disposition performed by one of the spouses without consent from the other is void. The Supreme Court of Estonia has explained that this means, in addition, that acquisition in good faith is excluded^{*8}, which brings uncertainty for the spouses and also for third parties.

Only to meet the needs of the family may one of the spouses act alone. Generally, spouses have to exercise their rights and duties related to joint property jointly, they must even only jointly enter into transactions and act in legal disputes (see §28 (1) and §29 (1) of the FLA). Word for word, this regulation means that the spouses may only jointly possess, use, and dispose of things; transfer claims; conclude contracts; demand fulfilment of an obligation; accept declarations of intent; or act in legal proceedings and initiate them. The principle of joint administration is so comprehensive that the consent of both spouses should be obtained even if one spouse wants to file an action against the other. Following the explicit wording of §29 (1) of the FLA, Tallinn District Court issued a decision wherein it was stated that one of the spouses shall not come to court alone^{*9}.

In particular, Tallinn District Court found that a husband was not permitted to file an action on his own against a third party to regain possession of an immovable in the spouses' joint ownership, under §80 (1) of the LPA^{*10}. Leaving aside even the fact that possession of that immovable had been lost in consequence of actions by his wife. In 2018, the Supreme Court annulled that judgement and formulated an exception to the principle of joint administration^{*11}. Although the language of §29 (1) of the FLA is straightforward, the Supreme Court ignored it and allowed the husband to come to court alone, pursuant to its finding that the aim behind §29 (1) of the FLA is to protect the spouses from misuse of matrimonial property rather than arbitrarily limit the spouses' opportunities to enter into transactions or initiate court proceedings^{*12}.

Considering that even the Supreme Court is trying to find ways of escaping this burdensome regulation by recourse to practical arguments while ignoring provisions that explicitly dictate otherwise, one may well find the merits of the strong proprietary bond between the spouses cast into doubt. The rigid and comprehensive regulation in the current FLA presumes that the spouses always agree and act as a single unit. Nevertheless, it is obvious that at times they will disagree. In cases of disagreement, the married person is placed in a stalemate and left only with the time-consuming option of trying to substitute for the consent of his or her spouse in court, according to §29 (3) of the FLA. It is doubtful that a stalemate situation could benefit the spouses and protect the weaker of them. Furthermore, it is hard to find justification for the restrictions being so rigid and comprehensive. The way forward should lie not in hoping the Supreme Court does not run out of practical arguments to bypass such burdensome regulation but in coming to a more systematic understanding of the regime.

In this article, the roots of community of property and the development of the regime in Estonian law since the Baltic Private Law Act (BPLA)^{*13} of 1865 are analysed in conjunction with the concept of joint ownership and the principle of joint administration. Answer is sought to the questions of when the regime gained foundations of joint ownership and joint administration, where those principles come from, and whether the system has always been as rigid and comprehensive as it is now. The answers should help us understand, firstly, how it can be that community of property has stood the test of time and been applied in

⁸ Decision of the Civil Chamber of the Supreme Court of Estonia (CCSCd) 3-2-1-157-11, para 14; CCSCd 3-2-1-127-13, para 22; CCSCd 2-16-16048/16, paras 13–15.

⁹ Tallinn District Court judgement of 6 November 2017 in case 2-16-9519 – see CCSCd 2-16-9519/78, para 8.

¹⁰ *Ibid.*

¹¹ CCSCd 2-16-9519/78, para 25.2.

¹² *Ibid.*

¹³ When Estonia was part of Tsarist Russia, Baltic Private Law applied from the year 1865. This body of private law also applied in Estonia in 1919–1940, when Estonia was an independent state. Mentions of the Baltic Private Law Act (BPLA) refer to Volume 3 of the Baltic Provincial Code, *Provincialrecht der Ostseegovernements, Dritter Teil: Privatrecht. – Liv-, Est- und Curlaendisches Privatrecht*; see P Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia' (2000) 5 *Juridica International* 104. The BPLA is available in German at: <https://dspace.ut.ee/handle/10062/18562> (accessed on 4 August 2020), with some parts in Estonian accessible at: <https://www.digar.ee/viewer/et/nlib-digar:14500/23547/page/1> (accessed on 4 August 2020). See the further details about the BPLA provided by: M Luts, 'Private Law of the Baltic Provinces As a Patriotic Act' (2000) 5 *Juridica International* 157; M Luts, 'Zur Verortung des Baltischen Privatrechts (1864/65) unter den europäischen Privatrechtskodifikationen' in *Rechtstransfer in der Geschichte. Internationale Festschrift für Wilhelm Brauner zum 75. Geburtstag hg. von Gábor Hamza, Milan Hlavačka, Kazuhiro Takii* (Berlin: Peter Lang 2019) 219.

the Baltic states since the nineteenth century^{*14} in such a restrictive form. Was the system different in the past, or was balance perhaps provided by better legal solutions that have since been forgotten? Understanding these historical underpinnings should show a way forward for the community-of-property regime also. Taking a few steps back can aid greatly in knowing which path should take us further in the right direction.

2. The development of the community-of-property regime

2.1. The origins of the regime

Nowadays, community of property is a widespread matrimonial-property regime – in fact, the most commonly applied system in the European Union^{*15} and also employed in the French- and Spanish-influenced states of the USA^{*16}. Community of property as it is known today in the Western World is of Germanic origin; that is, it was instituted either directly or indirectly through conquest and colonisation by countries that can trace their regime in this family to origins among the Goths in the Germanic provinces of Europe.^{*17} Systems expressing community of property do not have roots in Roman law. In contrast, Roman law featured spouses being subject to a separate-property system in the modern sense, and marriage did not affect the proprietary relations of the spouses^{*18}. The husband received a dowry from the wife's family, which legally belonged to him but that his wife could demand back in the event of divorce or his death^{*19}.

One of the earliest direct sources attesting to the existence of community of property is the Code of Euric, from fifth-century Spain^{*20}. In addition, a community-of-property regime was applied in mediaeval Franco-Belgian regions^{*21}, Norway, and Sweden^{*22}. Community of property (*Gütergemeinschaft*) was applied also in mediaeval Germanic regions, was explicitly retained in the vast majority of sixteenth-century civil codes^{*23}, and continued to be the most commonly applied regime – with a range of variations^{*24} – until the entry into force of the German Civil Code (BGB) on 1 January 1900^{*25}. However, the principles on which

¹⁴ T Anepaio, 'Varaühisus – kas nõukogulik igand?' (Community of Property – Is It a Remnant of Soviet Law?) (2002) 3 *Juridica* 193–95.

¹⁵ Community of property is used in the Netherlands and is an optional regime in Germany, but mainly it is used in countries with a Roman-law tradition, such as Belgium, France, Luxembourg, Italy, Portugal, and Spain, alongside many Eastern European countries – Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, and the Czech Republic. See: 'Impact Assessment Study on Community Instruments Concerning Matrimonial Property Regimes and Property of Unmarried Couples with Transnational Elements, Final Report' (2010) 65–66. Available in English at: <https://op.europa.eu/en/publication-detail/-/publication/48820a62-4950-4ebb-a20c-d5bc9f35bd84> (accessed on 4 August 2020).

¹⁶ J Rieck, *Ausländisches Familienrecht* (Munich: C.H. Beck 2019) see 'USA', Rn. 14. Community of property ('community property') is used in nine US states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

¹⁷ J E Sebree, 'Outlines of Community Property' (1928) 6(1) *New York University Law Review* 34.

¹⁸ M Kaser, *Das römische Privatrecht. Abschnitt 1, Das altrömische, das vorklassische und klassische Recht* (Munich: Beck 1971) 329.

¹⁹ J E Grubbs, *Women and the Law in the Roman Empire: A Sourcebook on Marriage, Divorce and Widowhood* (London: Routledge 2002) 95–96. DOI: <https://doi.org/10.4324/9780203442524>.

²⁰ J E Sebree (n 17) 34–36.

²¹ See: M Vleeschouwers-Van Melkebeek, 'Separation and Marital Property in Late Medieval England and the Franco-Belgian Region' in M Korpiola (ed), *Regional Variations in Matrimonial Law and Custom in Europe, 1150–1600* (Leiden/Boston: Brill 2011) 84–97. DOI: https://doi.org/10.1163/9789004211438_005.

²² See L I Hansen, 'Inheritance, Property and Marriage in Medieval Norway' and M Korpiola, 'Spousal Disputes, the Marital Property System, and the Law in Later Medieval Sweden' in C Beattie and F Stevens (eds), *Married Women and the Law in Premodern Northwest Europe* (Woodbridge: Boydell Press 2013) 11–52.

²³ J F Harrington, *Reordering Marriage and Society in Reformation Germany* (CUP 1995) 194.

²⁴ Absolute community of property (*allgemeine Gütergemeinschaft*), limited community of property (*Errungenschaftsgemeinschaft*), and community of movables (*Fahrmisgemeinschaft*) were used. See: E Schumann's contribution (ss 1363–557 (III), Rn. 16–22) to M Schmoedel, J Rückert, and R Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol IV: 'Familienrecht'. ss 1297–921 (Tübingen: Mohr Siebeck 2018); *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, 2019) – Münch, preliminary remark to BGB s 1008, Rn. 1. See also: S Mai, 'Die Gütergemeinschaft als vertraglicher Wahlgüterstand und ihre Handhabung in der notariellen Praxis' (2003) 3 *Zeitschrift für das Notariat in Baden-Württemberg* 55.

²⁵ German Civil Code, 'Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002' (BGBl. I S. 42, 2909; 2003 I S. 738), with the most recent amendments being made pursuant to Article 1 of the law published on 12 June 2020 (BGBl. I S. 1245). Available in German at: <http://www.gesetze-im-internet.de/bgb/index.html> and in English at http://www.gesetze-im-internet.de/englisch_bgb/index.html (both accessed on 4 August 2020).

Germanic-origin community of property was initially based and the societal conditions in which the regulation was applied are considerably different from modern system.

2.2. Community of property based on joint ownership

In Germanic regions, marital property was, interestingly, one of the areas least influenced by Roman law and in which local customs continued to apply even after the sixteenth century brought legal standardisation^{*26}. Nevertheless, Roman law did influence the concept of ownership by the spouses.

In Roman law, ownership could belong to two or more persons under the institution of **co-ownership**, which was called *condominium*^{*27}. For example, owners of separate ‘substances’ became co-owners of a mixture by *confusio*, given that the substances ended up mixed in such a way that they could not be returned to their former, known state^{*28}. At the same time, **joint** ownership did not exist. In regard of this, Ulpianus cited Celsus, who found that undivided ownership could not belong to two persons: *et ait duorum quidem in solidum dominium vel possessionem esse non posse* (D.13.6.5.15)^{*29}. Since joint ownership was in direct conflict with that maxim and contradicted a seemingly evident conception that only one person is able to possess something as a whole at any one time, it was considered impossible.

In mediaeval times, Germanic-origin community of property was not based on spouses having joint ownership. It was only in seventeenth-to-nineteenth-century German legal literature that the concept of joint ownership (*Gesamteigentum*) began being presented as a special German concept, as opposed to Roman law^{*30}. One of the reasons behind the development of the concept was that community of property of the spouses did not fit into the existing Roman-law-based system, according to which the only community admitted was a co-ownership-based *communio*, or a corporation^{*31}.

An important keyword related to the development of the concept of joint ownership is ‘dominium plarium in solidum’, which Justus Veracius used in 1681 to characterise the joint property of spouses as an example of *dominium germanicum*^{*32}. The first one to employ the specific notion of joint ownership (*Gesamteigentum*) may have been J.G. Estor, doing so in 1757^{*33}. W.A.F. Danz further developed the concept of joint ownership in the late eighteenth century^{*34}, characterising it as a case wherein the right of one of the owners extends to the whole thing, whereas a part of it is not distinguished^{*35}. However, in nineteenth-century German legal literature, arguments from Roman law were already being used against joint ownership. Opponents of joint ownership considered it burdensome and impossible and to have lost its practical relevance^{*36}. Nowadays, joint ownership has marginalised in the country of its origin. While joint ownership is acknowledged as a theoretical concept, it indeed does not have a legal definition in the BGB. Thus it stands in contrast to co-ownership, which is defined in the BGB’s §1008. Spouses have joint ownership

²⁶ J F Harrington (n 23) 194.

²⁷ See: G Mousourakis, *Fundamentals of Roman Private Law* (Berlin: Springer 2012) 156. DOI: <https://doi.org/10.1007/978-3-642-29311-5>.

²⁸ *Ibid*, 143. See also: M Kaser, *Das römische Privatrecht. Abschnitt 2, Die nachklassischen Entwicklungen* (Munich: Beck 1975) 453.

²⁹ Part of D.13.6.5.15 states: ‘Where a vehicle is lent or hired to two persons, Celsus, the son, says in the Sixth Book of the Digest [...] that the entire ownership of anything cannot belong to two persons, nor can they have the entire possession, nor can one party be the owner of a portion of an article, for he can only have partial ownership of the entire article by means of an undivided share.’ See P Krueger and T Mommsen (eds), *Corpus iuris civilis. Volumen primum Institutiones. Digesta* (Berlin: Weidmann 1932) or see S P Scott (tr), *The Digest or Pandects of Justinian* (Cincinnati 1932), available in English at: <https://droitromain.univ-grenoble-alpes.fr/> (accessed on 4 August 2020).

³⁰ See: S Lepsius, *Gesamthand, gesamte Hand. Handwörterbuch zur deutschen Rechtsgeschichte*, vol 2 (Berlin: Erich Schmidt Verlag 2020) 264–69.

³¹ F Limbach, *Gesamthand und Gesellschaft Geschichte einer Begegnung* (Tübingen: Mohr Siebeck 2016) 241–42. DOI: <https://doi.org/10.1628/978-3-16-154177-3>.

³² S Lepsius (n 30) 264.

³³ F Limbach (n 31) 246 and 248. See also the reference in footnote 37: J G Estor, *Bürgerliche rechtsgelehrsamkeit der Deutschen., Nach maasgebung der Reichs-abschiede*, vol 1 (Johann Andreas Hofmann 1757) 756.

³⁴ F Limbach (*ibid*) 248.

³⁵ *Ibid*, 241 and 248. See the citations of W A F Danz by F Limbach, on page 248 and in footnotes 52–54.

³⁶ F Limbach (*ibid*) 250–55.

in cases of community of property, but there is no *expressis verbis* reference to the term in the BGB that extends it to practice^{*37}.

2.3. Community of property based on joint administration of joint property

The principle of joint administration of joint property is, interestingly, an even later addition to the Germanic-origin institution of community of property than joint ownership. An important factor in this development has been the strong influence of the principle of coverture^{*38}, according to which married women do not have active legal capacity.

It is worth noting that community of property has never been a statutory matrimonial-property regime in German law, which differs markedly from Estonian law in this respect. Before the BGB's entry into force, in 1900, community of property was one of the candidates for selection as the statutory matrimonial-property regime^{*39}; however, the regime known as *Verwaltungsgemeinschaft* was chosen instead, in which marital property is formed but only the husband is permitted to administer it^{*40}. According to the original version of the BGB, community of property could still be chosen, by means of a marital-property contract^{*41}. Nonetheless, both of the regimes had the principle of coverture as their basis. Since married women had limited active legal capacity, the husband administered joint property independently^{*42}. Consequently, there were no provisions for joint administration in the original version of the BGB; opposed to the present language in §§ 1450–1470 of the BGB^{*43}.

Surprisingly, it was only on 1 July 1958 when §§ 1450–1470 of the BGB entered into force, after large-scale legal reform through which men and women were granted equal rights^{*44}. Those provisions were added to consider social changes and reshape community of property, which had been developed under an assumption that the man is the breadwinner of the family while women are housewives^{*45}. The detailed regulation in §§ 1450–1470 of the BGB is designed to specify joint administration rules for each individual case, with its §1455 itemising a list of things that one partner may do independently. Even though the provisions are precise and elaborated upon, the merits of the regulation can be doubted. In Germany, community of property is nearly obsolete in any case^{*46}, and the elaborate provisions are criticised for being overly complicated. In fact, they have almost never been applied^{*47}.

³⁷ The term 'Gesamteigentum' is not used in the BGB, but community of property is defined as so-called *Gesamthandsgemeinschaft*. See: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (n 24) – Münch, BGB s 1419, Rn. 1–7 and Schmidt, BGB s 1008, Rn. 1.

³⁸ The German equivalent to coverture is *Geschlechtsvormundschaft*. See further information from authors such as: C Zaher, 'When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture' (2002) 94(3) *Law Library Journal* 459. About coverture in German regions, discussion is offered by: S Ogilvie, 'Married Women, Work and the Law: Evidence from Early Modern Germany' in C Beattie and M F Stevens (eds), *Married Women and the Law in Premodern Northwest Europe* (Boydell Press 2013) 213–40.

³⁹ It was primarily Georg Beseler and Otto von Gierke who supported community of property. See: *Historisch-kritischer Kommentar zum BGB* (n 24) – Schumann, ss 1363–557 (III), Rn. 91–94. See the original version of the BGB also (the 1900 BGB), available in German at: <http://www.koeblergerhard.de/Fontes/BGBDR18961900.htm> (accessed on 4 August 2020).

⁴⁰ See sections 1363–425 of the 1900 BGB; *Historisch-kritischer Kommentar zum BGB* (n 24) – Mayenburg, ss 1363–557 (III), Rn. 6–15.

⁴¹ See sections 1437–518 of the 1900 BGB; *Historisch-kritischer Kommentar zum BGB* (n 24) – Schumann, ss 1363–557 (III), Rn. 18.

⁴² A husband had to have his wife's consent only for transactions with immovables, to dispose of the property as a whole, and for some gifts (ss 1444–46 of the 1900 BGB).

⁴³ It was stated in §1472 of the 1900 BGB that spouses have to manage joint property jointly after the divorce until the division of joint property was complete; nevertheless, there were no provisions as would have specified this statement.

⁴⁴ See the draft of law granting men and women equal rights: '*Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts*' *Bundesgesetzblatt*, part I, no. 26 (21 June 1957) 609 ff, available in German at: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl157s0609.pdf (accessed on 4 August 2020). For further details about historical development, consult: S Mai (n 24) 55–71.

⁴⁵ B Rešetar, 'Matrimonial Property in Europe: A Link between Sociology and Family Law' (2008) 12(3) *Electronic Journal of Comparative Law*. <https://www.ejcl.org/123/art123-4.pdf> (accessed on 4 August 2020).

⁴⁶ See: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (n 24) – Münch, preliminary remark to BGB s 1415 Rn. 15 and 19; S Mai (n 24) 56.

⁴⁷ *Ibid.*

3. The development of community of property in Estonian law

3.1. General notes on the institution under Estonian law

At the beginning of the twentieth century, community of property was a widespread matrimonial-property regime in Estonia, one that was already familiar from the nineteenth century's Estonian and Livonian peasant laws but also regulated by the BPLA^{*48}. Community of property was the matrimonial-property regime in force for those subject to the city law of Livonia and of Narva and applicable to Livonian non-parish priests^{*49}. With marriage, the property of the husband and of the wife became joint property of the spouses, per sections 67–68, 79–80, and 109 of the BPLA.

The BPLA was followed by a draft for a Civil Code of Estonia (1940 CC)^{*50}, according to §§ 352–386 of which the spouses could choose either absolute or limited community of property via contract as their marital-property regime. The statutory matrimonial-property regime set forth, however, was community of accrued gains^{*51}.

During the Soviet occupation, at first the Russian Civil Code (RCC)^{*52} was applied, from 1 January 1940 to 5 December 1941 and again from 7 September 1944^{*53}. At the start of 1965, the Estonian Soviet Civil Code (SCC)^{*54} entered into force. Meanwhile, the Russian Code of Marriage, Family and Guardianship (RCMFG)^{*55} from 1 January 1941 and the Estonian Soviet Marriage and Family Code (MFC) from 1 January 1970 regulated family law^{*56}. Community of property was the statutory matrimonial-property regime throughout the Soviet occupation^{*57}, but it has persisted ever since too, during the application of the Family Law Act of 1995^{*58} and presently, according to §24 (2) of the FLA.

In the early 2000s, an attempt was made to replace community of property as the statutory matrimonial-property regime with community of accrued gains as articulated in the 1940 CC. However, the attempt was unsuccessful^{*59}. Community of property had become so customary that changing it had not even been discussed on a larger scale^{*60}, and the plan to replace it drew opposition from society. Interest groups

⁴⁸ T Anepaio (n 14) 193–94.

⁴⁹ *Ibid.*, 193–94, for further discussion pertaining to the particular regions in which community of property regime applied.

⁵⁰ The draft for a Civil Code of Estonia from 1940 is available in Estonian as *Tsiviilseadustik* (Civil Code Act) (Tartu Ülikool 1992). <https://dspace.ut.ee/handle/10062/26808> (accessed on 4 August 2020). The preparation of Estonia's own civil code began in the 1920s. While the civil code was complete in 1940, it was never adopted, because of the Soviet occupation. The 1940 CC was largely based on the norms of the BPLA, Germany's BGB, the Swiss Civil Code, and the Austrian Civil Code. See: P Varul (n 13) 108.

⁵¹ See: J Uluots, *Seletuskiri tsiviilseadustiku 1935. a. eelnõu nelja esimese raamatu juurde* (Explanatory Notes to the First Four Books of the Draft Civil Code of 1935) 50. Available in Estonian at: <http://www.digar.ee/id/nlib-digar:46225> (accessed on 4 August 2020).

⁵² The Russian Civil Code, including amendments until 15 November 1940: *VNFSV tsiviilkoodeks: muudatustega kuni 15. novembrini 1940* (ENSV Kohtu Rahvakomissariaadi kodifikatsiooni-osakond; Tallinn: Riigi Trükkikoda 1940).

⁵³ See P Varul (n 7) – Kull, on part 1, general part, 6.3.

⁵⁴ The Estonian Soviet Civil Code is available as *Eesti NSV tsiviilkoodeks*, ENSV ÜT 1964, 25, 115 in Estonian at: <https://www.digar.ee/arhiiv/nlib-digar:386218> (accessed on 4 August 2020). See further discussion of the reforms during the time of Soviet occupation: M Luts-Sootak and H Siimets-Gross, *Eesti õiguse 100 aastat* (100 Years of Estonian Law) (Tallinn: Post Factum 2019) 98–103.

⁵⁵ The Russian Code of Marriage, Family and Guardianship's official text, including the amendments until 25 August 1945 and an annex of systematised materials, is available as: *VNFSV abielu, perekonna ja eestkoste seaduste koodeks. Ametlik tekst muudatustega kuni 25. augustini 1945. a. ühes paragrahvide järgi süstematiseeritud materjale sisaldava lisaga* (Tartu: RK 'Teaduslik kirjandus' 1946). Available in Estonian at: <https://www.digar.ee/arhiiv/nlib-digar:215351> (accessed on 4 August 2020).

⁵⁶ The Estonian Soviet Marriage and Family Code is available as: *Eesti NSV abielu- ja perekonnakoodeks* (Tallinn: Eesti Raamat 1969), in Estonian at: <https://www.digar.ee/arhiiv/nlib-digar:214888> (accessed on 4 August 2020).

⁵⁷ Property acquired during marriage was joint property of the spouses, per §10 of the RCMFG and §20 of the MFC.

⁵⁸ Family Law Act of 1995, *perekonnaseadus*. RT I 1994, 75, 1326; RT I 2009, 60, 395 was in force from 1 January 1995 to 30 June 2010. The text is available in Estonian at: <https://www.riigiteataja.ee/akt/13249859> (accessed on 4 August 2020). According to §14 (1) of the 1995 FLA, property acquired during marriage was the joint property of the spouses.

⁵⁹ A draft of the Family Law Act (55 SE) was submitted to the parliament in 2007, but it was never adopted. See the draft and the explanatory notes to it, available in Estonian at: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/982033c7-c2e1-2ce6-0479-ef2bf925488b/Perekonnaseadus> (accessed on 4 August 2020).

⁶⁰ K Kullerkupp (n 4) 80.

were against the amendment because they concluded that the reform would harm the economically weaker spouse⁶¹. In legal literature, the institution of community of property was defended with arguments relying on tradition. It was said that criticising community of property for being a remnant of Soviet law is unwarranted because community of property was already acknowledged in the Baltic states in the final part of the nineteenth century⁶². Although the latter may be true, community of property was rather different back then, because of the principles on which it was based. We examine that part of the picture next.

3.2. Joint-ownership-based community of property in Estonian law since the nineteenth century

Joint ownership by the two spouses was already under discussion in the nineteenth century in Estonian legal literature, just as in Germany. Interestingly, while joint ownership was a familiar concept in Estonia, it was not actually applied until quite recently.

According to §68 and §80 of the BPLA, the marital property of the spouses, who were in community of property, was called joint property. This does not mean that the two had joint ownership, however. The ways in which ownership could belong to more than one person were regulated by the BPLA's §927. This stated that a single thing could belong to many persons undivided – not in real parts, however, but in legal shares – in such a way that only the legal position of the owners is divided. Remark 3 on §927 of the BPLA made clear that only co-ownership was intended. The remark specified that a type of shared ownership wherein many persons own the same thing such that it belongs to all of them in its entirety – so-called joint ownership (*Gesamteigentum*) – was not acknowledged⁶³.

The author of the BPLA, F.G. Bunge, found that community of property of spouses is based on German theory of joint ownership neither in Estonian nor in Livonian law⁶⁴. C. Erdmann found joint ownership to be excluded per the BPLA and explained the nature of §927 of the BPLA with reference to *Miteigentum* and *Condominium*, which are the German- and Roman-law equivalents to co-ownership, not joint ownership⁶⁵. C. Erdmann criticised joint ownership in connection with a conclusion that the concept's very definition is in direct contradiction with the exclusive nature of ownership⁶⁶. Accordingly, although the spouses had joint property, they were co-owners. Joint ownership was deliberately not specified in the BPLA.

According to §§ 352–386 of the 1940 CC, community of property could be chosen by marital-property contract. Spouses had joint property, but the concept of joint ownership was not used. While co-ownership was regulated in §§ 930–940 of CC 1940, there was no reference to joint ownership, either in the act or in its explanatory notes⁶⁷. Instead, §940 of CC 1940 stated that the regulation of co-ownership applies meaningfully also to joint property, to the extent that the regulation pertaining to joint property did not provide

⁶¹ The criticism raised is documented in the transcript of the draft's discussion on 12 September 2007: *XI Riigikogu stenogramm II istungjätk. Kolmapäev, 12. september 2007, kell 14:00* (n 3). See also the 19 February 2008 press release from the Estonian Women's Association Roundtable (Eesti Naisteühenduste Ümarlaud) and a reference to an analysis available in Estonian at: <http://www.enu.ee/enu.php?keel=1&id=4&uid=56> (accessed on 4 August 2020).

⁶² T Anepaio (n 14) 193–95.

⁶³ Remark 3 on §927 of the BPLA stated: 'Ein solches Eigentum Mehrerer an derselben Sache, vermöge dessen jedem von ihnen die Sache ganz gehört, ein sog. Gesamteigentum, wird gesetzlich nicht anerkannt.'

⁶⁴ F G von Bunge, *Das liv- und esthländische Privatrecht. 1. Theil, Die Einleitung, das Personen-, Sachen- und Forderungsrecht enthaltend. 2. sehr vermehrte und verbesserte Auflage* (Reval: F Kluge 1847) 201. Available in German at: <http://hdl.handle.net/10062/6784> (accessed on 4 August 2020).

⁶⁵ C Erdmann, *System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. Band. 2. Sachenrecht* (Riga: N. Kymmell 1891) 21 and 23. Available in German at: <http://hdl.handle.net/10062/17599> (accessed on 4 August 2020).

⁶⁶ *Ibid.*, 21 and 23.

⁶⁷ J Uluots, 'Seletuskiri tsiviilseadustiku 1936. a. eelnõu juurde' (Explanatory Notes to the Draft Civil Code of 1936) 37 and 55. Available in Estonian at: <https://dspace.ut.ee/handle/10062/48579> (accessed on 4 August 2020). Mention is made only that the regulation of co-ownership can be applied in the event that there is joint property, and the terms are not further analysed. However, the concept of *ühisomandus* is briefly mentioned as an assumption in §282 of the 1935 version of the 1940 CC and §276 of the 1936 version of it. The former is available (in Estonian) as: *Tsiviilseadustiku 1935. a eelnõu. Tallinn. Koostatud kohtuministeeriumi kodifikatsiooni-osakonna juures asuva tsiviilseadustiku-komisjoni poolt* <http://www.digar.ee/id/nlib-digar:258860>. The latter, also in Estonian, can be found as: *Tsiviilseadustiku 1936. a eelnõu. Eesti Kohtuministeerium. Kodifikatsiooni osakond. Tsiviilseadustiku komisjon* <https://www.digar.ee/arhiiv/nlib-digar:259474> (both accessed on 4 August 2020).

otherwise. Therefore, although the spouses had joint property, they were co-owners. Rather than articulate joint ownership, the 1940 CC employed provisions dealing with co-ownership.

It was only with the era of Soviet occupation that joint ownership by the spouses became acknowledged. Even then, there was significant terminological confusion at first. According to §10 of the RCMFG, the objects acquired during marriage were joint property of the spouses; nevertheless, when one considers the provisions of the RCC that regulated property law at that time, doubt emerges as to whether the spouses having joint property meant that, concurrently, they had joint ownership. Comparison of the Estonian translations of the RCC from 1940 and 1952 reveals that the notions of co-ownership and joint property were used synonymously at times and that the adjustments to the Estonian translation of the act were incoherent^{*68}.

Terminological developments were notable only after a textbook on Russian civil law was translated into Estonian in 1947. Although §§ 61–65 of the RCC continued to use only the term ‘co-ownership’, this textbook in translation already mentioned joint ownership as a modified form of co-ownership, one found among spouses and the members of collective farms^{*69}. In 1955, E. Laasik most likely became the first in Estonia to suggest drawing a distinction between co-ownership and joint ownership as different types of shared ownership. This was done in an article^{*70} referenced in a later book by P. Kask^{*71}: E. Laasik criticised the Estonian translation of the Russian law textbook and found that co-ownership should not be used as a general gloss for ownership that belongs to two persons concurrently^{*72}. He reasonably pointed out that using the concept of co-ownership simultaneously in both a broader and a narrower sense causes confusion. He suggested that a new term, ‘shared ownership’ (*ühine omand*), should be brought into use as a general one covering both co-ownership (*kaasomand*) and joint ownership (*ühisomand*)^{*73}.

The proposal by E. Laasik seems to have been influential, given that when the SCC entered into force, at the start of 1965, joint ownership had a legal definition for the first time in Estonian legal history. Section 120 (1) of the SCC listed persons who could hold shared ownership, and §120 (2) of the SCC distinguished between co-ownership, which belongs to persons in particular defined legal shares, and joint ownership, wherein the shares of the owners are undefined. This landmark was followed five years later by the entry into force of the MFC, §20 (1) of which stated clearly that the property spouses acquire during their marriage is in their joint ownership. A distinction between co-ownership and joint ownership was expressed also in a textbook on Soviet civil law from 1971^{*74}, which explained that spouses could have joint ownership in the sense of §20 of the MFC and members of the collective farms in the sense of §129 of the SCC^{*75}. The present terms in §70 (1–3) of the LPA were based on §120 of the SCC^{*76}, with minor revisions. After Estonia regained independence, on 20 August 1991, the existing property law was not changed; only Soviet-specific regulation was omitted in the course of the civil-law reform that followed^{*77}. However, provisions pertaining to community of property were nonetheless changed to create a clearer distinction between the relevant ownership and property concepts^{*78}. Thus it becomes clear that the fact that community of property existed

⁶⁸ According to §63 of the RCC, co-owners were liable for obligations related to joint property (1940) or co-ownership (1952). At the same time, according to §279 of the RCC, partners had co-ownership (1940) or joint property (1952). See the 1940 version of the RCC (*ibid*) and the 1952 version, the civil code that was applied in the territory of the Estonian SSR, inclusive of amendments, until 1 January 1952, with an annex of systematised materials: *Eesti NSV territooriumil kehtiv tsiviilkoodeks: ametlik tekst muudatustega kuni 1. jaanuarini 1952, ühes paragrahvide järgi süstematiseeritud materjale sisaldava lisaga* (Tallinn: Eesti Riiklik Kirjastus 1952).

⁶⁹ M M Agarkov and D M Genkin (eds), *Tsiviilõigus. I* (Civil Law I) (A Randalu and A Sermat (tr), Tartu: Teaduslik Kirjandus 1947) 319, 362, and 363.

⁷⁰ E Laasik, ‘Mõningaid eestikeelse juriidilise terminoloogia küsimusi’ (Some Questions Pertaining to Estonian Legal Terminology) (Tartu Riikliku Ülikooli toimetised, Õigusteaduskonna töid. Vihik 39 (Publications of Faculty of Law. Booklet 39); Tallinn: Eesti Riiklik Kirjastus 1955) 162–63. Available in Estonian at: <http://hdl.handle.net/10062/36440> (accessed on 4 August 2020).

⁷¹ See P Kask, ‘Asjaõigusliku mõtte arengust Eestis: kriitiline analüüs’ (The Development of Legal Thinking Related to Property Law in Estonia: Critical Analysis) (Tartu: Greif 2011) 81.

⁷² E Laasik (n 70) 162–63.

⁷³ *Ibid*, 163.

⁷⁴ J Ananjeva, P Kask, V Kelder, *Nõukogude tsiviilõigus: üldosa* (Soviet Civil Law: General Part) (Tallinn: Valgus 1971) 281–83.

⁷⁵ *Ibid*, 283 and 293.

⁷⁶ See: P Varul’s LPA commentary (n 7) on s 70, 2.

⁷⁷ P Varul, ‘Omand: üldsätted’ (Ownership: General Provisions) [1993] 4 *Juridica* 78–80.

⁷⁸ For further details of the changes connected with the concept of joint property, see K Kullerkupp, T Uusen-Nacke, K Kerstnava, ‘Ühine vara, eraldi võlad: võlausaldajate nõuete rahuldamine abikaasade ühisvara arvel’ (Joint Property, Separate Debts: Satisfaction of Creditors’ Claims on Account of Spouses’ Joint Property) [2016] 7 *Juridica* 440–43.

and marital property was called joint property already in the nineteenth century does not mean that spouses have had joint ownership since the 1800s. Spouses did not have joint ownership in Estonian law before the SCC and MFC entered into force (1965 and 1970, respectively).

3.3. Community of property based on joint administration of joint property in Estonian law since the nineteenth century

In a parallel with developments in German law, the principle of joint administration of joint property does not have long traditions in Estonian law. Initially, the administration of joint property in cases of community of property relied likewise on the principle of coverture.

As noted above, under the BPLA, community of property applied where the city law of Livonia or Narva was applied and in cases involving Livonian non-parish priests⁷⁹. With marriage, the husband became the guardian of the wife, according to §11 of the BPLA. Therefore, even in cases of community of property, the husband administered joint property alone, in general, in accordance with §71, §82, and §109 of the BPLA.

The amendments produced in the course of the discussions about drafting an Estonian Civil Code, in 1923–1940, show development of increasing levels of equality of husband and wife. One of the most important changes relative to the BPLA's terms was the draft material's abolition of universal coverture⁸⁰. One key cause for this was the application of §6 of the Constitution of Estonia of 1920⁸¹, which stated that men and women have equal rights⁸². Another reason was agitation by women's rights organisations, who made numerous statements, starting in 1923, in which they demanded the abolition of coverture and establishment of equality of men and women.⁸³ These culminated in amassing 31,000 protest letters in 1930⁸⁴.

Per the 1926 draft version of 1940 CC⁸⁵, only the husband could administer marital property. This was held to be true under a statutory matrimonial-property regime of so-called *varäihendus* and in cases of community of property alike⁸⁶. However, the versions of 1935 and 1936 of 1940 CC were already more liberal. In place of the so-called *varäihendus*, community of accrued gains became the statutory matrimonial-property regime⁸⁷, with husband and wife having equal rights to decide over questions related to family life, according to the general provisions. Nevertheless, in cases of disagreement, the husband's vote on the matter was to prevail, or, alternatively, the matter would need to be decided by the courts⁸⁸. In cases of community of property regime, the principle that the husband administered joint property alone was not abandoned, but spouses were now to dispose of immovables jointly and to decide together on matters falling outside ordinary administration⁸⁹. The same extent of joint administration was the maximum limit set forth in the final version of 1940 CC⁹⁰.

⁷⁹ T Anepaio (n 14) 194.

⁸⁰ K Kiirend-Pruuli, 'Abikaasade isiklike suhete õiguslik korraldus Eesti esimesel iseseisvusperioodil: tee kaheliikmelise parlamendi suunas' (The Regulation Pertaining to the Personal Relations of the Spouses in the First Period of Independence of Estonia: A Way toward a Two-Member Parliament) *Õpetatud Eesti Seltsi Aastaraamat 2017/IX* (Tartu 2018) 205 and 223. Available in Estonian at: http://oes.ut.ee/wp-content/uploads/2017_9_Kiirend-Pruuli.pdf (accessed on 4 August 2020).

⁸¹ The Constitution of Estonia of 1920. *Eesti Vabariigi Põhiseadus 1920*. – RT 9.8.1920, 113/114, 243. Available in Estonian at: <https://www.riigiteataja.ee/failid/1920.html> (accessed on 4 August 2020).

⁸² For further information, see also: K Kiirend-Pruuli (n 80) 208–209.

⁸³ See further information about various pleas by the women's rights organisations in: K Kiirend-Pruuli (n 80) 213–16.

⁸⁴ T Anepaio (n 14) 193. See also: T Günthal, 'Nõupidamine Perekonnaseaduse eelnõu asjus' (Discussion about the Draft Family Law Act) [1932] 7 *Õigus* 334, n 4. Available in Estonian at: <https://www.digar.ee/arhiiv/nlib-digar:26861> (accessed on 4 August 2020).

⁸⁵ The 1926 version of the 1940 CC. Tsiviil seadustik: üldosa ja perekonna õigus. Tallinn: Kohtuministeeriumi kodifikatsiooni osakond, 1926. Available in Estonian at: <https://dSPACE.ut.ee/handle/10062/50914> (accessed on 4 August 2020).

⁸⁶ The statutory matrimonial-property regime of so-called *varäihendus* was based solely on coverture, regulated in §§ 380–404 of the 1926 version of the 1940 civil code. Absolute and limited community of property could be chosen via marital-property contract, per §§ 413–37, but the husband administered joint property alone in that case too. See §415 and §435.

⁸⁷ See §292 of the 1935 version of the 1940 CC and §278 of the 1936 version of it.

⁸⁸ See §264 of the 1940 civil code's 1935 version and §266 of its 1936 version.

⁸⁹ See §334 and §335 of the version of the 1940 CC from 1935 and §336 and §337 of the one from 1936.

⁹⁰ See the 1940 version of the 1940 CC as reproduced by: L Saarniit, 'Tsiviilseadustik' (1992). Available in Estonian at: <https://dSPACE.ut.ee/handle/10062/26808> (accessed on 4 August 2020).

During the Soviet occupation, the equality of men and women was explicitly mentioned in §122 of the Constitution of SSSR and §94 of the Constitution of Estonian SSR⁹¹, and it was further emphasised in §9 of the RCMFG. However, the principle of joint administration was explicitly stated in Estonian law only after the MFC entered into force, in 1970. According to §21 (1) of the MFC, spouses had to possess, use, and dispose of objects in their joint ownership in mutual agreement. This provision was the source for the provisions of the FLA of 1995⁹², wherein a similar principle was stated in §17 (1–2). However, the principle of joint administration remained quite general and was never as rigid and comprehensive as what is found in the FLA now in force.

Before the current FLA became valid, the principle of joint administration covered only exercising the right of ownership together. Spouses had to possess, use, and dispose of jointly owned things together. It was only in 2010 that §29 (1) of the FLA entered into force and, accordingly, spouses were further obliged to conclude contracts as a pair and go to court together. The role model for such extensive regulation was not earlier Estonian law but §1450 of the German BGB, where almost identical wording is used⁹³.

The foregoing discussion shows that joint administration of joint property has not been a principle with a long history in Estonian law. It was first applied in 1970, when the MFC entered force, and even then applied only to exercising the right of ownership. It is only for the last 10 years that spouses have been explicitly obliged to conclude contracts and go to court jointly – since the present FLA entered into force.

4. Conclusions

4.1. The past

Community of property, today a widely applied matrimonial-property regime, is of Germanic origin, and its roots extend back to the mediaeval era. In Estonia, it has been applied at least since the nineteenth century, and it has traditionally been a statutory matrimonial-property regime. However, community of property has endured for centuries not because the problems related to joint ownership and joint administration had better legal solutions. It endured because it was a different and less restrictive system at first, one based on coverture and co-ownership.

Community of property was not initially based on spouses having joint ownership. Joint ownership is a specific German concept that was developed only in the eighteenth century and criticised from the beginning on the basis of arguments from Roman law. In Estonian law, joint ownership has been a recognised concept since the nineteenth century, but it was deliberately left out of the BPLA and the draft of 1940 CC because of criticism levelled against it in legal literature. Only after the 1950s was joint ownership transplanted to the Estonian legal landscape, with inspiration from a translation of a Russian textbook on civil law and only in 1970, when it was explicitly stated that spouses have joint ownership. Joint property of the spouses did not presume the spouses also having joint ownership. Community of property may be a regime with mediaeval roots, but joint ownership in Estonia is a relic of Soviet law.

In addition, community of property was not based on the principle of joint administration of joint property initially. Until the twentieth century, the foundation for community of property was the assumption that, for reason of coverture, only the husband as head of household may administer joint property. It was only in the middle of the last century that the principle of joint administration was developed, in an attempt to merge the equality of men and women into the existing system of community of property. In German law, §§ 1450–1470 of the BGB were added in 1958. Those provisions contained very specific and comprehensive rules pertaining to joint administration of joint property. That was in contrast with the Estonian law of the time, which contained little more on the matter than a general rule stating that spouses have to exercise the

⁹¹ See: abstracts from the constitutions in the RCMFG text (n 55) 3. The material is available in Estonian at: <https://www.digar.ee/arhiiv/nlib-digar:215351> (accessed on 4 August 2020).

⁹² See: K Kullerkupp (n 4) 78.

⁹³ Section 29 (1) of the FLA states: 'If spouses administer their joint property jointly, they may **enter into transactions** with respect to the property and **conduct legal disputes** relating to the property only jointly or with the consent of the other spouse' (emphasis added). Section 1450 (1) of the BGB states that '[i]f the marital property is jointly managed by the spouses, the spouses are in particular entitled only jointly to **dispose of** the marital property and to **conduct legal disputes** that relate to the marital property' (emphasis added). One difference is that the BGB refers to disposition, not obligatory transactions.

right of ownership jointly. Nevertheless, in 2010, when today's FLA entered into force, Estonia caught up with the amendments made in Germany in 1958. On the example of §1450 of the BGB, §29 (1) of the FLA was implemented, which additionally obliged spouses to conclude contracts jointly and act in court jointly.

Therefore, one can conclude that the strong proprietary bond between spouses with regard to community of property was not based on rigid and comprehensive regulation stretching back to mediaeval times. Not equality between men and women but coverture formed the foundation for community of property for centuries, and joint property of the spouses did not necessarily mean joint ownership by the spouses. Regulation in this regard has been especially rigid and all-encompassing in Estonian law only since 2010.

4.2. The future

The fact that community of property has been applied against highly varied social backgrounds historically makes it questionable that a functioning yet specific system can be retained as the society and, therefore, the key principles of the regime fundamentally change. In Estonia, a long tradition of community of property being enshrined as a statutory matrimonial-property regime is coupled with reluctance to even discuss changing it, so a solution is required. It seems unfruitful to wait until the burdensome nature of the regulations and their lack of legal clarity force the Supreme Court to make further exceptions in reliance on practical arguments, irrespective of provisions that explicitly contradict those exceptions.

One option might be to take the German approach. Instead of providing a summary of German law in the FLA, the whole German system could be transplanted to Estonian law, including an analogue to §1455 of the BGB, which explains the cases in which spouses may act independently. Stating clear exceptions to the general principle that spouses have to act together would render the rigid system more flexible. However, this still would seem to be a step in the wrong direction: even from the outset, §§ 1450–1470 of the BGB were not good role models for Estonia. In Germany, these provisions have faced criticism for being overly complicated and have hardly ever been applied, ever since their adoption. Community of property and the equality of men and women are simply not compatible. Comprehensive rules on joint administration just end up making for an artificial and casuistic system. Instead, a few steps back could lead the way forward to a more liberal regime, one that would still protect the weaker spouse.

From a look at the roots of community of property, it is evident that problems with complicated and comprehensive restrictions were avoided because joint ownership was not actually applied and joint property was administered by only one of the spouses.

Firstly, the criticism of joint ownership as an impossible concept in both Roman law and German legal literature can be considered. Since joint property does not presume joint ownership, why not apply regulation pertaining to co-ownership instead or make the most of the reference to co-ownership rules in §70 (6) of the LPA? It makes little difference whether spouses have, for example, a car in their co-ownership or joint ownership. Although, unlike joint owners, co-owners can dispose of their legal share in the ownership individually, according to §73 (1) of the LPA, it is rather unlikely that a legal share in the ownership of, for instance, a car would be marketable. Even if one spouse were to dispose of his or her share purely to annoy the other, the weaker spouse can still be reasonably protected with a claim of compensation. To protect the weaker spouse, it is crucial that the value of joint property be retained until its division, whereas preservation of each individual object does not have any added value. The family home might constitute an exception, given that a legal share of ownership to an immovable is marketable and a family home holds emotional value. However, even for that or to preserve other items with emotional value, the concept of joint ownership still is not needed. The individual-specific right of disposition by one of the spouses could be limited for those items, similarly to what is done by the provisions that already address family homes in §27, §30 (2), and §41 (2) of the FLA.

Secondly, the time has come to acknowledge that it is impractical to force spouses to act as a single unit when administering joint property. It is obvious that spouses disagree at times and that leaving them in a stalemate position does not protect the weaker of them. Instead, the freedom of the spouses to act independently should be increased, to make the regime more similar to the one that endured for centuries. Restricting the right of disposition while specifying the liability of the spouses, if needed, would be enough to protect the weaker spouse. In its current wording, §29 (1) of the FLA only causes confusion in court proceedings and leaves an incorrect impression that a married person cannot conclude valid contracts alone.



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Insurer's Duty to Obtain Information under the IDD Directive – Threat or Opportunity?

1. Introduction

Directive^{*2} (EU) 2016/97 of the European Parliament and of the Council on insurance distribution (recast), ('IDD'), came into force on 23 February 2016, and its transposition period expired on 1 October 2018.^{*3} The IDD substituted and repealed Directive 2002/92/EC of the European Parliament and of the Council on insurance mediation. Enacting the IDD, *inter alia*, extended the scope of application of regulation, elevated the requirements for personnel expertise within insurers and insurance intermediaries, and particularised the content of the duty to give information.

One of the reforms IDD brought about was that regulation of the duty to give information was extended to cover not only insurance intermediaries but also insurers themselves^{*4} – prior to IDD, regulation of the insurer's duty to give information to a customer was left mostly to national legislators. A noteworthy element in the IDD rules concerning the insurer's duty to give information is that the directive contains a detailed list of issues that must be notified to the customer (art 20(8) IDD). This legislative technique corresponds to that adopted in Directive 2009/138/EC on taking up and pursuing the business of Insurance and Reinsurance (Solvency II) in the field of life insurance (see art 185(3)) as well as that adopted in art 2:201 of the Principles of European Insurance Contract Law ('PEICL') as generally applicable.^{*5} On the other hand,

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² I thank Christopher Goddard for checking and improving the language as well as Anna Liski for finishing the footnotes. I also thank the two anonymous peer reviewers for valuable comments.

³ The transposition period was initially due to expire on 23 February 2018, but the due date was subsequently postponed to 1 October in the same year in order to give insurance undertakings and insurance distributors more time to better prepare for correct and effective implementation of the Directive and to implement the necessary technical and organisational changes to comply with the delegated regulations. See Parliament and Council Directive 2017/0350 (COD) of 2 March 2018 amending Directive (EU) 2016/97 as regards the date of application of Member States' transposition measures.

⁴ This is also emphasised by Katarzyna Malinowska, 'Insurance transparency and protection regime under the Insurance Distribution Directive' (2016) 4 Insurance Review (Wiadomości Ubezpieczeniowe) 89–101, 91; accordingly Annette Hofmann, Julia K Neumann and David Pooser, 'Plea for Uniform Regulation and Challenges of Implementing the New Insurance Distribution Directive' (2018) 43 The Geneva Papers on Risk and Insurance – Issues and Practice 740–69, 743–44. DOI: <https://doi.org/10.1057/s41288-018-0091-6>.

⁵ See Thomas Köhne and Christoph Brömmelmeyer, 'The New Insurance Distribution Regulation in the EU—A Critical Assessment from a Legal and Economic Perspective', 43 The Geneva Papers on Risk and Insurance – Issues and Practice, 704–39, 720–21, who criticise the regulatory technique for going too far in details. DOI: <https://doi.org/10.1057/s41288-018-0089-0>.

this technique deviates from the one customarily utilised in Nordic countries, where the content of the insurer's duty to give information has been defined with compact general clauses.^{*6}

Another but not so obvious novelty in the IDD, as regards the insurer's duty to give information, is the insurer's duty to *obtain information* from the customer to be able to fulfil its own duty to give information. According to art 20(1) IDD, '[p]rior to the conclusion of an insurance contract, the insurance distributor shall specify, *on the basis of information obtained from the customer*, the demands and the needs of that customer and shall provide the customer with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision.'^{*7} The duty to obtain information is even stressed in situations where the insurance distributor not only offers insurance contracts to be concluded but gives *advice* on insurance issues, that is, by providing 'a personal recommendation to a customer, either upon their request or at the initiative of the insurance distributor, in respect of one or more insurance contracts' (art 2(1)(15) IDD).^{*8} In the case of advising, 'the insurance distributor shall provide the customer with a personalised recommendation explaining why a particular product would best meet the customer's demands and needs' (art 20(1) IDD).^{*9}

In addition, the content of the insurer's duty to obtain information is specified further in the context of insurance based investment products. In that situation an insurance intermediary or insurance undertaking must also obtain the necessary information regarding the customer's knowledge and experience in the investment field as well as their financial situation and investment objectives as provided in more detail in art 30(1) IDD. The focus of this article is, however, on 'normal' insurance, not on insurance-based investment products.

An insurer's duty to obtain information from their customer is unknown in previous EU legislation on insurance.^{*10} The same holds true as regards the PEICL – even though its second edition is newer (2016) than the directive proposal that later developed into the IDD.^{*11} Interestingly, however, the insurer's duty to obtain information from the customer is not completely unknown in the PEICL, either, though the duty is limited to those circumstances of the customer that are more or less obvious to the insurer. According to art 2:202 PEICL, ' – – the insurer shall warn the applicant of any inconsistencies between the cover offered and the applicant's requirements of which the insurer is or ought to be aware – – '. According to the commentary text, this 'duty of assistance' is limited 'to situations where the insurer had reason to know about gaps in cover – – , because the actual risk situation of the applicant was apparent to the insurer or where such a gap should reasonably have been anticipated by the insurer'.^{*12} Thus, under the PEICL an insurer is obligated to warn a customer whose misunderstanding as to the content of the insurance cover is apparent, whereas in contrast the IDD includes an automatic duty to request information from the customer.

The absence of a duty to obtain information from the customer in the PEICL is not surprising because the balance between the insurer's duty to give information and the customer's duty to become acquainted with the information received is customarily understood in many legal systems, roughly speaking, so that

⁶ See, e.g., Section 5(1) of the Finnish Insurance Contract Act (*vakuutusopimuslaki* 28.6.1994/543), as it was prior to implementation of IDD: 'Before an insurance contract is concluded, the insurer shall provide the applicant with any information that the applicant may need to assess their insurance requirement and select the insurance, such as details of the insurer's insurance products, insurance premiums and insurance terms and conditions. When giving such information, the insurer shall point out all major exclusions in the cover provided.' Correspondingly, Chapter 2, Section 2 of the Swedish Insurance Contract Act (*försäkringsavtalslagen* 2005:104) and Chapter 2, Section 2–1 of the Norwegian Insurance Contract Act (*forsikringsavtaleloven*, LOV-1989-06-16-69).

⁷ According to art 2(1)(8), 'insurance distributor' means any insurance intermediary, ancillary insurance intermediary or insurance undertaking.

⁸ On the other hand, art 20(1) IDD may be understood so that it recognises two types of advice, a) 'reduced' advice as provided for in the first sentence and b) 'extensive' advice as provided for in the third sentence. On this kind of outlook, see Malinowska (n 4) 94.

⁹ As noted by Köhne and Brömmelmeyer, the IDD thus leaves national discretion whether to provide for mandatory advice or not while only regulating advisory standards in case of advisory services being given. Köhne and Brömmelmeyer (n 5) 722.

¹⁰ However, the predecessor directive to the IDD, that is, Parliament and Council Directive 2002/92/EC of 9 December 2002 on insurance mediation [2002] OJ L009, '[p]rior to the conclusion of any specific contract' to 'specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product' (art 12(3)).

¹¹ Proposal for a directive of the European Parliament and of the Council on insurance mediation (recast) COM/2012/0360 final - 2012/0175 (COD).

¹² Jürgen Basedow and others (eds), *Principles of European Insurance Contract Law (PEICL)* (2nd expanded edn, Verlag Dr. Otto Schmidt 2016) 123. DOI: <https://doi.org/10.9785/9783504384753>.

(a) the insurer is obligated to give comprehensive information on its insurance products in an understandable form, but (b) the customer bears the risk of selecting correct and sufficient insurance relying on the information received. In other words, the insurer is liable in respect of the information as such, but the customer bears the risk of applying the information incorrectly in their own circumstances.

Another question is: what is the relationship between a) the insurer's duty to obtain information under art 20(1) IDD and b) the applicant's duty to inform the insurer of circumstances which may be of importance for assessment of the insurer's liability? The latter type of duty is not touched upon in the IDD but included in all European insurance contract acts¹³, art 2:101 PEICL as well as probably all other jurisdictions globally.

From a theoretical point of view the relationship between these two duties seems clear as they differ from each other both from the temporal perspective and in terms of their function: The insurer's duty to obtain information precedes the applicant's duty to give information as the function of the former is to enable the insurer to offer suitable types of insurance to the customer,¹⁴ and once the correct insurance has been identified, then the applicant must provide the insurer with sufficient information to enable the insurer to calculate the risk and set the insurance premium.¹⁵ However, from a practical point of view the functions of these two duties may be blended. For example, even if an insurer neglected its duty to obtain information from the customer, the information provided by the customer on their circumstances may reveal to the insurer that the insurance they initially selected is not suitable for the needs of the customer. However, in the present article the focus is on the insurer's duty only – thus, the analysis is implicitly based on the assumption that the information to be subsequently provided by the customer as to their circumstances does not touch upon the same issues that are in the scope of the insurer's duty to obtain information.

This background gives us a reason for the following research questions:

- 1) What is the legislative background of the new duty to obtain information, and what are its objectives?
- 2) What are the consequences of neglecting the duty?
- 3) What is the 'upside risk' of the reform, that is, in what kind of cases could the new duty improve things?
- 4) What is the 'downside risk', in other words, might the new duty cause any problems?

My analysis focuses on the IDD directive itself, not on any national jurisdiction where the directive has been implemented. For illustrative purposes, I use certain case examples from the complaints boards under the Finnish Financial Ombudsman Bureau.¹⁶ However, my focus is on the facts of the cases, not on the Finnish legal provisions that were applied to them, so the analysis is intended to be understandable to any reader, irrespective of whether they know Finnish law or not.

I was the chairman in some of the board cases which are analysed below. Whenever this is the case, it is mentioned explicitly, for the sake of transparency.

2. The Legislative Background and Objectives of the Duty

The insurer's duty to obtain information from a customer is touched upon only very lightly in the preamble of the IDD. Paragraph 44 states that '[i]n order to avoid cases of mis-selling, the sale of insurance

¹³ *ibid* 106. Cousy notes that as regards the applicant's duty to give information, European insurance contract laws may be divided in two main categories: a) systems where the applicant has a general duty to disclose to the insurer all information that may be relevant for the insurance contract and b) systems where the applicant's duty materialises merely as a duty to give true and complete answers to specific questions presented by the insurer. The international trend is towards a shift to the latter regulatory method. Herman Cousy, 'The Principles of European Insurance Contract Law: the Duty of Disclosure and the Aggravation of Risk' in *European Contract Law: ERA Forum Special Issue 2008* (Springer 2008) 121–22. DOI: <https://doi.org/10.1007/s12027-008-0078-z>. The 'new' model is also adopted in art 2:101(1) PEICL.

¹⁴ The objectives of the duty are analysed in more detail under Section 2 below.

¹⁵ cf Angelo Borselli, 'Cognosceat Emptor: On the Insurer's Duty to Inform the Prospective Policyholder in Europe' (2012) 2 *European Insurance Law Review* 55–65, 62–63, who does not recognise the difference in the same way but suggests that through the applicant's disclosure the insurer is able to propose the most suitable insurance cover.

¹⁶ The Finnish Financial Ombudsman Bureau is a purely private body. Its complaints boards submit recommendations to the parties involved. However, the de facto significance of the decisions as a legal source is often notable, because they are well reasoned decisions by a multi-member body, with members who are specialised in the field of law applicable to the dispute. Furthermore, especially in the financial sector, the recommendations are almost universally followed by the parties.

products should always be accompanied by a demands-and-needs test on the basis of information obtained from the customer'. Then it adds that '[a]ny insurance product proposed to the customer should always be consistent with the customer's demands and needs and be presented in a comprehensible form to allow that customer to make an informed decision'. The brevity of the reasoning of the new duty is slightly surprising taking into account that the new duty meant, as noted above, at least a small-scale paradigm shift in the relationship between insurer and its customer.

Another issue is that from the European legislator's viewpoint the paradigm shift perhaps has not appeared as significant in practice as it is from a purely legal perspective. As noted above, Directive 2002/92/EC on insurance mediation already contained a corresponding duty in the relationship between the intermediary and the customer (art 12(3)). The structures of insurance distribution vary significantly between different Member States, and in many of them direct sales between insurers and customers represent only a small minority of all sales.^{*17} From the viewpoint of such Member States, extending the scope of application of the duty to obtain information from intermediaries to insurers has perhaps not appeared as particularly significant.

That said, the background of the duty to obtain information becomes clearer when looking at the proposal for the directive. The duty to obtain information is present in both in the context of 'normal' insurance as well as insurance-based investment products.^{*18} However, in the preamble the duty is discussed only in the context of insurance-based investment products.^{*19} Furthermore, the general part of the preamble mentions that the planned directive should, 'whenever the regulation of selling practices of life insurance products with investment elements is concerned, – – meet the same consumer protection standards as MiFID II', that is, the revised directive on markets in financial instruments.^{*20} Later the preamble adds that '[s]ome parts of the new Directive will be reinforced by Level 2 measures in order to align the rules with MiFID: in particular, in the chapter regulating the distribution of life insurance policies with investment elements'.^{*21}

Thus, it seems that the logic of the European legislator has been the following: first, regulation on issuing insurance-based investment products must be harmonised to meet the standards of providing normal investment products and investment services;^{*22} second, regulation of 'normal' insurance must be harmonised with regulation of insurance-based investments.

The duty of a service provider to obtain information from its customer has a long history in the context of investment services. The EU legislator has obliged a provider of investment services to obtain information from its customer since the very first directive in this field: Directive 93/22/EEC on investment services in the securities field. According to art 11(1), 'an investment firm – – seeks from its clients information regarding their financial situations, investment experience and objectives as regards the services requested'. A corresponding duty was enacted in the successor to this directive, in the shape of Directive 2004/39/EC on markets in financial instruments ('MiFID'), yet in a significantly more sophisticated form, in art 19(4)–(6) of the said directive. The duty is present, of course, in the current directive in force in that field: Directive 2014/65/EU on markets in financial instruments ('MiFID II') in art 25(2)–(4).

As we have seen, the objective of the duty to obtain information is, according to the preamble to the IDD, to 'avoid cases of mis-selling'. In the insurance branch, the concept of mis-selling is understood as meaning a situation where a customer is sold a product that is not suitable for them.^{*23} The implications of mis-selling may be divided to positive and negative sides: 1) the customer pays for insurance cover they do not need (positive side); 2) the customer is not covered by their insurance against a certain risk that

¹⁷ On insurance distribution structures in different Member States, see Köhne and Brömmelmeyer (n 5) 712, 738.

¹⁸ COM/2012/0360 final 53 (art 18) and 59 (art 25).

¹⁹ *ibid* 11.

²⁰ *ibid* 2.

²¹ *ibid* 3.

²² Accordingly Malinowska (n 4) 92; Hofmann, Neumann and Pooser (n 4) 746 fn 18, 762. See also Köhne and Brömmelmeyer (n 5) 723–24, who raise the question whether striving for uniformity with the MiFID II regime increases efficiency sufficiently to surpass the inconvenience caused by the increase in complex processes. – The development trend where EU legislation on securities and investment markets is used as a model for EU legislation in other financial sectors is aptly labelled 'mifidization' by Cousy. Herman Cousy, 'The Delicate Relationship between Law and Finance: The Classification of Credit Default Swaps' (2014) 2 *Journal of South African Law* 227–42, 229.

²³ *Vakuutusalan sanakirja: Suomi – Ruotsi – Englanti* [Insurance Dictionary: Finnish – Swedish – English] (Suomen vakuutusalan koulutus ja kustannus Oy 2001) 393, headword 'mis-sell'.

they themselves understand as being covered (negative side).^{*24} The positive implication is not normally a major problem for a customer in the short run but accumulates unnecessary costs in the long run. The negative implication, on the other hand, may even be beneficial for the customer until the non-covered risk materialises, because the insurance premium may be lower than it would have been had the unintentionally non-covered risk been within the sphere of the insurance. However, if the risk materialises, the (negative) consequences may be drastic for the customer.

3. Consequences for Neglecting the Duty to Obtain Information

In the previous section, we saw that the main objective of the new duty to obtain information is to avoid cases of mis-selling. The next question is: How does the duty to obtain information actually help to avoid these situations, or tackle their consequences? One may rise factual, remedial and procedural aspects. From a *factual viewpoint*, it seems plausible that if insurers' representatives obtain information about their customers' circumstances and insurance needs, this enhances their possibility to offer suitable insurance to the customer as well as helping them to focus on relevant issues when giving information about insurance.

From the *remedial viewpoint*, the first question is what the remedies for non-compliance with the duty to obtain information from a customer are. As is normal with EU legislation, the IDD itself contains no provisions on civil law remedies for non-compliance with directive-based national legislation; rather, remedies are left to be determined by national legislation.^{*25} Thus, the character and content of remedies for non-compliance with the duty to obtain information may vary between Member States depending on legislation on insurance contracts as well as the general rules and principles of civil law in each country.

In this article is neither possible nor functional to analyse the question of remedies in different legal systems. However, I would surmise that most legal systems have no direct civil law remedy for non-compliance with the duty to give information. This is because even in the IDD the duty does not serve the customer's interest directly, but only indirectly through the insurer's duty to give information about insurance offered. To be more precise, the function seems to be as follows: Under the IDD, the extent and content of the insurer's duty to give information is determined *assuming that the insurer has obtained necessary information from its customer*. From this point of view it is irrelevant whether the insurer has actually fulfilled its duty to obtain information or not. Either way, it is regarded as having neglected its duty to give information if it has not given its customer *the information that it would have given had it requested information from its customer and otherwise acted reasonably*. Thus, at least the IDD itself does not assume legal orders to provide direct legal remedies to enforce the duty to obtain information. Rather, the consequences of failure to comply with the duty are, by default, determined indirectly through remedies for failure to give appropriate information.^{*26}

It must be emphasised that the duty to obtain information cannot only *extend* the amount of information that the insurer must give to its customer but can also *limit* it. The latter happens in a situation where the information obtained from the customer reveals – or, if it had been obtained, it would have revealed – to the insurer that certain insurance is not suitable for the customer because of some special circumstances of the customer, and because of this, that particular insurance should not be recommended to the customer.^{*27} This situation is more typical in the context of insurance-based investments than 'normal' insurance, though in principle it may also occur in the latter context.

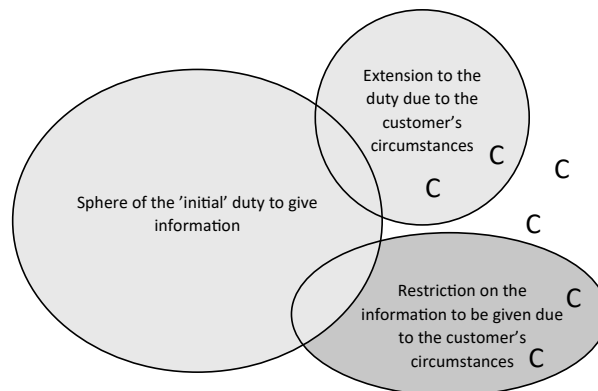
²⁴ Accordingly Basedow and others (eds) (n 12) 124.

²⁵ See, however, Chapter VII of the IDD on administrative or criminal sanctions for non-compliance of IDD. Hofmann et al believe the relatively harsh sanctions will become an effective and highly dissuasive tool and strengthen consumer protection in the EU. Hofmann, Neumann and Pooser (n 4) 762.

²⁶ cf art IV.C. – 2:102 of the 'Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)' on pre-contractual duties in service contracts. According to paragraph (6) of the article, a service provider has a certain kind of duty to collect information relating to the circumstances of the assignment and the customer. No direct remedies are prescribed for non-compliance with this duty, but failure affects the service provider's possibilities to fulfil the duty to warn customers of possible risks described in paragraph (1).

²⁷ As mentioned in the introductory section, whenever the insurer's communication to the customer fulfils the criteria of advising in art 2(1)(15) IDD, ie 'provision of a personal recommendation to a customer, either upon their request or at the initiative of the insurance distributor, in respect of one or more insurance contracts', then the insurer must also 'provide the

The idea may be illustrated with a drawing, where the C's stand for different circumstances of the customer, and the combined area of the two light grey ellipses represents the sphere of all the information that the insurer is obliged to give its customer, reduced by the dark grey area representing information or recommendation that should not be given to the customer.



In the IDD the question of remedies for non-compliance with the duty to give information to a customer is also left to be determined in national legal orders. Remedies available to a customer in such a situation might include, depending on the legal system, a right to declare the insurance contract void or terminated, a right to damages, or a right to modification of the insurance contract in accordance with their reasonable expectations.^{*28} The latter remedy may occur either by virtue of a special provision in the (national) insurance contract act,^{*29} or on the grounds of general rules and principles of interpretation of contracts.^{*30}

One can even recognise a *procedural aspect* in relation to the duty to obtain information. In cases where it is disputed whether the insurer has given appropriate information to the customer or not, the evidence is quite often imperfect on both sides. For example, the insurer may allege that its representative has notified the customer of a certain essential limitation in the insurance cover, whereas the customer denies this, but either side has no evidence to support their standing. If in that situation it is established that the insurer has neglected its duty to obtain information from the customer, this omission may have certain significance as an indicator favouring the conclusion that the duty to give information has also been neglected. This is because when the purpose of the duty to obtain information is to support fulfilment of the duty to give information, failure to fulfil the former may indicate – at least in dubious case – omission of the latter. However, this is not a ‘real’ remedy for neglecting the duty to obtain information but just a possible line of reasoning when a judge is assessing the evidence in an individual case.

4. Case Examples

4.1 Introduction

The question of the significance of the insurer's duty to obtain information from the customer is next approached through case examples from complaints boards under the Finnish Financial Ombudsman Bureau. Because of the novelty of the insurer's duty to obtain information, there are as yet no case examples directly concerning the duty. However, two groups of cases are worth analysing here because they may give an indirect clue as to what the consequences of the new duty might be.

customer with a personalised recommendation explaining why a particular product would best meet the customer's demands and needs' (art 20(1) IDD).

²⁸ Accordingly, Basedow and others (eds) (n 12) 124 and 126.

²⁹ See, e.g., Section 9(1) of the Finnish Insurance Contract Act: 'If the insurer or its representative has failed to provide the necessary information or has given incorrect or misleading information to the policyholder when marketing the insurance, the insurance contract is considered to be in force to the effect understood by the policyholder on the basis of the information received'.

³⁰ On part of Swedish law, e.g., see Bertil Bengtsson, *Försäkringsavtalsrätt* [Insurance Contract Law] (2nd edn, Norstedts Juridik 2010) 225.

First, we focus on a few cases from the Insurance Complaints Board ('ICB') from the era *prior to* enactment of the duty to obtain information. These cases share two elements in common: 1) they include an element of mis-selling, in that the insured believed themselves as being covered by their insurance from a certain risk, but according to the policy terms that was not the case; 2) the (then) provisions of the insurance contract act left the consequences to be borne by the insurer. Thus, my purpose is to present examples of real scenarios in which the duty to obtain information from the customer could have helped the insured to be covered against a risk that they believed has been covered.

Second, we focus on certain cases from the Securities Complaints Board ('SCB'; now known as the Investment Complaints Board), in which a service provider's duty to obtain information from its customer became relevant in the decision of the case. As mentioned in section 2 above, the service provider's duty to obtain information from its customer has been a part of regulation of investment services since the 1990s. The purpose of presenting and analysing the selected securities cases is to illustrate the circumstances when the duty to obtain information may become significant and how it can affect the outcome of the case.

4.2 Insurance Cases

Our first case example from the ICB is the resolution recommendation VKL 266/16 (2017).³¹ In this case, an accounting office had, when providing services to its customer, accepted a commission to file an application for a title registration. However, the application had been filed too late, which had rendered the client liable to a penal tax of 16,000 euros. The office sought compensation from its liability insurer. The application was denied, because the insurance had been granted to cover only provision of accountancy and audit services as well as consultation in tax and company matters. According to the insurer, a commission to apply for a title registration is a task relating to the real estate business. The office took the case to the ICB alleging its ill-fated application as belonging to the insured line of business. According to the office, applying for title registration is a typical task when providing financial administration services especially if the customer is a firm in the building trade.

The ICB dismissed the complaint, accepting the insurer's reasoning that applying for a title registration is, as a legal measure, by its nature a measure belonging to the law of real estate. The ICB also noted that even though the legal consequence of a delayed application was a penal tax, this did not change the nature of the measure itself to be (or become) tax law, that is, a legal context that was within the sphere of the insurance. Thus, the loss-causing measure was held as not being covered by the insurance.

The case and the ICB's decision were quite straightforward because the office had not even alleged that it would not have received proper information about the insurance. The office's only allegation was that the policy term defining the lines of business that are covered by the insurance must be interpreted as including a situation where the office applied for a title registration as part of other financial administration services. Thus, from a legal point of view, the case concerned only interpretation of a contract, so that the insurer's duty to give information did not become an issue. However, in its straightforwardness the case is a clear-cut example of a situation in which the course of events could have been quite different had the insurer been obliged to find out the nature of the insured business. Had the insurer realised that the insured occasionally applied for title registration in the name of its customers, it would have been easy to extend the sphere of insured events to cover these kind of measures – for a higher premium, of course.

Next, the resolution recommendation VKL 747/04 (2005) offers an example of situation where it seems quite clear that if the insurer at that time had a duty to obtain information from its customer, this would have affected the insurer's duty to give information in the circumstances of the case. In this case, a holiday rental cottage had been damaged by fire. The owners of the cottage, who had so-called extended home insurance for the cottage, sought compensation for, *inter alia*, loss of rental revenues. The insurer denied the application as far as rental revenues were concerned, stating that according to the insurance policy, loss of rental revenues was not covered by the terms of insurance.

The owners took the case to the ICB stating that in their oral discussion they had told the insurer's representative that the cottage was in rental use. Compensability of rental revenues was of utmost importance to the owners because they had purchased the cottage on loan, thus planning to pay the instalments with the rental revenues. Because the insurer's representative had not informed the owners of exclusion of rental

³¹ The author was the chairman of the panel in this case.

revenues, the insurer had neglected its duty to give information on insurance policies and essential limitations to the insurance cover, as required in the Insurance Contract Act. The insurer, on the other hand, contested the allegation that rental use of the cottage had been discussed when the insurance contract was concluded.

The ICB found it unclear what had actually been discussed when the contract was concluded. Thus, the owners had failed to prove having received wrongful information about the insurance policy. The ICB rejected the complaint.

The ICB did not take a stand explicitly on the question whether the clause precluding compensation of lost rental revenues could be regarded as being an essential restriction to insurance cover to which the insurer would have had a duty to pay attention when concluding the insurance contract. Clearly, the answer was understood as being negative at least if the owners had not mentioned the rental use of the cottage – otherwise the insurer should have been able to show they had notified the clause to the owners. In any case, it seems probable that if the insurer had had a duty to obtain information in those circumstances, then the insurer should have received information about the rental use, and in that case the insurer quite clearly should have paid attention to the critical limitation clause in the insurance policy.

4.3 Securities Cases

Next, we analyse two SCB cases in which the duty of a service provider to obtain information from its customer became significant in a situation where the customer purchased an unsuitable investment product. As noted above, the purpose of this analysis is to provide a point of comparison and thus shed light on the significance of the corresponding duty in the context of an insurance contract.

Our first example is case APL 621/02 (2002). The facts were that a bank had contacted two siblings recommending that they sell a part of listed stocks they had received as an inheritance about 20 years earlier, and put the money in a bond issued by the bank as well as in mutual funds managed by a company from the same company group as the bank. The siblings had followed the recommendation. Realization of the increase in value of the stocks had rendered the siblings liable to pay tax for the capital gain. In addition, the State Study Grants Centre had taken the capital income into account when determining the student financial aid for each of the siblings, which had decreased the aid they received. The siblings claimed compensation from the bank alleging that they had been totally inexperienced in managing investments and thus unaware of its fiscal effects as well as the effect on student financial aid.

The SCB stated that normally even private persons may be required to understand that selling assets may cause fiscal consequences. However, the SCP noted that in this case it had been the bank that took the initiative in the case and recommended realisation of the stocks, even though it was aware of the siblings' lack of experience of investment. In these circumstances, the bank should, according to SCB, have paid attention to fiscal issues when recommending the transaction so that the siblings could have assessed the fiscal questions and perhaps seek further information on the issue. According to the SCB, the same held true as regards student financial aid, which is one of the most common forms of welfare aid in Finland. Thus, the bank was held as having failed to give sufficient information to the siblings.

The case is a clear-cut example of how a service provider's duty to obtain information from its customer may affect the content of the duty to give information to the customer. Even though explaining fiscal and social security issues was not regarded as belonging to the scope of the duty to give information in its 'normal' form, notifying customers of these issues became necessary because of the circumstances of the case and the customers. Thus, in this case the duty to obtain information had an extensive effect on the scope of the duty to give information.

Another, slightly more complicated but perhaps even more interesting example of the significance of the duty to obtain information, is case APL 12/13 (2014).³² In this case, C Ltd. had concluded an *interest swap agreement* with a bank. According to the agreement, C was obliged to pay interest in a certain sum at a flexible rate based on the consumer price index whereas the bank was obliged to pay interest on a flexible rate based on the difference between the Euribor 6 months' reference rate and a fixed marginal. The fixed contract period was ten years. After concluding the contract, the real interest rate decreased significantly, which led C's position to become highly unprofitable. Two years after conclusion of the agreement the par-

³² The author was the chairman of the panel in this case.

ties agreed to cancel it, but according to a mechanism described in the swap agreement, the bank was entitled to a lump payment of MEUR 1.55 from C.

C took the case to the SCB alleging that the swap agreement was unsuitable for it and that it had not been properly informed of the risks of the investment. According to the bank, it had obtained relevant information on C's financial position and investment objectives in accordance with the regulation in force, both when C's customer relationship was established and again prior to offering the swap agreement to C. According to the bank, C was an experienced investor who sought significant returns against high risk.

The SCB noted that the bank had not presented any evidence for its allegation of having obtained information about C's investment objectives and C's financial position – even though the bank was, according to the regulation in force, obliged to store the documentation on information it had obtained from the customer concerning their circumstances. Thus, the SCB held the bank as having failed to show it had obtained the required information from the customer. Furthermore, because the bank did not have the required information on C's circumstances, it should not have recommended such a risky investment – as indeed the swap agreement was. In addition, the bank was found as having provided false information when its representative in a phone discussion had denied the possibility that reference rates could ever become negative – a fairly typical opinion at that time (2009). Thus, the bank was held liable in the sum of MEUR 1.125, which represented most of C's loss. The rest of C's loss was left to be borne by C itself, because it was found to have delayed cancelling the agreement and thus failed to mitigate its loss.

The case underlines the formal significance of the duty to obtain information – and the significance of evidence on fulfilment of the duty. It remained unclear until the end why the bank actually had recommended the swap agreement to C, and the merits on which C had assessed the agreement to be beneficial to it. Credit swap agreements may play an important role in the financing strategy of a business³³ having, for example, significant loans at a flexible interest rate or long maturity receivables at nominal value, and thus vulnerable to inflation. In such situations, interest swap agreements – if concluded and managed with skill and care – may help the business to protect its position against inflation or disadvantageous changes in the reference interest rate applicable to its loans. In the case at hand, however, C had not had such loans or receivables leading to the idea to purchase protection through a credit swap agreement. Moreover, the nominal capital of the swap agreement was significantly large compared to C's balance sheet.

Because of these circumstances, according to the SCB, the bank should not have recommended the swap agreement to C. This led the bank to be held liable for most of the loss – together with the aforementioned incautious prognostication on development of reference rates. The bank was not saved by the fact that the 'main' information it had given to its customer, including exact documentation and a brochure about the swap agreement, was found as such appropriate by the SCB. Thus, the case clearly illustrates the potential effect that the duty to obtain information may have on a service provider's duty to give information: because of the circumstances of the case, giving neutral information and recommending the swap agreement was held as amounting to negligence. In other words, in this case the duty to obtain information had a restrictive effect on providing information from the bank to its customer.

5. Possible Problems

As we have seen, the duty to give information most likely has positive effects on the relationship between the insurer and its customer. First, it presumably *de facto* helps the parties to avoid situations where the customer would purchase an unsuitable insurance. Second, it shifts the risk of negative consequences of mis-selling insurance a step towards the insurer, and thus improves customer protection in such cases. Does the duty to obtain information have negative effects, too?

One potential problem is the possibility that obtaining information from a customer becomes more or less a formality in a way that neither insurers nor customers put too much effort into monitoring and analysing the customer's circumstances. If this happens, the duty to obtain information does not achieve its goals, but may cause unnecessary transaction costs. It is even possible that sloppy surveys on a customer's circumstances will become, as pieces of evidence, merely misleading and thus distort the picture of the case

³³ Generally on interest swap contracts and their usage, Zvi Bodie, Alex Kane and Alan J Marcus, *Investments* (9th edn, McGraw-Hill Irwin 2011) 800–02.

in later proceedings before a court or complaints board. This problem has sometimes been faced by the SCB, especially in a recent group of related cases. Many of these cases shared the common feature that customers who were according to their own words risk-averse, had signed filled-in forms assuring, *inter alia*, the customers' knowledge of derivatives as well as their willingness to seek high returns for high risk. The SCB held that because of similar stories from many independent customers, their allegation that they had been misled into signing the forms was plausible, so that the forms were not given any value as evidence.^{*34} However, in the vast majority of cases before the SCB no such problem has occurred, but the parties seem to have fulfilled their responsibilities on monitoring the circumstances diligently and *bona fide*.

Another question is whether the duty to obtain information from the customer becomes a 'dispute generator', that is, a legal vehicle on which customers try to ride in almost any case where they have not received compensation for their loss from their insurer. It is possible that the new duty may cause a certain number of disputes at least during the early years, but it is difficult to see that this would become a significant phenomenon in the bigger picture. From a larger perspective, insurance disputes with an element of mis-sale are quite rare. In a clear majority of disputes, the customer has selected the most suitable of the insurance products offered, even though it may happen that the customer does not get all of their losses compensated from the insurance. The significance of the insurer's duty to obtain information from the customer is remote in most of such cases.

In addition, one may ask whether the insurer's duty to obtain information enables situations where a minor and excusable failure to fulfil the duty – or merely inability to show fulfilment – leads to insurer's liability for loss which has never really been understood by the insured to be covered by the insurance. In other words, does the duty create a risk of the insured benefiting unjustifiably from the insurer's mistake, which is, more or less, of a merely formal nature? The risk is emphasised because of the relative complexity and particularity of the duties to provide information under the IDD.^{*35} One may see such risk in circumstances resembling those of the above analysed resolution recommendation APL 12/13 (2014) concerning the bank's recommendation to a customer to conclude a swap agreement. In that case, it was undisputed that the bank *de facto* had known its customer for a quite long time. The bank also alleged that it had monitored the customer's investment objectives, but it was not able to show any documentation on this. For that reason, plus an incautious prognostication on the phone on development of reference rates, the bank was held liable for most of the customer's loss. One may also note that it was undisputed that the customer was an experienced and successful investor.

Such outcomes may appear as being harsh from the insurer's viewpoint. This risk may also lead insurance distributors to engage in defensive selling practices, that is, recommending more insurance than is needed, in order to avoid professional liability claims.^{*36} On the other hand, insurers are always quite large corporations, for whom it should not be unreasonably burdensome to be obliged to keep comprehensive documentation on essential parts of communication with customers, and otherwise be able to follow more or less strict patterns in their conduct. It is also worth noting that cases such as APL 12/13 (2014) are, in my experience, exceptional. In the vast majority of cases, banks and insurers diligently follow different rules of conduct. Thus, one may ask whether even though formal rules of conduct, such as the duty to obtain information, would lead in some, but still quite rare, cases to harsh outcomes from the insurer's viewpoint, such rules are justifiable by their benefits for the body of customers. Furthermore, a high level of customer protection improves the reputation of the insurance industry and thus benefits insurers, too.^{*37}

³⁴ See, e.g., cases FINE-004540 (2018), FINE-007425 (2018), FINE-012046 (2019), FINE-011256 (2019) and FINE-008970 (2019). The author was the chairman of the panel in all these cases.

³⁵ On the last aspect, see Malinowska (n 4) 94, noting that even the most basic information duties have become very complex and multilevelled in the IDD.

³⁶ Hofmann, Neumann and Pooser (n 4) 765.

³⁷ As Howells and others point out, in the golden era of small retail stores, a consumer's trust in their contracting partner was secured by personal experience and knowledge of the shopkeeper. However, in a modern internationalised market the trust that the functioning of the market requires must be built with the help of consumer protection measures instead. Geraint Howells, Iain Ramsay and Thomas Wilhelmsson, 'Consumer Law in its International Dimension' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (2nd edn, Edward Elgar Publishing 2018) 5. DOI: <https://doi.org/10.4337/9781785368219.00006>.

6. Conclusions

The insurer's duty to obtain information from its customer is an interesting addition to regulation on the relationship between an insurer and its customer. As has emerged above, such a duty does not create – at least the IDD does not require it to create – any direct rights for the customer, but, rather, the effect of the duty materialises indirectly through the insurer's duty to give information to its customer. The effect is the following: the extent and content of the insurer's duty to give information is determined assuming that the insurer has obtained necessary information from its customer. If the information then given by the insurer does not meet the requirements which were defined in the aforementioned way, the consequences of neglecting the duty to give information to the customer are determined according to national rules on insurance and contract law.

The case examples analysed above indicate that the duty to obtain information may in certain, yet in practice quite rare, circumstances have a strong effect on how the negative consequences of mis-selling insurance affect the parties. This improves customer protection but perhaps sometimes raises the question whether the customer may also stand to gain an unjustified benefit at the cost of the insurer. Such an outcome would occur if a customer obtains insurance compensation because of the occurrence of a risk that the customer in reality never believed to be covered by the insurance. However, my conclusion is that even though such an outcome is possible in certain quite exceptional situations, the practical significance of this problem is minor balanced against the benefits to customer protection in cases of mis-selling insurance, where the customer's situation has until now often been quite problematic.



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Digital Opportunities for – and Legal Impediments to – Participation in a General Meeting of Shareholders^{*1}

Introduction

In conditions of a globalising economy, holding a meeting by electronic means of communication to arrange a company's daily economic activities is increasingly widespread. The reasons given for this include, for example, the fact that often people engaged in joint business are located remotely from each other, so, at least for some of them, meeting at the same time in the same place would be time-consuming and costly. It has also been found that physical participation may be impeded by certain natural circumstances, such as the risk of spread of diseases or weather conditions adverse to travel.^{*2} The same impediments and inconveniences apply to public limited companies, whose shareholders are often located in different countries, such that physical attendance at a general meeting may prove to be excessively burdensome.

An expert group established by the European Commission has noted that the general meeting of shareholders as the highest body of a public limited company was originally created to ensure effective communication between the company and its shareholders. However, thanks to the virtually costless nature of digital communication, the rules for participation in a general meeting and the role of the general meeting should be reviewed.^{*3} The expert group's analysis produced the conclusion that it is evident that no need exists to gather shareholders in one single physical location to hold a general meeting, and companies should allow shareholders to communicate even before, as well as during, the general meeting by ensuring availability of digital platforms for that purpose.^{*4}

Also, the company law review carried out by the Estonian Ministry of Justice found that, even though decision-making at a meeting presumes shareholders' personal presence, or at least presence by proxy, under the current law presence should not mean only physical presence of shareholders in the same place,

¹ This article is based on laws as of 29 June 2020.

² P Pullan, 'The Seven Secrets of Successful Virtual Meetings', paper presented at PMI Global Congress 2011 – EMEA, Dublin, Ireland (Newtown Square, PA, Project Management Institute). <https://www.pmi.org/learning/library/successful-virtual-meetings-skills-improvement-6267>.

³ The Informal Company Law Expert Group (ICLEG), 'Report on Digitalisation in Company Law (March 2016) para 22.1. https://ec.europa.eu/info/sites/info/files/icleg-report-on-digitalisation-24-march-2016_en.pdf.

⁴ *Ibid*, para 22.4.

so that participation in a general meeting through virtual channels too is allowed if an adequate temporal-spatial connection for participants is ensured. It is important that the law ensure not only the possibility to vote on draft resolutions by electronic means prior to a meeting but also the possibility to participate in a meeting through real-time transmission and to vote during the meeting.^{*5}

The present article analyses whether and to what extent Estonia and other countries (first and foremost, Germany as a country with a legal system similar to Estonia's, but also the Netherlands and the United Kingdom) regulate holding general meetings of public limited companies by electronic means, the requirements for virtual meetings, and legal problems related to electronic meetings. For this, the author relies on the hypothesis that electronic participation should not be impeded if shareholders are ensured all the rights related to participation in a general meeting that they would have when participating in a meeting physically.^{*6}

The public limited company as an open limited company was chosen as the object of study because, presumably, it is precisely the larger companies that need to ensure flexibility of meetings, whereas private limited companies, with a smaller 'membership', can probably, at least as a rule, arrange adoption of resolutions more flexibly.^{*7}

As of 24 May 2020, the Estonian Commercial Code^{*8} regulates electronic participation for public and private limited companies. Prior to that, electronic participation was allowed only for listed public companies. Legal literature notes that, in comparison to ordinary public limited companies, listed companies are subject to stricter requirements, arising primarily from the need to ensure the transparency of their activities, their credibility, and equal treatment of their investors.^{*9} It has been found also that the larger the company, the more important the formal requirements become.^{*10} The main reason for changing the regulation was that on 12 March 2020, the Estonian Government declared a state of emergency in connection with the global novel coronavirus pandemic. Therefore, the Ministry of Justice prepared a draft law that included regulations expanding the possibilities for digital meetings.^{*11}

1. The legal significance of the general meeting of a public limited company and legal regulation of electronic participation

1.1. The legal significance of a general meeting

Shareholders exercise their rights at a general meeting. On one hand, legal scholars have found that the legal status of shareholders as investors should afford them the opportunity to have a say in essential issues of company management,^{*12} while, on the other hand, it has also been noted that, overall, the general meeting is the only place where shareholders can exercise their rights.^{*13} At least under the Germanic company

⁵ Ministry of Justice, *Ühinguõiguse revisjoni analüüs-kontseptsioon* (The Analysis-Concept of Company Law Review) (Tallinn 2018) 538.

⁶ Although participation in a meeting is linked to electronic voting also, the article does not explore issues of electronic voting more closely, as this would require a separate analysis.

⁷ For example, shareholders of a private limited company may adopt resolutions in a format reproducible in writing (Commercial Code, s 173). As for electronic holding of meetings of shareholders of a private limited company, the law currently only addresses electronic voting (Commercial Code, s 170¹).

⁸ Commercial Code (Äriseadustik). RT I, 23 May 2020, 9.

⁹ K Saare, U Volens, A Vutt, and M Vutt, *Ühinguõigus I. Kapitaliühingud* (Company Law I: Limited Companies) (Tallinn: Juura 2015) margin reference 1670.

¹⁰ E Boros, 'Virtual Shareholder Meetings' [2004] 8 *Duke Law and Technology Review* 6.

¹¹ Draft Act Amending the General Part of the Civil Code Act and Other Acts (Expanding Electronic Capabilities for Meetings and Decision-Making), 6 April 2020 (Tsiviilseadustiku üldosa seaduse ja teiste seaduste muutmise seadus. Eelnõu 6.04.2020). <http://eelroud.valitsus.ee/main/mount/docList/ab3f09b7-7557-48e9-bb29-38fa178faa9a?fbclid=IwAR24sbJOifRkLwE-JQyM-SjpoOlkGw-BHjOFKXgUzQFE4q3Pp6NzZfZG4mU#spQpVxw5>.

¹² M Vutt, 'Aktisionäri derivatiivnõue kui õiguskaitsevahend ja ühingujuhtimise abinõu' (A Shareholder's Derivative Claim As a Legal Remedy and a Measure of Corporate Governance) (PhD thesis, University of Tartu, 2011) 44.

¹³ K Saare, U Volens, A Vutt, and M Vutt (n 9) margin reference 1670.

law model, the competence of the general meeting is not unlimited, while at the same time more essential issues fall precisely within the competence of shareholders.^{*14}

The general meeting of shareholders deals primarily with adopting resolutions, but decision-making is far from the only function of the general meeting of a public limited company. At least equally important is that shareholders receive information at a general meeting (*inter alia*, under §287(1) of the Commercial Code, each individual shareholder is entitled to receive information from the management board at the general meeting). In German legal literature, it has been noted that the most important function of a general meeting is to articulate the will of the majority of participating shareholders at the meeting and, through resolutions adopted at the meeting, act as one of the company's bodies in relations with other bodies.^{*15} German legal literature also considers the shareholders' rights related to participation at the meeting to include the right to information, the right to have a say, the right to submit proposals and drafts, and the right to object to a resolution.^{*16} Dutch legal literature emphasises that the most important aspect of a general meeting is the opportunity for communication between the shareholders and the management board.^{*17}

At the same time, the legal literature expresses the view that, at least in the case of large listed companies, the actual effect and effectiveness of general meetings of shareholders is questionable since shareholders are passive and since institutional investors prefer to communicate directly with the management board and not at a general meeting, while for the rest of the shareholders attendance at a general meeting is simply inconvenient in terms of both time and space as meetings take place during working hours and mostly far from the shareholder's residence.^{*18} These problems could at least partially be resolved by a virtual general meeting.

1.2. Legal regulation of participation in a virtual general meeting

For a long time, a tacit presumption applied in company law that the idea of a general meeting is that all shareholders convene at the same time in the same place, so public limited companies could hold a general meeting only at the company's registered office (or another designated place) and only those shareholders physically present were deemed to be in attendance. Under §290(1) of the Commercial Code, shareholders exercise their rights in a public limited company at the general meeting of shareholders, which under §295 is to be held at the registered office of the public limited company unless otherwise prescribed by the articles of association.^{*19} In 2009, special provisions for listed companies were introduced to the Commercial Code. Under §290¹ of the version in effect since then, a listed company may prescribe in its articles of association that the shareholders may participate in the general meeting and exercise their rights by electronic means without physically attending the general meeting and without appointing a representative, if this is possible in a technically secure manner.^{*20} Section 290¹(1), clause 1 of the Commercial Code lays down terms for participation in a general meeting by means of real-time two-way communication throughout the general meeting or by other, similar electronic means that enable the shareholder to observe the general meeting from a remote location, vote by using electronic means throughout the general meeting on each draft resolution, and address the general meeting at the time determined by the chair of the meeting.^{*21} Section 290¹

¹⁴ For example, §298(1) of the Commercial Code lists the issues within the competence of the general meeting and subsection (2) of the same section lays down that a general meeting may adopt resolutions on other matters related to the activities of a public limited company at the request of the management board or supervisory board. In principle, this is similar to §119 of the German AktG, the first subsection of which lists the competencies of the general meeting and the second subsection of which states that the general meeting may decide on matters pertaining to the day-to-day management of the company only if requested by the management board or the supervisory board.

¹⁵ T Drygala, M Staake, and S Szalai, *Kapitalgesellschaftsrecht. Mit Grundzügen des Konzern- und Umwandlungsrechts* (Springer: Heidelberg, Dordrecht, London, New York 2012) 470.

¹⁶ U Hüffer and J Koch, *Beck'scher Kurz-Kommentare*, vol 53. Aktiengesetz (13th edn, Verlag C.H. Beck München 2018) – Koch, 'AktG', s 118, margin reference 12.

¹⁷ A van der Krans, 'The Virtual Shareholders' Meeting: How To Make It Work' [2007] *Journal of International Commercial Law and Technology* 32.

¹⁸ E Boros (n 10) 3–4.

¹⁹ With regard to this provision, the articles of association may only prescribe that a general meeting be held through physical participation but at an address different from the company's registered office. Probably the term 'registered office' cannot be interpreted to refer to the online environment.

²⁰ The law does not define more specifically what is to be understood as technically secure.

²¹ According to the explanatory memorandum to the Draft Act Amending the Commercial Code, the list of opportunities for holding an electronic meeting is open and a listed company in its articles of association may also lay down ways of holding a

was introduced to the Commercial Code in connection with transposing the Shareholder Rights Directive^{*22} into Estonian law. It is important to emphasise that if a listed company wishes to enable electronic participation for its shareholders, this must be laid down in the articles of association. Under the current law, this is not a default possibility arising directly from the law.^{*23}

On 24 May 2020, new regulation entered into force, which allows electronic participation also for non-listed public companies. Prior to the new regulation, a possibility to regulate holding a meeting through electronic means of communication in the articles of association was not clearly prescribed. Therefore, legal literature concluded that the admissibility of such provisions in articles of association is debatable. It had already been found that, at least to a certain extent, there could be freedom to shape the rules pertaining to relations between a public limited company and its shareholders in the articles of association (at least to the extent that no essential shareholder rights are violated).^{*24} On the other hand, the view has been expressed that the rules on public limited companies are mandatory, at least to a larger extent, and deviations from the provisions of the law are possible only where explicitly so provided by law.^{*25} Furthermore, Estonian legal scholars expressed a strong view that the law did not actually exclude the possibility of holding virtual meetings even before the new regulation was introduced in Estonia.^{*26}

One of the aims set out in the terms of reference for review of Estonian company law was to promote the holding of electronic meetings.^{*27} The draft act amending the Commercial Code^{*28} prepared in the course of the review was intended to introduce regulation to it that is, aimed, *inter alia*, at regulating the holding of a general meeting through a special voting platform set up in connection with the commercial register. However, taking into account the latest developments and the urgent need for regulating virtual meetings, the author is of the opinion that this proposal would not have been as quickly implemented and flexible as needed and therefore could only have been considered as an additional option.

As noted above, in connection with the ongoing pandemic, the law that entered into force on 24 May 2020 is designed to grant an opportunity to hold digital meetings for all types of legal bodies in private law, whether the articles of association foresee this option or not. As a result, the General Part of the Civil Code Act^{*29} was supplemented with a provision according to which every member of a body of a legal person may attend the meeting of the body and exercise their rights without being physically present, by an electronic mechanism that allows the member to observe the meeting, to speak, and to vote, unless the articles of association provide otherwise. The new regulation also includes terms whereby the procedures specified in the articles of association or by the management board for holding of electronic meetings must ensure the security and reliability of the identification of shareholders and shall be proportionate to the achievement of those objectives.

meeting not included in the list. See: SE 467, 'Explanatory Memorandum to the Draft Act Amending the Commercial Code'. <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/041369ed-82db-4840-cb2a-28eb744989d2/%C3%84riseadustiku%20ja%20teiste%20seaduste%20muutmise%20seadus>.

²² Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184, 17–24. The above directive was revised in 2017 but the general principles have remained the same (see: Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (text with EEA relevance) [2017] OJ L 132, 1–25).

²³ In this regard, it should be noted that analysis of the articles of association of some Estonian listed companies shows that some listed companies have not regulated electronic participation in their articles of association (e.g., Tallinna Kaubamaja Grupp AS, AS Merko Ehitus), while others provide for electronic participation in their articles of association (e.g., AS LHV Group) but confine the reference generally to copying provisions of the law.

²⁴ K Saare, U Volens, A Vutt, and M Vutt (n 9) margin reference 1721–25.

²⁵ See, for example: P Varul *et alia.*, *Võlaõigusseadus I. Kommenteeritud väljaanne* (Law of Obligations Act, Annotated Edition) (Tallinn: Juura 2016) – P Varul, s 5, comment 3.

²⁶ U Volens and A Vutt. 'Õigusteadlased: digitaalse koosoleku võrdsustamisest füüsilise koosolekuga' (Legal Scholars: Equalising a Digital Meeting with a Physical Meeting). <https://www.err.ee/1074990/oigusteadlased-digitaalse-koosoleku-vordsustamisest-fuusilise-koosolekuga>.

²⁷ Ministry of Justice (n 5) 26.

²⁸ The Draft Act Amending the Commercial Code. See the material on the initial project for debate by the company law working group, of 14 October 2019, available online at: https://www.just.ee/sites/www.just.ee/files/ariseadustiku_eelnou_17.10.2019.pdf.

²⁹ General Part of the Civil Code Act (Tsiviilseadustiku üldosa seadus). – RT I, 06.12.2018, 3.

According to the explanatory memorandum to the draft law,^{*30} and as of the entry into force of the regulation, this amendment is not a temporary measure. Therefore, it will stay in force even when the state of emergency is declared to have ended.

Germany, on the other hand, has chosen a different legal approach to holding digital meetings in the era of social distancing. Namely, on 27 March 2020, its Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law (COVInsAG) was adopted.^{*31} It includes some temporary rules regarding virtual general meetings of public companies. Article 2, Section 1(2) of the COVInsAG grants the management board the right to decide that the general meeting is to be held virtually, provided that the broadcast of the meeting encompasses the entire meeting and that shareholders have an opportunity to exercise their voting right and are given the opportunity to ask questions and to object to resolutions. Also, the management board is granted the right to decide that the members of the supervisory board may participate at the general meeting by means of audio and video transmission.^{*32} As is stated in Article 2, Section 7(2), the above-mentioned rules apply only to shareholder meetings held and resolutions passed in 2020. Article 6(2) foresees these temporary rules ceasing to have effect at the end of 31 December 2021.

As the above-mentioned changes in German legislation are not fundamental and are more of a temporary nature, one must also study the legal regulation of digital meetings under Germany's regular law. The main difference is that normal German law already lays down the right of electronic participation for non-listed public companies but it still has to be foreseen in the articles of association of the relevant company. In line with the first sentence of §118(1) of the *Aktiengesetz*^{*33} (AktG), shareholders exercise their rights in a public limited company at a general meeting unless said act prescribes otherwise. According to the second sentence of the same subsection, the articles of association may allow the shareholders to participate in the meeting without being present on the site and without sending a proxy-holder, and they may exercise any group or individual rights by way of electronic means of communication. The articles of association can also authorise the management board to decide on the opportunity for electronic participation in the meeting.

Section 118(3) of the AktG also lays down an important principle: the members of the management board and the supervisory board (unlike shareholders) must attend the general meeting directly, and only the articles of association may allow for certain cases wherein the attendance of supervisory board and management board members may be either by video or by audio transmission. Under §118(4) of the AktG, the articles of association or the bylaws (*Geschäftsordnung*) may allow audio-visual transmission of the general meeting. The articles of association may also authorise the management board or the chair of the general meeting to decide on transmission of the general meeting. Legal literature notes with regard to these provisions that the legislator has empowered the shareholders, through the articles of association, to decide on the matter of whether holding a meeting through electronic means of communication is in principle possible in a particular company. Under regular law, outside the rules of the articles of association, the management board itself is not entitled to decide whether to hold a meeting electronically *versus* traditionally.^{*34}

Section 118(4) of the AktG – i.e., the regulation allowing either video or audio transmission of a meeting – also entails enabling passive exercise of shareholder rights. However, the second sentence of §118(1) of the AktG refers to two-way electronic communication – that is, the opportunity not only to observe the progress of the meeting but also to communicate with the other participants through electronic means of communication. Merely observing the meeting does not guarantee the shareholders the right to influence the decision-making process, and, regardless of how voting takes place, the legal literature emphasises that ensuring the right of virtual participation is essential and necessary for the exercise of shareholder rights.^{*35} Unlike an observer of the meeting, all shareholders participating in the meeting through two-way

³⁰ 'Explanatory Memorandum to the Draft Act Amending the General Part of the Civil Code Act and Other Acts, 6.4.2020' (Tsiiviilseadustiku üldosa seaduse ja teiste seaduste muutmise seadus. Eelnõu seletuskiri 6.04.2020).

³¹ 'Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht Vom 27. März 2020' [2020] *Bundesgesetzblatt Jahrgang 2020*, part I, no. 14, issued in Bonn on 27 March 2020.

³² See also: E Gottschalk and K Ulmer, 'Das Gesellschaftsrecht im Bann des Corona-Virus' [2020] *Gesellschafts- und Wirtschaftsrecht* 134.

³³ 'Aktiengesetz vom 6. September 1965 (BGBl. I 1089), das zuletzt durch Artikel 9 des Gesetzes vom 17. Juli 2017' (BGBl. I 2446), amended since.

³⁴ L Beck, 'Aktuelles zur elektronischen Hauptversammlung' [2014] *Rheinische Notar-Zeitschrift* 160.

³⁵ W Goette, M Habersack, and S Kalss, *Münchener Kommentar zum AktG* (4th edn, Verlag C.H. Beck München 2018) – Kubis, 'AktG', s 118, margin reference 80.

communication can be deemed to be in attendance and their votes can be counted toward the quorum.^{*36} Additionally, online participants must be able to exercise their shareholder rights in the same way they could if physically present at the meeting, except where the exercise of a certain right is precluded under the articles of association.

German legal literature nevertheless has so far noted that, in practice, electronic meetings as such have been held rather rarely while electronic voting when shareholders are physically present at the meeting is already relatively widespread.^{*37} However, one can assume that holding virtual meetings will probably become more popular when taking into account that people's free movement is currently impeded.

In German legal literature, there is debate on the extent to which public limited company law, particularly provisions regulating the relationship between the company and shareholders, may be considered dispositive, but in comparison to Estonia the interpretations given there rely on significantly broader private autonomy. In line with the prevailing opinion, even though shareholders of a German public limited company cannot replace statutory rules with others, supplementing the existing rules is allowed. At the same time, supplementing is also understood as adding to the articles of association rules that develop the existing statutory rules such that the main essence and purpose of those rules remains unchanged.^{*38} Thus, German regular law differs from existing Estonian law, firstly, in that it lays down certain rules on holding virtual meetings for all public limited companies and, secondly, because those rules may be modified through the articles of association. On the other hand, Estonia's new draft law can be considered very flexible as it allows all companies to specify the issues related to holding virtual meetings in their articles of association.

Comparison of Estonian company law with the law of some other European countries shows that, for example, United Kingdom law also enables general meetings of all public limited companies to be held electronically. Specifically, §360A(1) of the Companies Act 2006^{*39} allows holding and conducting a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it. Under subsection (2) of the same section, in the case of a traded company, making use of electronic means for the purpose of enabling shareholders to participate in a general meeting may be done subject only to such requirements as are necessary to ensure the identification of those taking part and the security of the electronic communication, and proportionate to the achievement of those objectives. Thus, the law in the United Kingdom too is highly flexible and minimalist in terms of regulation.

Under Article 2:117a, clause 1 of the Dutch Civil Code,^{*40} the articles of association may entitle any shareholder to use electronic means of communication to participate in the general meeting, to address the general meeting, and to exercise their right to vote. Article 2:117a, clause 2 lays down, additionally, that, to participate in the meeting, the shareholder must be identified and must be able to obtain direct knowledge of the proceedings at the meeting and to exercise their right to vote. The same provision also lays down that the articles of association may provide that the shareholder is entitled to participate in the deliberations through electronic means of communication. Also important is the principle set out in clause 3 of the same article, that if the general meeting is going to be held electronically, this must be announced in the notice of convening the meeting. In sum, it should be concluded that Dutch law also already specifies broader electronic participation and Estonian law can catch up with regulatory competition only when the new draft law is adopted.

1.3. The possibility of carrying out a fully virtual general meeting

As a reason for which, allegedly, no general meeting can be fully virtual under German law, legal literature cites the argument that even if shareholders were to be given the opportunity to participate remotely in a general meeting through electronic means of communication, members of the management board

³⁶ *Ibid*, Kubis, 'AktG', s 118, margin reference 80.

³⁷ G Spindler and E Stilz, *Kommentar zum Aktiengesetz* (4th edn, Verlag C.H. Beck 2019) – Hefendehl, 'AktG', s 402, margin reference 17.

³⁸ O H Behrends, 'Einberufung der Hauptversammlung gem. § 121 IV AktG (mittels eingeschriebenem Brief) trotz abweichender Satzungsbestimmung' [2000] *Neue Zeitschrift für Gesellschaftsrecht* 579.

³⁹ Companies Act 2006. <https://www.legislation.gov.uk/ukpga/2006/46/contents>.

⁴⁰ Dutch Civil Code. <http://www.dutchcivillaw.com/civilcodebook022.htm>.

and the supervisory board usually must attend the meeting.^{*41} Thus, it has been found that under current law a general meeting of shareholders can never be held fully electronically.^{*42} The German temporary legislation^{*43} shows that the physical presence of the members of the management and supervisory board is in fact an impediment to holding a fully electronic meeting. Estonian law, on the other hand, does not require members of the management board or the supervisory board to attend the meeting. Only the optional principles of good corporate governance for listed public companies^{*44} set out that members of the management board; the chair of the supervisory board; and, if possible, also members of the supervisory board and at least one of the auditors should attend the general meeting. Furthermore, the author is of the opinion that even Estonia's existing law, not to mention the proposed amendments, allows the interpretation that the presence of the management and the supervisory board members, if needed, may be virtual and it is possible to hold a meeting such that all participants are in separate locations.

2. Problems in relation to electronic participation in a general meeting

2.1. Verification of participation and technical problems

A precondition for holding a meeting is that the right persons – namely shareholders – participate. German legal literature notes that in the event of electronic participation, just as in the event of physical attendance at a meeting, identification of shareholders must be ensured. In this regard, it has been recommended to use, for example, logging in to the system by using a PIN code for this purpose (i.e., using a so-called login mask).^{*45} This is certainly one option and probably the most secure one. However, setting up a special environment can be too burdensome, especially for smaller public companies who know their shareholders and therefore can identify them easily by using a Web-camera. The author of the article is of the opinion that public companies with fewer than, for example, 20 shareholders can very well organise meetings held via Skype, MS Teams, or other (similar) applications.

Addressing the problems of a virtual meeting, German legal literature cites the argument that even if the articles of association lay down the possibility of electronic participation, it still remains unclear what can be deemed participation within the meaning of the law. First and foremost, the question arises of how a shareholder's participation is to be verified. Secondly, it has been found that a shareholder participating in a meeting through electronic means of communication might not, in a situation wherein the meeting adopts a resolution and electronic voting takes place also, be certain whether it was indeed the decision that was displayed as that shareholder's particular vote being counted as their vote in reality. In the event of electronic participation, the risk of technical problems always exists too – transmission disturbances might either partly or fully prevent a shareholder from receiving all the information that they need to exercise their right to vote.^{*46} This could be a real problem, since current experience of working from a distance in Estonia has already shown that, if a successful meeting is to be held, one needs good Internet access and the relevant technical equipment.

Holding a virtual meeting must also take into account that the technical possibilities available to the company and to its shareholders must be mutually compatible.^{*47} Where this is not so, or where only some shareholders have the technical prerequisites for participation in the meeting, the requirements for holding a virtual meeting have not been fulfilled.

⁴¹ M Schüppen and B Schaub, *Münchener Anwaltshandbuch. Aktienrecht* (3rd edn, 2018) – Bohnet, s 26, 'Vorbereitung der Hauptversammlung', margin reference 32. The requirement of notarial authentication of a resolution of the general meeting arises from §130(1) of the AktG.

⁴² L Beck (n 34) 160.

⁴³ See: art 2, s 1(2) of COVInsAG.

⁴⁴ 'Corporate Governance Recommendations' https://www.fi.ee/failid/HYT_eng.pdf. The above principles are laid down in Article 1.3.2.

⁴⁵ U Hüffer and J Koch (n 16) – Koch, 'AktG', s 118, margin reference 12.

⁴⁶ L Beck (n 34) 164.

⁴⁷ Reference to this has also been made, for example, in U.S. legal literature (see: A van der Krans (n 17) 35).

Another shortcoming of an electronic meeting that has been pointed out is the lack of an atmosphere conducive to debate in an electronic meeting: in a situation wherein the management board and shareholders are not physically present at the same location, it is easier to express criticism (non-constructive included) while it is more difficult to exchange views with other shareholders.^{*48} The author is of the opinion that this should not be a big problem at least for smaller companies, and one can argue that holding a meeting electronically might even contribute to a more constructive atmosphere.

2.2. The place of the general meeting in the case of an electronic meeting

Under §295 of the Estonian Commercial Code, a general meeting is to be held at the registered office of the public limited company unless otherwise prescribed by the articles of association. In the opinion of the author of the present article, the above-mentioned provision neither restricts the right to hold the meeting virtually nor obliges the participants to be physically at the location of the company. The aim behind this regulation is to protect shareholders from a situation wherein the management board convenes the meeting in some unexpected place. Therefore, §295 of the Commercial Code should be interpreted in such a manner that it applies only to those meetings held physically.

German legal literature has debated whether, in a situation in which this is not specifically laid down in the articles of association, a general meeting of shareholders could also be held such that the participants are not simultaneously at the same location but in different locations, where the various meeting sites are connected to each other and everyone can hear and see everything taking place at the meeting. In this regard, an opinion has been expressed that such an interpretation is conceivable in itself, but at the same time doubts have been raised as to whether this would be affirmed by judicial practice should a dispute arise pertaining to the validity of a resolution of a general meeting. The main reason for doubt is that under the wording of the law the meeting is to take place at a 'single location'.^{*49} In the opinion of this author, the latter misgiving appears not to be justified, since the provisions of the AktG do not directly and unequivocally stipulate that it should definitely be one location. For example, §121(3) of the AktG stipulates that the notice of the shareholders' general meeting must state the place of the meeting, but the mere fact that the word 'place' in this provision is in the singular does not imply that the provision could not be interpreted so as to allow the meeting to be held, for instance, simultaneously in several locations via electronic access.

Furthermore, Estonian case-law has dealt with a dispute involving whether a general meeting could be held at multiple times and in multiple locations, in such a way that the meeting participants cannot observe what happens at the same time in other places where the meeting is being held. The Supreme Court adjudicated on this kind of dispute in a case involving a garage association^{*50} and held that if the association has decided that certain issues are to be resolved at a general meeting, the general meeting must take place simultaneously for all members of the association. The Supreme Court noted that this does not necessarily mean that all the members have to be simultaneously in the same place but stressed, first and foremost, that the meeting must be accessible in time and space for all members and that such accessibility may also be created via electronic means (e.g., Skype).^{*51}

In the same case, the Supreme Court formulated the purpose of a general meeting of non-profit associations thus: to enable members to jointly exercise their membership rights, form opinions based on debate of issues on the agenda together with other members, and vote in accordance with one's will developed in the knowledge of all the circumstances and opinions. The Supreme Court noted that holding a meeting with a subset of the membership at a different time fails to ensure, *inter alia*, that the meetings are identical; if members vote at a different time and place, no-one can be sure what was said at the previous part-meetings or what will be said at the next ones, or how draft resolutions are explained at other part-meetings.^{*52}

⁴⁸ L Beck (n 34) 165.

⁴⁹ M Schüppen and B Schaub (n 41) – Bohnet, s 26, 'Vorbereitung der Hauptversammlung', margin reference 32.

⁵⁰ In this context, in the absence of special rules, a garage association as a form of apartment association is subject to rules applicable to non-profit associations laid down in the Non-profit Associations Act (RT I 1996, 42, 811; 19 March 2019, 24).

⁵¹ Supreme Court Civil Chamber order 3-2-1-89-16, para 9.

⁵² *Ibid*, para 9.

One can only agree with this position, and, in the opinion of this author, both the purpose of holding a meeting and the requirement of a simultaneous meeting are the same for limited companies, including public limited companies, also extending to when a meeting is held virtually. Provisions enabling electronic participation may not prevent shareholders from jointly debating the issues on the agenda and developing their opinions in the course of debate and reaching informed decisions. It should be kept in mind that, in addition to the possibility of a resolution being passed at a general meeting, a public limited company has the option of adopting a resolution in writing (§305(1) and (2) of the Commercial Code),⁵³ but once a decision has already been made to hold a general meeting to pass resolutions, the rights of shareholders should be safeguarded to the greatest possible extent, with cases of an electronic virtual meeting included. This is not so if a meeting is held at several times and in different places.

2.3. Minutes of a virtual general meeting and the role of a notary at a general meeting

Also, in German legal literature, it has been noted that, since the minutes of a general meeting are the most important means of documenting the conduct of the meeting, the requirements for keeping the minutes and for their notarial authentication require that, even if shareholders are allowed to participate in a meeting remotely, a 'physical' meeting always take place somewhere with the attendance of a notary and members of the managing bodies. The possibility should be ruled out of the person keeping the minutes becoming at some point, for whatever reason, no longer able to observe the meeting and document its conduct, but this is arguably not possible in the case of fully electronic participation.⁵⁴

Since in Germany the requirement of notarial authentication of the minutes of a general meeting has been laid down for all public limited companies, the question arises, *inter alia*, of what additional duties are imposed on a notary in the event of enabling electronic participation in a general meeting. The question is also relevant in the context of Estonian law, since, even though the Commercial Code does not impose the requirement of notarial authentication of all minutes of general meetings, in certain cases the minutes do need to be notarised in line with the statutory requirement,⁵⁵ and additionally the law allows shareholders or other persons so entitled to request notarial authentication of the minutes. In the German legal literature, the role of a notary in virtual meetings is considered important also because, whereas at ordinary general meetings the shareholders themselves can observe how resolutions are passed, in the case of electronic participation, in contrast, this might not be possible for shareholders, and it is the notary who sees directly how and whether resolutions reach the number of votes needed for passing.⁵⁶ However, this problem probably concerns only public companies with a large number of shareholders who participate and vote through a special login system. When, for instance, Skype or MS Teams is used, the decision-making can be arranged in a manner allowing everyone to observe the decision-making process.

German legal literature notes that, in a situation wherein the articles of association enable shareholders to participate in a meeting via electronic means of communication, the duty of the so-called plausibility check (*Plausibilitätskontrolle*) is imposed on the notary. Specifically, the notary must be satisfied that the communication technology made available by the company is reliable and must verify whether the server and other technical solutions used by the company are dependable and have sufficient capacity. However, since, as a rule, a notary does not have the relevant specialist knowledge, the requirements imposed on a notary should not be excessively stringent, and the company should enable the notary to use the assistance of people with specialist knowledge.⁵⁷

⁵³ In that case, the precondition for passing a resolution is that it be formulated in writing and that all the shareholders sign the resolution.

⁵⁴ L Beck (n 34) 167.

⁵⁵ Under §304(7) of the Commercial Code, this is so if a resolution of the general meeting is the basis for election or removal of a member of the supervisory board, or for amending the articles of association with regard to the supervisory board.

⁵⁶ K-J Fassbender, 'Die Hauptversammlung der Aktiengesellschaft aus notarieller Sicht' [2009] *Rheinische Notar-Zeitschrift* 457. In the opinion of the present author, this position is primarily relevant for cases where electronic voting takes place in addition to electronic participation.

⁵⁷ *Ibid*, 456.

The Estonian Notarisation Act^{*58} is just like the German Notarisation Act^{*59} in not laying down special rules for instances wherein a general meeting of a legal person (public limited companies included) takes place such that shareholders participate in it electronically. However, §1(3¹) of the Estonian Notarisation Act enables most notarial acts to be performed by remote authentication^{*60}, and, under §12¹(6¹) of the Notarial Regulations^{*61}, also remote authentication of the minutes of a general meeting is possible.^{*62}

In line with the first sentence of §36(1) of the Notarisation Act, in the event of authentication of a resolution of a general meeting of a public limited company, a notary must verify the quorum of the meeting and the identity and active legal capacity of the chair and the secretary of the meeting. The notary must indicate the results of this verification, the agenda of the meeting, the content of the resolutions adopted, the results of voting, and dissenting opinions regarding the resolution. Under §36(3) of the Notarisation Act, the chair of the meeting is liable for the correctness of the list of participants, and the person who holds the voting is liable for the correctness of the record of voting. Both of them must sign the list or record in the presence of a notary to confirm correctness. The list of parties or the record of voting must be appended to the notarial instrument. A notary must indicate any doubts pertaining to the quorum, legality of resolutions, conformity of the list of participants or record of voting with the membership of the relevant body, and authority of representatives, in a notarial instrument prepared with regard to the minutes (§36(4) Notarisation Act). On that basis, under Estonian law, identification of participants in the meeting (including meetings held via electronic means of communication) is not directly the duty of a notary; however, it cannot be claimed that a notary should not have any role in at least raising issues with regard to the quorum or the correctness of voting results. Thus, in Estonia, problems similar to those with German law can (at least hypothetically) arise, and the role of the notary in authenticating the minutes of an electronic meeting would probably need to be regulated more precisely.

2.4. The effect of technical problems on resolutions of a general meeting

As for technical problems that may occur at an electronic general meeting, in Germany they do not, as a rule, constitute circumstances enabling a claim for annulment of a resolution.^{*63} Additionally, legal literature has deemed it questionable whether a technical malfunction can even be interpreted as violation of someone's rights.^{*64} First of all, it has been emphasised that no violation can be attributed to a public limited company where the technical malfunction falls within the sphere of influence of a shareholder themselves (for example, they are disconnected from the Internet during the meeting).^{*65}

However, in the opinion of the present author, the situation may be different where the technical malfunction is so considerable as to result in significant interference with participation. In that case, it should nevertheless be possible to contest a resolution that, according to the minutes, was deemed as adopted. The law does not directly lay down that opportunity, because a resolution of a general meeting may only be annulled if it contravenes the law or the articles of association.^{*66} However, a conflict with the articles of association (in the sense employed in the law in force at the time of writing) or with the law (in the sense of

⁵⁸ Notarisation Act [Tõestamisseadus] – RT I 2001, 93, 564; RT I, 22 February 2019, 3.

⁵⁹ 'Beurkundungsgesetz vom 28. August 1969 (BGBl. I 1513), das zuletzt durch Artikel 13 des Gesetzes vom 30. November 2019 (BGBl. I 1924) geändert worden ist', amended since.

⁶⁰ Under §13(7) of the Notarisation Act, in the case of remote authentication, the necessary acts are carried out via a video bridge enabling a person and their intention to be identified, subject to the specifications derived from the manner of authentication, and the act is deemed to have been performed in the presence of the notary.

⁶¹ Notarial Regulations [Notariaadimäärustik] – RTL 2009, 51, 751; RT I 3 April 2020, 20.

⁶² In fact, only marriage and divorce cannot be authenticated remotely.

⁶³ Under §243(3), clause 1 of the AktG, no claim for annulment of a resolution of a general meeting may be brought where the violation was caused by a technical malfunction related to electronic participation in the general meeting, unless the company can be accused of gross negligence or intent.

⁶⁴ U Hüffer and J Koch (n 16) – Koch, 'AktG', s 118, margin reference 14.

⁶⁵ L Beck (n 34) 165.

⁶⁶ Under §178(1) of the Commercial Code, on the basis of an action filed against a private limited company, a court may annul a resolution of shareholders contravening the law or the articles of association.

the proposed future regulations) may be present if the violation during the conducting of the meeting was due to infringement of requirements set on holding of virtual meetings.^{*67}

2.5. Equal treatment of shareholders and ensuring shareholder rights at an electronic general meeting

There are two aspects of equal treatment of shareholders with regard to virtual meetings. Firstly, one can ask whether fully virtual attendance may be forced on shareholders.

As regards the issue of whether a complete transfer to electronic meetings would be conceivable, doubts have been expressed in German legal literature noting that, despite the widespread use of electronic means of communication and various technical possibilities, some shareholders always, for some reason, do not want to or cannot use modern means of communication, so such shareholders would be sidelined in the case of a fully electronic meeting. It is argued that such sidelining cannot even be justified by the fact that, in itself, deciding on the threshold for electronic participation is within the competence of shareholders and, thereby, in a way, the shareholders themselves can decide how to regulate electronic participation through the articles of association. The argument is that establishing rules in the articles of association is under the control of majority shareholders, while those shareholders who do not wish to utilise electronic participation are normally in the minority and therefore would never have their views reflected in the articles of association. Consequently, it is argued, such strong interference with the membership rights of shareholders is not justified without the articles of association simultaneously laying down appropriate compensation.^{*68} However, it is difficult to imagine what that compensation might look like. In German legal literature, this situation has been compared to the one in which profit is transferred within a group of companies, to another company in the group under a profit distribution agreement, and minority shareholders of the original profit-earning company are thereby deprived of profit. In that situation, the law entitles the minority to compensation.^{*69} In Estonian law, however, fair compensation is provided only where equity participation is lost completely,^{*70} so those provisions are not of use even on the basis of analogy, since someone with no access to an electronic meeting has not lost their equity participation. That said, the law itself could actually lay down provisions under which a shareholder who does not agree with electronic communication being forced upon them is entitled to require either the company or other shareholders to acquire their equity participation against fair compensation.

The second problem (one of the most debated topics in German legal literature) in this area is the extent to which the shareholder rights may differ between those participating physically and those participating in the same general meeting via electronic means.

The AktG in itself enables articles of association to establish very different opportunities for participation in a general meeting and for the exercise of related rights; for example, the articles of association may prescribe that the same rights enjoyed by physical participants are ensured for those participating in a meeting via electronic means of communication, but it is also possible to lay down that only some rights are ensured. Moreover, the exercise of certain rights may be excluded in the event of electronic participation.^{*71}

Nonetheless, whether under German law online participation may influence shareholder rights related to participation in a general meeting is debatable. Disputes have been caused by, for example, the issue of whether the right of shareholders to contest resolutions of the general meeting could differ with the manner

⁶⁷ Apparently, no issue arises as to nullity of a resolution of the general meeting since the resolution could be void for procedural reasons only if the procedure for calling the general meeting that passed the resolution was violated (Commercial Code, s 301¹(1), cl 4).

⁶⁸ L Beck (n 34) 166.

⁶⁹ Under §304 of the AktG, adequate compensation must be paid to shareholders who are deprived of profit under a profit transfer agreement (*Gewinnabführungsvertrag*) entered into by the company. Estonian company law regulates relationships in a group of companies only to a limited extent, and no such provision exists in the law.

⁷⁰ For example, the obligation to pay fair compensation is laid down in §363¹(1) of the Commercial Code for a situation wherein a majority shareholder takes over shares owned by minority shareholders. Section 233³(1) of the Commercial Code also entitles a shareholder to transfer their shares and receive fair compensation in return where the person maintaining the share register is replaced and the shareholder does not agree with the replacement.

⁷¹ U Hüffer and J Koch (n 16) – Koch, 'AktG', s 118, margin reference 13.

of participation in a meeting,^{*72} along with the issue of whether the articles of association may deprive online participants of the right to file objections to resolutions passed at the meeting.^{*73} On one hand, it has been found that, as a rule, such a restriction should not be possible.^{*74} However, on the other hand, the view has been expressed that the freedom for the articles of association is extensive, enabling the company itself to decide whether to afford online shareholders all or only some of the rights connected with a general meeting. On that basis, it has been found in some legal literature that it is entirely conceivable that online participants may have, for instance, the right to ask questions while not having the right to receive answers on the spot, or for shareholders participating in a meeting via electronic means to enjoy the right to vote but lack the right to file objections to resolutions.^{*75} In sum, the predominant view is that, in principle, the law does not preclude putting online participants and other shareholders in two, mutually distinct situations,^{*76} nor does it preclude the articles of association from providing advantages to shareholders who are physically present at a meeting.^{*77} However, in line with the predominant view in German legal literature, shareholders participating in a meeting electronically should have the same right to contest resolutions as shareholders who are physically present at the meeting, on the precondition that the articles of association have not unequivocally deprived online participants of the right of contestation.^{*78}

In the opinion of this author, the interpretation that the articles of association may deprive a shareholder who is electronically participating in a meeting of the right to contest resolutions is highly questionable, as this may contravene the principle of equal treatment of shareholders.^{*79} The claim that there is no conflict with the principle of equal treatment could be justified only by the argument that since laying down rules on the exercise of electronic rights has been left for the articles of association to regulate, no equal underlying circumstances exist but special treatment has been agreed upon by the shareholders themselves in the articles of association. However, that justification is not very convincing, since the freedom to shape the articles of association is under majority shareholders' control.

Given that, according to the Estonian legal literature^{*80}, the rules regulating the forms of participation in a meeting are rather imperative in nature, it is apparently impossible to agree in the articles of association of an Estonian public company that different rights of participation in meetings are assured to shareholders on the basis of whether they participate electronically or instead are physically present. Excluding the opportunity to object to a resolution should definitely not be admissible, since the subsequent opportunity to contest the resolution depends on it.^{*81}

Conclusion

Prior to adoption of the new regulation that entered into force on 24 May 2020, there was ongoing discussion of whether virtual shareholder meetings are allowed for other than listed companies in Estonia. For this, the opportunity of electronic participation had to be laid down in the articles of association. On the other hand, Estonia's new regulation ensures an opportunity to hold digital meetings for all types of companies, irrespective of whether the articles of association foresee this option. For that, the General Part of

⁷² First of all, the issue of filing a claim for annulment of a resolution may be raised under §243(1) of the AktG, which lays down that annulment of a resolution of a general meeting may be sought where the resolution is in violation of the law or of the articles of association; the same right of contestation is given to shareholders of a public limited company in Estonia under §301(1) of the Commercial Code.

⁷³ Under §245, clause 1 of the AktG and §301(3) of the Commercial Code, only a shareholder who participated in the general meeting and raised an objection to the resolution, also having it recorded in the minutes, may seek annulment of the resolution.

⁷⁴ U Hüffer, J Koch (n 16) – Koch, 'AktG', s 118, margin reference 13.

⁷⁵ W Hölter (ed), *Aktiengesetz. Kommentar* (3rd edn, Verlag C.H. Beck / Verlag Franz Vahlen München 2017) – Drinhausen, 'AktG', s 118, margin reference 16.

⁷⁶ W Goette, M Habersack, and S Kalss (n 35) – Kubis, 'AktG', s 118, margin reference 82.

⁷⁷ L Beck (n 34) 160.

⁷⁸ U Hüffer and J Koch (n 16) – Koch, 'AktG', s 118, margin reference 14.

⁷⁹ The AktG lays down the principle of equal treatment of shareholders in §53a, and the equivalent rule in the Commercial Code is set out in §272. Both rules stipulate that shareholders must be treated equally in equal circumstances.

⁸⁰ See, for instance: P Varul *et al.* (n 25) – P Varul, s 5, comment 3.

⁸¹ Under §302(3) of the Commercial Code, a shareholder who participated in the general meeting may seek annulment of the resolution only if they had their objection to the resolution recorded in the minutes of the general meeting.

the Civil Code Act was supplemented with a provision according to which every member of a body of a legal person may attend the meeting of the body and exercise his or her rights without being physically present by electronic means that allow the member to observe the meeting, to speak, and to vote unless the articles of association provide otherwise. Articles of associations of public companies may foresee special rules for holding an electronic meeting, contingent upon the procedures provided ensuring the security and reliability of the identification of shareholders and being proportionate. For smaller companies, it is therefore possible (and legal) to hold meetings via Skype or other, similar applications. One can only agree with the remark of Estonian legal scholars that sometimes a global crisis is needed for seeing what is obvious.^{*82}

Although electronic participation seems a convenient and favourable opportunity, it also involves several legal and technical problems. Among these problems is authentication – that is, how to verify the participation of shareholders in big public companies that may have hundreds of shareholders. Another problem is the lack of clarity related to the issue of legal consequences that may arise in the event of technical problems. Also, the extent to which electronic participation may be forced on shareholders is arguable, as is whether minority shareholders should be entitled to require the company or the majority shareholders to acquire their shares against fair compensation if, for some reason, electronic participation is not suitable for them.

The present author supports the view that where an electronic general meeting is held, shareholders participating in the meeting electronically should be guaranteed the same rights as enjoyed by those physically attending the meeting. Even though an opinion has been expressed in German legal literature that deprivation of certain rights is permissible only through laying down restrictions in the company's articles of association, one cannot agree with this position, since, at least as a rule, a shareholder's rights may only be restricted with their consent and not through articles of association adopted by a majority.

⁸² U Volens and A Vutt (n 26).



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A *Kratt* as an Administrative Body: Algorithmic Decisions and Principles of Administrative Law*

Artificial-intelligence applications used in the private sector, part of the ‘fourth industrial revolution’, are increasingly finding their way into public-sector offices. Estonia also has ambitions to use robots, or *kratts***, more widely in public administration to support or replace officials.*¹ Public-sector *kratts* have received rather cursory academic attention,*² even though the legislator already granted authorisation in some fields (tax administration, environmental fees, unemployment insurance) for automated administrative decisions in 2019.*³ There are plans to present the *Riigikogu* with a bill by June of 2020 that, if adopted, would introduce the necessary changes to existing legislation, including the Administrative Procedure Act, to allow for wider use of artificial intelligence.*⁴

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** *Translator’s note:* A *kratt* is a mythological, Estonian creature that comes to life to do its master’s bidding when the devil is given three drops of blood. Today, it is also used as a metaphor for AI and its complexities. See also: <https://en.wikipedia.org/wiki/Kratt>.

¹ Ministry of Economic Affairs and Communications, *Eesti riiklik tehisintellekti alane tegevuskava 2019–2021* (Estonian National Action Plan on Artificial Intelligence 2019–2021). https://www.mkm.ee/sites/default/files/eesti_kratikava_juuli2019.pdf; State Chancellery / Ministry of Economic Affairs and Communications, *Eesti tehisintellekti kasutuselevõtu ekspertrühma aruanne, 2019* (Report of the Expert Group on the Implementation of Artificial Intelligence in Estonia), p. 36. https://www.riigikantslei.ee/sites/default/files/riigikantslei/strateegiaburoo/eesti_tehisintellekti_kasutuselevotu_eksperdiruhma_aruanne.pdf; *Kratt Project homepage*. <https://www.kratid.ee/>.

² K Lember, ‘Tehisintellekti kasutamise haldusakti andmisel’ (The Use of Artificial Intelligence in Administrative Acts) [2019] 10 *Juridica* 749; K Lember, *Tehisintellekti kasutamise haldusakti andmisel* (The Use of Artificial Intelligence in Administrative Acts) (Master, Tartu 2019).

³ Taxation Act, § 46²; Environmental Charges Act, § 33⁶; Unemployment Insurance Act, § 23 (4). See also the Minister of Finance’s Regulation 15, of 14. March 2019, and the Minister of the Environment’s Regulation 34, of 20 June 2011.

⁴ ‘Eesti riiklik tehisintellekti alane tegevuskava’ (Estonia’s National Strategy for Artificial Intelligence) (2019–2021) 9. https://www.mkm.ee/sites/default/files/eesti_kratikava_juuli2019.pdf.

There has been talk in Estonian media about automating pension payments and unemployment registration.^{*5} It is worth noting that not all e-government solutions are based on artificial intelligence and many are just simpler, automated forms of data processing. True, according to the principles of administrative law, if such human-guided solutions malfunction, they too may be transgressing the law. The real challenge, however, is legislating artificial intelligence, especially self-learning algorithms. With sloppy or malicious implementation, *kratts* may easily defy the rules of fair procedure, break the law, or treat individuals and businesses arbitrarily. Robots cannot explain their decisions yet. In order for our *kratt* project to succeed without exposing society and businesses to grave risks, the development of e-government must show full understanding of the nature of machine learning and, equally, its impact on administrative and judicial procedures.^{*6} Acting rashly in this field is tantamount to exercising governmental authority in line with a horoscope. It would be naïve and dangerous to let ourselves get overcome by the illusion of a *kratt* that can or will soon be able to engage in reasoned debate or comprehend the content of human language, including legal texts. Proper implementation of the law requires both rationality and true understanding of the law. If the risks are perceived and considered and also the algorithms are used for the proper operations, there will be plenty of work for them in public administration and they could be beneficial to both efficiency and quality in decision-making.

To maintain focus in this article, we will not broach questions of data protection,^{*7} even though there is important commonality here when it comes to administrative law. We will consider algorithms without regard for whether decisions are made about humans or legal entities and whether these are based on personal or other data. The breadth of this article doesn't allow us to go into depth on the issue of equality. This article is aimed at giving the reader some examples of the use of robots in public administration (1); attempting to explain the technical nature of algorithmic administrative decisions (2); and, finally, examining the operation of the principles of Estonian administrative law in this type of decision-making (3). The main question posed by this article is whether and when a *kratt* can be taught to read and follow the law, as the legitimacy of governmental authority must not be sacrificed to progress.

1. Algorithms in public administration

Artificial-intelligence enthusiasts both in Estonia and abroad have pointed out that the implementation of algorithms affords wide opportunities for cost savings, productivity gains, and freeing officials from routine assignments.^{*8} An increasingly powerful fleet of computers and ever more intelligent software can handle 'crazy' quantities of data and solve assignments that are too complicated for humans. The public sector has to keep up with the private sector. Among other applications, algorithms may become necessary in public administration to effectively control the use of artificial intelligence in business – in such areas as automated transactions on the stock exchange.^{*9}

Smart public administration systems can be classified as falling into the following categories: communication with people,^{*10} internal activities,^{*11} and preparation of decisions and decision-making. In the

⁵ M Mets, 'Töötukassas hakkab sulle robot hüvitist määrama, kui sa töötuks jääd' (A Robot Will Determine Your Unemployment Benefits If You Lose Your Job) *Geenius* (7 February 2019); 'Homme makstakse 79 370 inimesele välja üksi elava pensionäri toetus' (Tomorrow, 79,370 Single Pensioner Benefits Will Be Paid) *Maaleht* (4 October 2018).

⁶ K Leetaru, 'A Reminder That Machine Learning Is about Correlations Not Causation' *Forbes* (15 January 2019). See also: 'Critical Approaches to Risk Assessment in Early Releases' Circuit Court Decision 1-09-14104.

⁷ See in particular: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), art 22.

⁸ For example: C Coglianese and D Lehr, 'Regulating by Robot: Administrative Decision Making in the Machine-Learning Era' (2017) 105 *Geo L.J.* 1147, 1167 *ff.*

⁹ C Coglianese, 'Optimizing Regulation for an Optimizing Economy' (2018) 4 *University of Pennsylvania Journal of Law and Public Affairs* 1.

¹⁰ Chatbots have been tested around the world, for example, for taking testimony from border-crossers and asylum-seekers: J Stoklas, 'Bessere Grenzkontrollen durch Künstliche Intelligenz' 06363 *Zeitschrift für Datenschutz* (ZD-Aktuell 2018); 'About iBorderCtrl'. <https://www.iborderctrl.eu/The-project>; Harvard Ash Center for Democratic Governance and Innovation, 'Artificial Intelligence for Citizen Services and Government' (2017) 7; A Androutsopoulou et al., 'Transforming the Communication between Citizens and Government through AI-Guided Chatbots' (2019) 36 *Government Information Quarterly* 358. DOI: <https://doi.org/10.1016/j.giq.2018.10.001>. Cf. 'Statistikaameti kratt Iti aitab nii andmesitajat kui ka statistika tarbijat' (About the Statistics Estonia Chatbot). <https://www.kratid.ee/statistikaameti-kasutuslugu>.

¹¹ In Estonia, for example, the National Heritage Board plans to use *kratt* systems for museum inventory: <https://www.muinsuskaitseamet.ee/et/uudised/kratt-salli-muudab-muuseumiinventuurid-kiiremaks-ja-mugavamaks>. And elsewhere there has

framework of this article, we are primarily interested in the latter two. In Estonia, for example, the Agricultural Registers and Information Board uses algorithms to analyse satellite imagery to check for compliance with grassland mowing obligations. The Tallinn City Government uses machine vision to measure traffic flows. The Ministry of the Interior wants to automate surveillance with a nationwide network of face- and number-recognition cameras. The Unemployment Insurance Fund hopes to implement artificial intelligence soon to assess the risk of unemployment.^{*12}

In the U.S., an algorithm determines family benefits and analyses the risks that may justify separating a child from his or her family.^{*13} They have also applied algorithms to bar entry into the United States, to approve pre-trial bail, to grant parole, in counter-terrorism, for planning inspection visits to restaurants, etc. There are predictions that artificial intelligence will soon be implemented in the fields of aeroplane pilots' licensing, tax refund assessment, and the assignment of detainees to prisons.^{*14} Algorithmic predictive policing is used in the U.S. and also in Germany to predict the time, place, and perpetrator of an offence. The system analyses crime statistics together with camera and drone surveillance records to identify occurrence patterns for certain offences and uses the information gleaned to direct operational forces. Disputes over the use of algorithms have already reached the highest courts in European countries, such as the French and the Dutch Council of State, with regard to such issues as university applications and environmental permits.^{*15}

2. Technical background

2.1. Basic concepts

If we wish to understand artificial intelligence, we must first clarify some concepts from data science with definitions that are far from unanimous.^{*16} The latter notwithstanding, we will try to give one potential overview.

Artificial intelligence can be understood as the ability of a computer system to perform tasks commonly associated with the human mind, such as understanding and observing information, communicating, discussing, and learning. These features of artificial intelligence must be considered metaphors in the functional sense, because machine 'learning' is not actually the same as human learning. Artificial intelligence has many branches: automated decision support, speech recognition and synthesis, image recognition, and so on. A robot in our context is an artificial-intelligence application – an intelligent system.^{*17}

Data mining is the process of extracting new knowledge – generalisations, data correlation, and repeating patterns – from large volumes of data (big data) by using statistical methods.^{*18} Various statistical

been hope expressed that artificial intelligence will begin to pre-sort and distribute applications and requests received by authorities: L Guggenberger, 'Einsatz künstlicher Intelligenz in der Verwaltung' [2019] NVwZ 844, 849.

¹² 'Kasutusjuhud' (Uses). <https://www.kratid.ee/kasutuslood>; Estonian Unemployment Insurance Fund, 'Õlitatud masinavärk: Kuidas tehisintellekt kogu Töötukassa tegevust juhib?' (The Estonian Unemployment Insurance Fund, a Well-Oiled Machine: How Artificial Intelligence Runs All the Activities of the Unemployment Insurance Fund) *Geenius* (8 January 2020); 'Siseturvalisuse programmi 2020–2023 kavand kooskõlastamiseks' (Internal Security Programme 2020–2023 Draft for Approval) (14 November 2019). <http://eelroud.valitsus.ee/main/mount/docList/184b2e57-2c40-4e41-b5c2-e2e24ab71c30#1b1Z2BiP>.

¹³ S Valentine, 'Impoverished Algorithms: Misguided Governments, Flawed Technologies, and Social Control' (2019) 46 *Fordham Urb. L. J.* 364, 367.

¹⁴ E Berman, 'A Government of Law and Not of Machines' (2018) 98 *Boston Univ. L. Rev.* 1290, 1320; C Coglianese and D Lehr (n 8) 1161; C Coglianese and D Lehr, 'Transparency and Algorithmic Governance' (2019) 71 *Adm. L. Rev.* 1, 6 *ff.*

¹⁵ T Rademacher, 'Predictive Policing im deutschen Polizeirecht' (2017) 142 *AöR* 366. DOI: <https://doi.org/10.1628/000389117x15054009148798>; L Guggenberger (n 11) 848–849; K Lember [2019] *Juridica* (n 2) 750–751; Conseil d'État 427916: *Parcoursup*.

¹⁶ See material from the Estonian data-science community: <http://datasci.ee/post/2017/05/25/neli-sonakolkusu-masinope-tehisintellekt-suurandmed-andmeteadus/>.

¹⁷ M Herberger, '„Künstliche Intelligenz“ und Recht' [2018] *NJW* 2826; H Surden, 'Machine Learning and Law' (2014) 89 *Wash. L. Rev.* 87, 89.

¹⁸ For example, if 2/3 of the owners of less-than-five-year-old Land Cruisers make less than 1,200 euros per month, in the context of national monitoring. U Lõhmus, *Õigusriik ja inimene õigused* (The Rule of Law and Human Rights) (Tartu 2018) 121. Cf. D Lehr and P Ohm, 'Playing with the Data: What Legal Scholars Should Learn about Machine Learning' (2017) 51 *U. C. Davis L. Rev.* 653, 672; L Guggenberger (n 11) 848. Data mining allows for, among other things, effective profile analysis (GDPR, art 4, para 4), but data mining may not be limited to the analysis of personal data.

methods have previously allowed analysts to build **mathematical models** based on data sets to describe what is happening in nature or society. These can, in turn, help one assess and classify new situations and predict the future, such as the weather or criminal recidivism. This becomes particularly effective if the models are built on self-learning (machine-learning) algorithms.^{*19}

An **algorithm** is a set of precise mathematical or logical instructions, more generally a step-by-step procedure for solving a given problem (one example might be a cake recipe). The representation of an algorithm in programming language is a computer program. (1) Algorithms where the performance is entirely human-defined are distinguished from (2) algorithms that change their parameters autonomously in the course of learning.^{*20} The systems that automate the traditional decision-making processes in public administration (expert systems) are based on the former. Artificial-intelligence applications in public administration are mostly based on learning algorithms (sometimes also on more sophisticated non-learning algorithms).

Machine learning is the process by which an artificial-intelligence system improves its service by acquiring or reorganising new knowledge or skills. It is characterised by using the help of learning algorithms to assess situations or make predictions (e.g., making diagnoses, detecting credit card fraud, predicting crime). There are many machine-learning techniques, with different characteristics: linear and logistic regression, decision trees, the decision forest, artificial neural networks, etc.^{*21} In the most widespread – supervised learning – the algorithm is first trained from training data, a large number of data cases wherein the input (e.g., payment behaviour data) and output (e.g., solvency) values (features) are known. At a later stage, the application must calculate the output values for new cases on its own on the basis of the input data. These can be presented as numerical data (regression) or, for example, as yes/no answers (classification). The core element of a learning algorithm is its optimising or objective function. This is the mathematical expression of the algorithm's task, which contains a set of so-called weight parameters.^{*22} As it learns, the robot looks for possible combinations of weights and chooses the working model that is most appropriate for the future and the one that gives solutions that deviate the least from the relationship given in the training data. These operations are repeated hundreds, thousands, or even millions of times.^{*23}

By **automated administrative decisions** we mean any administrative decision that is prepared or made by means of automation. This may be based on simpler or more sophisticated non-learning algorithms (expert systems) as well as on machine learning.^{*24} For example, land-tax statements in Estonia are made entirely according to set rules and require no cleverness on the part of a computer. An **algorithmic**

¹⁹ E Berman (n 14) 1277, 1279–1280, 1284, 1286; W Hoffmann-Riem, 'Verhaltenssteuerung durch Algorithmen – Eine Herausforderung für das Recht' (2017) 142 AöR 1, 7–8. DOI: <https://doi.org/10.1628/000389117x14894104852645>; Gesellschaft für Informatik, *Technische und rechtliche Betrachtungen algorithmischer Entscheidungsverfahren. Studien und Gutachten im Auftrag des Sachverständigenrats für Verbraucherfragen* (Berlin: Sachverständigenrat für Verbraucherfragen 2018) 30. http://www.svr-verbraucherfragen.de/wp-content/uploads/GI_Studie_Algorithmenregulierung.pdf.

²⁰ Among many others: M A Lemley and B Casey, 'Remedies for Robots' (2019) 86 Univ. of Chicago L. Rev. 1311, 1312. DOI: <https://doi.org/10.2139/ssrn.3223621>; M Finck, 'Automated Decision-Making and Administrative Law' in P Cane et al. (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford: Oxford University Press (2019) 2. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433684.

²¹ Cf. M Koit and T Roosmaa, *Tehisintellekt* (Artificial Intelligence) (Tartu: Tartu Ülikool 2011) 194; material from the Estonian Data Science Community. <http://datasci.ee/post/2017/05/25/neli-sonakolksu-masinope-tehisintellekt-suurandmed-andmeteadus/>; E Berman (n 14) 1279, 1284–1285; D Lehr and P Ohm (n 18) 671; Gesellschaft für Informatik (n 19) 30.

²² Instead of a manmade program, the 'decision rule' for an intelligent system is thus a mathematical probability mass function. See: T Wischmeyer, 'Regulierung intelligente Systeme' (2018) 143 AöR 1, 47. A probability mass function indicates the probability that the (random) search value is equal to a certain value, such as getting a 6 when one rolls the dice: https://en.wikipedia.org/wiki/Probability_mass_function. A generalisation of the formula for the simplest self-learning model – a linear regression – looks like this: $\hat{y} = w_1x_1 + w_2x_2 + \dots + w_nx_n$.

In this equation, y is the desired output variable, which is calculated on the basis of the input x_1, \dots, x_n , taking into account the weight parameters w_1, \dots, w_n that are recalibrated during learning. With a linear regression, you can, for example, predict the value of real estate if you know the square metres, number of rooms, and distance from downtown. The actual mathematics of self-learning algorithms are more complex. They are based on multidimensional vectors and complex models that combine numerous regression equations. For example, in artificial neural networks, the structure of the equation mimics the neural connections in a human brain. Gesellschaft für Informatik (n 19) 31, 34.

²³ Gesellschaft für Informatik (n 19); M A Lemley and B Casey (n 20) 1324–1325; C Coglianese and D Lehr (n 14) 15; T Wischmeyer (n 22) 12; D Lehr and P Ohm (n 18) 671; J Cobbe, 'Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making' (2019) 39 *Legal Studies* 636. DOI: <https://doi.org/10.2139/ssrn.3226913>. In the case of unsupervised machine learning, output data is not used and the algorithm has to find the correlation in the data itself. A Berman (n 14) 1287.

²⁴ Compare to: K Lember (Master, Tartu) (n 2) 13–14.

administrative decision is more narrowly a decision made with the help of artificial intelligence. Automated administrative decisions can be divided into fully and semi-automated ones. The latter are approved by an official. Sometimes the computer decides, by following certain criteria provided, whether it is able to make a final decision, such as granting of a tax-refund claim, or an official must decide instead.^{*25} Sometimes the concepts of automated and algorithmic decisions are used synonymously, and the two are often combined, but it must be taken into account that the learning potential of artificial intelligence brings both a new opportunity and also problems to public administration.^{*26}

2.2. The basic characteristics of machine learning

Self-learning algorithms can handle trillions of data cases, each with tens of thousands of variables. For some time, institutions in Estonia have been collecting data in large data warehouses for analytical purposes.^{*27} Machine learning doesn't change the fundamental essence of data analysis but amplifies it: machine learning (in its current capacity) is only able to discover **statistical correlations**. These are not causal, natural, or legal relationships. Depending on the level of refinement of the model, the output data from machine learning may reflect the real world and anticipate the future with amazing accuracy. However, probability calculations will always retain some rate of error.^{*28}

Learning algorithms and models created during learning are so sizeable and complex that a human – even an experienced computer scientist or the creator of the algorithm – may not always be able to observe or explain the work of a machine-learning application (this is **opacity** or the black-box effect). The more efficient the algorithm, the more opaque it is. Individual elements of a sophisticated machine-learning system, such as individual trees in a decision forest, can be tracked, but this does not allow much to be inferred about the process as a whole. Sometimes opacity of a system is actually desirable, to protect personal data or business secrets or to prevent the addressee of a decision from deceiving the algorithm.^{*29}

Because of the statistical nature of machine learning, very **big sets of data** are needed. Unfortunately, or, rather, fortunately, we have too little information on terrorist acts, for example, to make accurate estimates.^{*30} In addition to the quantity of data, high **quality** and **standardisation** are no less important: accuracy, relevance, organisation, compatibility, comprehensiveness, impartiality, and – above all – security. This applies to both the training data and the 'operating data' used in the actual implementation of the algorithm. All machine-learning predictions are based on training data and previous experience. Another golden rule of machine learning is this: garbage in, garbage out. Poor data quality can result in a variety of distortions, including failure to investigate all of the factors affecting assessment because of inability, not considering this important, or finding it economically nonessential.^{*31} At the same time, large numbers of decisions amplify the impact of an error rate in absolute terms.

²⁵ See also: M Mets (n 5) on the Estonian Unemployment Insurance Fund decision.

²⁶ A Guckelberger, *Öffentliche Verwaltung im Zeitalter der Digitalisierung* (Baden-Baden: Nomos 2019) 484 ff. DOI: <https://doi.org/10.5771/9783748900535>.

²⁷ The data warehouse of the Police and Border Guard Board has been deemed a world-class system for analysis (https://issuu.com/ajakiri_radar/docs/radar_19/14). For more on the Unemployment Insurance Fund warehouse, see: 'Maksamet ühise IT-süsteemiga rahul' (Unemployment Fund Happy with Joint IT System) *Äripäev* (9 May 2003).

²⁸ W Hoffmann-Riem, 'Rechtliche Rahmenbedingungen für und regulative Herausforderungen durch Big Data' in W Hoffmann-Riem (ed), *Big Data – Regulative Herausforderungen* (Baden-Baden: Nomos 2018) 20. DOI: <https://doi.org/10.5771/9783845290393-9>; W Hoffmann-Riem (n 19) 13; M Finck (n 20) 2, 11; T Wischmeyer (n 22) 10, 13–14 (incl. cit. 48), 17–18, 24; C Coglianese and D Lehr (n 8) 1156–1159.

²⁹ A Deeks, 'The Judicial Demand for Explainable Artificial Intelligence' (2019) 199 *Columbia L. Rev.* 1829, 1834; M Finck (n 20) 9; C Coglianese and D Lehr (n 14) 17; J Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' (2016) 3 *Big Data & Society* 3; J Tomlinson, K Sheridan, and A Harkens, 'Proving Public Law Error in Automated Decision-Making Systems' (2019) 10. DOI: <https://doi.org/10.2139/ssrn.3476657>. For example, the Sharemind technology was developed in Estonia for the secure analysis of personal data – i.e., to enhance the black-box effect. D Bogdanov, *Sharemind: Programmable Secure Computations with Practical Applications* (Tartu Ülikooli Kirjastus 2013).

³⁰ D Lehr and P Ohm (n 18) 678; T Wischmeyer (n 22) 16, 33.

³¹ 'Tehisintellekti ekspertrühma aruanne' (Report of the Artificial Intelligence Expert Group) (n 1) 19; C Coglianese and D Lehr (n 8) 1157; D Lehr and P Ohm (n 18) 681; E Berman (n 14) 1302; C Weyerer and P F Langer, 'Garbage In, Garbage Out: The Vicious Cycle of AI-Based Discrimination in the Public Sector' in *Proceedings of the 20th Annual International Conference on Digital Government Research* (2019) 509 ff. DOI: <https://doi.org/10.1145/3325112.3328220>.

Models developed and decisions made through machine learning cannot be completely foreseen or guided.^{*32} Nonetheless, people – programmers; analysts; data scientists; system developers; and, ultimately, the end user – have a huge role and responsibility in the quality of machine learning's outcomes. The end result is influenced by all kinds of strategic decisions and fine-tuning: defining the relevant output value (target features),^{*33} creating an objective function, selecting and developing the type of algorithm, fine-tuning the algorithm to be more cautious or bolder, and performing testing and auditing. We must take into account that two distinct types of algorithms, both of which might be very precise on their own, may give completely different answers for the same case.^{*34}

3. Rule of robots or smart rule of law?

The above-mentioned technicalities of machine learning pose significant legal challenges in public administration. Machine learning can produce great results statistically, but in certain cases, a lot can go wrong also.

3.1. Administrative risks: Digital delegation and privatisation

The authority of the government can only be exercised by a competent institution. This institution may use automatic devices, such as a traffic light or computer, for this purpose. The more discretion is given to the algorithm, the more acute becomes the question of whether the decision is actually subject to the control of the competent institution or, instead, it is running its own course.^{*35} In our view, the decision is always formally attributed to the institution using the algorithm and they remain legally responsible for it. But with larger decisions to be made, a substantive problem actually arises: can the institution make the algorithm sufficiently consider all the important details of a decision?^{*36}

We can assume that the state will have a practical need to delegate the development of its algorithms largely to privately held IT companies. That makes it important that we not lose democratic control over the companies directly managing the algorithm, as with making sure they don't gain full control over the content of administrative decisions or maximise their profits at the expense of the quality of the administrative decisions. Therefore, as we develop our e-government, we have to analyse whether the current public procurement and administrative co-operation laws sufficiently address these risks.^{*37}

3.2. Impartiality

For decades, people have been hoping that artificial intelligence can help create a bias-free, selfless, comfort-zone-free decision-maker that treats everyone equally. Regrettably, the reality of machine learning has shown some serious difficulties with the problem of bias. Artificial intelligence tends to discriminate against some groups of people when the quality of input data or the algorithm itself is inadequate. For example, when some groups have been monitored more closely than others, this may become reflected in the training data (as seen with blacks in predictive policing in the U.S. or in recidivism assessment systems).^{*38}

³² C Coglianesse and D Lehr (n 8) 1167.

³³ For example, in predicting recidivism, we are interested in the likelihood of a new crime occurring in three, five, or ten years, or we might want to know which variable should be used to measure the best candidate for office in a public competition.

³⁴ E Berman (n 14) 1305, 1325 ff; D Lehr and P Ohm (n 18), 669 ff; J Burrell (n 29) 7.

³⁵ C Coglianesse and D Lehr (n 14), 32 ff.

³⁶ See Subsection 3.5 for more on these risks; cf. M Schröder, 'Rahmenbedingungen der Digitalisierung der Verwaltung' (2019) 110 *Verwaltungsarchiv* 328, 347.

³⁷ W Hoffmann-Riem (n 19) 24–25; A Guckelberger (n 26) 410; C Krönke, 'Vergaberecht als Digitalisierungsfolgenrecht. Zugleich ein Beitrag zur Theorie des Vergaberechts' (2019) 52 *Die Verwaltung* 65; M Finck (n 20) 10.

³⁸ E Berman (n 14) 1326; T Wischmeyer (n 22) 26 ff; M Finck (n 20) 11; L Guggenberger (n 11) 847; H Steege, 'Algorithmenbasierte Diskriminierung durch Einsatz von Künstlicher Intelligenz' [2019] *MultiMedia und Recht* 716.

3.3. Legal basis

The Estonian Constitution's §3 (1) 1 states that governmental authority shall be exercised solely pursuant to the law. The question of when and how the legislature should authorise institutions to implement machine-learning technology cannot be answered simply or unilaterally. If machine learning is used only in the preparation of administrative decisions (e.g., to forecast pollutant emissions before issuing of an environmental permit) while the final administrative decision is made by a human official following normal procedural rules, then machine learning can be considered one detail of the administrative procedure and control over the decision-making remains at the discretion of the administrative institution (Administrative Procedure Act §5 (1)), hence not requiring any special provisions.^{*39} If the role of the human in decision-making is limited to that of a rubber stamp or disappears altogether, then it may be a matter requiring parliamentary approval. In each area (licences, social benefits, environmental protection, law enforcement, immigration, etc.), the widespread implementation of intelligent systems raises specific issues that need to be resolved separately and balanced with appropriate substantive and procedural guarantees.^{*40} Aside from the legal issues, it would be wise to consider the risks to public finance: does it make the legislature a slave to the robot? An expensive and complicated implementation system may start to obstruct legislative changes and political will.^{*41}

The Taxation Act's §46² (1) grants an implementing institution broad powers to make automatic administrative decisions in the field of taxation without intervention by an official. A more detailed list must be established by the Ministry of Finance.^{*42} The law does not impose restrictions on the type or manner of decisions that may be automated. Because of its rather precise legal definitions, taxation is considered rather suitable for automation. Here, well-founded reliance on a broad mandate shouldn't produce unacceptable results. However, granting total power to an authority^{*43} to fully automate any administrative decision may result in violations of §3 (1) and §14 of the Constitution.

3.4. Supremacy of the law

Pursuant to §3 (1) 1 of the Constitution, the exercise of governmental authority may be guided by an algorithm only if the word of the law is followed at all times during its application.^{*44} But this requires the human or self-learning system to convert the law into an algorithm. In some cases, this may be possible in principle, albeit a substantial task, but that would require the developer to have very in-depth knowledge of information technology, mathematics, and the law.^{*45} Still, many legal provisions cannot be described in the unambiguous variables specific to an algorithm.^{*46} This is due both to the inevitable vagueness of the instrument of law – human language – and to the intentional slack that ensures flexibility in legislation.^{*47} Instead of step-by-step instructions (conditional programs), the law often uses outcome-oriented

³⁹ Cf. M Schröder (n 36) 343. The same goes for Australia: M Finck (n 20) 18.

⁴⁰ T Wischmeyer (n 22) 7–8, 41. Article 22 of the GDPR also allows fully automated decisions in processing of personal data only as an exception – for the purposes of fulfilling a contract, in cases stipulated by the law, or with the person's consent.

⁴¹ An example is the SKAIS2 information system saga of the Social Insurance Board. See: <https://www.err.ee/613092/skais2-projekti-labikukkumise-kronoloogia>.

⁴² Legislation with a much narrower scope includes: Estonia's Environmental Charges Act §33⁶ (1, 3), and Unemployment Insurance Act §23 (4). See also Note 63, below, with regard to discretionary authority.

⁴³ Compare to the proposed supplement to the Administrative Procedure Act, §5¹ (1): 'An administrative institution may issue an administrative act or document automatically, without any direct intervention by a person acting on behalf of the administrative institution (henceforth: automated administrative act and document).' T Kerikmäe et al., Identifying and Proposing Solutions to the Regulatory Issues Needed to Address the Use of Autonomous Intelligent Technologies, Phase III Report (2019) 6–7.

⁴⁴ Bundesministerium des Inneren, 'Automatisiert erlassene Verwaltungsakte und Bekanntgabe über Internetplattformen – Fortentwicklung des Verfahrensrechts im Zeichen der Digitalisierung: Wie können rechtsstaatliche Standards gewahrt werden?' [2015] NVwZ 1114, 1116–1117.

⁴⁵ Because of their precision, most traffic laws can probably be taught to self-driving cars, but there are also dilemmas that come up in traffic that do not have a determinate answer. See also: M A Lemley and B Casey (n 20) 1311, 1329 ff. It is also difficult to teach a machine to make exceptions to rules, such as driving through a red light. *Ibid*, 1349.

⁴⁶ E Berman (n 14) 1329; A Guckelberger (n 26) 367–370. Compare to: M Maksing, Kohtupraktika ühtlustamise võimalustest infotehnoloogiliste lahenduste abil (The Possibilities for Harmonizing Case Law Using IT Solutions) (Master, Tartu Ülikool 2017) 25.

⁴⁷ L Reisberg, *Semiotic Model for the Interpretation of Undefined Legal Concepts and Filling Legal Gaps* (Tartu: Tartu Ülikooli Kirjastus 2019) 170–173; K Larenz and C-W Canaris, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer 1995) 26;

programs:^{*48} **general objectives** such as better living environments, public involvement and informing the public, balancing and integration of interests, sufficiency of information, expedient and economical while also reasonable land use (Planning Act §§ 8–12); **discretionary powers**, such as the right of a law-enforcement agency to issue a precept to a person liable for public order to counter a threat or eliminate a disturbance (Law Enforcement Act §28); **undefined legal terms**, such as overriding public interest (Water Act §192 (2)) or danger (Law Enforcement Act §5 (2)); and **general principles**, such as human dignity, proportionality, and equal treatment (Constitution §10, §11 sentence 2, and §12).

By dint of the uncertainty of the law, legal subsumptions^{*49} (such as the decisions necessary to implement a law – is an object a building in the sense of the Building Act, is a person a contracting entity in the sense of the Public Procurement Act, is the recipient of rural support sustainable, and how should one define a goods market in competition supervision?) are not mere formal logical acts but require judgement. Before a situation is resolved, the decision-maker must interpret the norm to explain whether the legislator wanted to subject the situation to the norm or not. What's more, the decision must be made in situations that didn't occur to the legislature, such as that of a new cross-border tax avoidance scheme. Here, it is up to the implementer to assess whether he or she is dealing with permissible optimisation or abuse (Taxation Act §84). Those implementing the law – the ministers, officials, judges, and contracting parties – continue to interpret it and fill in the gaps in the regulatory process started by the parliament. It is up to them to make the law concrete.^{*50}

We must note that there is some similarity to machine learning here: a learning algorithm is not yet complete in the form in which humans created it. It keeps developing itself and is able to create new models to classify situations. So couldn't the legislator's real will not be modelled in this way as well? Is it not a standard classification task for a smart system, almost like finding cat pictures? Regrettably, the source material for machine learning – data from the past – cannot in principle be sufficient for further developing the law as code.^{*51} A law's enforcer must also account for existing judicial and administrative practice^{*52} and the generalisations that crystallise out of it, but his or her sources must not be limited to this alone.^{*53} An official or a judge must be able to perceive, understand, and apply a much broader context: the history of the law, the systematics of norms, the objective of this law, and the general meaning of justice but especially the direct and indirect effects of the decision. It is not possible in all fields to produce sufficient quantitative or qualitative data to describe all the layers of law and its operating environment. And it is far from possible for (current) smart systems to follow all of this material in real time. Therefore, many situations require a rational being who understands the peculiarities of the specific situations being regulated and, when necessary, creates a new law appropriate for the situation instead of searching for one in previously tested patterns.^{*54}

The vagueness of legal concepts expressed in natural language is not a flaw in the law. It must remain possible to argue over the law if we are to reach fair decisions in specific situations. But this requires open and honest discussion over different interpretations and ways of assessing the facts. Even if you translate the law into zeroes and ones, you don't escape the need to interpret it. This need would simply move from the decision-making stage to (1) the expert system's creation and calibration stage or (2) the intelligent system's learning stage.^{*55} In both cases, at least the persons concerned and presumably also the competent adminis-

K N Kotsoglou, 'Subsumtionsautomat 2.0: Über die (Un-)Möglichkeit einer Algorithmisierung der Rechtserzeugung' [2014] JZ 451, 452–454. DOI: <https://doi.org/10.1628/002268814x13940152210984>; R Narits, *Õiguse entsüklopeedia* (Tallinn: Tartu Ülikool 1995) 68 ff; R Narits, *Õigusteaduse metodoloogia I* (Tallinn 1997) 84 ff.

⁴⁸ See more on this distinction: N Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp 2018) 195 ff.

⁴⁹ A decision on whether the vital aspects of a case meet the presumptive preconditions for application stipulated by a norm. R Narits, *Õiguse entsüklopeedia* (Encyclopaedia of Law) (Tallinn: Tartu Ülikool 1995) 73.

⁵⁰ In the example of the general requirements for agricultural animals according to Decision of the Administrative Law Chamber of the Supreme Court 3-15-443/54, para 12.

⁵¹ Cf. C Coglianese and D Lehr (n 14) 14; E Berman (n 14) 1351; K N Kotsoglou (n 47) 453; M Herberger (n 17) 2829.

⁵² Moreover, it must be noted that even if someone were able to convert all jurisprudence into algorithmic learning data, said data must also first be interpreted, because judgements are written in natural language.

⁵³ This would be acceptable from the standpoint of legal certainty but unacceptable from a fairness standpoint; compare to: A Kaufmann, *Rechtsphilosophie* (Munich: Beck 1997) 122.

⁵⁴ E Berman (n 14) 1315; cf. F Pasquale, 'A Rule of Persons, Not Machines: The Limits of Legal Automation' (2019) 87 G. Washington L. Rev. 1, 48. Cf. A Adrian, 'Der Richterautomat ist möglich – Semantik ist nur eine Illusion' (2017) 48 *Rechtstheorie* 77, 87. DOI: <https://doi.org/10.3790/rth.48.1.77>; P Enders, 'Einsatz künstlicher Intelligenz bei juristischer Entscheidungsfindung' [2018] JA 721, 726.

⁵⁵ E Berman (n 14) 1331. In the natural-language processing systems already being tested in Axel Adrian's lab that are capable of finding statistical correlations between court judgements and scientific articles or other legal 'language-equivalent' texts (n 54) 188 ff. In our view, this is not enough for a rational application of the law.

trative institution (considering the complexity of machine learning) lack an effective opportunity to have a say in the interpretation. Because of their complexity, the decisions made by a self-learning algorithm are not just difficult to predict, they are structurally unpredictable.^{*56} But how can you ensure that the algorithm won't deviate from the law as it learns? Periodic testing and auditing is not a sufficient solution, because tests are also unable to anticipate or run through all of life's possible scenarios. The costs of such extensive calibration and testing would eventually outweigh the benefits.^{*57} Also, the machine-language translation of a law that an administrative robot could supposedly follow is anything but static. It is corrected not only by new laws, interpretations in case law^{*58}, and decisions made in constitutional review but also by the development of the context of the law – society. Weak artificial intelligence is not capable of perceiving or applying these changes itself.

The main question here is not whether and to what extent a machine makes mistakes. A machine doesn't perform any legal-thought operations. In the best case and only with sufficient quantities of data, machine learning (in its current capacity) can merely mimic legal decisions through statistical operations, not comprehend the content of the law or make rational decisions based on it.^{*59} But that is precisely the demand set by §3 (1) 1 of the Constitution. We are claiming not that an expert or smart system is unable to replace any legal assessment, just that solutions to the problems described above must be found when one is using such systems.

3.5. Discretionary power

These problems are exacerbated by discretionary decisions where the law does not prescribe clear instructions, such as those on whether to require the demolition of a building, what requirements to set for service providers in a procurement, whether and under what conditions to allow extraction in an area with groundwater problems, or where to build a landfill. Ostensibly, discretionary power does not give authorities the right to make arbitrary decisions. Discretionary decisions must also obey the general principles of justice and consider the purpose of the law and all of the relevant facts specific to each individual case (Administrative Procedure Act §4 (2)).^{*60} An algorithm that has been completely defined by humans is not suited to making discretionary decisions, because circumstances are unpredictable. True, there is some measure of standardisation and generalisation in making judgements, as in the case of internal administrative rules, but officials must retain the right and the duty to deviate from such standards when it comes to atypical cases.^{*61} However, optimists believe that, even though the capability is lacking at the moment, it is not rigid algorithms but machine learning that will be able to take advantage of the dynamic discretionary parameters to soon work within the lines of value principles and discretionary bounds.^{*62}

This does not seem realistic for the near future.^{*63} First of all, decisions of this kind are too unique for generation of large enough bodies of data for machine learning to be capable of modelling them. Secondly, discretionary rules and the general principles of justice may seem like simple maxims at first glance. They may even be represented as mathematical formulas, but this does not yet guarantee their practical applicability to machine learning. Let us illustrate with R. Alexy's proportionality formula by trying to explain its application through the example of an injunction to shut down a fish-processing plant infected with a dangerous bacterium.

⁵⁶ T Wischmeyer (n 22) 334.

⁵⁷ E Berman (n 14) 1338.

⁵⁸ Kaalutusõiguse kontekstis (The Context of Discretionary Law); K Lember (Master, Tartu) (n 2) 53.

⁵⁹ A computer processes legal texts as data, not as information; see: K N Kotsoglou [2014] JZ. Axel Adrian argues that humans also merely pretend to understand the meaning of natural language and semantics are merely an illusion, which means that replacing the human with another computer does not pose fundamental problems (n 54) 91. The scope of this article does not allow us to analyse these philosophical claims. We assume that humans are conscious and capable of understanding sentences, including legal provisions, in natural language and that they can associate these with their own consciousness.

⁶⁰ See also: K Merusk and I Pilving, *Halduskohtumenetluse seadustik. Kommenteeritud väljaanne* (Code of Administrative Court Procedure, Annotated Edition) (Tallinn: Juura 2013) § 158, comment F.

⁶¹ Decision of the Administrative Law Chamber of the Supreme Court 3-3-1-72-13, para 21; 3-3-1-81-07, paras 13–14. Cf. M Schröder (n 36) 333; A Guckelberger (n 26) 373.

⁶² See also: L Guggenberger's sources (n 11) 848.

⁶³ When writing §46² of the Taxation Act, its authors did not consider it possible to use automated administrative acts in the case of discretion. Explanatory report to the Taxation Act amendments and other laws (675 SE) 36. The text of the law, however, does not mention this restriction.

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

Here, i and j are the principles considered in making the decision (in this case, fundamental rights: consumer health versus the freedom to conduct business). $W_{i,j}$ is the specific value of principle i in relation to principle j . For the Veterinary and Food Board to issue an injunction, i , or health, must outweigh j , or freedom to conduct business. In other words, $W_{i,j}$ must be >1 . I is the intensity of interference with the given principle, which expresses the extent of potential damage if one or the other principle recedes (consumer illness or death / the facility's bankruptcy and unemployment for its many workers). W is the relevant principle's abstract value and illustrates the general importance we attach to public health and to freedom to conduct business. R is the probability of damage that could result from violation of the principle (for example, if the plant stays open, the product will not necessarily be contaminated but might be, but if it is shut down, bankruptcy is certain).^{*64}

Even if we disregard other criticism of this equation,^{*65} the real difficulty does not lie in calculations so much as in assigning correct values to the variables in the equation and in arguments over whether and to what extent one or another principle (fundamental right) is infringed, what the proven facts are, and whether they are even relevant with regard to the judgement to be made. The likelihood of one or another outcome (R) may depend on very special circumstances that did not occur to those inputting the algorithm's learning and working data; however, judgements made on the importance of the principles (W) and the intensity of interference (I) are value-based and can only be made in acute awareness of the sizeable context accumulated over a long span of evolution in law and society. If this information is not easily accessible to the human official, the deficiency can be overcome by communication between the decision-maker and the parties to the proceeding in a fair administrative procedure (see Subsection 3.6, below). The weak machine-learning technologies available today and expected in the near future are characterised by limited understanding of the context and the content of communication.^{*66} This is equally true for undefined legal concepts (public interest, material harm, etc.).^{*67} Even if, for example, the Law Enforcement Act's §5 (2) defines a threat as a sufficiently probable offence (e.g., food poisoning), it still does not quantify the level of sufficient probability. This is a legal judgement that is based on value judgements as to the significance of one or another interest, not just a statistical prognosis of the occurrence of damage.

To fully delegate a complex discretionary or judgement-based decision to an algorithm would, in our opinion, constitute a gross breach of discretion, against the Code of Administrative Court Procedure's §158 (3) 1 (failure of an administrative institution to exercise discretionary power). An algorithm can, however, be implemented as an aid.

3.6. Fair proceedings and the principle of investigation

Fair proceedings – especially the right to a hearing (Administrative Procedure §40 (1)) – play an important role in guaranteeing the substance of a decision as well as the dignity of the persons concerned.^{*68} The establishment and further development of law in a state based on the rule of law must take place in the

⁶⁴ See: R Alexy, 'Constitutional Rights, Proportionality, and Argumentation' (public lecture at the University of Tartu, 10 December 2019). <https://www.utv.ee/naita?id=29148>; T Mori, 'Wirkt in der Abwägung wirklich das formelle Prinzip? Eine Kritik an der Deutung verfassungsgerichtlicher Entscheidungen durch Robert Alexy' (2019) 58 *Der Staat* 555, 561. DOI: <https://doi.org/10.3790/staa.58.4.555>.

⁶⁵ T Mori (*ibid*), for example, gives examples of case law wherein this formula isn't applicable, on page 562.

⁶⁶ Cf. C Coglianese and D Lehr (n 8) 1218; J Cobbe, 'Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making' (2018). DOI: <https://doi.org/10.2139/ssrn.3226913>; A von Graevenitz, '„Zwei mal Zwei ist Grün“ – Mensch und KI im Vergleich' [2018] ZRP 238, 240. See also: Ü Madise, 'Põhiseaduse vaimust ja võimust muutuvas ühiskonnas' (The Spirit and Power of the Constitution in a Changing Society) in T Soomre (ed), *Teadusmõte Eestis IX* (Legal Thought in Estonia) (Teadus ja ühiskond 2018) 138. On value judgements: R Narits, 'Eesti õiguskord ja väärtusjurisprudents' (Estonian Legal Order and Value Jurisprudence) [1998] 1 *Juridica* 2.

⁶⁷ See also: A Guckelberger (n 26) 389 ff; T Wischmeyer (n 22) 17–18. Cf. A Berger, 'Der automatisierte Verwaltungsakt' [2018] NVwZ 1260, 1263.

⁶⁸ On this, see examples: E Andresen and V Olle's piece in J Sootak (ed), *Õigus igähele* (Law for Everyone) (Juura: Tallinn 2014) 149–150; I Pilving's contribution to A Aedmaa et al., *Haldusmenetluse käsiraamat* (Handbook of Administrative Process) (Tartu: Tartu Ülikooli Kirjastus 2004), 215 ff. On automated processing of personal data, see: GDPR recital 71, para 1.

framework of honest and open (at least to the persons concerned) dialogue. In decisions affecting large numbers of people, such as spatial planning and environmental permits, the right to express an opinion must also be open to the public. Such discussions are merely mimicked by contemporary algorithms (i.e., debate robots), not actually (meaningfully) held. In the case of machine learning, listening to the discussion would be all the more necessary, as the algorithm may not be programmed or have learned to account for unpredictable circumstances. A rare event may turn out to be decisive for the right prediction, as with a broken leg meaning that a person won't complete his weekly workout even if years of his behavioural patterns would indicate otherwise.^{*69}

C. Coglianese and D. Lehr point out that the right to a hearing is fairly flexible under U.S. law and that machine learning without a hearing could, in some situations, yield more accurate decisions on average than humans through the hearing process.^{*70} This is not adequate justification. A citizen or business falling within the margin of error does not have to be satisfied with pretty statistics and retains the right to demand a lawful decision on his case. In Estonia, the Administrative Procedure Act's §40 (3) provides several exceptions to the right to a hearing. The catalogue of exceptions may be augmented via special laws if the effectiveness of a hearing is low in practice. But no general exception to any administrative acts on algorithms may be granted. The greater the discretion of the authority, the more necessary communication becomes for the proceedings, and, therefore, the less possibility there is of using fully automated decisions; i.e., when artificial intelligence is applied, the person concerned must retain the opportunity to interact with an official.^{*71}

The effective protection of rights and public interest is guided by the principle of investigation in the Administrative Procedure Act (§6) – an administrative institution is obligated to take initiative in investigating all relevant facts. This is also a challenge for algorithms, because they cannot deal with circumstances that haven't been entered in their systems. The reality around us is not yet completely digitised or machine-readable with sensors. Therefore, a machine can only consider fragments of the actual situation in its analysis.^{*72} But a human is able to take initiative in searching for additional data from sources that have not been provided or are not in some manual. Not knowing important information does not exonerate the decision-maker who errs against a prohibitive norm.^{*73} This is why German law requires the intervention of a human officer, obliging him or her to manually correct an automated decision in light of the additional circumstances.^{*74} However, with intelligent implementation, machine learning can be applied to follow the principle of investigation – e.g., to select tax returns that need more extensive, manual control.^{*75}

3.7. Reasoning

The reasoning behind decisions made by governmental authorities is a core element of a fair procedure. According to §56 of the Administrative Procedure Act, an administrative act must state its legal and factual basis (the provision delegating authority and the circumstances justifying its application) and, if the act is based on discretion, at least the primary motives for the choice between the options (e.g., why the pulp mill should be in Narva and not Tartu or why the construction of a wind farm should be prohibited). This is not a mere ethical recommendation but a fundamental, constitutional obligation.^{*76} A law-enforcement mandate

⁶⁹ E Berman (n 14) 1323; A Guckelberger (n 26) 396.

⁷⁰ C Coglianese and D Lehr (n 8) 1186.

⁷¹ The same is seen on page 36 of: 675 SE Explanatory Report (n 63). See also: Decision of the Administrative Law Chamber of the Supreme Court 3-3-1-76-12, 14, on disciplinary action.

⁷² T Rademacher (n 15) 383; A Adrian (n 54) 77, 86.

⁷³ Concerning prohibitions on procurement agreements, see: Decision of the Administrative Law Chamber of the Supreme Court 3-3-1-7-17, para 11. In the case of discretion, ignorance can be an excuse if the person had the opportunity to inform the authority of it. With regard to deportation, see: Decision of the Administrative Law Chamber of the Supreme Court 3-18-1891/46, 19.

⁷⁴ See: *Verwaltungsfahrgesetz (VwVfG)* s 24 (1). In relation to this, see also: F Kopp and U Ramsauer, *Verwaltungsverfahrensgesetz. Kommentar* (Munich: Beck 2019) § 24 Rn 8; L Guggenberger (n 11) 847.

⁷⁵ M Belkin, 'Maksamet hakkab tehisintellekti abiga ümbrikupalga maksjaid püüdma' (The Taxation Board Will Use Artificial Intelligence To Find Envelope Wages) *Geenius* (6 January 2020).

⁷⁶ The obligation of reasoning is found in the Constitution § 13 (2 ff) and § 15 (1) 1 ff, as well as in the Charter of Fundamental Rights of the European Union art 41. For more, see: N Parrest in A Aedmaa et al. (n 68) 299 ff. Above all else, in the event of total opacity, wider public support for machine decisions is unlikely as this rather evokes suspicions of manipulation or even of a 'deep state'. See: M Herberger (n 17) 2828.

shall only be granted to an entity that can demonstrate that their decision is lawful – in accordance with external limits as well as internal rules of discretion. This brings us to an important difference between the private and public sectors: the exercise of freedoms does not need to be justified, but the use of authority does. A person receiving a notice of tax assessment or a demolition injunction does not have to accept an official's claim that 'I don't know why, but the machine made this decision about you'.

Neither Administrative Procedure Act §56 nor Taxation Act §46² articulates exemptions for automatic, including algorithmic, administrative decisions. Such exceptions would violate the Constitution as well as generally accepted standards in democratic, rule-of-law states.^{*77} As we have seen, creators of algorithms are often unable to explain the decisions made by a robot, for reason of machine learning's opacity. In the U.S., Houston used an algorithmic decision-making process to terminate employment contracts with teachers in 2011. During the ensuing litigation, the school administrator was unable to explain the functioning of the algorithm, claiming that he had no ownership or control over the technology.^{*78} Also, the U.S. Government has cited the issue of opacity as a matter of concern.^{*79}

Some experts see a possibility of solving the problem of opacity by using artificial intelligence to develop language-processing programs enough that the computer can analyse numerous prior justifications to synthesise a machine argument that is seemingly similar to legal arguments.^{*80} This method would still use only statistics, not reasoning based on the methods of jurisprudence, meaning that it could only offer an inadmissible semblance. Reasoning must be genuine, though.^{*81} There is a growing search for ways to increase transparency in machine learning by following the principles of accountability and explainability. Among other things, this requires greater access to learning and source data, the data processing, and the algorithms and their learning processes.^{*82} These challenges entail collisions with business secrets, internal information, personal data protection, and – above all – a human's ability to analyse the work of an algorithm. Moreover, the most important aspect of the reasoning for an administrative act is not its technical description of **how** the decision was made but the motives behind it, **why** the decision made was this particular one. Even in the case of decisions made by humans, we are interested not in the biochemical details of the decision-maker's brain but in his or her explanations. There is little benefit to expanding the overall transparency of machine learning to the reasoning of individual cases.^{*83}

As an alternative, development has started on so-called explainable artificial intelligence (xAI). Since the actual mathematical processes of machine learning are too complex and sizeable for humans to productively investigate them directly, developers are trying to employ artificial intelligence for this task too, in work such as trying to model complex implementation by using a simpler and more comprehensible algorithm.^{*84} Also, there are efforts to construct similar fictitious situations wherein the algorithm gives a different answer. To this end, some variables are ignored or changed (e.g., gender or age) while others

⁷⁷ Germany: VwVfG § 39; France: Code des Relations entre le Public et l'Administration art L211-5; United Kingdom: House of Lords, *R v Secretary of State for the Home Department, ex parte Doody* (1993) 3 All E.R. 92; European Union: TFEU art 296, para 2; On ECHR art 6 ECtHR Judgment 13616/88: *Hentrich v France* (1994), § 56; H Palmer Olsen et al., 'What's in the Box? The Legal Requirement of Explainability in Computationally Aided Decision-Making in Public Administration' (2019) 22. DOI: <https://doi.org/10.2139/ssrn.3402974>.

⁷⁸ United States District Court, S.D. Texas, Houston Division: *Hous. Fed'n of Teachers*. – 251 F. Supp. 3d (2017) 1168. Nor has it been possible to explain algorithms that suggest that police patrols stop and check certain persons. For examples, see: S Valentine (n 13) 367, 372–373.

⁷⁹ C Cath et al., 'Artificial Intelligence and the "Good Society": The US, EU, and UK approach' (2017) 24 *Science and Engineering Ethics* 9. DOI: <https://doi.org/10.2139/ssrn.2906249>.

⁸⁰ H Palmer Olsen et al. (n 77) 23–24. In Japan, for example, artificial intelligence is helping Members of Parliament prepare responses to citizens' memoranda. Harvard Ash Center (n 10) 8; K Lember (Master, Tartu) (n 2) 38. For more about this method, see: F Pasquale (n 54) 49 ff.

⁸¹ Decision of the Administrative Law Chamber of the Supreme Court 3-3-1-29-12, para 20. There is no reason to exclude the use of texts drafted with such a method if an official checks the draft substantially and carefully. See also: *ibid*; decision 3-17-1110/84, para 18, where the chamber explains that the reasoning for an administrative decision must not be limited to a mechanical copy of the norms.

⁸² Additional citations: M Herberger (n 17) 2827–2828; K Lember (Master, Tartu) (n 2); also GDPR, recital 71.

⁸³ L Edwards and M Veale, 'Slave to the Algorithm: Why a Right to an Explanation Is Probably Not the Remedy You Are Looking for' (2017–2018) 16 *Duke L. & Tech. Rev.* 18, 43, 56, 67. DOI: <https://doi.org/10.31228/osf.io/97upg>; E Berman (n 14) 1316–1317; W Hoffmann-Riem (n 28) 60. On restrictions to prison working methods, see: Tartu Circuit Court 3-16-418, para 12.

⁸⁴ A Deeks (n 29) 1834; E Berman (n 14) 1317; L Edwards and M Veale (n 83) 61 ff; M Finck (n 20) 15. Among others, see: A Adadi and M Berrada, 'Peeking Inside the Black-Box: A Survey on Explainable Artificial Intelligence (XAI)' [2018] 6 *IEEE Access* 52138. DOI: <https://doi.org/10.1109/access.2018.2870052>.

are kept constant. This technique can be used to parse out the criteria instrumental to a given decision.^{*85} But this still only takes us halfway: it is an explanation of the background of a statistical judgement, not a legal judgement itself.^{*86} That may suffice if the administrative act is solving of a complex but mathematically solvable problem, such as predicting development or the likelihood of an event (e.g., the increase or decrease in the population of a protected species when a railway is built).^{*87} Such judgements and predictions can be necessary, but the obligation of justification has a wider berth. In general, an administrative act may need an explanation of why legal provision *x* is applied and not *y*, why a statutory provision is interpreted as *a* and not *b*, what facts have been ascertained and why, why these facts are pertinent according to the relevant law,^{*88} or why it is necessary to implement a certain measure (e.g., why should a dangerous structure be demolished instead of rebuilt?). All of these issues demand counter-arguments to the positions held by the parties to the proceeding that were not addressed in the decision. A robot cannot give adequate explanations for these thought operations because it does not perform such operations.^{*89} If an administrative act requires a substantive legal justification, then the current level of information technology entails a need to place a human in the ‘circuit’.^{*90}

3.8. Judicial review

To ensure legality, it is recommendable to subject both private- and public-sector artificial-intelligence applications to multifaceted monitoring (documentation, auditing, certification, standardisation).^{*91} This is necessary but cannot replace the judicial protection of persons who find that their rights may have been violated (Constitution §15 (1), European Convention on Human Rights art. 6 and 13, Charter of Fundamental Rights of the European Union art. 47). If sufficient substantive and factual argumentation is given for administrative decisions made by means of an algorithm, there is no fundamental problem with judicial control. But difficulties arise in the absence of such argumentation.^{*92}

C. Coglianese and D. Lehr point out that courts tend to give deference to agencies when it comes to technically complex issues.^{*93} But it’s the algorithm that makes the decision complex! Implementing algorithms must not become a universal magic wand that frees the executive institution from judicial review for any decision. We can only talk of loosening control in situations wherein judges would, even without the use of artificial intelligence, defer for other reasons, such as the economic, technical, or medical complexity of the content or if the infringement of the rights of affected individuals is not excessively intense. Here, a complex administrative decision may include elements with different control intensity.^{*94} Discussing this matter, E. Berman sees the opportunities for use of algorithms the more discretion an authority has. This position is somewhat confusing because it does not account for the breadth of discretion afforded by the law, or the significant influence of general principles and basic rights. Her ultimate conclusion is that control may be allowed to weaken where infringements are not very grievous and regulation is sparse and that it may disappear altogether in situations wherein no-one’s rights are affected (e.g., deciding where to locate police

⁸⁵ C Coglianese and D Lehr (n 14) 52; Deeks (n 29) 1836; T Wischmeyer (n 22) 61–62.

⁸⁶ L Guggenberger (n 11) 849; K D Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (Cambridge University Press 2017) 3. DOI: <https://doi.org/10.1017/9781316761380>.

⁸⁷ This may be important in determining bias, but bias is far from the only aspect to consider when one is reviewing an administrative decision.

⁸⁸ The logical linking of so-called factual and legal reasoning using the example of restrictions to market trading: Decision of the Administrative Law Chamber of the Supreme Court 3-3-1-66-03, para 19.

⁸⁹ K Lember (Master, Tartu) (n 2) 53.

⁹⁰ See below for possible models, Section 4.

⁹¹ W Hofmann-Riem (n 28) 60 ff.

⁹² Unjustified, semi-automatic threat assessments used for parole decisions have been ‘doomed’ by the courts, which have stated that these ‘mean nothing in the eyes of the court’. Tartu Circuit Court 1-13-8065, 26; Tartu County Court 1-13-7295, para 14; Criminal Chamber of the Supreme Court 1-09-14104, para 26–27.

⁹³ C Coglianese and D Lehr (n 14) 44.

⁹⁴ For example, when assessing the danger of a foreign repeat offender, the police do not have any room for uncontrolled evaluation if they plan to issue that person an expulsion order. Danger assessment is not only a statistical prognosis of a new offence but also a legal evaluation based on that prognosis – whether it matches the legislator’s perception of a quantifiably undefined threshold. However, judicial review is limited in considering consequences (whether to issue an injunction and how long to refuse access), Decision of the Administrative Law Chamber of the Supreme Court 3-17-1545/18, para 28. See also: I Pilving, ‘Kui range peab olema halduskohus?’ (How Strict Must an Administrative Court Be?) [2019] 39 RiTo 61, 64 ff.

patrols).^{*95} We can agree with this conclusion. As a general rule, administrative court proceedings retain control of rationality (including proportionality), which requires substantive administrative decisions that are at least monitored by humans as well as legal justification, with the exception of routine, mass decisions.

The problem of control cannot be solved simply by the administrative institution disclosing the content and raw data of the algorithm to the court.^{*96} To analyse this material, the court would need its own IT knowledge or expert assistance. This is neither realistic from the angle of reasonable procedural resources nor in accordance with the constitutional roles given to the branches of government (Constitution §4). It would mean placing the primary responsibility for the compliance of an algorithm in the hands of the court where §§ 3 and 14 of the Constitution place it in the hands of the executive power. There is no need to turn algorithms into direct subjects of judicial control. It is not necessarily important whether the data is distorted or has calibration errors or bias – these deficiencies may not affect the end result. It is also not the responsibility of the appellant to prove such deficiencies when challenging an algorithmic decision. And it is not a reasonable solution to compensate for the complexity of the algorithm with longer appeal times. Algorithmic administrative decisions must also obtain final, conclusive force within a reasonable amount of time.^{*97} In court, it is important for administrative decisions taken by an algorithm to be legally justifiable. The executive institution must be convinced of the legality of its decision, and the process of forming such a conviction must be traceable without any special knowledge of computer science. This means using a so-called administrative Turing test, meaning that citizens and businesses must not detect any difference in whether a law-enforcement decision by the executive institution is made with the help of artificial intelligence or not.^{*98} An institution using algorithms can implement the help of the algorithm for making a decision if it is able. If not, a representative of reasonable thought – an official – must step in.

4. Conclusion: The division of labour between kratt and master

Administrative decisions vary widely in terms of content, legal and factual framework, and decision-making process. Depending on the field and situation, rigid, standard solutions; generalisations; and simplifications may be allowed to a greater or lesser extent in administrative law.^{*99} There are quite a few routine decisions that are subject to clear rules (e.g., in the areas of social benefits and taxes), and those can be trusted to computers working with non-learning or learning algorithms.^{*100} It may also make sense to use self-learning algorithms in areas where there is wide latitude for governmental decisions and the decision-making requires a more non-judicial analysis (e.g., determining the positions for police patrols or modelling protected populations).^{*101} But the important and complex decisions in society (e.g., where to build a railway or whether to build a nuclear power plant) are not routine and ought not be automated, at least not fully, because of a lack of appropriate learning data. These decisions need human judgement.^{*102}

In situations that fall between those two extremes, it is realistic to expect co-operation between the robot and the official, wherein the scope of each role may vary greatly, depending on the field and situation:^{*103}

More routine but not quite mechanical administrative decisions that are advantageous and lack negative side effects for the public and whose factual circumstances are comprehensible to an algorithm can be **fully automated administrative decisions**. However, the affected party must retain the right to request human review of the decision if desired. From a procedural point of view, it would be conceivable

⁹⁵ C Coglianese and D Lehr (n 14) 1277, 1283.

⁹⁶ M Schröder (n 36) 342. Where necessary, the court must have access to this information, irrespective of the interest of protecting business secrets. But the court may restrict the access of the other parties to information containing business secrets (Code of Administrative Court Procedure 88 (2)).

⁹⁷ However, cf. J Cobbe (n 66) 8.

⁹⁸ H Palmer Olsen et al. (n 77) 23.

⁹⁹ T Wischmeyer (n 22) 34.

¹⁰⁰ A Guckelberger (n 26) 386–387.

¹⁰¹ E Berman (n 14).

¹⁰² C Coglianese and D Lehr (n 14) 30; C Coglianese and D Lehr (n 8) 1214.

¹⁰³ See also: A Guckelberger (n 26) 386.

to provide a fully automatic administrative act as the initial act while allowing one month for the person to apply for a manual administrative act, for example.^{*104}

Administrative decisions of moderate complexity may require the administrative decision's **approval by an official**, but here we must avoid the 'rubber stamp' phenomenon. The official should first examine the arguments of the parties to the proceeding and the views of other authorities, assess the comprehensiveness and exhaustiveness of the facts on the basis of the investigative principle, and prepare a justification for the administrative act together with a thorough evaluation of his or her choices. As technology advances, there is reason to believe we will be able to use increasing assistance from machines in forming these justifications (to explain the aspects that tipped the scales or to prepare a draft justification or at least the more routine parts of it).

For factually or legally complex decisions, the weight of the decision must be **borne by humans**, at least until stronger artificial intelligence is developed,^{*105} though learning algorithms may be used to evaluate individual elements of those decisions. Officials still should take direct statements from witnesses, communicate directly and humanely with the parties to the proceedings, and make principled and justified decisions.

With all of these variations, quality machine learning is particularly suitable for assisting officials in those areas of their job where they need to make predictions about circumstances or events on which humans lack certain knowledge as well (e.g., the likelihood of offences). But the legal decision (e.g., whether the prediction is sufficient to qualify as the justification for intervention) must be made by a human.^{*106} Machine learning could also be implemented in very uncertain situations where a decision needs to be made but even officials would have trouble presenting rational justifications (e.g., a long-term environmental impact).^{*107} In any case, the implementation of machine learning in the performance of administrative tasks requires a sense of responsibility on the part of the institution as well as legal, statistical, and IT knowledge at least to the extent necessary to adequately outsource and oversee the development services.^{*108}

In conclusion, we are of the opinion that, at the current level of artificial intelligence, it is not possible to delegate atypical and complex administrative decisions to applications of it. Doing so is hindered both by the inability of the applications to conduct fair proceedings and explain the reasons and by the insufficiency of data. In conditions such as these, the delegation of a decision to an algorithm would be in conceptual conflict with the legality of administration and with procedural rules, along with the guarantee of judicial control. This is the actual state of things. The authors are not ambitious enough to predict whether implementation of 'science-fiction technology' available in the distant future could be in compliance with the law in effect at that time.

¹⁰⁴ Code des Relations entre le Public et l'Administration, art L311-3-1 (2). See also K Lember's master's thesis (n 2) 40.

¹⁰⁵ T Wischmeyer (n 22) 41.

¹⁰⁶ Practical experience so far shows that officials play a decisive role in predictive decisions: T Rademacher (n 15) 378, 384.

¹⁰⁷ Cf. A Vermeule, 'Rationally Arbitrary Decisions in Administrative Law' (2015) 44 *The Journal of Legal Studies* 475. DOI: <https://doi.org/10.1086/676332>.

¹⁰⁸ C Coglianese and D Lehr (n 14) 30.



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Regulating the Unregulatable:

An Estonian Perspective on the CLOUD Act and the E-Evidence Proposal

In increasing numbers, criminal investigations are relying on electronic evidence that is not considered open-source data (i.e., material that is not publicly available). Electronic evidence is required in around 85% of criminal investigations. In two thirds of the investigations in that category, there is a need to obtain evidence from online service providers based in another jurisdiction.^{*2} While criminals quickly move across borders – at least online – investigators do not, as their warrants are limited in jurisdictional reach. The current scale, scope, and challenges related to cybercrime and electronic evidence are such that cybercrime has become a serious threat to individuals' fundamental rights.^{*3}

The jurisdiction of a state is deemed to be territorial. The state may not exercise it outside its territory except under a permissive rule derived from international custom or a corresponding convention. Law-enforcement and criminal-justice matters fall within this exclusive domain of the sovereign state – with the result that, traditionally, criminal jurisdiction has been linked to the geographical territory^{*4} and, so far, cyberspace has not wrought much change in that concept. Accessing data stored on a server located in the territory of another state without the prior consent of that state constitutes a breach of the territorial integrity of said state and, thereby, a wrongful act.^{*5}

The traditional instruments used for collecting evidence extraterritorially were designed at first for all manner of material apart from digital information, and the territory-based conception born in pre-Internet times made sense in that context. Since then, the Internet has evolved from a predominantly American network into a global one, both in usage and in infrastructure, and, because of these unforeseen developments, such laws (and the associated reasoning of practitioners) are no longer adequate for managing the current reality. In most cases involving digital data, an exclusive connection to one particular state is non-existent.

¹ The author presents her personal views, which do not reflect the official position of the Prosecutor's Office.

² Recommendation for a Council Decision authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters. https://ec.europa.eu/info/sites/info/files/recommendation_council_decision_eu_us_e-evidence.pdf (accessed 14 April 2020) (first page).

³ 'Criminal Justice Access to Electronic Evidence in the Cloud: Recommendations for Consideration by the T-CY' 6. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a495e> (accessed 14 April 2020).

⁴ 'Comprehensive Study on Cybercrime' [2013] 184. http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf (accessed 14 April 2020).

⁵ B-J Koops and M Goodwin. *Cyberspace, the Cloud, and Cross-Border Criminal Investigation: The Limits and Possibilities of International Law* (Tilburg Institute for Law, Technology, and Society; Center for Transboundary Legal Development, December 2014) Tilburg Law School Research Paper 5/2016 9. DOI: <https://doi.org/10.2139/ssrn.2698263>.

There have been many efforts to regulate the extraterritorial collection of electronic evidence and also to enhance the co-operation between states in this connection. However, crucial problems related to jurisdiction and extraterritorial digital data collection are still unsolved. The latest attempt to address issues with extraterritorial evidence-gathering consists of the European Commission's E-Evidence Proposal⁶ coupled with the Clarifying Lawful Overseas Use of Data Act (CLOUD Act)⁷. These instruments are intended to simplify the procedure of requesting data from the relevant Internet service provider (hereinafter 'ISP'). In this, they represent a simplified version of traditional mutual legal assistance (referred to below as MLA also), imposing an obligation on the ISP to respond while not articulating an element of the requesting state's control (this aspect of traditional MLA is replaced with trust).

The CLOUD Act is a direct result of the so-called *Microsoft case*⁸, and discussions that were prompted by that case highlight that contemporary jurisdiction-oriented thinking has failed to address the challenges posed by the Internet adequately. Perhaps this is nowhere more evident than with regard to cloud computing in particular. Researchers have found that this failure may be blamed partially on the law's unwillingness to part with traditional categorisation schemes and equivalent thinking so as to recognise models and structures that better correspond to the new technological reality.⁹ States have begun efforts to rectify some of the problems that have arisen from cyber-territorial environments, which often involve discussions about allowing direct requests to ISPs. The latter approach still leaves critical issues unresolved, however – issues that various states face in the course of gathering data from foreign servers in the course of criminal proceedings.

Although the discussions culminating in the E-Evidence Proposal and in the CLOUD Act that followed do show that a clear shift is taking place from the concept of location-based data as the determinant for jurisdiction and movement toward acknowledgement of the data-owner's citizenship status or registered domicile as the overriding feature with regard to jurisdiction, this still represents only half of the solution, especially for those states that lack clear and transparent regulation covering extraterritorial computer-system searches. The purpose and core aim stated for the CLOUD Act is to facilitate the fight against serious crime, ranging from terrorism and violent crime to sexual exploitation of children and cybercrime. The question is this: while the United States is making efforts to streamline the handling of requests from foreign states, what should be the response on the part of other states? Are corresponding efforts warranted, or would the CLOUD Act and instruments under the E-Evidence Proposal suffice to ensure comprehensive legal grounds for appropriate extraterritorial data-gathering?

This article constitutes an attempt to assess the effects of the above-mentioned mechanisms on states' actions in the extraterritorial collection of evidence, from the perspective particular to a state that has no regulation in place for computer-system searches or extraterritorial data-gathering.¹⁰ Estonia is taken as an example of a state without regulation addressing searches of computer systems. I will highlight problems that states with this approach or a similar one are left to face even if there is an agreement in force with the

6 Related material is available: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en (accessed 14 April 2020).

7 Clarifying Lawful Overseas Use of Data Act or the CLOUD Act. <https://www.congress.gov/bill/115th-congress/house-bill/4943> (accessed 14 April 2020).

8 In the case *United States v Microsoft Corp.*, the US court system had to consider the circumstances under which law-enforcement agents in the United States may obtain digital information from abroad. In December 2013, the US Government served a search warrant on Microsoft under the Electronic Communications Privacy Act of 1986, or ECPA. The warrant authorised the search and seizure of information associated with a specified Web-based e-mail account that was stored on premises owned, maintained, controlled, or operated by Microsoft Corporation ('Microsoft'). The physical location of the data that the government wanted Microsoft to turn over, however, was a server in Dublin, Ireland (accessible to Microsoft employees working in Redmond, Washington). The dispute ended with the Supreme Court when, on 30 March 2018, the Department of Justice moved to drop the lawsuit as moot and Microsoft filed to agree with the motion. The Supreme Court then dropped the case. Both the government and Microsoft maintained that the newly passed CLOUD Act had rendered the lawsuit meaningless, since that act of law creates clear new procedures for obtaining legal orders for data in cross-border situations of such a nature. See the opinion summary: <https://supreme.justia.com/cases/federal/us/584/17-2/> (accessed 14 April 2020).

9 D Svantesson and F Gerry, 'Access to Extraterritorial Evidence: The Microsoft Cloud Case and Beyond' (2015) 31(4) *Computer Law & Security Review* 481. DOI: <https://doi.org/10.1016/j.clsr.2015.05.007>.

10 The seventh round of GENVAL mutual evaluations was dedicated to the practical implementation and operation of European policies with regard to preventing and combating cybercrime. Evaluations reveal that most states lack regulation pertaining to computer-system searches and for digital data-gathering carried out extraterritorially. States have declared that in cases of evidence obtained abroad, it is necessary to follow the procedures set forth under relevant international treaties while considering the domestic code of criminal procedure or the equivalent thereof. Reports from related evaluations are available: https://www.coe.int/de/web/octopus-old2019/blog/-/blogs/17449981?_33 (accessed 28 July 2020).

US that pertains to requesting data from a foreign ISP. For the analysis, I rely on practical expertise and apply traditional legal methods such as analysis proceeding from pragmatic concerns. However, on account of confidentiality requirements, several particulars are not revealed or addressed here.

It is my contention that the CLOUD Act and E-Evidence Proposal enhance the collection of data from foreign ISPs with respect to direct requests for data. However, states that have no regulation system in place for computer-system searches are still bound to face admissibility problems in court in connection with unauthorised extraterritorial data collection.

Coping with lack of regulation extending to computer-system searches

The Estonian Code of Criminal Procedure^{*11}, or CCP, contains no regulation on conveying data across borders.^{*12} Estonian law-enforcement agencies (hereinafter ‘LEAs’) see four possibilities for obtaining data from servers in foreign countries^{*13}: 1) the suspect provides the material voluntarily, as is done quite often during a home search; 2) the person controlling the data (the ISP) supplies said data voluntarily in response to a request; 3) the location of the information is identified and a request for legal assistance is submitted to the corresponding state^{*14}; or 4) data are collected by means of surveillance measures.^{*15}

Data subjects’ consent as legal grounds for data access

Estonian criminal procedure provides for an investigative measure referred to as inspection. According to the CCP (§83), the objective of an inspection is to collect information necessary for resolving the criminal matter, detect the evidentiary traces of the criminal offence, and confiscate objects that may have use as physical evidence. The object of inspection may be a scene where certain events took place, a body, a document, any other object or physical evidence, and – in the case of physical examination – the person and a relevant postal or telegraphic item. Considerable latitude for interpretation of inspection creates a large number of opportunities for the investigator.

Firstly, any object may be the object of inspection, and, for instance, the Estonian Supreme Court has found that an e-mail account is an object since it is a part of a server. Therefore, the account, as part of the server, may be inspected. The Supreme Court has adjudicated a matter wherein the main subject of dispute was whether e-mail messages held in a Google account could be seen as a ‘thing’. The Court concluded that the relevant Google server itself, where the files containing the e-mail messages are stored, should be seen as the ‘thing’ and that, when inspecting an account on a Gmail server by utilising the username and password connected with the account in question, one is inspecting that part of the server (i.e., the portion

¹¹ The Code of Criminal Procedure can be found at: <https://www.riigiteataja.ee/en/eli/531052016001/consolide> (accessed 14 April 2020).

¹² See, generally: E Laurits, ‘Criminal Procedure and Digital Evidence in Estonia’ (2016) 13 *Digital Evidence and Electronic Signature Law Review*. DOI: <https://doi.org/10.14296/deeslr.v13i0.2301>; A-M Osula, ‘Remote Search and Seizure in Domestic Criminal Procedure: Estonian Case Study’ (2016) 24(4) *International Journal of Law and Information Technology* 343. DOI: <https://doi.org/10.1093/ijlit/eaw010>.

¹³ These are described in the evaluation report on the seventh round of mutual evaluations: ‘The Practical Implementation and Operation of European Policies on Prevention and Combating Cybercrime’ [2016] *Report on Estonia* 36. <http://data.consilium.europa.eu/doc/document/ST-10953-2015-DCL-1/en/pdf> (accessed 14 April 2020).

¹⁴ This option is not discussed in the article, since the predominant opinion is that the current MLA system is not suited to meeting the requirements associated with effective co-operation between states in connection with collection of digital evidence. The MLA procedures are often slow and ineffective, irrespective of the need to obtain e-evidence rapidly for reason of its volatility.

¹⁵ For general discussion, see the final report from the seventh round of mutual evaluations: ‘The Practical Implementation and Operation of the European Policies on Prevention and Combating Cybercrime’ [2017]. <https://data.consilium.europa.eu/doc/document/ST-12711-2017-INIT/en/pdf> (accessed 14 April 2020).

where the account is)^{*16}. In Estonia, inspection as a public investigative measure is conducted by the investigative body and does not require any higher authorisation (neither a prosecutor's nor a judge's).

In the hypothetical situation wherein a suspect is willing to co-operate and willingly reveal his or her Gmail, Facebook, or similar account credentials and offer assistance in the investigation, the revealing of the password and username would be considered to be the explanation for the inspection (rather than being testimony).

Data subjects^{*17} consent as sufficient legal foundation for the processing of sensitive personal data by competent authorities could prove highly problematic in light of the Data Protection Directive. The directive states that where the data subject is required to comply with a legal obligation, said data subject has no genuine, free choice and that, accordingly, the compliant reaction of the data subject could not be considered an indication of his or her wishes expressed freely.^{*18}

On one hand, it is problematic to argue that the consent of the suspect or accused is genuinely free, or at least one would be taking a risk in so arguing (the presumption is that it is not). However, Article 32 b of the Budapest Convention could provide grounds for extraterritorial evidence-gathering of such a nature. On the other hand, it would be controversial to forbid or refuse freely and willingly offered help from the suspect or accused person wishing to co-operate with the LEA, since such co-operation is seen as a mitigating circumstance that would create grounds for reduced punishment under the Estonian Penal Code's Section 57.

There might exist a possibility for the LEA to conduct this investigative measure itself even when the credentials have been obtained in some other way than through their provision by the suspect or accused (in cases of surveillance activities, discovery during a home search, storage on a relevant device for automatic login or similar functions, etc.). However, it is essential to consider that such use of the username–password pair, such interference, could constitute commission of a criminal offence on the part of the LEA, under domestic and/or foreign jurisdiction, as in cases of illegal access under the Convention on Cybercrime^{*19}. It should be quite clear that without the approval of the suspect, such an inspection carried out by the LEA (without the added weight of an authority such as a judge declaring a connection with a crime) would be illegal.

Searches of a computer system

One of the investigative measures provided for is 'search'. However, the search described in Estonia's CCP does not cover searching a computer system. The problem with the regulation of searches set forth in the CCP is that the provision gives a list of places that may be searched: buildings, rooms, vehicles, and enclosed areas. The list does not mention computer systems. I would suggest that the provision would be less restrictive and more up-to-date if it were not to include a list at all and instead search were defined only in terms of the objective (to find an object to be confiscated or used as physical evidence; a document, thing, or person whose discovery is necessary for resolution of the criminal matter; assets to be seized in criminal proceedings; or a body – whether a corpse or in apprehension of a fugitive). In practice, this means that if a potentially pertinent technological 'working device' is found during a search (e.g., of a house), the LEA would have to decide on inspecting that working device or creating an image of it on-site. Both of these actions are meant to guarantee the possibility of future procedural actions – namely, inspecting the storage medium. However, if 'live' inspection of the computer system or similar entity is not conducted there and then, at that

¹⁶ Judgment of the Criminal Chamber of the Supreme Court of 20.11.2015, 3-1-1-93-15, clause 92. <https://www.riigikohus.ee/et/lahendid?asjaNr=3-1-1-93-15> (accessed 14 April 2020).

¹⁷ 'Data subject' is defined as 'an identified or identifiable natural person [where] an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or [...] one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person', per Directive (EU) 2016/680, art 3(1).

¹⁸ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] (OJ L119) s 35. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L0680&qid=1556338292741&from=EN> (accessed 14 April 2020).

¹⁹ Convention on Cybercrime (Budapest 23.XI.2001), at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561> (accessed 7 July 2020).

precise moment, a considerable quantity of data (what is held in RAM at the very least) and the connections established (e.g., to 'cloud' services) are bound to be lost.

Engaging in live inspection of computer systems without suspects' approval could be deemed illegal since the authorisation for a search typically does not extend to searching (inspecting) all the computer systems that are accessible from the space covered by the warrant. Judges are obviously reluctant to grant authorisation for computer-system searches. This scenario involves a weird hybrid measure wherein the LEA when carrying out one investigative measure, search, engages in another, inspection. Obviously, the following issue related to the suspect's rights rears its head also: while the person is subject to a given procedural action, such as search, a new measure arises from it wherein suspects' consent could provide grounds for several distinct legal actions.

Obtaining data through surveillance measures

This section of the paper focuses on gathering data by means of surveillance measures^{*20} as another possibility for collection of data from servers on foreign soil. For these purposes, surveillance activities are defined as processing of personal data for the performance of a duty provided for by law with the objective of hiding the fact and content of the data-processing from the data subject. Such activities must follow the *ultima ratio* (last resort) principle: they are to be carried out only if collecting the data via other activities or obtaining the evidence through other procedural acts is impossible, cannot be done within the required time, or would be especially complicated or if employing other means might prejudice criminal proceedings in the case. Collection of digital data extraterritorially meets all those requirements.

The Advisory Guidelines on IT-Evidence, issued on 24 May 2016 as a co-ordinated effort of Estonian law-enforcement authorities, claim that in cases of public investigative measures (inspection or search) and covert surveillance, no request for legal assistance is needed with regard to data stored 'in the cloud' on foreign states' servers. The reason cited is that the action (i.e., copying of the relevant data) is performed in the territory of Estonia by an Estonian body conducting proceedings and the data can be received without anyone physically leaving the territory of Estonia. Accordingly, the guidelines state that Estonia has jurisdiction to copy the data.^{*21}

The main argument seems to be that the actual location of the data (the material being copied) is not particularly relevant as long as the procedure itself is carried out within Estonian jurisdiction. In cases involving surveillance, further authorisation is needed either from the prosecutor (in cases of covert examination of a thing) or from a judge (for all other measures prescribed by law). The distinguishing properties of inspection are that, firstly, it is conducted in secret from the subject and, secondly, it requires higher authorisation. As for jurisdiction, one could argue that it is fundamentally of no importance, since the actions undertaken are the same wherever the data may be housed: the inspection of someone's account.

The foregoing argument seems to run counter to prevailing opinion. Obviously, it manifests seeking justification for the claim that all the measures involved are conducted within the territory of Estonia. Although the latter is highly debatable from a technical standpoint, one can see the reasoning behind it: is there really any difference for the data subject when the data are collected via surveillance measures in Estonia as opposed to under an information request whereby the data are handed over or otherwise made available by, for example, a US-based ISP? I would claim that the answer is indeed 'no'. Collecting data from a digital account is considered covert inspection under the definitions applied in Estonian legislation and case law. Therefore, it requires a prosecutor's authorisation. If this measure involves accessing a computer system, authorisation from a judge too is needed. In essence, both authorisations are needed, as there is no other way to collect data from a foreign server apart from by accessing a computer system. Once the matter of authorisation is settled, the critical issue of jurisdiction remains. In this connection, the reasoning behind the argument presented above might be that Estonia has jurisdiction because the crime under investigation is subject to Estonian criminal jurisdiction and that access to the data could be achieved via the Internet

²⁰ CCP s 126¹ and the following provisions set in place the regulation for surveillance activities. In cybercrime investigations and for the collection of digital evidence, covert examination (s 126⁵) and covert observation or examination of wire-tapping information (s 126⁷) are the most commonly undertaken surveillance activities. For the former, the prosecutor grants authorisation, and judges' authorisation is needed for the latter.

²¹ Per material in the author's possession: 'The Advisory Guidelines on IT-Evidence' [2016].

without any recourse to involving foreign authorities. After all, if the location of the data is largely irrelevant for the data subject, why should it pose an unimaginably difficult jurisdictional puzzle for the LEA?

The CLOUD Act and E-Evidence Proposal as a solution to MLA challenges

The CLOUD Act and E-Evidence Proposal lay the grounds for states to directly contact the relevant foreign service provider. Attention should be drawn to the fact that these instruments are foreseen not as giving any additional rights to foreign LEAs to collect data themselves (e.g., via surveillance measures as in the Estonian example) so much as introducing a fast-track form of MLA.

The United States CLOUD Act was adopted by the US Congress on 23 March 2018. Following from *Microsoft*, the CLOUD Act has two essential aspects. Its Part I clarifies the reach of US law enforcement to access data held extraterritorially by US-based providers. Part II authorises the executive branch of government to enter into agreements with foreign governments pursuant to which those foreign governments may bypass the otherwise applicable mutual legal assistance requirements in specified circumstances and in accordance with baseline substantive and procedural requirements. Recertification of partner nations' fulfilment of the agreement conditions is to take place every five years^{*22}. The scope of the CLOUD Act's data coverage is delineated as encompassing both stored data and interception of wire or electronic communication, while the offences covered are 'serious crimes'.^{*23}

With the above-mentioned agreements in place, foreign governments may issue wiretap orders or request stored data where the target persons are not located in the US or US citizens / legal permanent residents, regardless of where the data in question are located.^{*24} To access data of US citizens or legal permanent residents and others within the US, the foreign government must continue to employ the process set forth in the mutual legal assistance treaty. The key difference from the *status quo* is connected with the common-sense notion, grounded in principles of democratic accountability, that governments have an interest in setting standards and rules regarding access to their own citizens' and residents' data. They seldom have a similar interest in setting rules regulating and moderating foreign governments' access to foreigners' data.^{*25}

Non-US parties would be expected to find partnership under a CLOUD-Act-based agreement especially beneficial with regard to obtaining the data requested; in the absence of such an agreement, there might be very little chance of receiving any content data (as opposed to metadata), on account of procedural factors and the like. The agreements foreseen by the CLOUD Act render it possible even to utilise real-time interception mechanisms as long as the investigation is related to 'transnational domestic crime'. For example, in cases in which the data needed by Estonia for criminal proceedings must be provided by a US-based ISP, being a party to such an agreement would simplify the proceedings significantly. Gaining access to a suspect's computer system is a huge challenge, and having this sort of agreement with the US would greatly simplify the work of the LEA. However, this is just a technical benefit. From the perspective of the Estonian data subjects' rights, nothing changes: the same judicial control applies as would when an Estonian LEA is conducting the surveillance measures.

It is yet to be seen how CLOUD-Act-based agreements will be handled with regard to the EU. Would there be a framework agreement? That would be extremely difficult to achieve, given the multitude of opinions within and among EU member states on the E-Evidence Proposal. Are individual Member States tempted to enter into their own agreements of the sort the UK has^{*26}? Discussions of the E-Evidence Proposal already show a rocky start to efforts to establish common ground, and the pace is slow.

²² Clarifying Lawful Overseas Use of Data Act, §105(e). <https://www.congress.gov/115/bills/s2383/BILLS-115s2383is.pdf> (accessed 14 April 2020).

²³ *Ibid*, §2(1).

²⁴ See, generally, J Daskal, 'Setting the Record Straight: The CLOUD Act and the Reach of Wiretapping Authority under US law [2018]. <https://www.crossborderdataforum.org/setting-the-record-straight-the-cloud-act-and-the-reach-of-wiretapping-authority-under-us-law/?cn-reloaded=1> (accessed 14 April 2020).

²⁵ J Daskal, 'Microsoft Ireland, the CLOUD Act, and International Lawmaking 2.0' (2018) 71 *Stanford Law Review* 6. <https://www.stanfordlawreview.org/online/microsoft-ireland-cloud-act-international-lawmaking-2-0/> (accessed 14 April 2020).

²⁶ Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Access to Electronic Data for the Purpose of Countering Serious Crimes (3 October 2019).

Let us examine the proposal more closely. In April 2018, the European Commission tabled it as two proposals (one for a regulation and one for a directive) that together would establish a legal framework that renders it easier and faster for police and judicial authorities to obtain and secure access to electronic evidence in cross-border cases. Under the proposed terms, law-enforcement authorities in any of the EU member states would be allowed to force providers such as Facebook or Google to hand over the user's personal data even if the provider is based in a different country. The proposal and, even more so, the Council's draft entrust the mission of protecting human rights almost solely to the issuing authority and are, therefore, clearly rooted in mutual trust, in that the involvement of authorities in the executing state is, in principle, avoided – the orders pass directly from the issuing body in one Member State to the service provider in another Member State. The scope of the operations proposed is limited to stored data (both content and non-content data) and does not extend to real-time interception.^{*27} In the latter, the proposal is in sharp contrast with the CLOUD Act, which, in allowing real-time interception (albeit subject to the rules specified in the act), conveys the idea that we trust each partner's judicial system and leave the evaluation entirely up to them. That said, since these instruments are articulated as for fighting serious crime, it could be difficult to reach said objective in the absence of an opportunity to use real-time information.

Both the CLOUD Act and the E-Evidence Proposal manifest the principle of mutual trust, in that the only judiciary-level control shall be by the requesting state. This creates obvious hurdles with regard to notification, data subjects' rights, and principles related to guaranteeing a fair trial, but it certainly expedites the collection of data from a foreign ISP. The main idea is that the judiciary's control should rest with the requesting state and that said state should be accountable for the lawfulness of the request. Neither the proposal on e-evidence nor the CLOUD Act is going to change the presumption of territorial jurisdiction – under these instruments, the participating states are just agreeing to trust each other's judicial system and are streamlining requests that would normally be subject to other procedural norms. Under these instruments, requesting states still are not granted a right to exercise their ability to collect data themselves without having asked.

Concluding discussion

Data collection is an urgent issue today, and the options offered under the CLOUD Act seem to mark the end to a long wait for many states (one exception being the UK, which has already entered into an agreement with the US). For the time being, the Estonian standpoint in a nutshell is this: the data are not seized but copied (not an uncomplicated issue and one best examined elsewhere), and the actions (copying) are carried out in Estonia, in accordance with Estonian legal norms; therefore, Estonia has jurisdiction. Although interpretations of this nature have received criticism ever since the *Gorshkov and Ivanov* case^{*28}, indications of domestic courts allowing such self-authorized digital data collection are rising. One example is the Danish Supreme Court's reasoning whereby the crime with which the accused is charged is subject to Danish criminal jurisdiction. If the matter is under investigation by Danish authorities and if the relevant interventions can be implemented without involving foreign authorities (on Danish territory), Denmark has jurisdiction.^{*29} In those circumstances in which it is technically possible for the investigating state to gather the data, where the quantities of data so allow, the preferred method should be 'self-help' that may take the form of surveillance activities subject to the control of local judicial authorities.

<https://www.justice.gov/ag/page/file/1207496/download#Agreement%20between%20the%20Government%20of%20the%20United%20States%20of%20America%20and%20the%20Government%20of%20the%20United%20Kingdom%20of%20Great%20Britain%20and%20Northern%20Ireland%20on%20Access%20to%20Electronic%20Data%20for%20the%20Purpose%20of%20Countering%20Serious%20Crimes> (accessed 14 April 2020).

²⁷ Article 2 (7–10) of the proposed E-Evidence Regulation distinguishes among four types of data: (i) subscriber data, (ii) access data (related to the commencement and termination of a user access to a service, (iii) transaction data (context or additional information about the service, such as data on the location of the device used to access the service), and (iv) content data (any data stored in digital form – text, voice, videos, images, sound, etc.).

²⁸ *United States v Ivanov* [2001] 300CR00183AWT, case brief. https://sherloc.unodc.org/cld/case-law-doc/cybercrime/crimetype/usa/2001/united_states_v_ivanov.html?lng=en&tmpl=sherloc (accessed 14 April 2020).

²⁹ Case translation: Denmark. U 2012.2614 H (10 May 2012). See the commentary by Professor Lars Bo Langsted (2013) 10 *Digital Evidence and Electronic Signature Law Review* 162. <https://journals.sas.ac.uk/deeslr/article/view/2038/1975> (accessed 14 April 2020).

As the Estonian example illustrates, the level of judicial control over digital data collection is remarkably high when access to a computer system is involved, with such actions necessitating judges' authorisation. Estonia's regulation of surveillance measures is strict, and both the *ultima ratio* condition must be met and the crime investigated has to be serious enough to warrant the measures³⁰. It seems that since *Gorshkov and Ivanov*, states have grown more willing to admit – and domestic courts readier to go along with – reasoning whereby digital data collection should be possible without the need for *pro forma* help from another state. Of course, such actions may be necessary in part because advanced technical knowledge cannot and should not be expected. For instance, should the agents involved have to know that, even though the copying of digital data is performed in Estonia, the data undergoing the copying are still retrieved from a foreign server? Likewise, should lawyers really need to possess such in-depth knowledge of technology that they can (and do) determine where exactly the copying action is completed, and should this determine jurisdiction? Does one really have to go so far with the demand for understanding of the reality of a given case that knowing which jurisdiction and legal norms are applicable would necessitate lawyers consulting IT experts case-specifically?

First of all, there should be a shift in our understanding of data and in how legal norms are applied on that basis. When applying the law, those involved in the relevant processes are still drawing parallels with physical things. This can be seen in the reasoning behind the Estonian Supreme Court's decision that part of a server was being inspected, not the piece of data itself. It seems to be very difficult to see the digital network as 'space' rather than as 'place'. For digital data to be transformed into a human-readable form, there must be a 'place', a storage medium. If digital data could be understood without reference to a storage medium, would different solutions result? If it were possible to pick up the pieces of information in transit and put them together in some other way, would the legal norms have to be changed again? Or the concept behind them? Also, the same digital data might be stored by a given user on multiple systems, which could be in different jurisdictions (as in the case of using two 'cloud' service providers for redundancy). The diversity that is created by the non-territorial nature of data is leading to confusing legal decisions, in the course of which the data subjects' rights might end up protected even less than they would if the rights offered by the investigating state were honoured by all parties in all cases.

By passing the CLOUD Act, the US has already declared that, when certain criteria are met, democratic states are eligible to receive the data they request. Allowing or tolerating 'self-help' for data in the same categories should be likewise legally accepted, in light of the fact that, in reality, it is no longer important where the data are, in contrast against the nationality and location of the data-holder. Again, it is worth remembering that governments have an interest in setting standards and rules regarding access to their own citizens' and residents' data while they do not have an equivalent interest in setting rules pertaining to foreign governments accessing foreigners' data.

For European Union countries, one of the options would be to define the rules for extraterritorial evidence-gathering in national laws and let the relevant disputes be addressed at national level: as courts start issuing decisions, states will begin finding it easier to form legal interpretations. The greatest benefit in this would lie in having transparent, precise requirements, which should be coupled with an explicit requirement to notify (or receive consent from) the foreign government in question (when this information is known). Today, in contrast, many states lack regulation of e-evidence collection and are simply waiting for this field to be regulated at a higher level. This could well result in rigid norms and excessively slow movement or in undesirable regulation, since, for instance, negotiations involve too many parties (data-retention disputes serve as a case in point). There should exist a possibility of legally using digital data that, for reason of the digital data's non-territoriality, are gathered extraterritorially. However, the conditions for said use should be abundantly clear.

The above-mentioned reluctance to tackle this complicated issue is evident in Estonia also. Therefore, it is worthy of note (though not surprising) that neither the circuit court system nor the Supreme Court³¹ raised the issue of jurisdiction when given the opportunity. One of the issues in the case in question was covert examination of a server of a foreign private company located in a foreign territory – an issue that definitely requires legal analysis. I am aware that the courts did not have an obligation to say anything on that subject, as the question of jurisdiction was never really raised, since it was not a governmental entity

³⁰ The CCP's §126-1 sets the general conditions for conduct of surveillance activities, and §126²'s Subsection 2 enumerates the list of crimes in the event of which surveillance activities are allowed.

³¹ Judgment of the Criminal Chamber of the Supreme Court of 20.11.2015, 3-1-1-93-15.

collecting digital data from the foreign computer system. However, the Supreme Court has, on numerous occasions, exercised its powers of making statements on important issues in the form of *obiter dictum*. Hence, the silence on the matter was interpreted as acceptance of the ‘copying’ argument, with the Advisory Guidelines on IT-Evidence for LEAs getting prepared in the wake of that decision.

The critical issue for Estonia and states that are lacking in computer-system search regulations is that there is no justification for such actions to be found in the international agreements in place, and neither is justification offered in domestic rules. In this light, the silence of the Estonian Supreme Court might be intentional and does not necessarily imply the Supreme Court’s acceptance of such interpretations of jurisdiction. It might also mean that the Supreme Court leaves this issue for the legislator to regulate. In fact, the latter is much more likely.

It can be concluded that European countries are a far cry from clarity on the subject, and in the absence of national rules, clarity will never come about. It remains to be seen whether EU members can agree at all on joint principles (even when real-time interception is not under consideration). Inevitably, the slow and uncertain movement toward regulating requests for data from foreign ISPs leads to states using alternative methods, as seen in the Estonian example. Because the debate about how cyberspace should be regulated is highly politicised, one should not be surprised that states are actively pushing for norms and legal interpretations that coincide with their strategic and ideological preferences. Since legal environments can differ significantly between states, the wait for a solution might be a long one indeed. The discussion surrounding the E-Evidence Proposal has already shown clear signs of this.

In the future, when the EU has a suitable agreement in place with the US, it should be simpler for an LEA to obtain the necessary content data, since it would not have to access computer systems itself and would receive the data by merely making a request. States such as Estonia, which do not have any legal norms for extraterritorial data-gathering or computer-system searches at present, are going to continue facing problems when data are needed anywhere other than from a US or European ISP or when data are collected via methods (e.g., surveillance measures) that do not involve recourse to assistance, since no justification is provided for such extraterritorial digital data collection. The CLOUD Act should be a clear sign of new thinking – the state with the world’s largest ISPs is declaring that location is not the centre of gravity in digital data collection; rather, the citizenship of the data-owner is the deciding factor. This should supply encouragement to start thinking in a manner that acknowledges the data’s non-territoriality and should be a nudge for states such as Estonia.



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The Use of Human Voice and Speech for Development of Language Technologies:

The EU and Russian Data-protection Law Perspectives

1. Introduction

Language technologies^{*1} (LTs) have become part of our day-to-day life. Their applications range from services for automatic text translation and spelling- and grammar-checkers to speech-to-speech translators^{*2} and applications synthesising the human voice.

The development of LTs does not rely merely on text on a page. It encompasses using the human voice and speech also. Here, ‘voice’ refers to the process of acoustic waves’ creation and ‘speech’ is the process of phoneme creation.^{*3} In a narrow sense, it is possible to regard the human voice as a tool that is used to create speech (the speech vocalisation element).

The voice and speech are crucial elements of the communication process. Communication by voice is the most convenient and the fastest means of interaction between people and also between humans and

¹ Language technologies rely on the use of language resources, where language resources are characterised as copyright-protected databases that may contain copyright-protected works, performances protected as objects of related rights, and personal data. For reasons of space, the authors do not address technical issues such as the relationship between language resources and technologies in this article. Neither is this necessary for the analysis of legal issues related to personal-data protection. For further discussion of the nature of language resources, see: Aleksei Kelli, Krister Lindén, Kadri Vider, Penny Labropoulou, Erik Ketzan, Pawel Kamocki, Pawel Straňák, and Maciej Piasecki, ‘Implementation of an Open Science Policy in the Context of Management of CLARIN Language Resources: A Need for Changes?’ in *Selected Papers from the CLARIN Annual Conference 2017* (Linköping University Electronic Press / Linköping Electronic Conference Proceedings, Linköpings Universitet 2018) 102–111. <https://www.ep.liu.se/ecp/147/009/ecp17147009.pdf>; Aleksei Kelli, Kadri Vider, and Krister Lindén, ‘The Regulatory and Contractual Framework As an Integral Part of the CLARIN Infrastructure’ in Koenraad De Smedt (ed), *Selected Papers from the CLARIN Annual Conference 2015, October 14–16, 2015, Wrocław, Poland* (Linköping University Electronic Press, Linköpings Universitet 2015) 13–24. <https://www.ep.liu.se/ecp/article.asp?issue=123&article=002>; Aleksei Kelli, Kadri Vider, Heiki Pisuke, and Triin Siil, ‘Constitutional Values As a Basis for the Limitation of Copyright within the Context of Digitalization of the Estonian Language’ in Kalvis Torgans (ed), *Constitutional Values in Contemporary Legal Space II: Collection of Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia* (University of Latvia Press 2017) 126–139. DOI: <https://doi.org/10.22364/cvcls.2.2016>.

² In October 2017, Google demonstrated the brand-new headphones known as Pixel Buds, which have an integrated speech-to-speech translation function: Adam Champy, ‘Google Pixel Buds – Wireless Headphones That Help You Do More’ *Google Blog* (4 October 2017). <https://www.blog.google/products/pixel/pixel-buds/>.

³ Alison Behrman, *Speech and Voice Science* (Plural Publishing 2017) 4.

computers. It is much easier to input large volumes of data, utilise a control system, and thereby create a dialogue via voice rather than through other methods of communication.^{*4}

Today, more and more products and services are based on LTs that use voice and speech. The practical utilisation of the voice and speech in an LT can be divided into four categories: speech synthesis^{*5}, voice biometrics^{*6}, speech analysis^{*7}, and speech recognition.^{*8}

LTs are seldom focused on one particular country. They are disseminated through multiple jurisdictions. Several of the speech-recognition systems now in use are actively distributed by global digital companies (e.g., the Google Cloud speech API or Yandex SpeechKit), and they can be integrated easily into any program, app, or service, developed nearly anywhere in the world. For example, such speech-recognition systems form the core elements of the following products: virtual ‘voice assistants’ (e.g., Siri^{*9}, Cortana^{*10}, Alexa^{*11}, and Alisa^{*12}), Intensive Voice Response (IVR) systems, and vehicular voice-control systems (as used by Tesla, BMW, Ford, and Mercedes–Benz).

To consider the global character of research and business related to LTs, the producers of such technologies need to comply with the relevant regulation, which includes data-protection regulation. The aim for this article is to delineate, evaluate, and compare the legal frameworks for the use of voice and speech in development and dissemination of LTs from the perspectives of EU and Russian data-protection law. Some references to the Estonian legal landscape for data protection^{*13} are made also, where there is a need to consult the data-protection rules of a specific EU country. Firstly, Estonian law has been chosen since the authors are familiar with it. Secondly, the EU’s data-protection rules leave the Member States considerable flexibility to choose from among various harmonisation and implementation models.

The foundation of data-protection law is the same for Europe and Russia: the European Convention on Human Rights (ECHR)^{*14} and the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (Convention 108).^{*15} Since the international framework is limited to the essential principles, it does not extensively harmonise data-protection laws. Therefore, the EU and Russian national laws possess distinctive elements and even conflict with each other in some respects. Such differences in legislation create legal challenges for technology companies that wish to provide their services in Europe and Russia.

⁴ Wendy Holmes, *Speech Synthesis and Recognition* (2nd edn, CRC Press 2001) 1. DOI: <https://doi.org/10.4324/9780203484685>.

⁵ Speech synthesis is a technology that converts the text to speech. See: Thierry Dutoit, *An Introduction to Text-to-Speech Synthesis* (Springer Science & Business Media 1997, vol 3) 1. DOI: <https://doi.org/10.1007/978-94-011-5730-8>.

⁶ The voice can be considered to be one of the unique characteristics of the personality that may be used to establish an identity, alongside fingerprints, DNA, and the face or facial geometry. See: Anil Kumar Jain, Arun Ross, and Salil Prabhakar, ‘An Introduction to Biometric Recognition’ (2004) 14.1 *IEEE Transactions on Circuits and Systems for Video Technology* 4, 5. DOI: <https://doi.org/10.1109/TCSVT.2003.818349>.

⁷ The human voice can provide large amounts of useful information about a person’s mental state – for instance, mood, emotional condition, stress level, and any lack of sleep. See: Keng-hao Chang, Drew Fisher, and John Canny, ‘AMMON: A Speech Analysis Library for Analyzing Affect, Stress, and Mental Health on Mobile Phones’ in *Proceedings of PhoneSense 2011* (2011). http://people.eecs.berkeley.edu/~jfc/papers/11/AMMON_phonesense.pdf (accessed 10 April 2020).

⁸ Speech-recognition technology is a process of automatic speech-to-text transcription. See: Alexander Clark, Chris Fox, and Shalom Lappin (eds), *The Handbook of Computational Linguistics and Natural Language Processing* (John Wiley & Sons 2013) 299.

⁹ Speech Interpretation and Recognition Interface, developed by Apple, Inc. Information is available at: <https://www.apple.com/siri/> (accessed 10 April 2020).

¹⁰ Voice assistance developed by Microsoft, Inc. See: <https://www.microsoft.com/en-us/cortana> (accessed 10 April 2020).

¹¹ Voice assistance developed by Alexa Internet, Inc., a company owned by Amazon, Inc. For information, see: <https://www.amazon.com/meet-alexa/b?ie=UTF8&node=16067214011> (accessed 10 April 2020).

¹² Voice assistance developed by Yandex, Inc. Information available in Russian at: <https://alice.yandex.ru/> (accessed 10 April 2020).

¹³ The Estonian Personal Data Protection Act (Isikuandmete kaitse seadus). Entry into force on 15 January 2019. English translation available at: <https://www.riigiteataja.ee/en/eli/523012019001/consolide> (accessed 18 June 2020).

¹⁴ Article 8 of: Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.005, ‘Treaty open for signature by the member States of the Council of Europe and for accession by the European Union at Rome’ on 4 November 1950 with entry into force on 3 September 1953. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005> (accessed 10 April 2020).

¹⁵ Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS No.108, ‘Treaty open for signature by the member States of the Council of Europe and for accession by the European Union at Strasbourg’ on 28 January 1981 with entry into force on 1 October 1985. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108> (accessed 10 April 2020).

The European data-protection framework is established primarily by the General Data Protection Regulation (GDPR)^{*16}, which is directly applicable^{*17} in all EU member states.^{*18} Russian data-protection law relies on the following acts: Federal Law ‘On Personal Data’^{*19}, Federal Law ‘On Information, Information Technologies and Information Protection’^{*20}, and the ‘Yarovaya package law’^{*21}. This list is not exhaustive. There are also legal acts that do not directly refer to the realm of data protection but do contain separate legal rules affecting the data-protection domain (e.g., Federal Law ‘On Communications’^{*22}, from 2003). On account of the scope for the research presented here and the complexity of Russia’s data-protection law, these acts are not the main focus of the article.

The choice of jurisdictions for examination here is based on consideration of the fact that the EU and Russia are neighbours and in a globalised world such as ours, it is not possible or even reasonable to avoid co-operation across the jurisdictions in technology development. The authors’ ambition in this regard is limited to addressing co-operation within the framework of LTs, with emphasis on data protection. The research holds further relevance in that extensive comparative analysis of the Russian data-protection laws (significantly amended in 2015^{*23} and 2017^{*24}) and the General Data Protection Regulation^{*25} with regard

¹⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), dated 27 April 2016, with entry into force on 25 May 2018. <https://eur-lex.europa.eu/eli/reg/2016/679/oj> (accessed 10 April 2020).

¹⁷ However, the GDPR (*ibid*) allows derogation from the regulation in certain fields, such as research; see its Article 89. It is also relevant with regard to the development of LTs. For reasons of space and the focus of this article, this derogation is not addressed.

¹⁸ The GDPR’s territorial scope is not limited to the EU states alone. It applies also to the European Economic Area (EEA) countries and in certain circumstances to non-EU-, non-EEA-based companies. The territorial scope of the GDPR is described further on, in section 3 of the paper.

¹⁹ Федеральный закон «О персональных данных» (Federal Law ‘On Personal Data’) N 152-FZ, dated 27 July 2006, adopted by the State Duma on 8 July 2006, approved by the Federation Council on 14 July 2006, with entry into force on 26 January 2007. Unofficial English translation available at: <https://pd.rkn.gov.ru/authority/p146/p164/>. All translations from Russian into English are by the authors of the present paper unless otherwise noted.

²⁰ Федеральный закон «Об информации, информационных технологиях и о защите информации» (Federal Law ‘On Information, Information Technologies and Protection of Information’) N 149-FZ, dated 27 July 2006, adopted by the State Duma on 8 July 2006, approved by the Federation Council on 14 July 2006, with entry into force on 26 January 2007. Unofficial English translation available at: <http://www.wipo.int/wipolex/ru/details.jsp?id=15688> (accessed 10 April 2020).

²¹ Its unofficial name, after one of the authors of the law, Irina Yarovaya. The package consists of the two pieces of Federal Law legislation that introduce amendments to the acts on combating terrorism: (i) Федеральный закон «О внесении изменений в Федеральный закон «О противодействии терроризму» и отдельные законодательные акты Российской Федерации в части установления дополнительных мер противодействия терроризму и обеспечения общественной безопасности» (Federal Law ‘On Amendments to the Federal Law “On Counteracting Terrorism” and Certain Legislative Acts of the Russian Federation Regarding the Establishment of Additional Measures To Counter Terrorism and Ensure Public Safety’) N 374-FZ, dated 6 July 2016, adopted by the State Duma on 24 June 2016, approved by the Federation Council on 29 June 2016, with entry into force on 20 July 2016. Available in Russian at: <http://kremlin.ru/acts/bank/41108/>; (ii) Федеральный закон «О внесении изменений в Уголовный кодекс Российской Федерации и Уголовно-процессуальный кодекс Российской Федерации в части установления дополнительных мер противодействия терроризму и обеспечения общественной безопасности» (Federal Law ‘On Amendments to the Criminal Code of the Russian Federation and the Code of Criminal Procedure of the Russian Federation with Regard to the Establishment of Additional Measures To Counter Terrorism and Ensure Public Safety’) N 375-FZ, dated 6 July 2016, adopted by the State Duma on 24 June 2016, approved by the Federation Council on 29 June 2016, with entry into force on 20 July 2016. Available in Russian at: <http://kremlin.ru/acts/bank/41113/> (accessed 10 April 2020).

²² Федеральный закон «О связи» (Federal Law ‘On Communications’) N 126-FZ, dated 7 July 2003, adopted by the State Duma on 18 June 2003, approved by the Federation Council on 25 June 2003, with entry into force on 1 January 2004. Unofficial English translation available at: <http://www.wipo.int/wipolex/en/details.jsp?id=17111>.

²³ Федеральный закон "О внесении изменений в отдельные законодательные акты Российской Федерации в части уточнения порядка обработки персональных данных в информационно-телекоммуникационных сетях" (Federal Law ‘On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Clarification of the Procedure for Processing Personal Data in Information and Telecommunication Networks’) N 242-FZ, dated 21 July 2014, adopted by the State Duma on 4 July 2014, approved by the Federation Council on 9 July 2014, with entry into force on 1 September 2015. Available in Russian at: http://www.consultant.ru/document/cons_doc_LAW_165838/ (accessed 10 April 2020).

²⁴ Федеральный закон “О внесении изменений в Кодекс Российской Федерации об административных правонарушениях” (Federal Law ‘On Amendments to the Code of Administrative Offences of the Russian Federation’) N 13-FZ, dated 7 February 2017, adopted by the State Duma on 27 January 2017, approved by the Federation Council on 1 February 2017, with entry into force on 1 July 2018. Available in Russian at: http://www.consultant.ru/document/cons_doc_LAW_212391/ (accessed 12 April 2020).

²⁵ General Data Protection Regulation (n 16).

to the LT field has not been undertaken before.^{*26} The article could also be useful to LT researchers and entrepreneurs who want to cover both the EU and Russia in their studies or products/services. The research results serve as a basis for further investigation pertaining to the personal-data aspects of several jurisdictions' law.

The authors draw on prior research^{*27} while relying also on personal experience in the field of legal aspects of LTs. The article broadens the focus of LT-related legal research from that previously established, so as to include Russian data-protection law as well.

The second section of the article addresses the legal nature of human voice and speech from the data protection law perspective. In the third part, the applicability of the EU and Russian data-protection legislation from the LTs perspective is analysed. Under the last section, the principles and rules for voice- and speech-processing are studied.

2. Human voice and speech as personal data

The question of whether human voice and speech should be treated as personal data influences the requirements imposed on development of LTs. Therefore, the authors address particular aspects of the human voice and speech accordingly (see Figure 1). The first of these involves the subject matter of the speech and its content (speech can contain personal data), the second involves the voice as personal data, and the third is related to the question of whether voice belongs to a special category of data that entails additional requirements for its processing (use). The voice is examined without a strong connection to the speech content.

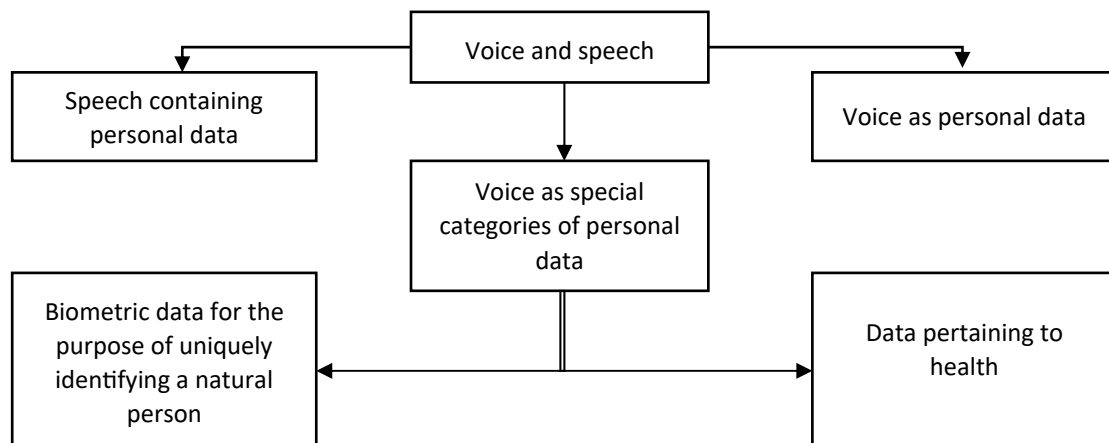


Figure 1: Voice and speech from a data-protection perspective

²⁶ As a matter of fact, even analysis of the impact of the GDPR on the development of language technologies in Europe remains at quite a preliminary level.

²⁷ See Jane Klavan, Arvi Tavast, and Aleksei Kelli, 'The Legal Aspects of Using Data from Linguistic Experiments for Creating Language Resources' (2018) 307 *Frontiers in Artificial Intelligence and Applications* 71. <http://ebooks.iospress.nl/volumearticle/50306>; Aleksei Kelli, Kadri Vider, Irene Kull, Triin Siil, Krister Lindén, Arvi Tavast, Age Väriv, Carri Ginter, and Einar Meister, 'Keeleressursside loomise ja kasutamise seonduvaid isikuandmete kaitse küsimusi' (Data Protection Issues Related to the Development and Utilisation of Language Resources) *Eesti Rakenduslingvistika Ühingu aastaraamat* (2018) 14, 77–94. DOI: <https://doi.org/10.5128/erya14.05>; Liina Jents and Aleksei Kelli, 'Legal Aspects of Processing Personal Data in Development and Use of Digital Language Resources: The Estonian Perspective' (2014) 21.1 *Jurisprudencija* 164. DOI: <https://doi.org/10.13165/jur-14-21-1-08>.

We begin by considering the facets of speech. Data-protection laws apply if the speech contains personal data. Both European and Russian legal regulations define personal data as information related to an identified or identifiable natural person (the ‘data subject’).^{*28}

The GDPR makes references to various types of personal data (e.g., biometric, genetic, and health data)^{*29}; however, the most fundamental line is drawn between the concept of personal data in general and personal data falling in special categories. According to the GDPR, special categories of personal data consist of ‘data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation’.^{*30} The latter is subject to more stringent requirements.^{*31}

The Russian data-protection regulation, in turn, defines three main categories of personal data: general, special, and biometric personal data. Some of the legal acts specify a fourth category of personal data, ‘publicly available personal data’^{*32}. However, Russia’s Federal Law ‘On Personal Data’ does not classify this as a separate and independent category. The ‘special’ category of personal data under these laws includes data pertaining to a person’s racial or ethnic origin, political opinions, religious or philosophical beliefs, health, or sex life^{*33}. The ‘biometric data’ category covers data related to a person’s physiological and biological characteristics that are used for identification purposes^{*34} (e.g., fingerprints, DNA, voice, the person’s image, the iris portion of the eyes, and/or body structure^{*35}).

The three-category division among general, biometric, and special personal data is of fundamental importance in cases of data-processing. For instance, under the general rule, the processing of special-category data is prohibited^{*36}, while processing of biometric data may be performed, albeit only with the explicit consent of the data subject^{*37}. It is important to distinguish data in the special category from the biometric class also because the **level** of protection required is different^{*38}.

The information space considered to contain personal data is rather extensive. According to the Article 29 Working Party^{*39} (WP29), the concept of personal data covers information available in any of various forms (graphical, photographic, acoustic, alphanumeric and so forth) and maintained in storage of numerous types (e.g., on videotape, on paper, or in computer memory).^{*40}

According to Russian law, general-category personal data^{*41} include such data as the name (surname, patronymic, etc.); the year, month, day, and place of birth; one’s address; the identity of one’s family; social

²⁸ Article 4 of the General Data Protection Regulation (n 16). See also Federal Law ‘On Personal Data’ N 152-FZ (n 19) art 3 (1).

²⁹ Article 4 of the General Data Protection Regulation (n 16).

³⁰ Article 9(1) of the General Data Protection Regulation (n 16).

³¹ The general rule is that the processing of special categories of personal data is prohibited unless certain circumstances exist, per Article 9 of the General Data Protection Regulation (n 16).

³² Clause 5 of Decree of the Government of the Russian Federation No. 1119, ‘On approval of the requirements for the protection of personal data when processing them in information systems of personal data’.

³³ Federal Law ‘On Personal Data’ N 152-FZ (n 19) art 10.

³⁴ *Ibid*, art 11.

³⁵ Разъяснения Федеральной службы по надзору в сфере связи, информационных технологий и массовых коммуникаций «Разъяснения по вопросам отнесения фото-, видеозображений, дактилоскопических данных и иной информации к биометрическим персональным данным и особенностей их обработки» (Explanations on the Issues of Attributing Photo, Video, Fingerprint Data, and Other Information to Biometric Personal Data and the Features of Their Processing) issued by the *Roskomnadzor* on 30 August 2013. <http://www.garant.ru/products/ipo/prime/doc/70342932/> (accessed 12 April 2020).

³⁶ Federal Law ‘On Personal Data’ N 152-FZ (n 19) art 10.

³⁷ *Ibid*, art 11.

³⁸ Maxim Krivogin, ‘Osobennosti pravovogo regulirovaniya biometricheskikh personalnykh dannykh’ (Peculiarities of Legal Regulation of Biometric Personal Data) [2017] 2 *Journal of the Higher School of Economics* 80, 82–83. DOI: <https://doi.org/10.17323/2072-8166.2017.2.80.89>.

³⁹ The Article 29 Working Party is an advisory committee established via the Data Protection Directive (95/46/EC) (repealed as of 25 May 2018). Its opinions are still relevant since the nature of personal data’s protection has not changed.

⁴⁰ See page 7 of Article 29 Working Party Opinion 4/2007, adopted on 20 June 2007, on the concept of personal data: http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf (accessed 12 April 2020).

⁴¹ Federal Law ‘On Personal Data’ N 152-FZ (n 19) art 3 (1).

or property status; education, profession, or income^{*42}; passport data^{*43}; e-mail address^{*44}; and information on crossing of state borders^{*45}.

Another relevant and often misinterpreted issue is the protectability of publicly available personal data. The matter has been settled in EU case law. The European Court of Justice has explained that the use of data collected from documents in the public domain is still processing of personal data.^{*46} The public availability of personal data has relevance in the context of processing of special categories of personal data, with the rule being that processing of data in the special categories is prohibited.^{*47} However, this prohibition does not apply if the processing involves personal data that have been manifestly made public by the data subject.^{*48}

The Russian data-protection laws provide that the personal data in question should be considered publicly available if the data subject gives explicit consent^{*49} for inclusion of the data in the relevant publicly accessible sources^{*50}. The publicly available data still are subject to the data-protection regulation^{*51}, but the threshold level of protection is much lower for data in this category than for other categories of personal data. For instance, there is no need to obtain consent for processing^{*52} or to ensure a confidentiality regime^{*53} for general- and special-category personal data in this case (consent need only be received once for making the data publicly available). At the same time, the rule explicitly does not extend to publicly available biometric data, whose processing still requires the consent of the data subject.

From a language-technology perspective, it is not so relevant when precisely the data subject's rights arise. However, when they end is crucial.^{*54} The GDPR does not apply to personal data of deceased persons.^{*55} That said, variations may exist in national legislation, creating differences between EU countries in such respects. Therefore, it is important to consult the laws of each specific EU country that is relevant. For instance, under the Estonian Personal Data Protection Act, the protection of rights extends 10 years after the death of the data subject except in cases wherein the data subject died as a minor, for which the term of protection is 20 years. Any heir may give consent for processing.^{*56} Other Member States may take different approaches.

Russian data-protection regulation extends to the personal data of deceased persons^{*57}. The processing of such data must comply with data-protection rules (including the requirement to gain consent for the processing).^{*58} Russia's data-protection law does not specify a duration for the protection of personal data

⁴² For relevant case law, see: Presidium of the Russian Supreme Arbitration Court, resolution in case N. A36-5713 / 2014, dated 29 April 2015. https://kad.arbitr.ru/Document/Pdf/21af41bd-86ed-4551-b372-10bb6499cf3d/635e0e09-c758-4f90-85d4-e327555d3daf/A36-5713-2014_20151228_Reshenija_i_postanovlenija.pdf?isAddStamp=True (accessed 12 April 2020).

⁴³ See the case law: Appeal Definition of the Moscow City Court N 33-14709 / 2014, dated 22 May 2014. <https://mos-gorsud.ru/mgs/cases/docs/content/631f39ab-1e88-4428-9ece-d53bdc6b6670> (accessed 12 April 2020).

⁴⁴ Consult the case law from: Kalininsky District Court (St Petersburg, Russia) Decision N 12-253 / 2015, dated 26 May 2015. https://kln--spb.sudrf.ru/modules.php?name=sud_delo&name_op=sf&delo_id=1540005 (accessed 12 April 2020).

⁴⁵ See case law: Moscow City Court, Appeal Definition N 33-11688 / 2014, dated 10 April 2014. <https://mos-gorsud.ru/mgs/cases/docs/content/747dfe19-f877-4121-838c-5f30ab010ebf> (accessed 12 April 2020).

⁴⁶ Relevant case law is: *Tietosuojavaltutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*. [2008] C-73/07, from 16 December 2008. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1538028665554&uri=CELEX:62007CJ0073> (accessed 12 April 2020).

⁴⁷ General Data Protection Regulation (n 16) art 9(1).

⁴⁸ General Data Protection Regulation (n 16) art 9(2) (e).

⁴⁹ The data subject has a right to withdraw consent, per Article 8 (2) of Federal Law 'On Personal Data' N 152-FZ (n 19).

⁵⁰ *Ibid*, art 8 (1).

⁵¹ *Ibid*, art 6 (1).

⁵² *Ibid*, art 6 (1).

⁵³ *Ibid*, art 7.

⁵⁴ For instance, the Russian voice company STC Group demonstrated a novel vocalised by the synthesised voice of a dead Russian actor: «Синтез речи. Белый обзор» (Synthesis of Speech: A Brief Review) *Stokito on Software Blog* (25 December 2014). <http://goo.gl/Kmcpgh/>. An example of the synthesised voice is available at: <https://www.youtube.com/watch?v=hvaB1exK9rY> (accessed 12 April 2020).

⁵⁵ Recital 27 to the General Data Protection Regulation (n 16).

⁵⁶ The Estonian Personal Data Protection Act (n 13) s 9.

⁵⁷ In the case law, see: Decree of the Federal Arbitration Court of the Eastern Siberian District N A33-14182/2007, dated 1 July 2008. <https://kad.arbitr.ru/> (accessed 12 April 2020).

⁵⁸ Where a personal-data subject has died, any consent to the processing of his personal data shall be given by his heirs unless the personal-data subject gave such consent while alive. This is addressed in: Federal Law 'On Personal Data' N 152-FZ (n 19) art 9 (7).

of deceased persons. One solution is to rely on an analogy to protection of a person's private life^{*59}, which is likewise protected after the person's death.^{*60} Following this analogy, we could presume that the duration of such protection extends to at least 75 years after the death of the data subject^{*61}.

The identifiability of a natural person is a critical issue in determination of whether data-protection laws apply. The authors agree with the WP29 reasoning that 'a mere hypothetical possibility to single out the individual is not enough to consider the person as "identifiable"'.^{*62}

It is also pointed out in the literature that identifiability depends on the context. Data items not identifying for one person might be identifying for another.^{*63} It is also suggested that 'the categorisation of data as identifiable or non-identifiable is a matter of self-assessment by the controller; the controller determines how the data are to be categorised and treated'.^{*64} This does not, however, mean that the data are in reality non-personal. The controller cannot avoid liability just by considering all the data processed non-personal.

The use of non-personal data is less subject to legal restrictions.^{*65} Data may be non-personal from day 1^{*66}, or personal data may be anonymised and thereby rendered non-personal. With regard to the latter, one should bear in mind that the definition of personal data's processing is quite broad in the GDPR^{*67} and Russian law alike^{*68}. Accordingly, the anonymisation process itself is subject to personal-data protection requirements. Secondly, creating entirely anonymised datasets such that the data do not lose their value is a challenging task.^{*69} This is especially true for voice and speech.

⁵⁹ Mariya Vazhorova, "Соотношение понятий «Информации о частной жизни» и «Персональных данных»" (The relationship between the Concepts of 'Information on Private Life' and 'Personal Data') M Vazharova, tr (2012) 4(87) *Bulletin of the Saratov State Law Academy* 55, 55–56.

⁶⁰ See Article 152.2(5) of: Гражданский кодекс Российской Федерации (часть первая) (The Civil Code of the Russian Federation (Part I of IV)) N 51-FZ, dated 30 November 1994, adopted by the State Duma on 21 October 1994, signed by the President of the Russian Federation on 30 November 1994, with entry into force on 1 January 1995. Unofficial English translation available at: <http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru083en.pdf> (accessed 13 April 2020).

⁶¹ See Article 25(3) of: Федеральный закон «Об архивном деле в Российской Федерации» (Federal Law 'On Archival Affairs in the Russian Federation') N 125-FZ, dated 22 October 2004, adopted by the State Duma on 1 October 2004, approved by the Federation Council on 13 October 2004, with entry into force on 27 November 2004. Available in Russian at: <https://rg.ru/2004/10/27/arhiv-dok.html>. The law provides for restriction of access to archival documents containing information about the personal and family secrets of a citizen or his private life or including information that creates a threat to his safety, with a set term of 75 years from the date of the creation of these documents.

⁶² See page 15 of: Article 29 Working Party Opinion 4/2007, on the concept of personal data, as adopted on 20 June 2007. http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf (accessed 13 April 2020).

⁶³ Manon Oostveen, 'Identifiability and the Applicability of Data Protection to Big Data' (2016) 6(4) *International Data Privacy Law* 299, 306.

⁶⁴ *Ibid.*, 307.

⁶⁵ According to the General Data Protection Regulation (n 16), '[t]he principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable' (Recital 26).

⁶⁶ For instance, machine-generated data not containing personal information are not subject to personal-data protection. However, this does not mean that said data are not subject to some currently recognised rights (in the main, database rights and trade-secret protection) or future legal requirements. For further discussion, see, from 10 January 2017: Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Building a European Data Economy' COM (2017) 9 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1537175097689&uri=CELEX:52017DC0009> (accessed 13 April 2020). See also: P Bernt Hugenholtz, 'Data Property: Unwelcome Guest in the House of IP' (2017). https://www.ivir.nl/publicaties/download/Data_property_Muenster.pdf (accessed 13 April 2020).

⁶⁷ Article 4 of the General Data Protection Regulation (n 16) defines processing as 'any operation or set of operations which is performed on personal data or on sets of personal data'. The Article 29 Working Party is of the opinion that '[a]nonymisation constitutes a further processing of personal data; as such, it must satisfy the requirement of compatibility by having regard to the legal grounds and circumstances of the further processing'. See page 3 of: Article 29 Working Party Opinion 05/2014, on anonymisation techniques, adopted on 10 April 2014. http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp216_en.pdf (accessed 13 April 2020).

⁶⁸ Federal Law 'On Personal Data' N 152-FZ (n 19) art 3 (3) states that personal data's processing may consist of any action (operation) or combination of actions (operations) performed both automatically and manually with personal data, including collection, recording, arrangement, accumulation, storage, specification (updating or other changing), extraction, use, distribution (including transfer), anonymising, blocking, and destruction of personal data.

⁶⁹ See (n 67).

The next two aspects to be considered pertain to the human voice as such. In scientific literature, the voice is considered biometric data.^{*70} Both jurisdictions considered here distinguish biometric data from the other categories of personal data. They define said data as data about physical, physiological, or behavioural characteristics of a natural person.^{*71} Most commonly, LTs use voice and speech as biometric data for two purposes: 1) to identify and verify a person (voice biometrics) and 2) to acquire and analyse new information about a person (voice and speech analysis).^{*72}

From the biometrics perspective, the voice samples (or voiceprints) are used to identify and verify who someone is in a similar manner to DNA, fingerprints, or face recognition.^{*73} Depending on the operation mode of the biometric system, the voiceprint may be compared with one particular voiceprint to verify the claimed identity (verification mode) or the system may scan a database of voiceprints to find the matching one and thereby establish the speaker's identity (identification mode).^{*74} The voice samples (biometric personal data) within voice-biometrics frameworks are often used in combination with other categories of personal data.

From a speech-analysis perspective, voice and speech patterns can be investigated for purposes of obtaining additional information about the person speaking. For example, voice and speech analysis can be used in medical applications^{*75} for its ability to provide information about stress levels, emotional state^{*76}, or other health details of the person. In the case of detecting mental state, one's level of stress, and other medical information, the data received can be considered to be, in addition, information pertaining to the person's health.

Although the human voice contains biometric information and potentially health-related data, the crucial issue in this regard is whether this means that the voice as such always belongs to a special category of data. The GDPR's definition of special categories of data^{*77} refers to two instances of processing wherein the voice can be deemed to belong to special categories: 1) the voice as health data and 2) the voice as biometric data for the identification of a natural person.

If we presume that the voice *per se* (even without any relevant content) always contains health-related information (which is disputable), then it would be regarded as a special category of personal data both in the EU and per Russian data-protection law.^{*78} However, a question remains as to what kind of information should be considered health-related and how much of the health-related information can be extracted from the voice.

Russia's data-protection regulation does not provide a definition addressing precisely what information is connected with information pertaining to health. At the same time, Russian regulation of health protection includes the concept of medical secrecy, under which information about requests for medical assistance, information about health and diagnoses or other information received during medical examinations and treatment constitutes a medical secret.^{*79} Data with 'medical secret' status receive special legal protection, and the processing and disclosure thereof are prohibited, with certain specified exceptions.^{*80} The concept

⁷⁰ See discussion by: Joaquín González-Rodríguez, Doroteo Torre Toledano, and Javier Ortega-García, 'Voice Biometrics' in Anil K Jain, Patrick Flynn, and Arun A Ross (eds), *Handbook of Biometrics* (Springer Science & Business Media, 2007). DOI: https://doi.org/10.1007/978-0-387-71041-9_8; Anil Kumar Jain, Arun Ross, and Salil Prabhakar, 'An Introduction to Biometric Recognition' (2004) 14(1) *IEEE Transactions on Circuits and Systems for Video Technology*. https://www.cse.msu.edu/~rossarun/BiometricsTextBook/Papers/Introduction/JainRossPrabhakar_BiometricIntro_CSVT04.pdf (accessed 13 April 2020).

⁷¹ Article 4 of the General Data Protection Regulation (n 16); Federal Law 'On Personal Data' N 152-FZ (n 19) art 11.

⁷² Judith Markowitz, 'Voice Biometrics' (2000) 43.9 *Communications of the ACM* 66.

⁷³ Anil Kumar Jain, Ross Arun, and Salil Prabhakar, 'An Introduction to Biometric Recognition' (2004) 14.1 *IEEE Transactions on Circuits and Systems for Video Technology* 4.

⁷⁴ Hariton Costin, Tudor Barbu, Cristi Rotariu, and Iulian B Ciocoiu, 'A Complex Biometric System for Person Verification and Identification through Face, Fingerprint and Voice Recognition' [2006] *Scientific Studies and Research* 361.

⁷⁵ (n 7).

⁷⁶ Ryan Hafen and Henry Michael, 'Speech Information Retrieval: A Review' (2012) 18.6 *Multimedia Systems* 499.

⁷⁷ Article 9(1) of the General Data Protection Regulation (n 16).

⁷⁸ (*ibid*); Federal Law 'On Personal Data' N 152-FZ (n 19) art 10.

⁷⁹ See Article 13 of: Федеральный закон «Об основах охраны здоровья граждан в Российской Федерации» (Federal Law 'On the Fundamentals of Protecting the Health of Citizens in the Russian Federation') N 323-FZ, dated 21 November 2011, adopted by the State Duma on 1 November 2011, approved by the Federation Council on 9 November 2011, with entry into force on 22 November 2011. An English translation is not available, but the law is available in Russian at: <http://kremlin.ru/acts/bank/34333> (accessed 13 April 2020).

⁸⁰ Federal Law 'On Personal Data' N 152-FZ (n 19) art 3 (9).

of medical secrecy is associated primarily with medical assistance requests and provision of medical treatment. The information forming a medical secret is a subset of what is deemed to be personal data having to do with health.

In contrast, European data-protection regulation does define the boundaries of information pertaining to health.^{*81} According to the GDPR, the information related to health is the personal data that refer to the physical and mental state of the person, along with information about the provision of medical services and related information about health status.^{*82} Health-related data are subject to special regulation and protection.

In the authors' opinion, the voice does not always contain health data. Not all television and radio programmes, interview content, etc. should be considered to belong to a special category of personal data. In cases wherein the voice processing is done for collecting data about health, however, it does belong to a special class of personal data, accordingly.

There is no disputing that the voice as such is biometric data. The question is whether this leads to it counting as a special category of data. According to the GDPR, only biometric data used for uniquely identifying a natural person belong to a special category of data.^{*83} In other words, it is insufficient to deem the voice biometric data without further consideration. Rather, for it to qualify as a special category of data, the voice processing must be done for identification purposes. In this case, the data processing determines its nature. The situation is similar to that of photos depicting people – after all, one's appearance constitutes biometric data. For the latter case, the GDPR provides the following clarification:

The processing of photographs should not systematically be considered to be processing of special categories of personal data as they are covered by the definition of biometric data only when processed through a specific technical means allowing the unique identification or authentication of a natural person.^{*84}

The authors of this article presume that the foregoing explanation is valid also for the human voice.

Russian data-protection law treats information about physiological and biological characteristics as biometric data only if the operator^{*85} uses it for purposes of identification^{*86}. The identification purpose behind the data-processing is the critical criterion for identifying the given personal data as biometric personal data^{*87}. In a similarity to the EU approach, the voice is not deemed biometric data in the context of data protection unless it is used for identification purposes.

Whether the voice and speech are considered to be personal data plays a crucial role in the processing and in compliance with the data-protection rules. There is commonality between the European and the Russian approach to personal data and the categories thereof in that technology companies are required to treat information such as voiceprints, health information, and other subject data as personal data and to comply with domestic data-protection regulations on that basis. In the following section, the two regulation systems are analysed and compared. The voice and speech are examined as both non-sensitive, general personal data and personal data belonging to a special category of personal data (biometric data or data pertaining to health).

⁸¹ Even in early jurisprudence of the European Court of Justice, 'health-related data' is accorded extensive scope. For instance, the European Court of Justice has found that 'reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health'. Case C-101/01, criminal proceedings against Bodil Lindqvist (6 November 2003). <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1521039149443&uri=CELEX:62001CJ0101> (accessed 13 April 2020).

⁸² See Article 4(15) of the General Data Protection Regulation (n 16).

⁸³ Article 1 of the General Data Protection Regulation (*ibid*).

⁸⁴ Per Recital 51 to the General Data Protection Regulation (*ibid*).

⁸⁵ In contrast against the General Data Protection Regulation, the Russian data-protection legislation presumes only one entity processing data, the 'operator', while under the GDPR there are both a 'controller' and a 'processor'. The definition of 'operator' more closely matches the 'controller' definition under the GDPR. This difference is described further on in the paper, in Section 4, which deals with requirements for processing of speech and voice.

⁸⁶ Federal Law 'On Personal Data' N 152-FZ (n 19) art 11.

⁸⁷ 'Explanations on the Issues of assigning Photo, Video, [and] Fingerprint Data and Other Information to Biometric Personal Data and the Features of Their Processing' issued by the *Roskomnadzor* on 30 August 2013. Available in Russian at: <https://pd.rkn.gov.ru/press-service/subject1/news2729/> (accessed 13 April 2020).

3. The applicability of EU and Russian data-protection legislation

The literature emphasises that the right to data protection is a response to technological developments.^{*88} The ease of accessing huge volumes of data is rapidly increasing apace with cross-border data flows driven by advances in developments of information and communication technologies and a shift toward a digital economy.^{*89} This forces entrepreneurs to comply with the data-protection laws of all countries where their products and services are offered. For example, the social network LinkedIn was banned and now could not be accessed from the territory of Russia because it was in breach of the Russian data-localisation requirement^{*90}, discussed below – at that time, there was no LinkedIn Corporation legal entity in Russian territory (e.g., branches or representatives' offices).

This section addresses the question of when the EU and the Russian data-protection laws are applicable. The applicability of such laws depends on their territorial and material scope. Let us consider European law first. It defines protection of personal data as a fundamental human right^{*91}, without any limitation based on nationality or residence.^{*92} The GDPR has extraterritorial character and applies both to entities established in the EU and to entities offering goods and services or monitoring data subjects there.^{*93} The latter refers to targeting the EU market (i.e., the data subject is within EU territory).^{*94} The indicator of targeting the EU market is the use of a language or currency of at least one of the EU member states.^{*95}

In practical terms, the extraterritorial effect creates an obligation to comply with the GDPR's requirements. Entities not established in the EU must designate a representative of their operations targeting EU territory.^{*96}

In contrast, Russian data-protection law does not have extraterritorial effect. It is not applicable to non-residents processing personal data of Russian citizens abroad. There are two exceptions, however. The first involves a 'data-localisation requirement', and the second is related to the implementation of the Yarovaya package law.

The localisation requirement for Russian citizens' personal data was introduced to Russian data-protection law by a federal law dated 27 April 2017 (242-FZ).^{*97} The amendment added a new obligation for data-processing operators: their collection, storage, and use of personal data of Russian citizens must involve only databases on Russian territory.^{*98}

This rule mandating local handling of Russian citizens' data must be complied with where the following conditions are met: 1) the information contains **personal data**; 2) personal data are **collected**, meaning the data-processing operator having received the data from third parties; 3) the data are **processed**, or their processing is organised by the operator; and the personal data pertain to **Russian citizens**.^{*99}

The restriction of Russia's data protection to Russian citizens creates problems – for instance, how to determine the citizenship of a person who speaks to a voice assistant or how to detect that the voiceprint

^{*88} Hielke Hijmans, *The European Union As Guardian of Internet Privacy: The Story of Art 16 TFEU* (Law, Governance and Technology Series, Pompeu Casanovas and Giovanni Sartor (eds) vol 31, Springer 2016) 48. DOI: <https://doi.org/10.1007/978-3-319-34090-6>.

^{*89} Fabian Hungerland, Jörn Quitzau, Christopher Zuber, Lars Ehrlich, Christian Growitsch, Marie-Christin Rische, Friso Schlitte, and Hans-Joachim Haß, *The Digital Economy* (Strategy 2030 – Wealth and Life in the Next Generation series no 21e 2015).

^{*90} Case law includes: *LinkedIn Corporation v Roscomnadzor* 02-3491/2016. See the decision of the Tagansky District Court (Moscow, Russia) dated 4 August 2016 and the appeals determination of the Moscow City Court, dated 10 November 2016, on case N 33-38783 / 2016 <https://mos-gorsud.ru/mgs/cases/docs/content/c364d1d9-e30c-4ffa-aabb-327c8977adab> (accessed 13 April 2020).

^{*91} Per Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (n 14).

^{*92} Recital 2 to the General Data Protection Regulation (n 16).

^{*93} See Article 3 of the General Data Protection Regulation (*ibid*).

^{*94} See Article 3 (2) of the General Data Protection Regulation (*ibid*).

^{*95} Recital 23 to the General Data Protection Regulation (*ibid*).

^{*96} Recital 80 to the General Data Protection Regulation (*ibid*).

^{*97} Federal Law 'On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Clarification of the Procedure for Processing Personal Data in Information and Telecommunication Networks' N 242-FZ (n 23).

^{*98} Federal Law 'On Personal Data' N 152-FZ (n 19) art 18 (5).

^{*99} Alexander Savelyev, 'Russia's New Personal Data Localization Regulations: A Step Forward or a Self-Imposed Sanction?' (2016) 32.1 *Computer Law & Security Review* 128. DOI: <https://doi.org/10.1016/j.clsr.2015.12.003>.

being processed belongs to a Russian citizen. The Russian data-protection authority (the *Roskomnadzor*) attempted to solve the problem by issuing an official opinion.^{*100} In that opinion, the authority replaced the term ‘citizenship’ with a reference to the territory. According to the opinion, in the event of doubts about the data subject’s citizenship, all information collected and proceeded within the limits of Russian territory must be ‘localised’ to databases located in Russia.^{*101} Applying this principle solves the problem of identification of citizenship. However, it leaves out Russian citizens’ personal data collected outside Russian territory.

The application of Russia’s data-localisation rule poses a significant hurdle for companies. The above-mentioned LinkedIn case is an excellent example, and it is far from the only one. Recently, the *Roskomnadzor* initiated review proceedings to determine the level of compliance with the data-localisation rule shown by the Facebook group of companies.^{*102}

The second exception with regard to the nationally bounded character of Russian data-protection law is found under the Yarovaya package law. This law is not directly connected to data protection, and its material scope differs from that of the Russian federal law ‘On Personal Data’ and of the GDPR. The Yarovaya package law mostly concerns the public sector (public safety and national security). To some extent, it resembles the EU’s Data Protection Police Directive.^{*103} Since the Yarovaya package law creates new obligations related to the storage and processing of data, its applicability is analysed below.

The Yarovaya package law is a legislation package consisting of two federal laws that introduce amendments to the acts on combating terrorism. The law obliges the providers of telecommunication services and those organising information’s dissemination to store the relevant Internet traffic data (text and voice messages, sounds, photos, videos, and files’ metadata) for six months to three years.^{*104}

The first issue that arises is that of the ‘organiser of information dissemination’ concept. The legal definition provided^{*105} is too broad and could be taken to refer to virtually every Web page that interacts with a user (e.g., using cookies). Neither does the definition have a national restriction, and it could be considered to cover the Internet giants’ companies, messaging services, blog-hosting platforms and owners of blogs that are hosted on such platforms, the owners and ‘tenants’ of domain names, etc. This legal uncertainty of the definition creates a legal risk for any companies that have a connection with the Russian market that might be covered by the description ‘organiser of information dissemination’. That risk leads to the necessity of complying with the legal provisions cited above.

Compliance of communication service providers and organisers of information dissemination with the requirements of the Yarovaya package law could force companies into breaching other obligations – for instance, under their contracts (confidentiality obligations etc.), national legislation (e.g., the various national acts implemented in transposition of Directive (EU) 2016/680), and the GDPR’s rules. One of the most significant examples of the far-reaching effects of the Yarovaya package law is the *Telegram* case^{*106}, involving blocking of services within Russian territory.^{*107}

A summary of the framework provided above is presented in Table 1.

¹⁰⁰ Letter issued by *Roskomnadzor* N 08АП-3572, dated 19 January 2015.

¹⁰¹ See page 5 of the letter of the *Roskomnadzor* (*ibid*).

¹⁰² ‘Роскомнадзор направил в Facebook запрос об исполнении российского законодательства’ (Roskomnadzor Sent a Request to Facebook on the Implementation of Russian Legislation) (12 April 2020). <http://www.interfax.ru/russia/608271> (accessed 13 April 2020).

¹⁰³ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

¹⁰⁴ A similar issue was addressed by the European Court of Justice in the context of the directive on privacy and electronic communications (2002/58/EC; 2009/136/EC). The Court found that the directive ‘must be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union’. Joined Cases C-203/15 and C-698/15, 21 December 2016. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1537508719221&uri=CELEX:62015CJ0203> (accessed 13 April 2020).

¹⁰⁵ Article 10.1 of Federal Law ‘On Information, Information Technologies and Protection of Information’ N 149-FZ (n 20).

¹⁰⁶ For case law, see: Tagansky District Court (Moscow, Russia) 02-1779/2018. <https://mos-gorsud.ru/rs/taganskij/cases/docs/content/03a478c6-798c-4769-80eb-83d4d0a33b34> (accessed 13 April 2020).

¹⁰⁷ Neil MacFarquhar, ‘Russian Court Bans Telegram App after 18-Minute Hearing’ *The New York Times* (13 April 2018). <https://www.nytimes.com/2018/04/13/world/europe/russia-telegram-encryption.html> (accessed 18 June 2020).

Table 1: Summary framework

Application of EU and Russian data-protection legislation			
	European data-protection regulation	Russian data-protection regulation	
Sources	<ul style="list-style-type: none"> The General Data Protection Regulation (GDPR) 	<ul style="list-style-type: none"> Federal Law 'On Personal Data' Federal Law 'On Information, Information Technologies and Information Protection' The Yarovaya package law 	
Extraterritorial effect?	Yes	Only per the data-localisation rule and the Yarovaya package law	
Applicability	<ul style="list-style-type: none"> EU companies Non-EU companies with business activities within EU territory (targeting/monitoring activity) 	Data-localisation rule	Yarovaya package law
		<ul style="list-style-type: none"> The data subject as a Russian citizen Processing performed within Russian territory 	<ul style="list-style-type: none"> The provider of communication services The organiser of the information dissemination
Specified connection with citizenship?	No	Yes	Neutral / not addressed – citizenship-agnostic definitions

One of the primary data-protection problems encountered in the development of language technologies is related to cloud computing and cross-border data flows. For instance, most voice assistants provide their services by means of cloud computing. Speech-recognition systems too are often built in a manner using cloud services, with Yandex SpeechKit being one example. The main problem currently plaguing the organisation of cross-border data flows between European countries and Russia is legal complication, involving friction among the GDPR, the Russian localisation requirement, and the requirements of the Yarovaya package law. To address the data-localisation rule, the *Roskomnadzor* published a letter aimed at tackling the problems wrought by that rule with regard to cross-border data flows. According to that letter, data of Russian citizens (or, in cases of any doubts about the citizenship of the data subject, data collected within Russian territory) should be initially collected and stored in databases that are physically on Russian territory, after which the material may be copied and transferred to databases situated in other countries.^{*108} This leaves several questions, and, at the same time, the legal risk related to rules set forth in the Yarovaya package law are not solved. These various issues could negatively affect further co-operation between European countries and Russia.

4. The principles and rules for voice- and speech-processing

Since voice and speech are protected as personal data, their use (processing) is subject to several requirements. European and Russian jurisdiction both define data-processing in a broad manner, such that it covers virtually all activities performed with the given personal data. For instance, European and Russian data-protection regulations alike provide that the processing involves such operations with data as are

¹⁰⁸ Letter of *Roskomnadzor* (n 100).

carried out by either automatic or non-automatic means and involve such activities as collecting, recording, structuring, storing, using, and transmitting.^{*109}

There are usually several parties involved in the processing of data in practice. The Russian and European data-protection scheme differ in how they articulate the identity of the parties performing data-processing activities. Russia's data-protection regulation defines only one body (the 'operator') in this regard that may perform data-processing activities. With its notion of the operator, Russian data-protection legislation refers to the body – defined as a legal person, natural person, or national/local government authority – performing the data's processing and determining the scope, means, and purposes for data-processing.^{*110} According to the GDPR, meanwhile, there are two parties involved in data-processing activities (these parties may be represented by a single body): the 'processor' and the 'controller'. The processor is responsible for the technical part of the data-processing and performs the processing on behalf of the data controller.^{*111} The data controller determines the means and purposes for processing the data. In comparison with the Russian data-protection regulation scheme, the operator is most similar in definition to 'controller'.

Russian law does not define the processor – the person who technically processes the data. However, under Russia's data-protection regulatory structure, the operator has a right to delegate the data-processing to a third party.^{*112} Thereby, the Russian legal approach includes functions of the processor in the legal concept of the third party.

Internationally, the fundamental principles for data-processing are set forth in Article 5 of Convention 108^{*113} and reflected in both Article 5 of the GDPR and Article 5 of Russia's federal law 'On Personal Data'. According to Article 5 of the convention, the personal data shall be lawfully obtained and processed,^{*114} fairness is required,^{*115} processing must be limited in line with the purposes for which the data were stored, the data must be relevant and accurate, and the data shall be kept in a form that permits identifying the data subject for no longer than the purposes for the data's storage necessitate.^{*116} These are the fundamental principles that guarantee a certain minimum level of protection in the data-processing. The GDPR complements the list with the accountability principle. This principle for data-processing was developed by the Organisation for Economic Co-operation and Development (OECD). Under it, the data controller too is obliged to comply with the principles mentioned above.^{*117} Neither Russian data-protection regulation nor Convention 108 highlights the latter principle.

These fundamental principles for data protection lay the groundwork for the rules on data-processing. The rules developed on their basis can be divided into three groups: those regarding lawful, secure, and transparent processing. Both jurisdictions' rules are discussed in terms of this classification below. Also, voice and speech can be either sensitive data (by virtue of falling into special categories of personal data) or non-sensitive, so the regulatory framework for processing should be investigated with regard to both of these categories as well.

Firstly, the principle of lawfulness of the processing means that the processing should be done in strict compliance with the law and that appropriate legal grounds for such processing must exist.

Under the GDPR, non-sensitive data are lawfully processed if one of the following grounds exists: 1) the data subject's consent, 2) performance of a contract, 3) compliance with a legal obligation, 4) protection of

¹⁰⁹ The full list of the operations that are considered to be data-processing is set forth (for the European approach) in Article 4(2) of the General Data Protection Regulation (n 16) and (for the Russian approach) in Article 3(3) Federal Law 'On Personal Data' N 152-FZ (n 19).

¹¹⁰ Article 3 (2) of Federal Law 'On Personal Data' N 152-FZ (n 19).

¹¹¹ See Article 4(8) of the General Data Protection Regulation (n 16).

¹¹² Federal Law 'On Personal Data' N 152-FZ (n 19) art 6 (3).

¹¹³ Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS No.108 (n 15) art 5.

¹¹⁴ See both Article 5(a) and Article 5(b) of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (*ibid*). For case law, see the ECtHR's: *Rotaru v Romania* [GC], 28341/95 04 May 2000; *Taylor-Sabori v The United Kingdom* 47114/99 22 October 2002; *Peck v The United Kingdom* 44647/98 28 January 2003; *Khelili v Sweden* 16188/07. See also the CJEU case: *Huber v Germany* C-524-06 16 December 2008.

¹¹⁵ See Article 5(a) of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS No.108 (n 15). For relevant case law, consult: the ECtHR's: *Haralambie v Romania* 21737/03 29 October 2009; *K.H. and Others v Slovakia* 32881/04 28 April 2009.

¹¹⁶ See Article 5 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (*ibid*).

¹¹⁷ Governance per Article 14 of the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (2013).

vital interests, 5) performance of a task carried out in the public interest, and 6) processing for purposes of pursuing legitimate interests.^{*118}

Russian law provides for additional grounds for processing of non-sensitive data. For instance, non-sensitive data may be lawfully processed for purposes of statistics (the Russian data-protection regulations consider this to constitute separate and independent grounds for data-processing)^{*119} or if the processing is performed to fulfil non-mandatory terms of the law with regard to information disclosure and so forth.^{*120}

In general terms, the GDPR prohibits the processing of special categories of personal data (e.g., biometric and health data).^{*121} However, there are the following exceptional cases in which processing is allowed: those of 1) explicit consent; 2) fulfilling one's obligations and exercising specific rights; 3) protection of vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent; 4) performing legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects; 5) processing related to personal data that are manifestly made public by the data subject; 6) processing necessary for the establishment, exercise, or defence of legal claims; 7) processing necessary for reasons of substantial public interest; 8) processing necessary for purposes of preventive or occupational medicine; 9) what is necessary for the public interest in the sphere of public health; 10) and processing necessary for purposes of archiving in the public interest, for scientific or historical research purposes, or for statistical purposes.^{*122}

Russian data-protection law takes a different approach to sensitive and biometric data, so the rules for processing of voice and speech depend on how relevant the terms related to health or biometric data are. In cases wherein the voice and speech involve health data, the regulation of the data-processing is similar to that under GDPR rules. The general rule is to prohibit processing of this type of data.^{*123} In contrast, Russia's data-protection law does not restrict the processing of biometric data as a special category of personal data. Instead, there is a requirement that processing be done only after receipt of the data subject's consent.^{*124}

For the development of language technologies, the most relevant grounds are the data subject's consent and legitimate interest.

As for the second group of data-processing rules, referring to security, under the European approach, the implementation of the relevant measures is an obligation of the data processor and controller. The Russian approach presumes that the operator implements these measures. Security measures can be divided into two main groups: technical and organisational measures. Implicit to the European approach is that appropriate security measures should be implemented by design^{*125} and should be applied by default.^{*126} The GDPR provides a list of the technical measures that should be applied in the data-processing.^{*127} For instance, among these measures are pseudonymisation and encryption of the personal data and measures to ensure the confidentiality, integrity, and availability of the data. The security requirements set forth under the GDPR follow the ISO 27001 standard.^{*128} Organisational measures, in turn, are measures that can be implemented within the company with regard to the employees, other workers, etc. These include provision of information about data-security rules, clarifying these individuals' responsibilities and duties

¹¹⁸ See Article 6 of the General Data Protection Regulation (n 16).

¹¹⁹ See Article 6(1-9) of Federal Law 'On Personal Data' N 152-FZ (n 19).

¹²⁰ *Ibid*, art 6(1-11).

¹²¹ General Data Protection Regulation (n 16) art 9(1).

¹²² *Ibid*, art 9(2).

¹²³ See Article 1 of Federal Law 'On Personal Data' N 152-FZ (n 19). This provides a list of the exceptions to the general rule set forth in Article 10(2) of 'On Personal Data'.

¹²⁴ This is addressed by Article 11 of Federal Law 'On Personal Data' N 152-FZ (*ibid*).

¹²⁵ The relevant technical and organisational measures should be integrated into the data-processing process.

¹²⁶ See both Article 25(1) and Article 25(2) of the General Data Protection Regulation (n 16).

¹²⁷ Per Article 32 of the General Data Protection Regulation (*ibid*).

¹²⁸ See the ISO/IEC 27000 family – Information Security Management Systems: <https://www.iso.org/isoiec-27001-information-security.html> (accessed 13 April 2020).

with regard to data protection.^{*129} The Russian approach too presumes that data-processing should employ both technical and organisational safeguards for security^{*130}; however, the law 'On Personal Data' makes only general provisions for required security measures.

The last group of rules, that related to transparency of processing, deals with the data subject's right to understand the essence of any automated processing of personal data, the main purposes of that processing, and the identity and habitual residence or place of business of the controller of the data-processing.^{*131}

The principles and rules for the data-processing are the basis that should be taken into consideration by those companies conducting business activities in Russian or European territory. Compliance with these data-processing rules demands awareness of the scope of the data subject's legal rights with regard to data protection. These rights are not absolute, and they need to be balanced with the other fundamental rights, such as freedom of expression, freedom of thought, freedom of expression and of information, religious freedom, and linguistic diversity.^{*132} The right to linguistic diversity may play an especially significant role in the further development of language technologies and use of voice and speech in their development.

5. Conclusions

With regard to the field of development of LTs, the European and the Russian stance to data protection are quite close in approach but at the same time very far apart. The above analysis of European and Russian legislation shows that these jurisdictions apply similar international legal grounds and follow the same internationally recognised data-protection principles; however, the data-protection regulations are not fully harmonised between the two. For instance, the EU and Russia identify different subjects of data-processing and different scope of obligation for such subjects. Moreover, the EU and the Russian data-protection regulation scheme diverge with regard to the importance of the citizenship of the data subject and differ in the nature of their international application (most importantly, as a general rule, Russia's data-protection legislation does not have extraterritorial effect).

Examination of the relevant laws showed that voice and speech are considered personal data in both jurisdictions. Therefore, there is a need to follow data-protection laws in this connection.

The human voice can be personal data, or it can belong to special categories of personal data. Which rules are applicable depends on such factors as the type of personal data involved (does voice fall under special categories of personal data?), the form of data storage (is the material anonymised or not?), the place where the data-processing takes place, particular circumstances, and the purpose of the processing. Moreover, in some cases, the applicability of the law depends on the citizenship of the data subject and the territorial focus of the processing activities.

The differences and conflicting legal norms between these jurisdictions create legal obstacles to co-operation extending between the two. The reality is that entities involved with language technologies targeted at both EU and Russian territory must simultaneously comply with the regulation systems of both jurisdictions – which are not compatible with each other. This creates a situation wherein a company needs to choose which regulation has to be breached for the sake of other compliance. Therefore, clear grounds exist for further research and investigation aimed at identifying a possible solution that might solve the problem of conflicting norms.

¹²⁹ ECtHR: *I. v Finland* No. 20511/03 17.07.2008.

¹³⁰ Federal Law 'On Personal Data' N 152-FZ (n 19) art 19.

¹³¹ Article 8(a) of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, ETS No.108 (n 15).

¹³² Per Recital 23 to the General Data Protection Regulation (n 16).



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The Yukos Arbitration Saga and Russia's Constitutional Amendments*

I. Introduction

On 24 February 2020, a Dutch appeals court^{*1} ruled that the Russian state owed shareholders in the company Yukos 50 billion US dollars, one of the largest sums ever awarded, for having bankrupted the company by means of tax-fraud charges. This judgement had been awaited by the international community since the District Court of The Hague ruled in Russia's favour, thereby overturning the arbitral award by the Permanent Court of Arbitration (PCA).^{*2} In its judgement, the Court of Appeal of The Hague rejected the district court's argument pertaining to provisional application of the arbitration clause of the Energy Charter Treaty (ECT)^{*3}, including its other arguments addressing tax and investment issues.^{*4} This international legal battle had been played out not only in front of the above-mentioned courts but also before the European Court of Human Rights (ECtHR)^{*5} and various national courts of several countries, among them the United States,^{*6} Belgium^{*7}, and France.^{*8}

The case of Yukos is illustrative of that part of recent Russian history in which extensive privatisation of Russian assets took place, starting in the early 1990s and coming to an end when Vladimir Putin became

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1 The Hague Court of Appeal, on 18 February 2020. See: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2020:234>.

2 The PCA case: *Yukos Universal Limited (Isle of Man) v The Russian Federation* [2014] 2005-04/AA227. <https://pca-cpa.org/en/cases/61/>.

3 See the material on the Energy Charter Treaty, of 17 December 1994, at: <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>, especially with regard to Article 45 (1).

4 The Hague Court of Appeal (n 1).

5 *OAo Neftyanaya Kompaniya Yukos v Russia*, application 14902/04 (ECHR, 20 September 2011).

6 *Richard Allen et al., Plaintiffs v Russian Federation et al., Defendants*, United States District Court for the District of Columbia, Civil Action 05-2077 (CKK), Memorandum Opinion of 26 November 2007. https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2077-74.

7 'Tribunal de premier instance francophone de Bruxelles, section civile – 15/8181/A, 8 June 2017, jugement'. https://globalarbitrationreview.com/digital_assets/200397ed-8b57-40c6-b712-62cecc43d4bf/2017-06-08---Jugement-saisie-arret.pdf.

8 'Tribunal de Grande Instance à Paris, 1 December 2014, no 14/03742; Cour d'Appel de Paris, pôle 1 chambre 1, RG 15/1166, Ordonnance sur l'incident devant le magistrat chargé de la mise en charge'. <https://www.italaw.com/sites/default/files/case-documents/italaw7455.pdf>. For further reading, see: Karol Bucki and Flore Poloni, 'The Yukos Case: Former Shareholders Lose Their Legal Battle in France But Continue the War' (4 December 2017). <https://www.august-debouzy.com/en/blog/1092-the-yukos-case-former-shareholders-lose-their-legal-battle-in-france-but-continue-the-war>.

the president of the Russian Federation, in 2000. When the former owner of Yukos, Mikhail Khodorkovsky, started to be politically active in Russia, the shareholders in Yukos were charged with fraud and tax evasion. With Yukos's declaration of bankruptcy, the Russian government transferred its assets to government-owned companies.⁹

During the arbitration process, the terms of the Energy Charter Treaty¹⁰ formed the basis for the award: the former Yukos shareholders had invoked their foreign-investment rights. Although the Russian Federation objected to the jurisdiction of the PCA¹¹, that court confirmed its jurisdiction and issued the award nevertheless.¹² After the Hague District Court then annulled the Yukos-connected arbitral award in line with Russian argumentation, that judgement was reversed by the above-mentioned Hague Court of Appeal¹³, so one can presume that Russia will now file a complaint against the appeals court's judgement with the Supreme Court of the Netherlands.

One key question in the legal disputes pertains to the ECT's provisional-application clause¹⁴, whereby an even broader question is raised – that of Russia's attitude toward international law and tribunals.

This article discusses whether non-enforcement of the arbitral award on the Russian government's part would be justified by Article 15 (1) of the Russian Constitution and what impact the currently planned amendments to the Russian Constitution might have with regard to international treaties and decisions of international bodies.

The first part of the paper deals with the *Yukos* case and lays out its most important facts, after which the ECT and its key function in the case will be examined. The impact of Russia's constitutional reform – in particular, the proposed amendments with regard to international law – and its possible effects on the ultimate disposition of the *Yukos* case will be considered in the last part of the paper.

II. The *Yukos* case

With the collapse of the Soviet Union, in 1991, Russia was left struggling economically. To ensure that it would remain capable of servicing foreign debts, the Russian government made the decision to sell off state companies in parts or in their entirety in 'loans for shares' auctions.¹⁵ This led to several years of seemingly endless privatisation, which came to an end when Putin took office as President of the Russian Federation. Before 2000, however, the privatisation process saw Mikhail Khodorkovsky, then the owner of Menatep Bank, acquire Yukos. For purposes of promoting economic growth in poorer regions, Russia initiated a system of low-tax regions in the 1990s, under which some local authorities could either partially or completely exempt corporations in their area from corporate-profit tax.¹⁶ It was then that Yukos relocated to regions in Central Russia and Siberia and, later, started to sell the oil that it was extracting at a low price to its own trading companies. Those companies, in turn, resold the oil at market prices abroad.¹⁷ As the Russian Federation mentioned in the course of the arbitral proceedings,¹⁸ Yukos sold the oil from sham shell to sham shell for higher profits but profited from low tax rates on these sales, resulting from the location in which the trading companies had been registered.

These actions prompted the Russian Federation to accuse Yukos of tax avoidance that led to a loss of billions of dollars in Russian corporate-profit tax from 1999 to 2004. With its huge profits, the company had increased in size and by 2002 become one of the world's biggest oil companies. When Khodorkovsky

⁹ This laid foundations for the PCA case: *Yukos Universal Limited (Isle of Man) v The Russian Federation* (n 2).

¹⁰ The Energy Charter Treaty (n 3).

¹¹ See Russia's defence on appeal before the Court of Appeal in The Hague, dated 28 November 2017, at: <https://www.italaw.com/sites/default/files/case-documents/italaw9634.pdf>.

¹² PCA, *Yukos Universal Limited (Isle of Man) v The Russian Federation* (n 2).

¹³ *Ibid*; The Hague Court of Appeal (n 1).

¹⁴ Energy Charter Treaty (n 3) art 45 (1).

¹⁵ Stefan Hedlund, *Russia's 'Market' Economy: A Bad Case of Predatory Capitalism* (Routledge 1999) 189–224. DOI: <https://doi.org/10.4324/9780203495438>.

¹⁶ Olivier Marquais, 'Overview of the Yukos Arbitration, International Arbitration Information' *International Arbitration Attorney* (19 June 2015). <https://www.international-arbitration-attorney.com/overview-of-the-yukos-arbitration/> (accessed 27 April 2020).

¹⁷ *Ibid*.

¹⁸ PCA, 227, Final Award, para 76. <https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>.

entered merger talks with Sibneft in 2003, the proposed transaction could have made it into Russia's largest company. After merger negotiations with ExxonMobil and ChevronTexaco began, and with further growth of Khodorkovsky's political influence, the Russian government felt threatened, and Khodorkovsky was arrested on charges of fraud and tax evasion.^{*19}

The huge success of Yukos put the company in the spotlight. Consequently, it was perceived as one of the symbols of the privatisation of Russian industry after the dissolution of the Soviet Union, and of oligarchs enriching themselves.

Although the PCA found that Yukos had, in some respects, abused the legislation in force, it decided that the Russian Federation's reaction was far worse, in that the state 'launch[ed] a full assault on Yukos [...] in order to bankrupt Yukos and appropriate its assets while, at the same time, removing Khodorkovsky from the political arena'.^{*20}

Three shareholders together owned about 70% of Yukos and separately made three arbitration filings against the Russian Federation in early 2005 (Hulley Enterprises Limited owned 56.3%, Yukos Universal Limited 2.6%, and Veteran Petroleum Limited 11.6% of Yukos Oil Company). Accordingly, three separate arbitral awards were issued, on 18 July 2014.^{*21}

1. The process of Yukos's expropriation

The arbitral tribunal found that Russia took the following steps^{*22} to expropriate the assets of Yukos. In its first action in this regard, Russia brought criminal proceedings against Yukos, which paralysed the company, and accused its directors chosen by the shareholders in Yukos Oil Company of fraud, tax evasion, and embezzlement. Next, the Russian government carried out interrogations, searches, and seizures. A further step involved a series of tax re-evaluations carried out by the Russian authorities. After those produced revisions, the tax authorities determined that Yukos owed 24 billion USD in taxes by 2006, which Yukos was not prepared to pay in such a short amount of time. The PCA's final conclusion was that 'the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets'.^{*23} In the last step, the government seized all shares in the company and sold them off to pay the tax amounts determined for Yukos. Those shares were sold off to a sham entity that later came into the ownership of Rosneft.^{*24} The tribunal noted in its award decision that this action led to the destruction of Yukos and that the assets had been sold solely to benefit the Russian state and the state-owned companies Rosneft and Gazprom.^{*25}

Finally, in November 2007, Yukos ceased to exist as a company.

2. The arbitration proceedings

The proceedings of the tribunal, which was composed of Charles Poncet, appointed by the claimant; Stephen Schwebel, appointed by the respondent; and Yves Fortier, appointed by the Permanent Court of Arbitration, were conducted under the UNCITRAL Arbitration Rules and were supervised by the PCA in The Hague. Importantly, the claims were based on the ECT. Since Article 26 of the treaty contains the terms for arbitration, investors from a particular contracting state were given the opportunity to sue either in the national courts or through arbitration.

The shareholders claimed that the measures taken by the Russian Federation had led to expropriation under article 13 of the ECT. The tribunal agreed and, therefore, stated that it did not have to decide whether Article 10's terms specifying fair and equitable treatment had been violated in addition.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Martin Dietrich Brauch, 'Yukos v. Russia: Issues and Legal Reasoning behind US\$50 Billion Awards' International Institute for Sustainable Development, *Investment Treaty News* (September 2014). https://www.iisd.org/itn/wp-content/uploads/2014/09/iisd_itn_yukos_sept_2014_1.pdf (accessed 27 April 2020).

²² PCA (n 1) 8.

²³ *Ibid.*, para 757.

²⁴ *Ibid.*, para 1038.

²⁵ *Ibid.*, para 1180.

III. The ECT and Yukos

The ECT is an energy-sector-specific multilateral treaty designed to encourage long-term co-operation with post-Soviet states in activities in the energy sector. The idea was to establish common goals for an open energy market, securing and diversifying the energy supply and stimulating cross-border investment and trade in the energy sector.^{*26} To that end, the ECT provided for a broad scope of protection for investments.^{*27}

1. Application of the ECT

One important feature of the ECT is that it allows for provisional application of the treaty by a signatory, pending formal domestic ratification by that signatory. As a signatory that had not expressly indicated an inability to apply the ECT provisionally, Russia was obliged to comply with its terms prior to ratification by the Russian State Duma, 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations' in the wording of the treaty.^{*28}

The provisional application of the treaty was judged by the PCA to be consistent with the Russian Constitution^{*29}, and the court of arbitration decided that the ECT's provisional-application clause was in accordance with the rules of the Vienna Convention on the Law of Treaties (VCLT).

Article 45(1) of the ECT^{*30} provides that each signatory agrees to apply the ECT provisionally with ratification pending, again 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'.^{*31} Nevertheless, there is an ambiguity with Article 45 (2), arising from the fact that it was designed to allow a signatory nation to reject provisional application explicitly, whereupon it may excuse itself from the obligation of provisional application under Article 45 (1). Still, the Russian Federation did not invoke Article 45 (2–3), which give a signatory the right to terminate provisional application of the treaty at any time upon that signatory state's submission of written notification of its desire not to become a party to the treaty.

In the arbitration proceedings, Russia stressed that it had not ratified the ECT since doing so would have a direct effect on Russian law. Additionally, Russia stated that its public law would not allow arbitration of public matters, which include taxation and bankruptcy just as much as energy disputes. This led to the consequence that a position was maintained in Russia that the arbitration clause of the ECT could not be applied.^{*32} In this regard, Russia completely ruled out provisional application of arbitration to matters of Russian public law for reason that such arbitration would be contrary to the Russian Constitution and the state's laws and regulations. Russia deemed Article 45 (1) an attempt by international law to influence national law and politics in the field of energy investment and national resources, which would be a threat to Russia's sovereignty.^{*33}

²⁶ Energy Charter Treaty (n 3).

²⁷ *Ibid*, art 1.

²⁸ Energy Charter Treaty (n 3) art 45 (1); Alex M Niebruegge, 'Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law' (2007) 8 *Chi. J. Int'l L.* 355.

²⁹ PCA (n 1) 8, paras 314–15.

³⁰ Article 3 of the Energy Treaty Charter (see Note 3) reads: '1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations. (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository. (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1). (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations. (3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatories written notification is received by the Depository.(...)'

³¹ Energy Charter Treaty (n 3) art 45 (1).

³² Halil Rahman Basaran, 'What To Make of the Yukos v. Russia Dispute?' (2019) 22(1) *Gonzaga Journal of International Law* 10869, 2.

³³ *Ibid*.

Nevertheless, the arbitral tribunal decided that the Russian Federation must accept an 'all or nothing' approach to provisional application since by signing the treaty Russia had agreed to apply it as a whole.^{*34} Furthermore, the tribunal concluded that provisional application is not in conflict with Russian law and that Russia was, in fact, subject to provisional application of 45 other treaties at the time of the arbitration.^{*35} In accordance with the principle of good faith, states may only remove inconsistencies, not introduce new ones.

The tribunal's conclusions reiterated that the award underscores the principles of the VCLT and emphasises the *pacta sunt servanda*^{*36} principle.

The predominant view in Russia is that investor–state disputes are not matters of public law but private-law disputes.^{*37} Russian lawyers argued before the Dutch appeals court that the parts of the ECT providing for arbitration did not apply and that the PCA had no jurisdiction. However, the PCA ruled that it did, because 'such provisional application' refers to application of a treaty as a whole, including the parts about arbitration.^{*38}

2. Possible need for modernisation of the ECT

In 2009, the Russian Federation not only decided to terminate provisional application of the ECT^{*39} but also stated its intention of not becoming a contracting party to the ECT and thus not ratifying it. Nevertheless, Russia put forward its 'Conceptual Approach' in the same year to demonstrate its discontentment with the existing frameworks for bilateral and multilateral co-operation.^{*40} In a document titled 'Roadmap for EU–Russia Energy Cooperation until 2015'^{*41}, Russia pronounced its interest with regard to energy goals shared between the EU and Russia in the form of a multilateral agreement.

Questions regarding regulation of transit are crucial for Russia and in the context of the ECT could make the Energy Charter Treaty interesting to the country again.^{*42} According to the Heritage Foundation,^{*43} a conservative think-tank in the USA, levels of property-rights protection remain low there (although there has been a slight improvement over the years) and this is one more reason for Russia to reconsider ratification of the ECT – doing so could attract investment to the Russian energy industry.^{*44}

In 2019, the Council of the European Union mandated that the European Commission start negotiations for modernisation of the ECT.^{*45} The intention behind this is not only to include additional protection measures aimed at sustainable development and addressing climate issues but also to clarify and modernise the standards of investment protection applied, especially mechanisms for resolution of investor–state disputes. This should improve legal certainty and lead to stronger investment protection.^{*46} More

³⁴ *Yukos Universal Ltd. v Russian Federation* (n 2) para 301.

³⁵ *Ibid*, paras 330–37.

³⁶ *Ibid*, paras 312–15.

³⁷ See: Lauri Mälksoo, *Russian Approaches to International Law* (OUP 2015) 127. DOI: <https://doi.org/10.1093/acprof:oso/9780198723042.001.0001>.

³⁸ This is addressed in the PCA's *Yukos Universal Limited (Isle of Man) v The Russian Federation* (n 2); for further reading, consult: Johannes Fahrer, 'A New Hope for the Yukos Shareholders – PCA Awards Revived by the Hague Court of Appeal' *EJIL: Talk!* (4 March 2020). <https://www.ejiltalk.org/a-new-hope-for-the-yukos-shareholders-pca-awards-revived-by-the-hague-court-of-appeal/> (accessed 28 April 2020).

³⁹ Decree of the Government of the Russian Federation 1055-p, of 30 July 2009.

⁴⁰ 'Conceptual Approach to the New Legal Framework for Energy Cooperation' (21 April 2009) per material in Russian at: <http://www.kremlin.ru/supplement/258>.

⁴¹ Russian Federation, 'Roadmap for EU–Russia Energy Cooperation until 2015' (March 2013) per Russian-language material at: https://russiaeu.ru/sites/default/files/user/Roadmap%20Russia-EU%20Energy%20Cooperation%20until%202050_Rus.pdf.

⁴² Irina Pominova, 'Risks and Benefits for the Russian Federation from Participating in the Energy Charter: Comprehensive Analysis' (Energy Charter Secretariat Knowledge Centre 2014). https://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/Russia_and_the_ECT_en.pdf.

⁴³ Heritage Foundation, '2020 Index of Economic Freedom – Russia'. <https://www.heritage.org/index/country/russia>.

⁴⁴ Pominova (n 42).

⁴⁵ European Council, 'Council Adopts Negotiation Directives for Modernisation of Energy Charter Treaty' (15 July 2019). <https://www.consilium.europa.eu/en/press/press-releases/2019/07/15/council-adopts-negotiation-directives-for-modernisation-of-energy-charter-treaty/>.

⁴⁶ *Ibid*.

specifically, it would cover most-favoured-nation (MFN) treatment provisions, fair and equitable treatment (FET), matters connected with expropriation (direct or indirect), umbrella clauses, transfers (allowing free transfers relative to investment), and denial of benefits for purposes of maintaining international peace and security.^{*47}

Although modernisation of the ECT represents a lengthy process, involving many members having to come to agreement, this step would be necessary for clarifying the application of certain clauses and preventing further misunderstandings pertaining to interpretation of precisely the sort that occurred in the *Yukos* case. In any case, any future modernisation of the treaty cannot affect past investment disputes, such as that related to *Yukos*. Nevertheless, they could make the treaty attractive again for Russia. This, in turn, would create a platform for negotiations in the energy sector and clarify the ECT's application.

IV. Russia's constitutional reform in relation to international treaties and its impact on the *Yukos* case

1. The *Anchugov and Gladkov* case

Already in 2015, the Russian Federation made amendments to the Federal Constitutional Law in aims of strengthening the supremacy of the Russian Constitution over international law.^{*48} On 4 July 2013, the ECtHR issued a decision on *Anchugov and Gladkov v. Russia*^{*49}, in response to a case in which the Russian Constitutional Court had been asked by a member of the State Duma to carry out control for purposes of determining the mutual compatibility of ECtHR rulings and the Russian Constitutional order.^{*50} In the *Anchugov and Gladkov* case, the ECtHR decided that the Russian Federation had violated Article 3 of Protocol 1 to the European Convention on Human Rights (ECHR) in that it denied convicted prisoners the right to vote. Said article was in direct conflict with Article 32 (3) of the Russian Constitution,^{*51} which deprives prisoners of the right to vote or to be elected to public office. The Russian Constitutional Court responded by issuing a decision on 19 April 2016,^{*52} which it proceeded to cite with regard to implementation of the ECtHR's rulings in this case. This decision laid out the foundation for a new line of reasoning of the Russian Constitutional Court, which had been made possible by a 14 July 2015 decision of the same court, in which it held the possibility of not or only partially executing judgments of the ECHR if they were considered contrary to the Russian Constitution. Some of the dissatisfaction with the reasoning of the ECtHR may well have been connected with the award granted by the ECtHR in the *Yukos* case.^{*53} In any case, with the April 2016 ruling, the Russian Constitutional Court set the direction for more 'autonomous' interpretation of Russian law with regard to international matters and pulled Russia away from the general European understanding of human rights as reflected in the ECHR.^{*54}

⁴⁷ 'Approved Topics for the Modernisation of the Energy Charter Treaty' (6 October 2019). <https://www.energychartertreaty.org/modernisation-of-the-treaty/>.

⁴⁸ The Russian Federation's Federal Law 7-ΦK3, 'Federal Law on the Introduction of Amendments to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation"', approved by the State Duma on 4 December 2015 and by the Federation Council on 9 December 2015 and entering into force on 14 December 2015.

⁴⁹ *Anchugov and Gladkov v Russia*, applications 1157/04 and 15162/05 (ECHR, 4 July 2013).

⁵⁰ Lauri Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-Π/2015' (2016) 12(2) *European Constitutional Law Review* 377–95. DOI: <https://doi.org/10.1017/s1574019616000237>.

⁵¹ The Constitution of the Russian Federation's Article 32 (3) states: 'Deprived of the right to elect and be elected shall be citizens recognized by court as legally unfit, as well as citizens kept in places of confinement by a court sentence.'

⁵² The decision on ECtHR cases 1157/04 and 151662/05 (*Anchugov and Gladkov*), of 19 April 2016. See: <http://doc.ksrf.ru/decision/KSRFDecision258613.pdf> and <http://doc.ksrf.ru/decision/KSRFDecision230222.pdf>.

⁵³ Marina Aksenova, 'Anchugov and Gladkov Is Not Enforceable: The Russian Constitutional Court Opines in Its First ECtHR Implementation Case' *Opinio Juris* (25 April 2016). <http://opiniojuris.org/2016/04/25/anchugov-and-gladkov-is-not-enforceable-the-russian-constitutional-court-opines-in-its-first-ecthr-implementation-case/> (accessed 27 April 2020).

⁵⁴ *Ibid.*

With non-payment of the amount awarded by the ECtHR by the deadline given by the Court, 15 March 2015^{*55}, along with other non-enforcement of judgements,^{*56} the Russian Federation leads in terms of ECtHR Judgment non-enforcement. This might be linked to a lack of political will on the part of the government.^{*57}

2. Amendments to the Russian Constitution

During his annual speech addressed to the Federal Assembly on 15 January 2020, President Putin announced that he sees a need to amend the Russian Constitution. Hence, on 20 January 2020, he presented a draft law titled 'On Improving Regulation of Certain Issues of the Organization of Public Authority'^{*58} to the State Duma, which turned the draft into law three days later.

Article 15 of the Russian Constitution states^{*59} in its first paragraph that 'the Constitution of the Russian Federation has the highest legal force' but then adds in paragraph 4 that 'generally recognized principles and norms of international law and international treaties of the Russian Federation are an integral part of its legal system'. Article 15 (4) continues: 'If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.' Until the decision in *Anchugov and Gladkov*^{*60}, the common understanding of this article seemed quite clear as to the priority of international law. Nevertheless, when one considers Article 15 as a whole alongside Russia's later decision on non-enforcement of certain awards issued by international tribunals, there are indications that the Russian Constitution has the highest legal force in Russia. Therefore, the Russian Constitution takes precedence over international law.

The proposed amendments^{*61} to the Russian Constitution would directly affect this, as President Putin has proposed an amendment to 'guarantee the priority of the Constitution in Russian legal space'.^{*62} That amendment would necessitate changes to what is currently Article 15 of the Constitution, which is part of its Chapter I, a portion to be redrafted only by the Constitutional Assembly. In a further complication, there is no law on this body on the books at present, so it is not currently possible to establish a Constitutional Assembly.^{*63}

This proposed amendment sends a signal that can be understood as announcing how Russia will deal with unfavourable international judgements in the future.^{*64} The proposed change seems only symbolic, especially since the Russian Constitutional Court has already pronounced (in the *Anchugov and Gladkov* case) how it plans to deal with decisions that it judges incompatible with the Russian Constitution.

⁵⁵ Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, 'Information Relating to Payment Awaited or Information Received Incomplete, Status As of 20 July 2020' *OAO Neftyanaya Kompaniya Yukos v Russian Federation* 19. <https://rm.coe.int/09000016805a9af7>.

⁵⁶ *Ibid.*, 10–25.

⁵⁷ Mälksoo (n 50) 394.

⁵⁸ Draft law of the Russian Federation: Законопроект, 885214-7. <https://sozd.duma.gov.ru/bill/885214-7>.

⁵⁹ Constitution of the Russian Federation, art 15: '1. The Constitution of the Russian Federation shall have the supreme juridical force, direct action[,] and shall be used on the whole territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation. 2. The bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws. 3. Laws shall be officially published. Unpublished laws shall not be used. Any normative legal acts concerning human rights, freedoms and duties of man and citizen may not be used, [sic] if they are not officially published for general knowledge. 4. The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.'

⁶⁰ Russian Constitutional Court (n 52).

⁶¹ By the Duma per Federal Meeting of the Russian Federation: 'Что изменится в Конституции? (Chto izmenitsya v Konstitutsii?)' (What Will Change the Constitution?). <http://duma.gov.ru/news/47985/>.

⁶² See: <https://www.interfax.ru/russia/691265>.

⁶³ Yulia Ioffe, 'The Amendments to the Russian Constitution: Putin's Attempt To Reinforce Russia's Isolationist Views on International Law?' *EJIL: Talk!* (29 January 2020). <https://www.ejiltalk.org/the-amendments-to-the-russian-constitution-putins-attempt-to-reinforce-russias-isolationist-views-on-international-law/> (accessed 27 April 2020).

⁶⁴ *Ibid.*

Furthermore, this amendment could serve as justification for Russia's decision in the *Yukos* case^{*65}, since the Russian Constitutional Court has stated that such compensation would violate the provisions of the Russian Constitution.^{*66} The above-mentioned decision might be oriented toward future disputes, especially those related to the current situation on the Crimean Peninsula^{*67} and pending investment lawsuits.^{*68}

Under Russian law, international treaties that are incompatible with the Russian Constitution may not be signed and ratified by the Russian Federation. This entails application of its Article 79^{*69}, under which membership in an international body would not be allowed if that body's principles are not in line with the Russian Constitution. Therefore, the question of Russia's membership in the Council of Europe arises, especially in conditions of potentially introducing an amendment to the Russian Constitution that would even strengthen the principle of adopting constitutional distance from the ECHR. With formalisation of the power of the Russian Constitutional Court to decide whether or not the state need enforce decisions or awards specified by foreign jurisdictions and arbitral courts, Russia's membership in international organisations would no longer be very meaningful. After all, there would openly exist the option of Russia not recognising a decision of, for example, the ECtHR.

3. The impact on implementation of the PCA's *Yukos* Award

In this light, the *Yukos* dispute demonstrates the prominence and pride of place of governments in the functioning and enforcement of international law and, in at least this case, the realm of international investment law and arbitration. With official amendment to the Russian Constitution and, thereby, the Russian interpretation of international law, the number of international judgements that Russia might try to dismiss as irrelevant could grow. This step would dislodge Russian international law from international law and already agreed-upon treaties as they are understood in the West.

If, nevertheless, new amendments to the Russian Constitution were used as justification for non-enforcement of the PCA's *Yukos* award, that action would go against the international principle of legal certainty and non-retroactivity. Also, a parallel can be drawn to the current legal situation in Ukraine. The Ukrainian state has already brought several complaints against Russia before international tribunals – not only the ECtHR and the International Court of Justice (ICJ) but also the International Criminal Court (ICC), with regard to the situation in Eastern Ukraine. Furthermore, Ukrainian investors have initiated several filings for investor–state arbitration themselves.^{*70} Against this backdrop, there is ample significance of the ease with which, via amendments to the Russian Constitution, Russia could ignore decisions by international tribunals in the future.

⁶⁵ Russian Constitutional Court decision on ECtHR case 14902/04 (*Yukos*), of 19 January 2017, per: <http://doc.ksrf.ru/decision/KSRFDecision258613.pdf>.

⁶⁶ *Ibid.*, 8–9, 22, and 25.

⁶⁷ Of tensions between the two countries since Russia's annexation of the Crimean Peninsula in 2014.

⁶⁸ Current and pending investment-law cases involving disputes on the Crimean Peninsula. See, among other materials: 'PCA Press Release: PJSC Ukrnafta v. The Russian Federation and Stabil LLC et al. v. The Russian Federation' (24 April 2019) on application 2015-34. <https://pca-cpa.org/en/news/pca-press-release-pjsc-ukrnafta-v-the-russian-federation-and-stabil-llc-et-al-v-the-russian-federation-5/>; 'PCA Press Release: Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation' (15 February 2019) on application 2015-07. <https://pca-cpa.org/en/news/pca-press-release-aeroport-belbek-llc-and-mr-igor-valerievich-kolomoisky-v-the-russian-federation-4/>; 'PCA Press Release: JSC CB PrivatBank and Finance Company Finilon LLC v. the Russian Federation' (15 February 2019) on ongoing proceedings from application 2015-21. <https://pca-cpa.org/en/news/pca-press-release-jsc-cb-privatbank-and-finance-company-finilon-llc-v-the-russian-federation/>.

⁶⁹ Constitution of the Russian Federation, art 79: 'The Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.'

⁷⁰ Examples are provided by the PCA's: *PJSC Ukrnafta v The Russian Federation and Stabil LLC et al. v The Russian Federation* (n 68); *Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v The Russian Federation* (n 68); *SC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation* (n 68).

V. Conclusion

No country, to date, has been able to enforce the Yukos arbitral award against Russia. The arbitration tribunal in the Yukos investment case ruled in favour of the company, affirming that provisional application of the ECT was compatible with Russian domestic law. Still, Russia regards the matter as an issue of sovereignty and sees its power as being threatened. First and foremost, the *Yukos* award involves so much money that any country would probably be reluctant to 'lose'.

The proposed amendments to the Russian Constitution might seem only symbolic but form part of efforts to lay a foundation for Russia's selective compliance with decisions of international tribunals and with international law in general. This is especially concerning with regard to the proposed precedence of the Russian Constitution over international treaties and decisions by international bodies. The amendments would directly assure the priority of the Russian Constitution in the Russian legal system and over international law. That would, in turn, result in the Russian Constitution dictating that international treaties and decisions of international bodies cannot be valid on Russian territory if they contradict the Constitution of the Russian Federation. These efforts do not exist in isolation. Recall that the Russian Parliament passed a law already in 2015 empowering the Russian Constitutional Court to declare decisions of international human-rights bodies non-enforceable when such decisions are incompatible with the Russian Constitution.

In regard of the *Yukos* case, the proposed amendments should not be of impact if they come to pass, since law should not be modified retroactively. We should keep in mind also that Article 27 of the VCLT stipulates that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. One can assume that this encompasses reinterpretation of a state constitution and constitutional law, because these are still part of domestic law, even if the highest law of the land. Therefore, political and theory-oriented debate will continue and it is likely to remain hard for the former Yukos shareholders to collect their money under the PCA's arbitral award – especially since on 15 May 2020 the Russian Federation submitted an appeal^{*71} in cassation at the Dutch Supreme Court against the judgement of the Hague Court of Appeal^{*72}.

⁷¹ Reuters (Tom Balmforth), 'Russia Appeals \$57 Billion Yukos Payout in Dutch Supreme Court' (20 May 2020). <https://www.reuters.com/article/netherlands-russia-yukos/russia-appeals-57-billion-yukos-payout-in-dutch-supreme-court-idUSL8N2CX2QH>.

⁷² The Hague Court of Appeal (n 1).



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The Ombudsman in the Eyes of the European Court of Human Rights

Introduction

The institution of the Ombudsman*² with a task of investigating maladministration of public authorities has its roots in Scandinavian/Nordic countries, Sweden being the pioneer in 1809, followed by Finland in 1919.*³ Now there are more than 140 Ombudsman institutions, around the world, in different models and with various tasks.*⁴ Ombudsman institutions have played important roles in countries that have restored their democracy. Just to give an example, in Estonia, a special institution in charge of monitoring the adherence of public bodies to the law (and justice), the Chancellor of Justice (*Õiguskantsler*), was established in 1938, yet the functions of an Ombudsman were given to the same institution after Estonia regained its independence in the 1990s.*⁵ Today, the Chancellor of Justice / Ombudsman also carries out functions of the national preventive mechanism under the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*⁶ and acts as National Human

¹ The paper reflects personal opinions only.

² Although there are different terms used in different countries in relation to the Ombudsman institution, such as ‘defender of rights’, ‘defender of people’, and ‘ombudsperson’ to be more gender-neutral, or just ‘ombuds’ (coming from the Swedish and meaning ‘to represent’), the term ‘Ombudsman’ (for the singular) is used throughout this article, as the most common and official term, and is employed to represent national and, if applicable, regional Ombudsmen as well as the European Ombudsman.

³ About the Ombudsman institutions in Europe, see: Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions: A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea* (Wien; New York: Springer 2008). DOI: <https://doi.org/10.1007/978-3-211-72882-6>.

⁴ For details, see: ‘Principles on the Protection and Promotion of the Ombudsman Institution (“The Venice Principles”)’ adopted by the European Commission for Democracy through Law (the Venice Commission) at its 118th Plenary Session (Venice, 15–16 March 2019) and endorsed by the Committee of Ministers at the 1345th Meeting of the Ministers’ Deputies (Strasbourg, 2 May 2019), Opinion 897/ 2017, CDL-AD(2019)005.

⁵ Furthermore, it is important to note that the Chancellor of Justice is, according to the Constitutional Review Court Procedure Act, requested to give an opinion in cases involving review of constitutionality of laws by the Supreme Court. This aspect has also been noted by the Court; see, for instance: *Raudsepp v Estonia*, 54191/07, s 40. There has been no legal debate as such about this procedure before the ECtHR, however.

⁶ ‘Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ adopted on 18 December 2002 at the 57th session of the General Assembly of the United Nations by resolution A/RES/57/199 and entering into force on 22 June 2006. See: s 1(7) of the Chancellor of Justice Act, passed on 25 February 1999, RT I 1999, 29, 406, as amended RT I 2007, 11, 52 with entry into force on 18 February 2007.

Rights Institution^{*7}, as do many Ombudsmen. Some countries also have introduced the institution of a regional Ombudsman. Ombudsmen have been awarded more and more new tasks; there are Children's Ombudsmen^{*8}, Data Protection Ombudsmen, etc.

The European Ombudsman, an impartial and constructive intermediary between individuals and European Union (EU) institutions to promote good administration, was created with the Maastricht Treaty in 1992 and started this work 25 years ago, in 1995.^{*9}

The European Court of Human Rights ('the ECtHR' or 'the Court' below) in Strasbourg was established in 1959 on the basis of the European Convention on Human Rights ('the ECHR' or 'the Convention') and is in charge of ensuring observance of the Convention by the 47 member states of the Council of Europe, who have all recognised the jurisdiction of the Court. On 1 November 1998, the Court became a full-time institution and the European Commission on Human Rights, which used to decide on admissibility of applications, was abolished.

Notwithstanding the fact that the work of an Ombudsman (whether the national or the European Ombudsman) and the ECtHR might look somewhat different, the rule of law, democracy, transparency, and access to documents, alongside migration issues and many more fundamental-rights-related topics, are at the focus of both institutions. Unlike a court, an Ombudsman can introduce investigations on his or her own initiative. However, unlike court judgements, the decisions of Ombudsmen do not have legally binding force. Irrespective of this dilemma – own initiative without binding decision or binding decision without own initiative – the common goal between Ombudsmen for Europe and the Court is to guarantee flawless protection of human rights in Europe. Of course, it would be interesting, for further steps in order to create a complete picture of the relations between 'defenders of rights' and 'renderers of justice' on European level, to have a closer look at the relations between the Ombudsman and courts as such on national level, as well as, on the other hand, between the European Ombudsman and the Court of Justice of the European Union (CJEU). This is out of scope for the present article, however.

The purpose of the present article is – by having a so-far unique closer look at the case law of the ECtHR related to Ombudsmen with regard to institutional, procedural, and substantial issues – to reveal how these institutions can more effectively contribute, in co-operation with each other, to best serving the above-stated common goal. One must admit that the case law of the ECtHR is not very extensive (this is true to a greater extent for the countries with long Ombudsman traditions) and there is quite little academic literature on this topic.

Therefore, inspired by these limited sources, with some particular emphasis on the ECtHR case law pertaining to the Ombudsman institution of Estonia, the structure of the article is based on the logic of the existing jurisprudence, looking first, institutionally, at whether the Ombudsman institution should be considered a remedy on national level that needs to be exhausted before one may turn to the Court. That discussion is followed by addressing this question: what is the role of the Ombudsman *vis-à-vis* the applicant before the ECtHR – could the Ombudsman intervene as a third-party *amicus curiae*, or, even more, could the Ombudsman represent a party who is incapable of self-representation? Further, in consideration of the procedure, it will be discussed whether the procedure before an Ombudsman should fulfil guarantees of a fair trial (Article 6 ECHR) and, if so, how. As to the substance, the discussion will look at what the impact of the Ombudsman is, both on national and on ECtHR level, on the further development of the case law on human rights. Albeit scarce, the case law of the Court regarding the European Ombudsman is introduced also.

⁷ UN General Assembly Resolution 48/134 of 20 December 1993, 'National Institutions for the Promotion and Protection of Human Rights'. See: s 1(10) of the Chancellor of Justice Act, passed on 25 February 1999, RT I 1999, 29, 406 as amended RT I, 3 July 2018, 14, with entry into force on 1 January 2019. The Chancellor of Justice performs the functions of protection of the rights of children and promotion thereof according to Article 4 of the Convention on the Rights of the Child.

⁸ See, for example, the European Network of Ombudspersons for Children (ENOC) website: <https://enoc.eu/> (accessed 1 July 2020).

⁹ About the European Ombudsman, see, for example: Herwig C H Hofmann and Jacques Ziller (eds), *Accountability in the EU: The Role of the European Ombudsman* (Cheltenham: Edward Elgar Publishing 2017). DOI: <https://doi.org/10.4337/9781785367311>.

1. The Ombudsman and the European Convention on Human Rights System: Institutional Issues

Firstly, let us look at some institutional issues that need to be dealt with: whether the Ombudsman institution is a remedy to be exhausted on national level and whether it as such is an effective remedy to enforce the ECHR rights. Also, can a national Ombudsman represent a party before the ECtHR and/or intervene as a third party?

1.1. The Ombudsman – effective remedy on national level?

Articles 34 and 35 of the Convention set the criteria for admissibility of an application to the ECtHR¹⁰, stipulating, among other things, that the Court may only deal with the matter after all domestic remedies have been exhausted.

Article 13 ECHR guarantees the availability at the national level of a remedy to enforce the substance of the ECHR rights and freedoms, and, to grant appropriate relief; the remedy must be effective in practice as well as law.

The question arises of whether referral to the Ombudsman institution is a domestic remedy to be exhausted prior to referral to the ECtHR as foreseen by Article 35 ECHR and whether notifications to the Ombudsman institution should be considered effective and accessible ‘remedies’ within the meaning of Article 13 ECHR.

In *Montion v. France*,¹¹ the applicant unsuccessfully turned to the French administrative courts to try to overturn a decree affecting his property (he was obliged to offer the municipal hunting association the use of his land such that all the hunters in the municipality could hunt on his land without him as the owner of the land being able to object). The applicant also complained to the French Ombudsman (*Médiateur* at that time)¹², who made recommendations to a government minister for amendments to associated legislation (the legal base of the decree challenged by the applicant). In a letter, the Ombudsman informed the applicant that the Secretary of State for the Environment had rejected his suggestions for amendments to the law governing municipal hunting associations. Only after that did the applicant turn to the ECtHR, consisting at that time also of instances from the European Commission on Human Rights. The latter found the application inadmissible in 1987, stating that recourse to an organ that supervises administration, such as the Ombudsman, does not constitute an adequate and effective domestic remedy and that, since the final decision therefore was the judgment delivered by the French Council of State (*Conseil d'Etat*), the present application had been introduced well over six months after the date of the decision.

In *Raninen v. Finland*,¹³ the applicant objected to military and ‘substitute’ civil service and was arrested several times. He complained only to the Ombudsman, who found that arrest lacked legal basis but that it did not call for ordering criminal proceedings against the military official involved. The ECtHR took note of the Ombudsman’s response to the complaint and the fact that statutory actions for damages would not have been successful and rejected the government’s objection of non-exhaustion, stating that existing remedies did not provide reasonable prospects of success and were not effective and adequate.

¹⁰ Admissibility criteria are set forth in articles 34 and 35 of the Convention, stipulating the right of individuals’ application. An application may be filed with the Court by any individual or non-governmental legal entity located within the jurisdiction of a State Party to the Convention. He or she must be able to make out a case that he or she is a victim of a violation of the Convention. The Court may only deal with the matter after all domestic remedies have been exhausted, in accordance with the generally recognised rules of international law, and within six months from the date on which the final decision was taken. The Court does not deal with anonymous applications or with applications that are substantially the same as ones raising a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contain no relevant new information. The Court declares inadmissible any individual application if it considers the application to be incompatible with the provisions of the Convention and its protocols; manifestly ill-founded, or an abuse of the right of individual application, or if the applicant has not suffered significant disadvantage. See, in more detail: European Court of Human Rights, ‘Practical Guide on Admissibility Criteria’ (latest update 31 August 2019). https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (accessed 1 July .2020).

¹¹ *Montion v France*, 11192/84, 14 May 1987.

¹² The institution was changed by law in 2008–11 into *défenseur des droits*; see: <https://www.defenseurdesdroits.fr/>.

¹³ *Raninen v Finland*, 20972/92, 16 December 1997.

In another Finnish case, *Lehtinen v. Finland*,^{*14} the ECtHR declared the application inadmissible, stating that, as a general rule, a petition to the Ombudsman cannot be regarded as an effective remedy as required by Article 35 ECHR. The Court found that where the applicant makes a complaint to the Ombudsman and, at the same time, a court action with a legally binding result is available but was not initiated by the applicant, the domestic remedies have not been exhausted. The ECtHR stressed that, even though the Ombudsman of Finland can bring criminal charges against public servants, he or she has no power to quash or amend decisions made by administrative authorities. It distinguished the case from the *Raninen* case in that, because in *Raninen* neither criminal prosecution nor a civil action would have had reasonable prospects of success, there were no other remedies available than the Ombudsman.

In *Egmez v. Cyprus*,^{*15} the applicant argued in national court that he had been a victim of treatment applied by police officers of the defendant state that was contrary to Article 3 ECHR (prohibition of inhuman or degrading treatment). The government claimed that the applicant had not exhausted all domestic remedies, because he did not use the judicial avenues offered by national law. The applicant, although he had not taken any other action, had turned to the Ombudsman, having been encouraged to do so by the Prosecutor General. The Ombudsman made an inquiry and published a report concluding that the applicant had been ill-treated. The Ombudsman had no power, however, to dictate what concrete measures should be taken by the executive or to apply sanctions to the responsible persons directly. Nevertheless, the ECtHR concluded that, since the Ombudsman's report was published, the state bodies had an obligation imposed by Article 3 ECHR to conduct their own investigations, which would have led not only to identifying those responsible – some of whom were already identified in the Ombudsman's report – but also to punishing them.

Yet it was the other way around in a further case: The Ombudsman had sent the applications of some of the applicants to the public prosecutor's office, and the question was whether this was sufficient to meet the requirements of exhausting domestic remedies. Namely, in *Korobov and Others v. Estonia*,^{*16} each of the applicants made either an individual criminal complaint to the public prosecutor's office or application to the Chancellor of Justice (*Õiguskantsler*) / Ombudsman. The applicants complained that violence had been used against them during the riots in Tallinn in April 2007 that followed the protests against relocation of a monument commemorating the entry of the Soviet Red Army into Tallinn during the Second World War.^{*17} The applicants also alleged that they had been unlawfully deprived of their liberty. The Ombudsman forwarded the applications submitted to him to the public prosecutor's office. With regard to the issue of whether domestic remedies had been exhausted, the applicants submitted that the Ombudsman had sent the applicants' applications to the prosecutor's office, as the applicants had done themselves. The applicants argued that it would be strange to suggest that they should have had better knowledge and understanding of the law than the Ombudsman. The ECtHR agreed with the applicants; it did not consider the applicants' choice of procedure in the circumstances of the case unreasonable. The Court rejected the Estonian government's plea of non-exhaustion of domestic remedies, because in the Court's view the applicants were not required to embark on another set of proceedings before the administrative courts that served substantially the same purpose.

In the case *Leander v. Sweden*,^{*18} the applicant argued that he was entitled to receive all documents in the possession of national authorities on which basis they had issued a negative opinion on his ability to hold a certain position. He claimed a violation of Article 13 ECHR because he had not had the opportunity to address an independent competent authority for issuing of a binding decision on the communication in question. The respondent government indicated that the applicant would be able to lodge a complaint, domestically, about a violation of his right to the privacy guaranteed by Article 8 ECHR to 'the Chancellor of Justice' or to the Parliamentary Ombudsman. The ECtHR held that both of these authorities are competent to examine individual complaints to ensure that state organs apply the appropriate rules in force. In the exercise of their functions, these authorities have access to special information and are independent from the government. However, the ECtHR decided that such a 'national authority' should have the power to issue a binding ruling on the breach of Convention provisions asserted by the applicant and that in the

¹⁴ *Lehtinen v Finland*, 39076/97, 14 October 1999.

¹⁵ *Egmez v Cyprus*, 30873/96, 21 December 2000.

¹⁶ *Korobov and Others v Estonia*, 10195/08, 28 March 2013.

¹⁷ See above, ss 7–51.

¹⁸ *Leander v Sweden*, 9248/81, 26 March 1987.

Swedish system both the ‘Chancellor of Justice’ and the Ombudsman, though independent, are not invested with powers of full adoption of ‘binding judicial decisions’, so from this point of view they do not meet the requirements imposed by Article 13 ECHR.

In the case *T.P. and K.M. v. United Kingdom*¹⁹, a complaint to the Ombudsman could have been made, but the ECtHR held that it would not have provided the applicants with any enforceable right to compensation. In *E. and Others v. United Kingdom*,²⁰ among other remedies attempted, the applicants complained to the Ombudsman, who declined to investigate, citing statutory limitations to his jurisdiction. The ECtHR found that the Ombudsman process could not have resulted in a binding determination anyway.

Thus, beyond the particularities of each specific case, the jurisprudence of the ECtHR principally does not consider the Ombudsman to be an effective remedy within the meaning of Article 35, §1 ECHR, in general. Irrespective of the fact that in some countries Ombudsmen may have additional powers to bring cases before, for instance, constitutional courts, they nevertheless do not have powers to force changes – their role may assist with but does not fulfil the existence of domestic remedies.

A complaint to the Ombudsman usually also does not constitute an effective remedy for the purposes of Article 13 ECHR, except in certain exceptional circumstances of fact; where judicial remedies are unavailable and the Convention right in question is not one of the core rights, the available non-judicial remedies, including the Ombudsman, may constitute an effective remedy. The prevailing factor, however, is that, since Ombudsmen do not have power to impose legally binding decisions on administrative authorities, their investigations do not constitute an Article 13 ECHR remedy. This is so even in cases wherein the national Ombudsman has additional powers to launch court cases, challenge constitutionality of laws, and prosecute officials.

An effective remedy is looked at in terms of the process in its entirety and, thereby, encompasses the availability of judicial processes provided by the state and court judgements arising out of a complaint, with the Ombudsman, of course, playing a supportive role in it.²¹

1.2. The Ombudsman – representative of the applicant and/or third-party intervener?

Let us now have a look at the national Ombudsman’s role *vis-à-vis* the applicant before the ECtHR and possibilities for the Ombudsman to intervene as a third party.

If, in general, the Ombudsman institution is not a remedy to be exhausted before one turns to the ECtHR and if a complaint to the Ombudsman is not an effective remedy in terms of Article 13 ECHR either, is there any chance that an Ombudsman can make an application to the ECtHR on behalf of a victim, to protect human rights? This topic is connected to questions such as these: Would that entail full representation? Would that be in line with the tasks performed by a sample of Ombudsmen? Could an Ombudsman represent a person before the ECtHR even if he or she could not do so in national proceedings?

Article 34 ECHR permits any person, nongovernmental organisation (NGO), or group of individuals claiming to be a victim of a violation by one of the contracting parties to the ECHR or its protocols to file an application. In principle, Article 34 ECHR permits only ‘victims’ of Convention violations to make an application.

There have been some exceptional situations wherein third parties have been permitted to bring applications on behalf of a victim. Most often, these have been family members of deceased or minor victims or, on some rare occasions, non-governmental organisations (e.g., *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*²², about the standing of a non-governmental organisation to file an application on behalf of a deceased mental patient).

It is an unanswered question in the case law of the ECtHR whether these exceptions could be expanded to include an Ombudsman. If this were to be possible in one case, what are the limitations of such

¹⁹ *T.P. and K.M. v United Kingdom*, 28945/95, 10 May 2001; see judgment, s 109.

²⁰ *E. and Others v United Kingdom*, 33218/96, 26 November 2002, ss 45 and 76–77.

²¹ For further literature, see, for example: Simina Gagu, *Aspects of the European Court of Human Rights Jurisprudence Regarding the Ombudsman*; Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Springer 2004) 125–36. DOI: <https://doi.org/10.1007/978-94-017-5932-8>.

²² *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* [GC] 47848/08, 17 July 2014.

representation, and do they follow from the ECHR, national legislation, or both? If national legislation were, for example, to accept a national Ombudsman representing a person, would the ECtHR deny such a possibility? A parallel could be drawn with national or international NGOs representing applicants.

In the Inter-American human rights system, a human rights Ombudsman co-petitioned the Inter-American Commission, which found the case admissible.^{*23}

In Europe, so far, the role of the Ombudsman is mostly limited to making a complainant aware of his or her right to turn to the ECtHR and informing him or her about the ECHR and ECtHR case law. This may even take the form of giving assistance in preparation of an individual's application if the person has not obtained legal assistance elsewhere.

Another option would be to allow Ombudsmen (particularly in their role as National Human Rights Institutions) to intervene as a third party and make *amicus curiae* submissions as *expressis verbis* the case for the Commissioner of Human Rights of the Council of Europe before the ECtHR^{*24}. The Inter-American Court of Human Rights has accepted the mechanism of *amicus curiae* submissions by Ombudsmen^{*25}. According to Article 36 (2) ECHR, the President of the Court may, in the interest of the proper administration of justice, invite any person concerned who is not the applicant to submit written comments or take part in hearings.^{*26} The Northern Ireland Human Rights Commission has intervened as a third party.^{*27}

Thus there is still room for Ombudsmen to intervene as *amici curiae* and exceptionally to represent a party, if the ECtHR would be willing to accept this.

2. The Ombudsman and the European Convention on Human Rights System: Procedural Issues

Let us now turn to some procedural issues by looking at whether the procedure before the national Ombudsman has had any impact on the Convention system. Even if the Ombudsman institution is not a remedy to be exhausted, there still can be cases of applications where the applicant has not only exhausted all domestic remedies but also sought advice from the Ombudsman or where the Ombudsman has on his or her own initiative reported on issues that later became relevant to the case before the ECtHR. The impact of the Ombudsman in substance is analysed further on; at this point, only some procedural connections are drawn. It is also important to examine how far the proceedings before the Ombudsman go toward meeting the criteria of a fair trial as set out in Article 6 ECHR and in ECtHR case law, and this is addressed later in the paper.

2.1. Proceedings before Ombudsmen – impact on proceedings before the ECtHR?

The following examples are all taken from the case law of the ECtHR concerning Estonia, as they are good illustrations of how the important role of the Ombudsman when coupled with the functions of the Chancellor of Justice has been taken into consideration by the parties and by the Court in deciding concrete cases. Of course, one could add to this list some of the cases discussed above, such as *Raninen v. Finland* and *Egmez v. Cyprus*.

The case *Sõro v. Estonia*^{*28} involved publication of information about the applicant's prior employment with former security services. After regaining independence from the Soviet Union, in 1991, Estonia carried

²³ See: *Janet Espinoza Feria and Others v Peru*, 12.404, 10 October 2002.

²⁴ See: Article 36(3) ECHR. See also: Dagmara Rajska and Zuzanna Rudzińska-Bluszcz, *Ombudsperson Institutions in Europe: Their Role As Third Party Interveners before the ECHR and Their Initiatives before the Council of Europe (Examples of Poland, Sweden and Montenegro)* (Cendon 2016) 55 ff.

²⁵ See, for example: *Yatama v Nicaragua*, 23 June 2005, Seria C, no 127; *Ticona Estrada v Bolivia*, 27 November 2008, Seria C, no 193.

²⁶ See also: Laurence Burgogue Larsen, 'Les interventions éclairées devant la cour européenne des droits de l'homme ou le rôle stratégique des amici curiae' in *Mélanges en l'honneur de Jean-Paul Costa. La conscience des droits - 1ère édition: La conscience des droits (Études, mélanges, travaux)* (Daloz 2011) 67–81.

²⁷ *Shanaghan v UK*, 37715/97, 4 May 2001.

²⁸ *Sõro v Estonia*, 22588/08, 3 September 2015.

out legislative reforms for transition to a democratic system. It passed the Disclosure Act in February 1995, under which information about the previous employment of individuals who had served in or co-operated with security or intelligence organisations of the former regime would be registered and made public. The applicant had been employed as a driver by the Committee for State Security (KGB) from 1980 to 1991. In February 2004, he received notice that he had been registered pursuant to the Disclosure Act and that an announcement would be published. He did not exercise his right to lodge a complaint, and the announcement was published in the paper and Internet versions of the *State Gazette*. The applicant subsequently challenged the notice in the administrative courts. Dismissing his complaint, the court of appeal accepted that the application of the Disclosure Act could interfere with a person's fundamental rights, but it was impossible to establish with absolute certainty decades later whether a specific driver had performed merely technical tasks or whether he had also performed substantive tasks. The applicant raised the issue with the Ombudsman, who addressed the Estonian Parliament with a report wherein he concluded that the Disclosure Act was unconstitutional, among others, in so far as all employees of the security and intelligence organisations were made public with no exception made in respect of the personnel who merely performed technical tasks. The Constitutional Law Committee of the Parliament disagreed with the Ombudsman. After the applicant had again addressed the Ombudsman, the latter replied (in 2006) with a letter stating that he did not deem it necessary to initiate constitutional review proceedings in respect of the Disclosure Act – the Ombudsman had in the meantime been briefed by the Estonian Internal Security Service and changed his mind.

The Estonian government pleaded before the ECtHR that the applicant had not exhausted all remedies. The government additionally suggested that the fact that the Ombudsman had expressed his opinion on the matter by the time court proceedings took place may have played a certain role in the domestic courts' assessment of the proportionality of the interference.

The ECtHR did not agree with the Estonian government and rejected the arguments on non-exhaustion. As far as the fact that the more recent (2006) opinion of the Ombudsman – according to which the Disclosure Act was constitutional – was known to the domestic courts while they were dealing with the case is concerned, the ECtHR observed that it is not for the Court to speculate whether the domestic courts would have decided the applicant's case differently if they had dealt with it before the Ombudsman gave his opinion. The ECtHR stated that, in any event, the Ombudsman's opinion was not binding on the courts, which were independent in deciding the case.

In *Metsaveer v. Estonia*,²⁹ the applicant made a petition to the Ombudsman, who replied by letter that he had established that the detention conditions in the Kuressaare arrest house did not meet the requirements necessary to uphold human rights. The Ombudsman had requested the Lääne Police Prefecture to take measures to ensure that the cells in the arrest house conform to the applicable requirements and that the inmates be given the possibility of being in the fresh air for at least one hour each day. The ECtHR took note of this.

In the case *Tali v. Estonia*,³⁰ a prison guard informed the applicant that he would be transferred to a punishment cell the very same evening to serve a disciplinary punishment. The applicant was dissatisfied, as he had been led to understand that he would not have to serve the punishment in question until the resolution of his complaint related to the matter by the Ombudsman. The prison guard told him that if he continued to object to going to the punishment cell, he would be taken there by force. The dispute triggered an incident that culminated in the use of pepper spray by the prison guards against the aggressive prisoner and his confinement to a restraint bed for more than three hours and that resulted in the ECtHR finding a violation of Article 3 ECHR. The Court did not have to take a stand, however, on whether the prison authorities should have waited until the resolution of the applicant's complaint by the Ombudsman.

Thus, in two of the three examples, the Court did not ignore the fact that the Ombudsman had been involved in one way or another in domestic proceedings; it even took note of what the Ombudsman had stated although engaging the Ombudsman was not a remedy to be exhausted and there were also domestic judgements in place. In the third case, the link to the Ombudsman is remote, as the Court decided anyhow that there was a violation of the ECHR without the need to answer the challenging question of whether an application pending before the Ombudsman would have allowed preventing the applicant from serving the disciplinary punishment.

²⁹ *Metsaveer v Estonia* [dec.] 12454/05, 26 June 2006.

³⁰ *Tali v Estonia*, 66393/10, 13 February 2014.

2.2. Procedure before the Ombudsman – are guarantees of a fair trial (Article 6 ECHR) applicable?

The Court has dealt with several issues related to the right to a fair trial (Article 6 ECHR) in relation to the Ombudsman, such as problems with independence and impartiality of the Ombudsman, the absence of a public hearing before the Ombudsman, and a weak legal basis and non-publication/inaccessibility of the Ombudsman's decisions.

The case *Heather Moor & Edgcomb Limited (HME) v. UK*³¹ is a good example of the Court's assessment of the applicability of the right to a fair trial with regard to the procedure before the Ombudsman. The case was, firstly, about the alleged failure of the Financial Ombudsman Service (FOS) to guarantee a fair and public hearing. Parliament established the FOS as a means of resolving certain consumer complaints quickly and with minimum formality. The rules governing the FOS's procedure provide no guarantee of an oral/public hearing; the parties can seek this, but it is at the Ombudsman's discretion. There is a presumption against a hearing. The ECtHR did not find such legislative policy inappropriate. According to the ECtHR in deciding on the complaint against the applicant, the Ombudsman determined the applicant's civil rights and obligations; the procedure before the FOS must therefore conform to the standards set down in Article 6 ECHR. The Ombudsman, by deciding whether to hold a hearing or not, took each decision in light of ECHR requirements and each time reasoned it. The ECtHR concluded that a hearing would not have imparted any additional fairness. The ECtHR logic was strained in placing considerable weight on the option of judicial review of an Ombudsman's decision, which was sought in the case at hand and ended up with oral arguments at the Court of Appeal resulting in a judgment that, *inter alia*, elaborated on whether there was a need for an oral hearing before the Ombudsman. The ECtHR concluded that the fact that proceedings are of considerable significance for an applicant is not decisive for the necessity of a hearing, the applicant had ample opportunities to present the case, and the facts and law could have been adequately addressed in written proceedings.

Secondly, the ECtHR also addressed the complaint about the non-publication of the Ombudsman's decision and found that, irrespective of the fact that publicity contributes to guarantees of a fair trial, special features of the proceedings have to be taken into account. In a contrast against certain types of cases, such as those involving children, there was no compelling reason to withhold the Ombudsman's decision from publication. The considerations of quickness and informality that are relevant to the holding of an oral hearing are not relevant to the public pronouncement of 'judgement'. However, looking at the domestic proceedings in this case in their entirety, the ECtHR agreed with the Court of Appeal's judgment, which quoted from the Ombudsman's final decision and achieved the purpose of Article 6 of the Convention.

Thirdly, the applicant complained about the legal basis of the Ombudsman's decision. The ECtHR considered that the scope of the Ombudsman's discretion is not so broad as to automatically contravene the principle of foreseeability that is an integral part of the rule of law. The Ombudsman's office explained in detail the basis for its decision. The ECtHR detected no sign of any arbitrariness in the procedure conducted by the Ombudsman and in the decision issued. The applicant was able to respond in detail to the provisional decision of the Ombudsman; therefore, it cannot be said that the final decision of the Ombudsman was unforeseeable.³²

In the second case, *Heather Moor & Edgcomb Limited (HME) v. UK (No. 2)*³³, the ECtHR was again faced with a complaint about the fact that an FOS decision was not pronounced publicly and that the Ombudsman refused to hold an oral hearing and a cross-examination. The applicant further complained that the Ombudsman lacked structural independence and impartiality; lastly, relying also on Article 1 of Protocol No. 1 ECHR, the applicant complained that the FOS did not operate compatibly with the rule of law, its case law being neither accessible nor foreseeable. The ECtHR declared the application inadmissible (by a majority). Since the facts in the two *Heather Moor & Edgcomb Limited* cases are similar, the ECtHR referred to the considerations developed in its previous decision. The ECtHR added that it is not for the

³¹ *Heather Moor & Edgcomb Limited (HME) v UK* [dec.] 1550/09, 14 June 2011.

³² See also: RPC, 'FOS Does Not Breach Human Rights (7 July 2011)'. <https://www.rpc.co.uk/perspectives/financial-services-regulatory-and-risk/fos-does-not-breach-human-rights> (accessed 12 April 2020); Herbert Smith Freehills LLP, 'European Court of Human Rights Considers the Compatibility of the Financial Ombudsman Service Process with Article 6 ECHR'. <https://www.lexology.com/library/detail.aspx?g=976b200c-3cf6-4a49-af3d-1d5bcb3d0539> (accessed 12 April 2020).

³³ *Heather Moor & Edgcomb Limited (HME) v UK (No. 2)* [dec.] 30802/11, 26 June 2012.

Court to take a view on the well-foundedness of the Ombudsman's decision – to do so would be tantamount to exercising a fourth-instance function.

The applicant argued that there was such a close structural connection between the Financial Services Authority (FSA) and the FOS that the latter's independence and impartiality were open to doubt. It referred to the fact that the chairman and directors of the FOS were appointed by the FSA, that the Chief Ombudsman reports to the FSA on the discharge of its functions; that the FSA controlled the FOS budget, and that FSA approval was required for the FOS rules of procedure. The ECtHR found that these assertions by the applicant were of a general character. The Court was not persuaded that the statutory relationship between the FSA and the FOS was such as to compromise or raise doubts related to the latter's independence and impartiality in deciding on individual complaints.

In the case *Kalda v. Estonia*,³⁴ the applicant, a prisoner, complained that he was prevented from carrying out legal research in consequence of being refused access to certain Internet sites, these including the site of the Ombudsman (*Õiguskantsler*). According to the applicant, he was involved in a number of legal disputes with the prison administration and needed access to those Internet sites so as to be able to defend his rights in court. The Estonian Supreme Court concluded by majority that detainees were able to contact the Ombudsman by mail and make a request for information, and it found no violation of the prisoner's right. The ECtHR found a violation of the applicant's right to receive information and that the denial of access to the websites of the Council of Europe Information Office in Tallinn, the Ombudsman (Chancellor of Justice), and the Estonian parliament was in breach of Article 10 ECHR (freedom of expression, the right to information). The Court noted that these websites, including the Estonian Ombudsman's website, predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. For example, the website of the *Õiguskantsler* contained his selected legal opinions. The ECtHR considered that the accessibility of such information promotes public awareness and respect for human rights. The Court gave weight to the applicant's argument that the Estonian courts used such information and the applicant needed access to it for the protection of his rights in the court proceedings.

The ECtHR took note of the applicant's argument that legal research in the form of browsing through the available information (to find relevant information) and making specific requests for information were different matters. Indeed, for one to make a specific request, one would need to be aware of which particular information is available in the first place. The Court noted also that, while the domestic authorities had referred to alternative means of making available to the applicant the information stored on the websites in question (for example, by mail), they did not compare the costs of these alternative means with the additional costs that extended Internet access would allegedly incur. The Court went on to note that in a number of Council of Europe and other international instruments the public-service value of the Internet and its importance for the enjoyment of a range of human rights has been recognised. Internet access has increasingly been understood as a right, and calls have been made to overcome the 'digital divide'. More and more services and information are only available only via the Internet. The Court reiterated that under the Imprisonment Act prisoners have been granted limited access to the Internet via computers specially adapted for that purpose and under the supervision of the prison authorities. Thus, arrangements necessary for the use of the Internet by prisoners have in any event been made and the related costs have been borne. While the security and economic considerations cited by the domestic authorities may be considered relevant, the Court noted that the domestic courts undertook no detailed analysis as to the security risks or additional costs allegedly emerging from the access to the three additional websites in question.

Therefore, it can be concluded that the conditions for a fair trial as specified in Article 6 ECHR and the case law of the ECtHR are applicable to the procedure before the Ombudsman if the Ombudsman determines the applicant's civil rights and obligations, including (to a certain extent) dealing also with administrative cases as covered by the case law of the ECtHR under Article 6 ECHR, and possibly in cases in which the Ombudsman could in some way determine criminal charges. According to the existing case law of the ECtHR, among these rights are those to a public hearing, publication and accessibility of the decisions (including on the website), foreseeability, and reasoning of the decision of the Ombudsman. The Court has, however, made certain concessions with regard to strict application of these guarantees/criteria in so far as there are also possibilities of the matter decided upon by the Ombudsman being revised before the courts, and the Court has declined to express a view on the well-foundedness of the Ombudsman's decision.

³⁴ *Kalda v Estonia*, 17429/10, 19 January 2016.

Certainly there could be many more issues, such as the question of reasonable time or the right to be heard and issues of representation in the Ombudsman proceedings that could lead to case law of the Court; however, these issues rarely reach the Court, mainly because recourse to the Ombudsman is not a remedy to be exhausted on national level.

3. The Ombudsman and the European Convention on Human Rights system: substantial issues

Let us now look at the contribution and impact of the Ombudsman to the case law of the ECtHR.

National Ombudsmen have an important impact in enhancing the European system of protection of human rights. On one hand, they rely in their practice on the ECHR and other Council of Europe treaties as well as on ECtHR case law. They are non-judicial mechanisms for the domestic application of the ECHR system. The European Ombudsman also uses provisions of the ECHR and ECtHR case law in replying to those complaints against EU institutions and bodies that involve human rights issues.

On the other hand, the Ombudsmen play an important role in the execution of judgments of the ECtHR.

Furthermore, their notifications, decisions, recommendations, reports, and opinions can become point of reference in the judgments of the ECtHR; thus, they not only take what the ECtHR has decided but also help to shape the decisions of the ECtHR and indirectly contribute to it. The ECtHR profits from national/EU knowledge of the Ombudsman, and, *vice versa*, ECHR-based knowledge is useful for an Ombudsman. But can the Ombudsman go even further – beyond the ‘margin of appreciation’ doctrine?

3.1. An Ombudsman’s decision – only a point of reference or part of the reasoning of the ECtHR?

It happens, and not rarely, that the ECtHR makes reference to the findings of Ombudsmen. However, this is done most of the time in the so-called facts part (‘circumstances of the case’ or ‘relevant domestic law and practice’), not in the reasoning part (‘law’), of the ECtHR judgments. Ombudsmen’s decisions, reports, and other materials are classified as useful information; it can even happen that these have, in a way, the value of evidence.

For example, concerning Estonia, the ECtHR has on several occasions mentioned the findings of the national Ombudsman in the facts part of the judgment. In the judgment in the case *A.T. v. Estonia*,³⁵ the Court referred to an opinion wherein the Estonian Ombudsman addressed the situation of medical examinations in a prison; the Estonian government had also referred to the fact that the Ombudsman had accepted that in some instances constant supervision of a prisoner might be necessary even during a doctor’s examination. However, the ECtHR did not repeat the findings of the Ombudsman in its reasoning.

The Greek Ombudsman has observed that a violation of the Convention by Greece as found by the ECtHR in the case *Choudury and Others v. Greece*³⁶ could have been avoided, had the measures requested by the Ombudsman been taken.³⁷ The case involved a serious violation – namely, that of Article 4, §2 ECHR (prohibition of forced labour) – by Greece in a context of foreign land-workers in Manolada. The Judgment of the ECtHR makes extensive reference to the warning addressed by the Greek Ombudsman in 2008 to the then leadership of competent ministries, also in the law part where the Court gives its reasons³⁸.

In another case, *Kummer v. The Czech Republic*³⁹, the ECtHR again confirmed a national Ombudsman’s findings, this time pertaining to humiliating treatment of a detained man at a police station in the Czech Republic. The case concerned a man who, on his way home from a bar where he had been drinking alcohol, was stopped by a police patrol and, since he had no identity card and in disregard of the fact that he said he lived just a few metres away and could provide his identity card, was taken to the police station,

³⁵ *A.T. v Estonia*, 23183/15, 13 November 2018 (s 41).

³⁶ *Choudury and Others v Greece*, 21884/15, 30 March 2017.

³⁷ See the homepage of the Greek ombudsman, at: <https://www.synigoros.gr/?i=stp.en.news&page=8> (accessed 12 April 2020).

³⁸ See: *Choudury and Others v Greece* (n 36) s 112.

³⁹ *Kummer v The Czech Republic*, 32133/11, 25 July 2013.

handcuffed to an iron ring on the wall by one hand and later by his other hand too, and kept in a cell for 50 minutes. The only institution on national level to point out the police's mistake was the Ombudsman, who issued a report finding that the police had violated the Police Act in several respects and that there had been no legal grounds for detaining the applicant. The ECtHR found the Czech Republic to be in breach of Article 3 ECHR⁴⁰.

In the case *Satakunnan Markkinapörssi OY and Satamedia OY v. Finland*⁴¹, the Finnish Data Protection Ombudsman requested the Data Protection Board to restrain the applicant companies from processing taxation data in the manner and to the extent they had done and from passing such data to an SMS service. The Data Protection Board dismissed the Ombudsman's request on the grounds that the applicant companies were engaged in journalism. The case subsequently came before the Supreme Administrative Court, which sought a preliminary ruling from the CJEU on the interpretation of the EU Data Protection Directive.⁴² The CJEU ruled that activities related to data from documents that were in the public domain under national legislation could be classified as 'journalistic activities' if their object is to disclose to the public information, opinions, or ideas, irrespective of the medium used to transmit them. Consequently, the Finnish Supreme Administrative Court directed the Data Protection Board to forbid the processing of taxation data in the manner and to the extent carried out by the applicant companies, thus confirming what the Ombudsman had suggested. The Supreme Administrative Court concluded that, since the decisive factor was assessment of whether the publication contributed to public debate or was solely intended to satisfy the curiosity of readers, the publication of the whole database and the transmission of the information to the SMS service could not be regarded as journalistic activity. In the Convention proceedings, the applicant companies complained of, among other grievances, a violation of Article 10 ECHR. The ECtHR found no violation of the applicants' freedom of expression, thereby confirming the Finnish Data Protection Ombudsman's position, and the ECtHR criticised the applicants for not complying with the Ombudsman's request. The ECtHR also noted that, contrary to what the applicant companies suggested, it emerged clearly from the case file that the Data Protection Ombudsman acted on the basis of concrete complaints from individuals claiming that the publication of taxation data infringed their right to privacy.

From the above analyses, it appears noteworthy that the documents of national Ombudsmen have contributed to the findings of the Court, and, in fact, the Court could even use them more in the future.

3.2. The Ombudsman: Beyond the 'margin of appreciation' doctrine?

Ombudsmen can help on national level to reach out to the ECHR and aid in disseminating the ECtHR case law up to the point where this is confirmed by the ECtHR. But can he or she go further than the strict minimum standards provided by the Convention system?

According to some authors, a national Ombudsman can play a role in the leeway given to states in implementing some of their ECHR duties.⁴³ Even if the ECtHR has not found a violation of the ECHR in a particular case, owing to the margin of appreciation a state may have, the national Ombudsman may find, on the basis of the broader Ombudsman criteria of equity and justice, that the state's conduct falls short of acceptable standards.

Ombudsmen can in certain situations go further and make human-rights-friendly interpretations even if the situation does not *per se* represent a violation of minimum standards set by the ECHR.

⁴⁰ *Ibid.*

⁴¹ *Satakunnan Markkinapörssi OY and Satamedia OY v Finland* [GC] 931/13, 27 June 2017.

⁴² The Data Protection Law Enforcement Directive, Directive (EU) 2016/680 on the protection of natural persons regarding processing of personal data connected with criminal offences or the execution of criminal penalties, and on the free movement of such data.

⁴³ See, for example: Matti Pellonpää, 'Finnish Parliamentary Ombudsman As Guardian of Human Rights and Constitutional Rights: View from the European Court of Human Rights' in Ilkka Rautio (ed), *Parliamentary Ombudsman of Finland 80 Years* (Helsinki) 75–76; Linda C Reif (n 21) 125–36.

4. The European Ombudsman and the European Court of Human Rights

There are almost no ECtHR cases involving the European Ombudsman. The European Ombudsman is, notably, mentioned by the ECtHR in a freedom of expression case, *Tillack v. Belgium*⁴⁴. The case involved search and seizure operations carried out at the home and office of a journalist suspected of bribing a European Union official. The applicant, a German journalist, was assigned to Brussels to cover European Union policy and the activities of the European institutions. His newspaper published two articles he had written on the basis of information from confidential documents from the European Anti-Fraud Office (OLAF). The articles reported on allegations by a European civil servant pertaining to irregularities in the European institutions and the internal investigations OLAF carried out into those allegations. Suspecting the applicant of having bribed a civil servant to disclose confidential information, OLAF opened, to no avail, an investigation to identify the informant. Then OLAF lodged a complaint against the applicant with Belgian judicial authorities, which initiated an investigation. The applicant's home and workplace were searched; almost all his work papers and tools were seized and placed under seal, and his belongings were not returned.

The applicant filed a complaint with the European Ombudsman. The Ombudsman submitted a special report to the European Parliament in which he concluded that the suspicion of bribes by the applicant had been based on mere rumours spread by another journalist and not, as OLAF had suggested, by Members of the European Parliament. The Ombudsman concluded that OLAF should acknowledge that it had made incorrect and misleading statements.

The ECtHR agreed with the European Ombudsman; it reiterated the importance of protecting journalistic sources for press freedom in a democratic society and found that the searches in this case had amounted to non-justified interference with the applicant's right to freedom of expression. As OLAF's internal investigation had failed to produce the desired result and the suspicion of bribery by the applicant was based on mere rumour, there had been no overriding public interest to justify such measures.

Other judgments of the ECtHR mentioning the European Ombudsman, such as *Jeunesse v. the Netherlands*⁴⁵ and *Ramadan v. Malta*,⁴⁶ merely contain a reference to Article 20 of the Treaty on the Functioning of the European Union (TFEU), on citizenship of the Union, which enshrines, among other rights, the right to apply to the European Ombudsman.

Conclusion

The title of this article has a double meaning on purpose: 'in the eyes' has a sense defined as 'in the view or opinion of, from the standpoint of', but it also has a second meaning, 'in the centre or focal point of something'. Perhaps this article helps a bit to move the Ombudsman institution in the case law of the Court from the first connotation mentioned to the second one.

The examples analysed above show how intertwined the work of Ombudsmen and that of the Court are. In general, it can be agreed that the Ombudsman institution is neither a remedy to be exhausted before one turns to the Court nor a remedy in the sense of Article 13 ECHR. However, in certain exceptional circumstances, as was the case in *Raninen v. Finland* and *Egmez v. Cyprus*, it would be important not to cut off the applicant's access to the ECtHR simply because he or she, under the specific circumstances or in the absence of any other remedies, turned only to the Ombudsman before bringing an application to the ECtHR. Overall, even if the Ombudsman does not constitute a domestic remedy to be exhausted, the Ombudsman's role is to assist in the domestic remedies and this role is to be taken seriously by the Court.

Maybe there will one day be a necessity in a case before the ECtHR to accept the Ombudsman as an applicant on behalf of the victim of a human rights violation. It would be welcoming to open possibilities, in a limited and not abusive manner, for the Ombudsman to represent an applicant under certain exceptional circumstances (or at least co-represent) and certainly to encourage the Ombudsman to intervene as a third

⁴⁴ *Tillack v Belgium*, 20477/05, 27 November 2007.

⁴⁵ *Jeunesse v the Netherlands*, 12738/10, from 4 December 2012 (decision on admissibility) and 3 October 2014, respectively.

⁴⁶ *Ramadan v Malta*, 76136/12, 21 June 2016.

party before the Court. This would allow the Ombudsman to make a greater contribution to the case law of the Court.

Ombudsmen sometimes have knowledge and experience of various sorts, related to their possibly broader tasks and their own-initiative competencies, that not only benefit the applicant but would increase the level of protection of human rights in general and improve the co-operation between the Ombudsman and the Court in serving the common goal.

The ECtHR has looked at whether the proceedings before a national Ombudsman meet the requirements for a fair trial as provided by Article 6 ECHR. It goes without saying that the independence and impartiality of Ombudsmen are of crucial significance. Furthermore, the Court has acknowledged the importance of access to the Internet for purposes of consulting the documents of the national Ombudsman. To a lesser extent, the Court has had to deal with questions of the impact of national Ombudsmen on proceedings of the domestic judiciary.

Ombudsmen use the case law of the ECtHR in their work; they play an important role in enforcing the principles of the ECtHR judgments in practice. On the other hand, the ECtHR also uses the work done by Ombudsmen in its judgments.

Notwithstanding the fact that the Ombudsman institution is, apart from in exceptional circumstances, generally not an effective remedy to be exhausted before turning to the ECtHR and not an effective remedy in the sense of Article 13 ECHR, it is not rare for the reports of the national Ombudsman to contribute to the proceedings of the ECtHR. The proceedings before the Ombudsman as such but also, above all, his or her substantial findings are regularly taken seriously by the Court, and references are made (although mostly in the facts part, on a few occasions also under the findings in the judgments of the Court). The use of the Ombudsman's decisions depends on the information in the case file, the parties' submissions, the legal system of the respective country the case concerns, and the role and position of the Ombudsman in that country.

In these cases, the Court indirectly gives the Ombudsman's work legal value/force. This 'legal transformation' is of utmost importance in cases where national Ombudsmen have correctly applied the Convention and ECtHR case law. The Court, in referring to Ombudsmen's opinions in the facts part and even using them in its reasoning (albeit rarely), is giving national Ombudsmen and the European Ombudsman alike encouragement to continue paving the challenging road of human rights protection. It is to be welcomed if this encouragement would result in even further and wider protection than that offered by the ECtHR because the Ombudsman can use broader criteria of equity and justice.

The Ombudsman should not only be a bridge between citizens and administration but also be an intermediary between citizens and other human rights protection bodies in Europe.

It is vital to continue communication within the European Network of Ombudsmen⁴⁷ while also strengthening the dialogue between the Ombudsmen and the ECtHR. Why not invite Ombudsmen, including the European Ombudsman, together with NGOs, to regular meetings with the ECtHR? There is a role for all to perform – in particular, in situations wherein the rule of law is becoming, regrettably, more and more vulnerable.

Last but not least, besides everyday work with investigations/complaints, the Ombudsmen and courts should be able to see the forest behind the trees, so as to take a more global attitude and, above all, not forget the human being.

It is important to think about the most vulnerable – human rights are not a luxury, and the independence of Ombudsmen and courts is not their privilege but serves those who seek justice. One must also not forget the 'middle class': the ordinary people who need protection, not only the weak and minorities. It is important to reach out to people, make them aware of their human rights, and contribute to the development of human rights culture in general. This human rights culture starts with the home and family; continues in schools and other education establishments; and should be present in all areas of life, including within European and national institutions, who themselves need to show good examples to others by respecting ethics and fundamental values.

⁴⁷ See the website of the European Ombudsman, at: <https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/about/en> (accessed 2 July 2020).



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International Human-Rights Supervision Triggering Change in Child-Protection Systems?

The Effectiveness of the Recommendations
of the CRC Committee in Estonia^{*1}

Introduction

The international rights of children as enshrined in the Convention on the Rights of the Child (CRC)^{*2} require the states concerned to undertake ‘all appropriate legislative, administrative, and other measures’ to implement the rights guaranteed to children (per the CRC’s Article 4). When signing a human-rights treaty, states undertake an obligation to incorporate the treaty obligations into their national legal system and implement them therein^{*3}; in reality, states ratify international human-rights treaties in pursuit of various short-term and long-term goals and for a host of reasons.^{*4}

National implementation of United Nations (UN) human-rights treaties is supervised by designated treaty bodies.^{*5} The political process performed by the treaty bodies results in recommendations addressing ways to improve the national implementation of the treaty in question. The attention paid to these recommendations depends on the good will of the states, as there is no inherent enforcement mechanism.^{*6} Practitioners of international law often focus on the binding case-law of the

¹ This article was produced in conjunction with a project titled ‘Discretion and the Child’s Best Interests in Child Protection’ at Norway’s Centre for Research on Discretion and Paternalism (<https://www.discretion.uib.no/>), affiliated with the University of Bergen. This project has received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement 724460).

² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

³ Simon Hoffman and Rebecca Thorburn Stern, ‘Incorporation of the UN Convention on the Rights of the Child in National Law’ (2020) 28 *The International Journal of Children’s Rights* 133. DOI: <https://doi.org/10.1163/15718182-02801001>.

⁴ Rebecca Thorburn Stern, ‘Much Ado about Nothing? The Road to the Incorporation of the UN Convention on the Rights of the Child in Sweden’ (2019) 27 *The International Journal of Children’s Rights* 266. DOI: <https://doi.org/10.1163/15718182-02702005>; Kasey McCall-Smith, ‘To Incorporate the CRC or Not – Is This Really the Question?’ (2019) 23 *The International Journal of Human Rights* 425. DOI: <https://doi.org/10.1080/13642987.2018.1558990>.

⁵ Michael O’Flaherty, ‘The United Nations Human Rights Treaty Bodies As Diplomatic Actors’ in Michael O’Flaherty and others (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Brill 2011). DOI: <https://doi.org/10.1163/ej.9789004195165.i-301.55>.

⁶ Walter Kälin, ‘Examination of State Reports’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (Cambridge University Press 2012). DOI: <https://doi.org/10.1017/cbo9781139047593.003>.

international supervisory bodies or on the general recommendations as consolidation of the state practice. The national impact and effectiveness of the recommendations given to a specific state in a specific context have received more limited attention; often, such analysis formally evaluates national compliance with international legal norms instead of constituting substantive examination of the recommendations' effectiveness.^{*7}

This article focuses on the recommendations that the CRC Committee^{*8} has made for the Estonian child-protection system. Estonia's legal system transitioned rapidly from communism to democracy in the 1990s^{*9}, and the country's legal system is regarded as receptive to international human-rights law, and international treaties and the associated supervision practices are implemented directly by national courts.^{*10} Correspondingly, Estonia is among the countries where the impact of international human-rights law (especially the European Convention on Human Rights and the practice of the European Court of Human Rights) is visible and where the state addresses any international criticism via implementation relatively quickly.^{*11}

The main research question considered here is this: what has been the impact and effectiveness of the CRC Committee's Concluding Observations with regard to the Estonian child-protection system? A second aim with this article is to elucidate the factors that contribute to the (in)effectiveness of these recommendations. Impact is defined as influencing change in the national legal system or practice, whereas effectiveness is understood as the level of impact.

Fulfilling an obligation to create an effective child-protection system is one of the central ways in which a state protects children from violence or danger, as the CRC's Article 19 notes. This paper examines only those elements of the child-protection system that the CRC Committee has dealt with in its comments on the development of Estonia. Assessing its effectiveness and the impact on the child-protection system requires an understanding of the general set-up of the Estonian child-protection system (CPS); against that backdrop, the changes and the reasons for those changes can be analysed.

The article starts by giving an overview of the legal context and of the obligation to create a child-protection system as entailed by the CRC. Secondly, it provides a description of the way in which Estonia has adopted the CRC and co-operated with the CRC Committee, together with a brief overview of the Estonian child-protection system. Then, an overview of the theoretical framework and the way it is conceptualised for purposes of analysing the various elements of the child-protection system is offered. These elements of the child-protection system are considered in light of the developments in the system, for identification of possible impacts of the COs by the CRC Committee. The following features of the child-protection system have been identified for analysis: central requirements connected with the CPS, the CPS's organisation, implementation of child-protection principles, and family environment and public care.

⁷ With regard to Finland, the Netherlands, and New Zealand, see, for example: Jasper Krommendijk, 'The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies' (2015) 10(4) *The Review of International Organizations* 489. DOI: <https://doi.org/10.1007/s11558-015-9213-0>. For an analysis of Finland, Estonia, and Russia, see: Katre Luhamaa, *Universal Human Rights in National Contexts: Application of International Rights of the Child in Estonia, Finland and Russia* (University of Tartu 2015).

⁸ A treaty body created for the supervision related to the CRC.

⁹ Katre Luhamaa, 'Estonia: Transition through Human Rights' in Vinodh Jaichand and Markku Suksi (eds), *60 Years of the Universal Declaration of Human Rights in Europe* (Intersentia 2009); Merike Ristikivi and others, 'An Introduction to Estonian Legal Culture' in Sören Koch and Jørn Øyrehagen Sunde (eds), *Comparing Legal Cultures* (Fagbokforl 2017).

¹⁰ Madis Ernits, 'The Use of Foreign Law by [the] Estonian Supreme Court' in Giuseppe Franco Ferrari (ed), *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems* (Brill | Nijhoff 2019). DOI: https://doi.org/10.1163/9789004297593_021.

¹¹ Julia Laffranque, 'Estonia's Trump in Europe – Protection of Human Rights' in Andres Kasekamp and others (eds), *Estonian Foreign Policy Yearbook* (Estonian Foreign Policy Institute 2013); Julia Laffranque, 'European Human Rights Law and Estonia: One- or Two-Way Street' (2015) 23 *Juridica International* 4. DOI: <https://doi.org/10.12697/ji.2015.23.01>; Luhamaa (n 7). The Supreme Court has observed that 'the general principles of law developed by the institutions of the Council of Europe and the European Union should be taken into consideration alongside the Constitution'. Judgement of the Constitutional Review Chamber of the Supreme Court of Estonia III-4/A-5/94, of 30 September 1994, with translation available at: <http://www.nc.ee/?id=482> (accessed 21 March 2020).

The legal framework

The CRC's child-protection requirements

Family is central to the full and harmonious development of the child (per paragraph 5 of the CRC preamble). Article 19 of the CRC provides for a child's right to be free from all forms of violence and obliges the state to protect children from all forms of physical and mental violence, including abuse by parental powers.^{*12} The definition of violence in Article 19 is all-encompassing: it includes, besides physical and mental violence, several other types of potentially harmful activities – injury or abuse, neglect or negligent treatment, and maltreatment or exploitation (including sexual abuse).^{*13} Furthermore, Article 3(2) states that the child has the right to such protection and care as are necessary for his or her well-being. The obligation to protect the child might require separating him or her from parental care.^{*14}

Article 19 is an overarching article that guides the state's action also under other provisions of the CRC. The state's overall obligation to ensure the survival and development of the child to the maximal possible extent (Article 6) and its specific obligations to provide appropriate assistance to parents (Article 18), together with the rights to health (Article 24), to benefit from social security (Article 26), to an adequate standard of living (Article 27), and to education (Article 28), are all particularly relevant with regard to prevention of neglect. Furthermore, child safety is guaranteed in practical terms by means of separation from the parents (Article 9), protection of children who are deprived of a family environment (Article 20), and child-protection-oriented adoptions (Article 21), where necessary.^{*15}

In order to provide a child with appropriate protection, the child-protection system foreseen under Article 19 should include a reporting and referral mechanism both for the child and for adults who notice that a child is in danger (per the Committee's General Comment (GC) 13, para 49). Said process should entail a multidisciplinary assessment of the needs of the child and the caregivers, giving due weight to the views of the child, with referral of the child (and family) to the necessary services, follow-up, and evaluation of the intervention (see para 50). Article 19 does not list the types of measures that the CPS has to take; rather, such measures are at the discretion of the state. While separating the child from the family is not usually desirable and should be an option of last resort, the measures taken to protect the child might indeed include separation.^{*16} A guiding principle in this regard is that the state should perform 'the least intrusive intervention [...] warranted by the circumstances' (GC 13, para 54).

Reporting procedure under the CRC

The CRC-associated monitoring process is rooted in the obligation of the states to submit periodic reports (reporting every five years) to the CRC Committee, hereinafter also 'the Committee' (see Article 44 of the CRC). Independent experts^{*17} with the Committee (per Article 43 of the CRC) examine the report in constructive dialogue with the state, and interventions are allowed on the part of national and international non-governmental organisations (NGOs) and human-rights institutions. The assessment of the report ends with the adoption of the recommendations included in the Concluding Observations (COs).^{*18}

State reports submitted to the Committee should present both the nation's positive developments and the difficulties related to national implementation of the CRC. The guidelines for initial reports stress that reporting allows a state to conduct a comprehensive review of the national implementation measures.

¹² CRC Committee, 'General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence' (CRC/C/GC/13, 18 April 2011) 13.

¹³ CRC Committee, 'General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment' (CRC/C/GC/8, 2 March 2007).

¹⁴ Kirsten Sandberg, 'Children's Right to Protection Under the CRC' in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds), *Human Rights in Child Protection: Implications for Professional Practice and Policy* (Springer International Publishing 2018). DOI: https://doi.org/10.1007/978-3-319-94800-3_2.

¹⁵ For further reading, see: Rachel Hodgkin and others, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 2007) 257.

¹⁶ Sandberg (n 14) 29–30.

¹⁷ Valentina Carraro, 'Electing the Experts: Expertise and Independence in the UN Human Rights Treaty Bodies' (2019) 25 *European Journal of International Relations* 826. DOI: <https://doi.org/10.1177/1354066118819138>.

¹⁸ Kälin (n 6).

Initial reports should describe the central legislative regulation and policies, while the subsequent reports should focus on the changes that have occurred in the years since the preceding report.^{*19}

Estonia's accession to the CRC

International treaty norms are an integral part of the Estonian legal system, inseparable from it (as stated in Article 3 of the Estonian Constitution)^{*20}, and are a formative part of the national legal system, guiding the creation and implementation of national law and practice.^{*21} Estonia joined the CRC signatories in 1991, shortly after it declared independence and began efforts to separate its legal system from the Soviet one and build a new democratic legal system.^{*22} Estonia's decision to become a party to the CRC in 1991 was, in the typology of Simmons,^{*23} strategic – subordination to human rights marked a path into the international community. It also demarcated Estonia's aspirations as clearly distinct from those of the Communist USSR. Estonia joined the CRC during its pre-Constitution era as its legal system was undergoing rapid transition.^{*24} Accession to the CRC did not follow from any national discussion, nor was there a clear understanding of what this accession meant for the state in practice.^{*25} One indicator of the limited understanding in this connection is that Estonia delayed translation of most of the treaties ratified in 1991, producing a translation and publishing the Estonian-language CRC only in 1996^{*26} in the wake of criticism from the Constitutional Review Chamber of the Supreme Court in a case related to a child's right to association.^{*27} Currently, international human-rights instruments and the CRC, in particular, are utilised by the national courts in interpretation of child-protection regulation.^{*28}

Estonia submitted its first report to the CRC Committee in 2001. During the first reporting cycle, the country provided a general overview of its CPS, and the second reporting cycle (2013–2017) saw Estonia report on the changes the system had undergone (see the summary in Table 1). Because of these peculiarities of the reporting, the earliest impact and the effectiveness of the first set of COs can only be evaluated between the two reporting periods, in light of the analysis by the state in the second reporting cycle. Thus far, the potential impact of the COs from the second reporting cycle is visible only at the national (rather than international) level, since the state has not yet reported to the CRC Committee on their implementation.

Submission of the initial report to the CRC Committee was strategically important, coming in 2001, when Estonia wanted to become a member of the European Union. This required that Estonia show that it substantively honoured the rule of law and international human rights, among them the rights of the child. International research shows that many similar actions of Estonia internationally have been influenced by a wish to belong to European legal culture.^{*29}

Estonia's strategic approach changed somewhat before the second round of reporting, in that the country had made a genuine attempt to improve its child-protection system. Nevertheless, Estonia submitted

¹⁹ CRC Committee, 'Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports' (CRC/C/58/Rev3, 3 March 2015).

²⁰ The Constitution of the Republic of Estonia (*Põhiseadus*) RT I, 15.5.2015, 2.

²¹ Article 123 of the Constitution of Estonia provides that Estonia shall enter into only treaties that are in conformity with the Constitution; when national law is in conflict with a treaty, the international treaty prevails.

²² Luhamaa (n 9).

²³ Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009). DOI: <https://doi.org/10.1017/CBO9780511811340>.

²⁴ The accession document was adopted in the form of a resolution of the government, with this resolution including a list of 28 international treaties to which Estonia had acceded at the time. See the Estonian-language article on the accession of the Republic of Estonia to international agreements for which the Secretary-General of the United Nations is the depositary: 'Eesti Vabariigi ühinemisest rahvusvaheliste lepingutega, mille depositaariks on ÜRO peasekretär' RT 1991, 35, 428. <https://www.riigiteataja.ee/akt/13031565> (accessed 15 October 2019).

²⁵ For further analysis of the transition process, see, for instance: Luhamaa (n 9).

²⁶ See the State Gazette: RT II 1996, 16, 56. <https://www.riigiteataja.ee/akt/24016> (accessed 15 October 2019).

²⁷ Judgement of the Constitutional Review Chamber of the Supreme Court 3-4-1-1-96, of 10 May 1996. <https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-1-96> (accessed 15 October 2019).

²⁸ For example, the judgement of the Administrative Law Chamber of the Supreme Court of 24 October 2012: 3-3-1-53-12, para 14.

²⁹ Simmons similarly discusses the influence of international human-rights law in the context of the abolition of the death penalty: Simmons (n 23) 194.

its second report five years late, in 2013, with the aim of doing so only when there were genuine improvements that could be reported. As the second review cycle with the CRC Committee took some time, Estonia followed up on its report proactively by making substantive changes to the child-protection system. For example, it reformed the organisation of its child protection and also initiated juvenile-justice reform, both after submitting its report but before the completion of the second review cycle.

Table 1: Timeline of Estonia's dialogue with the CRC Committee

Reporting cycle	State report	Shadow reports	Oral session(s)	Concluding observations
1	7 June 2001 (due in 1993) ^I	None	14 January 2003	17 March 2003 ^{II}
2–4	30 April 2013 (due on 1 November 2008) ^{III}	5 (1 Estonia's, 3 from international NGOs, and 1 from ombudsman)	17–18 January 2017	8 March 2017 ^{IV}
5–7	Due in 2022			

^I CRC Committee, 'State Party Report: Initial Report of Estonia' (CRC/C/8/Add45, 11 July 2002).

^{II} CRC Committee, 'Concluding Observations: Estonia (Initial Report)' (CRC/C/15/Add196, 17 March 2003).

^{III} CRC Committee, 'State Party Report: Second, Third and Fourth Report of Estonia' (CRC/C/EST/2-4 2014); CRC Committee, 'Concluding Observations' (n 31) para 56.

^{IV} CRC Committee, 'Concluding Observations: Estonia (Second to Fourth Report)' (CRC/C/EST/CO/2-4, 8 March 2017).

Of central importance for analysis of the impact and effectiveness are the national developments after the adoption of the first COs of the CRC Committee and before the second report by Estonia, since this is the time in which Estonia should have responded to the recommendations of the Committee with implementation actions. Estonia reported on these developments in 2013, and the Committee evaluated them in its 2017 COs. At the same time, because the review process took three years, the Committee also asked questions about more recent developments in Estonia and took these into consideration in its COs.

Estonian child-protection legislation

Although the Child Protection Act^{*30} is a central element of child-protection law in Estonia, in that it defines the general principles and organisation of the nation's child protection, the regulation of particular measures for child protection is scattered about and found in several other legal acts.^{*31} The description in the initial report of Estonia does not give a comprehensive and systematic overview of the child-protection system – particular parts of the system are presented in various isolated portions of the report. In this section of the paper, a general overview of the child-protection system in Estonia is presented, to address this issue in part. The details and criticism of the system are discussed further along in the paper.

The Constitution of Estonia has as a core premise that all the rights protected under the Constitution extend to protection of children. Article 27 of the Constitution establishes specific protection of the family. Even though its focus is more on supporting the family and less on protecting the rights and welfare of the child, Section 4 of Article 27 does state that the protection of children is provided by law. Therefore, it can be argued that the Constitution creates a child's subjective right to protection and simultaneously obliges the state to create an appropriate child-protection system.

The regulation of family law in Estonia has undergone rapid transformation over the last 30 years. The Marriage and Family Code of the Estonian Soviet Socialist Republic^{*32} (or the 1969 MFC) regulated all matters related to child protection, alongside parental-rights issues, until the Child Protection Act was adopted,

³⁰ The Child Protection Act (*Lastekaitseadus*) RT I, 6.12.2014, 1; RT I, 12.12.2018, 49.

³¹ Merle Linno and Judit Strömpl, 'Child Protection Systems in Estonia and Latvia' in Jill Duerr Berrick and others (eds), *International Handbook of Child Protection Systems* (forthcoming).

³² ESSR Code of Marriage and Family Law (*ENSV Abielu ja perekonnakoodeks*) (Eesti Raamat (Tallinn) 1969).

in 1994. Family relations and their limitation are governed by the Family Law Act (1994),^{*33} which was revised in 2010.^{*34} Estonia adopted its Child Protection Act (CPA) in 1992, with entry into force in 1993^{*35}; this was amended in 1996 and again in 1998. The Estonian child-protection system was revamped in its entirety via reforms in 2014.^{*36}

The central concept in Estonian child-protection legislation until 2014 was that of ‘the child in danger’, or *hüdaohus olev laps* (see §32 of the 1993 CPA). Since 2014, the legislation has focused instead on ‘the child in need of assistance’, or *abivajav laps* (per Chapter 6 of the CPA), with the distinction being that children who are in danger (addressed in Chapter 7 of the CPA) are a subgroup of children in need of assistance that entails immediate intervention. In practice, the local government units are responsible for the children under their jurisdiction; they must provide support to the child and his or her family when necessary and must initiate the process to remove a child in danger to safety (see §§ 27, 31, and 32 of the CPA) and arrange substitute care for the child. The Social Welfare Act (SWA)^{*37} lists specific types of services, including substitute-care arrangements available in Estonia. A single judge of a generalist county court makes all decisions related to parental rights, alongside public care for children.

Courts typically appoint a ‘kinship guardian’ or the child-protection services (CPS authorities) of the local government as the guardian of children without parental care.^{*38} The child-welfare services of local governments are responsible for social work with the child and for the organisation of family-based foster care or residential care; they also participate in the adoption process, but the Social Insurance Board is the central unit for all adoptions in Estonia.^{*39} Alongside the state^{*40} and local governments, non-governmental organisations support families that raise young people who are not their biological children.^{*41}

The analysis framework and method applied

Numerous national and international factors can influence legal or policy change in society.^{*42} The study presented here employed a socio-legal research method wherein the focus is on the ways in which international legal norms alter national legal understandings or the behaviour of the state.^{*43} In this regard, I have taken inspiration from the analysis framework proposed by Heyns and Viljoen^{*44} and later fleshed out

³³ Family Law Act (*Perekonnaseadus*) RT I 1994, 75, 1326; repealed RT I 2009, 60, 395.

³⁴ Family Law Act (*Perekonnaseadus*) RT I 2009, 60, 395; RT I, 9.5.2017, 29.

³⁵ Child Protection Act (*Lastekaitse seadus*) RT 1992, 28, 370; repealed RT I, 6.12.2014, 3.

³⁶ Child Protection Act (*Lastekaitse seadus*) (n 34). A general characteristic of Estonian laws in the 1990s is that they were short and simple in their wording and referred to a range of principles rather than modern legal norms guiding the actions of the subjects of law. This means that the discretion of the decision-makers was much wider in interpreting the legislation and that the practice of the courts was more substantially guided by the interpretation by the Supreme Court. Secondly, this era manifested frequent changes in legislation. See: Luhamaa (n 9).

³⁷ Social Welfare Act (*Sotsiaalhoolekande seadus*) RT I, 30.12.2015, 5; RT I, 21.4.2020, 37.

³⁸ Children in public care in Estonia are divided into two groups: those under the guardianship of an individual (typically family/kinship-based placement) and children under the guardianship of the local government, who are placed with a foster family, in a family home, or in residential care. Estonian legislation refers to residential care units as ‘substitute homes’. See: Linno and Strömpl (n 35).

³⁹ Kenneth Burns and others, ‘The Hidden Proceedings – an Analysis of Accountability of Child Protection Adoption Proceedings in Eight European Jurisdictions’ (2019) 6 *European Journal of Comparative Law and Governance* 1. DOI: <https://doi.org/10.1163/22134514-00604002>.

⁴⁰ The National Institute for Health Development, for example, provides training for provision of better services, including PRIDE training for foster parents.

⁴¹ Examples: NGO Own Family (*MTÜ Oma pere*), *MTÜ Igale lapsele pere*. <https://kasupered.ee>; the Estonian Union for Child Welfare (*Lastekaitse liit*). <https://www.lastekaitseliit.ee>.

⁴² On international factors, see, for example: Simmons (n 23). The ways in which the CRC has been incorporated into national law and practice are addressed by, among others: Stern (n 4); McCall-Smith (n 4); Ursula Kilkelly, ‘The UN Convention on the Rights of the Child: Incremental and Transformative Approaches to Legal Implementation’ (2019) 23 *The International Journal of Human Rights* 323. DOI: <https://doi.org/10.1080/13642987.2018.1558974>; Simon Hoffman, ‘The UN Convention on the Rights of the Child, Decentralisation and Legislative Integration: A Case Study from Wales’ (2019) 23 *The International Journal of Human Rights* 374. DOI: <https://doi.org/10.1080/13642987.2018.1558978>.

⁴³ O’Donovan, ‘Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls’ in Laura Cahillane and Jennifer Scheppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016).

⁴⁴ Christof H Heyns and Frans Viljoen (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International 2002).

further by Krommendijk^{*45} for examining the way in which the impact and effectiveness of international human rights under a national legal system can be analysed. With the present article, I develop this theoretical approach further and differentiate among various levels of impact.

Simmons^{*46} showed that states ratify treaties for many reasons and that these factors have consequences for how states comply with international human-rights treaties, implement them in the national legal system, and treat the international supervisory bodies for those treaties. Simmons divides states into three broad categories: sincere ratifiers, false negatives, and strategic ratifiers. In this context, parties in the first category value the content of the treaty and anticipate compliance; some ratify it so as to set an example. Those in the 'false negatives' class are committed to the values of the treaties in principle but do not ratify them, for domestic political reasons. Finally, strategic ratifiers ratify treaties because others are doing so or because they see another short-term benefit to ratification. Simmons does not discuss non-ratifiers; neither are they important in the context of children's rights and the CRC, since the CRC has achieved nearly universal ratification. Estonia ratified the CRC in 1991 without any declarations.^{*47} At the time, Estonia could be classed as a strategic ratifier, for its central aim at that point was to be respected as a state that could be part of the international community. Therefore, there was no national public discussion of the reasons for acceding to the CRC or of the obligations that this treaty would bring.^{*48} In 2009, Simmons characterised Estonia as a partial/transitional democracy with moderately strong rule of law.^{*49}

The CRC is an exceptional treaty in that it has been ratified by all the governments of the world apart from that of the USA.^{*50} At the same time, only a quarter of the states have accepted more thorough review of their national practice through the individual-complaints procedure. Estonia is not among these countries.^{*51} Therefore, one could well ask whether only a quite limited subset of the ratifications of the CRC have been sincere ones within the meaning of the categories articulated by Simmons.

Each state's motivation for ratification has consequences for how it complies with the standards of the treaty and whether there is political mobilisation for true implementation of the rights expressed in the conventions.^{*52} Simmons explained the universal ratification of the CRC in terms of the importance of the aims stated for the treaty and the aspirational nature of the obligations encompassed by it. She also pointed to the possible weakness of the enforcement procedure under the CRC.^{*53}

Krommendijk^{*54}, who has operationalised the way the national impact of treaty obligations can be analysed, sees the impact of treaty bodies' recommendations as 'the way in which domestic actors have referred to, used and discussed' these recommendations. For purposes of this paper, 'domestic actor' refers to the state in its presentation of its report on the implementation of the CRC for review. Krommendijk has, further, defined effectiveness as 'the extent to which policy, legislative or other measures have been taken as a result of the COs'. Here, he differentiates between compliance (which can be accidental) and impact (referring to action that was taken because of the COs). Accordingly, examining effectiveness puts the focus directly on the relationship between the recommendations in the COs and the government's behaviour.

Krommendijk's analysis of effectiveness is limited, as it presupposes that change in itself demonstrates effectiveness. With the present analysis, in contrast, I propose that the effectiveness of impactful COs should be viewed on a scale: ineffective, of limited effectiveness, and effective. The core aim behind the CRC is to

⁴⁵ Jasper Krommendijk, 'Finnish Exceptionalism at Play? The Effectiveness of the Recommendations of UN Human Rights Treaty Bodies in Finland' (2014) 32 *Nordic Journal of Human Rights* 18. DOI: <https://doi.org/10.1080/18918131.2014.876752>; Krommendijk (n 7).

⁴⁶ Simmons (n 23) 58 ff.

⁴⁷ Among others: *ibid* 99.

⁴⁸ Luhamaa (n 9).

⁴⁹ Simmons (n 23) 396.

⁵⁰ For the status of ratification of the CRC, consult: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&clang=_en (accessed 9 March 2020). The USA might be regarded as a 'false negative' in this context, in that it substantively follows most requirements of the CRC.

⁵¹ In fact, Estonia only acceded to the individual-complaints mechanism of the Human Rights Committee established by the Optional Protocol to the International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) in 1991, simultaneously with its accession to the CRC.

⁵² Simmons (n 23) 113.

⁵³ *Ibid* 60.

⁵⁴ Krommendijk (n 49) 19.

have a substantive and positive impact on the life of the child.⁵⁵ Therefore, the only recommendations that can be deemed fully effective are those that bring about positive change in practice, since effectiveness requires actual implementation. The analysis presented here uses this further differentiation, employing a three-class division to address the effectiveness of those recommendations that have had an impact (see Table 2): ineffective COs, COs with limited effectiveness, and effective COs. For example, a CO recommending legislative change has an impact but limited effectiveness when said legislation is only planned, not adopted, or when it is adopted but not implemented in practice.

Table 2: Operationalisation for assessment of impact and effectiveness

Impact and effectiveness	Indicators
No impact:	<ul style="list-style-type: none"> – The government discusses the recommendation neither in its national practice nor in the next report
COs with impact	
Ineffective COs: <ul style="list-style-type: none"> – COs that are (explicitly) rejected – Standing policy and legislative measures that are already in line with the COs and simply coincide with them 	<ul style="list-style-type: none"> – The government challenges the CO on factual and/or legal grounds, either nationally or internationally – Follow-up measures get announced before the CO is issued – the system reform does not involve discussing the elements mentioned in the CO – Domestic actors do not use the COs in their lobbying leading to the relevant measures
COs with limited effectiveness: <ul style="list-style-type: none"> – Recognition of the problem but lack of active measures addressing the issue – Adoption of formal measures 	<ul style="list-style-type: none"> – The link between the measure and the CO is weak or one whose only connection is time – A measure is taken or initiated after issuing of the CO, but adoption is delayed – The measures taken do not substantively address the concern expressed in the CO
Effective COs: <ul style="list-style-type: none"> – Policy initiatives or allocation of additional resources for (existing) policy measures – Legislative changes – Acknowledgement of the salience of the issue (in an agenda-setting function) – Initiation of studies or evaluations – The establishment of a new institution or the strengthening of an existing one – Prevention of a previously intended policy or legislative course's implementation 	<ul style="list-style-type: none"> – An explicit link is evident between the CO and legal measures, policy documents, or reports – Measures are taken or at least initiated after issuing of the CO and prior to the next reporting round – The measures address the substantive concern and bring about a change in practice

Impact assessment in this context requires the analysis of written documents. Central in this regard are the two sets of COs from the Committee (from 2003 and 2017) and the second periodic report (SR 2-4) of Estonia, from 2013 (see Table 1). It is often impossible to detect a direct causal effect between the recommendation made and the political or legal change that followed. In contrast, a correlation can be more clearly ascertained when the actors have made reference to the CRC in conjunction with presenting the need for change. There are cases of this sort, in which correlation can be established because the preparatory legislative work laid out the need for changes and thereby reveals a direct link between said change and the CRC.

⁵⁵ Laura Lundy and others, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' [2014] *The Future of Children's Rights* 305. DOI: https://doi.org/10.1163/9789004271777_015.

Nevertheless, for the purposes of the research presented here, it is regarded as sufficient for a state to have declared a change to be a response to a recommendation by the CRC Committee.

Findings on the impact and effectiveness of the Committee's Concluding Observations

Recommendations of the CRC Committee may be either general and overarching or related particularly to the child-protection system. The discussion of the latter, below, examines four sub-topics in turn. Discussed first are general principles with relevance for the child-protection system. Secondly, recommendations related to the institutional CPS set-up are addressed. The third subsection presents issues related to the implementation of the child's right to be free from any form of violence, along with any relevant procedural rights. The final topic discussed is recommendations connected with the placement of a child within the child-protection system.

In the subsections, the areas of concern are presented as indicated in the COs, followed by the responses, expressed in terms of which relevant national changes had taken place between issuing of the CO and the time of the second report. Also discussed are any follow-up comments as presented by the CRC Committee in the second review. Both the central recommendations of the CRC Committee and national responses are summarised in a table for each of the four topics.

Requirements for the child-protection system

Table 3, below, presents a summary of the Committee's general recommendations with relevance for child-protection-system matters, Estonia's responses to those recommendations, and the follow-up recommendations made.

Table 3: Summary of the CPS-related general recommendations, national responses to them, and follow-up recommendations

Recommendation	Accepted?	Mention in SR 2?	Legisl. change?	Other measures?	Effect	CO follow-up?
Bring the laws into conformity with the CRC (CO 1, para 6(a))	Yes	Yes	Planned	Yes	Effective	Limited
Ensure effective implementation by the courts (CO 1, para 6(b))	Yes	Yes	Yes	Yes	Limited in CP	Yes
Establish a comprehensive national plan of action (CO 1, para 14) and strategy for preventing violence (CO 1, para 31(I))	Yes	Yes	No	Yes	Limited in CP	Yes
Ensure effective budgetary allocation (CO 1, para 6(b))	Yes	Yes	No	Yes	Limited in CP	Yes
Collect disaggregated child-rights data (CO 1, para 10 (a–b))	Yes	Yes	No	Yes	Limited	Yes
Establish a monitoring structure (CO 1, para 12)	Yes	Yes	Yes	No	Effective	Yes

CP = child protection; CO = Concluding Observations; SR = State Report.

The criticism from the CRC Committee in the first CO materials for Estonia (2003) focused on a lack of detailed regulation and policy planning, extending to child protection.^{*56} Even though the first child-protection legislation of the 1990s was primarily a continuation following on from the Soviet child-protection legislation, the inclusion of the individual rights of the child in the protection-focused legislation had proved to be difficult.^{*57}

The CRC Committee noted a lack of detail in various legislation, including child-protection-specific legislation, and stated a requirement for adoption of more detailed legislation, with particular regard to budgetary allocation (CO 1, paras 5–6), the implementation of the rights, and (on account of its special importance) child-rights impact assessment for legislative acts. The Committee's presumption seems to have been that full implementation of all the CRC principles requires detail-level regulations (CO 1, paras 5–6). While the Estonian legal norms did refer to general principles set forth in the CRC (non-discrimination, the interests of the child, and the child being heard), these norms were declaratory in nature, while substantive implementation of these principles and rights was limited in practice. There was also a lack of detailed guidance and budgetary allocation as would support the implementation of these rights. Also, Estonia was mandated to adopt a long-term policy plan for children's rights (CO 1, para 14).

Estonia's reception of these recommendations was positive, and the country reflected on all these recommendations in the second report with an aim to demonstrating positive developments in all of the general areas addressed (SR 2-4, Chapter 1). Nevertheless, the child-protection legislation did not substantively change before 2013 and the second report. In the course of the reporting period, Estonia clarified the pre-conditions for public care in the Family Law Act (FLA, 2010) and introduced the concept of the 'well-being of the child'. The law further clarified the conditions wherein a child may be separated from the family (in §§ 134–135 of the FLA and SR 2-4's para 267). Section 123 of the FLA introduced the notion of the interests of the child, albeit vaguer in its scope than the articulation of this principle in the CRC itself (Article 3).^{*58} Estonia incorporated some of the general children's rights into other laws. One example is the Code of Civil Procedure, designed to ensure that a child who is at least 10 years old is heard^{*59} (setting such an age limit is not required by the CRC's Article 12).

During the second reporting cycle, Estonia illustrated the planned changes in legislation in the wake of the recommendations of the Committee. Several of these changes were still in progress at the time of submission of the report. Estonia brought the completely revised CPA into force in 2016. For example, Section 21 of this version of the CPA listed the considerations that any decision-maker has to employ when making a decision that should be in the best interests of the child and affects a child. That development is in line with the requirements of the CRC; nevertheless, this provision has received limited attention in court practice to date.^{*60} Therefore, one can conclude that the COs of the CRC Committee had limited effect before the submission of SR 2-4. However, several of the COs were effectively implemented soon after the submission of the state report, with clear reference to both the CRC and the recommendations of the Committee.^{*61}

The lack of policy planning was remedied with the adoption of the national strategy for children and families for 2012–2020.^{*62} This strategy had limited effect on the CPS, as the strategic focus was not on child protection and the framework lacked comprehensive analysis of some elements of child protection, such as child-protection-motivated adoptions (COs 2–4, paras 6–7).^{*63} Planning was made more difficult by the lack of disaggregated child-protection data. The NGOs pointed to lack of development in this regard when the second periodic review was being conducted: the statistics collected on children separated from

⁵⁶ This recommendation reflects the limits of the transitional legal-drafting process of the 1990s, wherein legal texts were minimal and there was a lack of substantive understanding of how to legislate and protect individuals' rights and, specifically, children's rights effectively. See: Luhamaa (n 9); Ristikivi and others (n 9).

⁵⁷ Linno and Strömpl (n 35).

⁵⁸ Estonian legislation has omitted 'best' and uses the term 'interests of the child'; see Luhamaa (n 7) 148–51.

⁵⁹ Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*) RT I, 19.3.2019, 22.

⁶⁰ Until June 2020, it was mentioned in only one judgement of the Civil Law Chamber of the Supreme Court: 6 April 2018, 2-15-16111/116.

⁶¹ E.g., Government of Estonia, 'Explanatory Report to the Draft Child Protection Act (*Seletuskiri Lastekaitse seaduse Eelnõu Juurde*)' (677 SE 2014). Available at: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/f3beec87-7eaf-4aad-afa0-aacbd-de93a4c/Lastekaitse seadus> (accessed 2 May 2020).

⁶² Ministry of Social Affairs of Estonia, 'Strategy of Children and Families 2012–2020: Smart Parents, Great Children, Strong Society (*Targad vanemad, toredad lapsed, tugev ühiskond. Laste ja perede arengukava 2012–2020*)' (2011).

⁶³ For an analysis of the limitations of child-protection adoptions, see, for example: Burns and others (n 43).

families did not include information on the background of the families in question.⁶⁴ Following up on this, the recommendations of the Committee in the second set of COs noted a continued need to develop a comprehensive information system and a need to collect and publish child-focused data (COs 2–4, para 11). Hence, this requirement had no substantive effect before submission of the report. The issue was, however, rectified later through centralised data collection and introduction of systems such as the STAR database.

The CRC Committee noted, in addition, the absence of a National Human Rights Institution (NHRI) tasked with monitoring the status of children's rights in Estonia. The response included appointing the Legal Chancellor as Ombudsman for Children, in 2011 (CO 1, paras 11–12; SR 2-4, paras 72–74). In the second review, the Committee welcomed this appointment but noted that the commitment still must be accompanied by sufficient funding and a strong enough mandate for the staff (COs 2–4, para 13).⁶⁵

Child-protection institutions

The summary in Table 4 presents the Committee's recommendations with regard to the CPS institutional arrangements, Estonia's responses to them, and the follow-up recommendations.

Table 4: Summary of the CRC Committee's recommendations as to the CPS institutional set-up, Estonia's responses to those recommendations, and the follow-up recommendations made

Recommendation	Accepted?	Mention in SR 2?	Legisl. change?	Other measures?	Effect	CO follow-up?
Ensure that there are enough qualified professionals and support local governments' CPS work (CO 1, para 16 (d–e))	Yes	Yes	No	Limited	Limited	Yes
Provide training in the management of cases of poor treatment (CO 1, para 31 (h))	Yes	Yes	No	Yes	Effective	Yes
Establish procedures for complaints, including intervention (CO 1, para 31(d))	Yes	No	No	Yes	Limited in CP	No
Assess the causes, nature, and extent of treating children poorly and of abuse (CO 1, para 31(a))	No	No	N/M	N/M	No impact	Yes

CP = child protection; CO = Concluding Observations; SR = State Report; N/M = not mentioned.

The CRC Committee's discussion of institutional challenges in 2003 focused on the small number of specialist child-protection workers in Estonia and the limited support given to the local governments. The Committee recommended an increase in the number of professionals working with children and support to the child-protection work done by the local governments (CO 1, para 16 (d–e)). In response, Estonia's SR 2-4 pointed out that numbers of child-protection workers were indeed increasing (SR 2-4, paras 92–93). The latter report still stressed that child-protection work is the task of the local governments, which have to provide support and advice for those families in need of support. Estonia's second report was submitted shortly

⁶⁴ Estonian Union for Child Welfare, 'Additional Report on the UN Convention on the Rights of the Child' (CRC/NGO/EST/22404 2015) para 53.

⁶⁵ The Ombudsman for Children submitted additional 'shadow reports' in the second review cycle, pointing to lack of implementation of the CRC in several areas. Her report to the Committee was sharp in its criticism in the course of summarising the cases it had reviewed and advised on while she was fulfilling her functions. See: Chancellor of Justice, 'Report of [the] Chancellor of Justice of the Republic of Estonia on Implementation of [the] UN Convention on the Rights of the Child about the Fourth and Fifth Regular Report of [the] Republic of Estonia' (INT/CRC/NGO/EST/22403 2015).

after the economic crisis of 2008. This gave the state the opportunity to portray not having decreased its child-protection funding as a positive measure (SR 2-4, Chapter 1.8.1). Nevertheless, the NGOs noted also in their comments during the second reporting cycle that the Committee's recommendations had been implemented at formal level and in a limited manner. They pointed to an absence of preventive measures supporting the child and family and to a low number of child-protection workers.⁶⁶ The CRC Committee took note of this criticism, and in 2017 it repeated its recommendation and expressed concern over the small number of child-protection workers in Estonia (COs 2-4, paras 32-33).

The Committee noted that the CPS institutional set-up lacked procedures for complaints to address violence against children, along with lack of a comprehensive strategy, alongside inadequate allocation of resources (CO 1, para 30). As for suggested ways of remedying the situation, the Committee recommended studying the causes, nature, and extent of children's ill treatment and abuse and, accordingly, designing policies to address these (CO 1, para 31(a); COs 2-4, paras 50-51). This recommendation had no impact; the Estonian report did not discuss it, explicitly or implicitly.

Estonia was more successful in providing training for people managing cases of poor treatment of children and shown to have improved in its co-ordination of the work crossing boundaries between various state agencies (e.g., the police and social workers) in exchanging information and planning interventions (CO 1, para 31(d, h); SR 2-4, Chapter 5.10.3). The effectiveness of these COs indeed was mentioned by the Committee in 2017, which commended the associated developments in Estonia. However, the Committee noted that any training should be provided regularly and to a broader range of professionals – for instance, encompassing teachers (COs 2-4, paras 15, 29, and 31). The existence of this more detailed follow-up recommendation should not be taken to indicate that the initial recommendation was ineffective. After all, the aim of the Committee is to ensure gradual and progressive improvement of the CPS.

Implementation of principles of child protection

Table 5, below, summarises the CRC Committee's recommendations related to the fundamental principles for child protection, the responses of Estonia to them, and the follow-up recommendations from the Committee.

Table 5: Summary of the CRC Committee's recommendations related to child-protection principles, Estonia's responses to them, and follow-up recommendations

Recommendation	Accepted?	Mention in SR 2?	Legisl. change?	Other measures?	Effect	CO follow-up?
Appropriately integrate the general principles (2, 3, 6, and 12) into the legislation and apply them in all decisions (CO 1, para 22(a-b))	Yes	Yes	Planned	Yes	Limited	Yes
Implement respect for the views of the child and the best interests of the child across all institutions and bodies (CO 1, para 27(a))	Yes	Yes	Yes	Yes	Limited	Yes
Explicitly prohibit corporal punishment and prevent physical and mental violence (CO 1, para 31(b))	Yes	Yes	Planned	Yes	Effective	No
Investigate and prosecute for children's ill treatment and provide legal proceedings that protect the child (CO 1, para 31(e))	Yes	Yes	No	Yes	Limited	Yes

CP = child protection; CO = Concluding Observations; SR = State Report.

⁶⁶ Estonian Union for Child Welfare (n 68) para 53.

The Committee's 2003 recommendations focusing on the general principles of the Estonian child-protection system pointed out the need to implement the rights of the child in practice. The following were highlighted: incorporation of the general principles for child protection into systems (CO 1, para 22(a–b)), including that of hearing the views of the child (CO 1, para 27(a)); ascertaining the causes, nature, and extent of children's abuse and poor treatment (CO 1, para 31(a)); prohibiting corporal punishment, physical violence, and mental violence (CO 1, para 31(b)); investigating and prosecuting cases of poor treatment; and protecting the child in the context of legal proceedings (CO 1, para 31(e)). The version of the Child Protection Act that entered into force in 2016 implemented necessary legislative changes, and institutional changes to the child-protection system were implemented in 2017. Therefore, one can conclude that by the time of the second review, the COs connected with principles had an impact that was effective to a limited extent.

Causing bodily harm had been criminalised in Estonia, but the legislation in this regard lacked a clear prohibition of corporal punishment (CO 1, para 31(b)). Inclusion of such a prohibition was planned for the Child Protection Act (SR 2-4, Chapter 2.7.1; §24 of the CPA of 2016). This change in national legislation was strongly influenced by the CRC Committee's COs, even though it was not fully implemented by the time of the second report. The Committee viewed the planned changes in legislation as sufficient, so the CO in question can be regarded as effective.

It is difficult to assess the effectiveness of preventive work with families at risk (see paragraphs 58–59). Estonia did provide training in the general child-protection principles to judges (SR 2-4, Chapter 1.10.1) and the police (SR 2-4, paras 241–242). Therefore, even though these recommendations' effectiveness in terms of government policy was low, this particular recommendation was clearly picked up on by a national NGO, which both lobbied for substantive change and indicated to the Committee that the recommendation was of limited effectiveness during the second review process.

Family environment and public care

The final element, the family environment and public care, is presented in Table 6, below.

Table 6: Summary of the CRC Committee's recommendations related to the family environment and public care, the Estonian responses to the recommendations, and the follow-up recommendations made

Recommendation	Accepted?	Mention in SR 2?	Legisl. change?	Other measures?	Effect	CO follow-up?
Promote the family as the best environment for the child through counselling and financial support (CO 1, para 33(b))	Yes	No	No	Yes	Limited	Yes
Increase and strengthen foster care, family-type foster homes, and other family-based alternatives (CO 1, para 33(c))	Yes	No	Yes	Yes	Limited	Yes
Study the institutionalisation of children (CO 1, para 33(a))	N/M	No	No	No	No impact	Yes
Establish mechanisms for complaints, monitoring of standards of care, and performing periodic review of placements (CO 1, para 33(h))	Yes	Yes	No	Yes	Limited	Yes
Provide follow-up and reintegration services for children leaving care (CO 1, para 33(i))	Yes	Yes	Limited	Yes	Limited	Yes

CP = child protection; CO = Concluding Observations; SR = State Report.

Estonia's responses to the recommendations related to support for families and public care were less elaborate and more focused on formal requirements related to public care. Also, these were the recommendations the Estonian report did not directly discuss. Therefore, the impact and effectiveness of these recommendations are inferred from the responses of the state.

The Committee's comments echoed some of the more general issues brought up in its general recommendations. One example is the need to provide adequate support for the local governments in child-protection cases (CO 1, para 16), accompanied by paying attention to the lack of adequate data on the review process connected with placements (CO 1, para 32). The Committee was concerned about the high number of children placed in residential substitute care (CO 1, para 33(a)).⁶⁷ In particular, it noted the large number of children who were in shelters because of difficult economic conditions. Furthermore, the conditions in the institutions were poor, and there was not adequate periodic review of placements (CO 1, para 32). The Committee recommended further support to the families, as the family constitutes the best environment for a child (CO 1, para 33(b)), and noted a need to increase and support foster care, family-type foster homes, and/or family-based alternative care (CO 1, para 33(c)). It further recommended that children in care be given access to a complaint system (CO 1, para 33(h)).

The recommendations related to the system of substitute care were limited in their effectiveness even though they did trigger national legislative change. Changes to national law and practice were discussed extensively in the second report of Estonia (SR 2-4, Chapter 5.7.1). In 2005, Estonia amended the Social Welfare Act⁶⁸ to set more explicit requirements for foster-care families and in relation to the review process. Now, every child in foster care has to have a development plan; there is an obligation to hear the opinion of any child who is at least 10 years of age in conjunction with placing him or her in foster care and preparing the development plan; and the child has a right to visit the foster family prior to placement (R 2-4, paras 275–276). In the preparations related to the placement system and development plans, one element added was a requirement to review each placement at least once per year. Estonia's report included a statement that the '[w]ork with the biological family whose child has been placed in substitute care needs to be strengthened to enable the return of the child to his or her family' (R 2-4, para 299); however, it is unclear whether this reflected plans for a policy change or, rather, merely an admission of limitations to the existing system of social work with families.

Estonia had reformed the substitute-home system over the course of the reporting period, by creating smaller residential-care units modelled after family homes (R 2-4, paras 279–282). Nevertheless, the report does not specify whether and to what extent these substitute homes differ from the institutions previously in place.

Estonia's child-protection NGOs⁶⁹ generally agreed with the government that the number of children separated from families had dropped. It still was pointed out that, even though the legislation in force prevented removing a child on the basis of poverty, material exclusion, and insufficient parenting skills, there were cases wherein children had, in fact, been removed in the absence of sufficient justification (NGO 2-4, para 57). The relevant NGO did not cite examples of this class of cases but did point out that the Supreme Court had expressed similar opinions.⁷⁰

NGOs indicated, furthermore, that only 30% of the children removed in 2014 were placed in foster families, placed under guardianship, or adopted. Other children were placed in some type of institutional setting (NGO comments, para 65). Part of the problem was the obligation of the local governments to uphold these institutions, an obligation that hindered placement of children in family-based foster care on account of the local governments' limited resources and their desire to utilise the available institutional substitute homes as fully as possible (NGO 2-4, paras 65–68).

The CRC Committee was still concerned over the large number of children placed in institutions, as indicated by the second set of COs, and recommended the establishment of clear standards for the institutions, together with increased support for foster families, periodic review, and monitoring of foster-care placements (CO 2, paras 36–37). These recommendations covered adoptions from care settings also, since

⁶⁷ The Estonian system recognises four types of substitute care (*asendushooldus*): guardianship (typically kinship-based care) and three types of care organised by the local government, in the forms of foster care, residential care, and adoption.

⁶⁸ Social Welfare Act (*Sotsiaalhoolekande seadus*) RT I 1995, 21, 323; repealed RT I, 30.12.2015, 111.

⁶⁹ Estonian Union for Child Welfare (n 68).

⁷⁰ With reference to judgement of the Civil Law Chamber of the Supreme Court 3-2-1-13-11, of 4 May 2011, or 3-2-1-121-12, of 14 November 2012.

there was no effective system for the screening of foster or adoptive parents – let alone a set of national standards and efficient mechanisms to prevent the sale and trafficking of children – to review, monitor, and follow up on the placement of children and to collect statistics on foster care and adoption, including inter-country adoptions. The Committee recommended the development of national policy and guidelines governing foster care and adoption (CO 1, paras 36–37). Estonia adopted the Strategy of Children and Families for 2012–2020,^{*71} which discusses both support for the families involved and essential developments to the country's foster care. The strategy did not articulate a substantive policy for adoptions from care^{*72}, though. Hence, the recommendations had limited effect.

Conclusion

As noted above, most of the COs of the Committee had only limited effects on the Estonian child-protection system during the reporting period, and both of the Estonian reports focused on the changes planned rather than on the progress achieved during the reporting period. In the analysis performed for this paper, such developments are classified as having limited effect. This conclusion has been confirmed by the CRC Committee in that several of its comments were repeated in the second review.

Simmons explained the universal ratification of the CRC as rooted in the importance of the aims for the treaty and the aspirational nature of the obligations brought by it. She also pointed to possible weakness of the enforcement procedure specified in the CRC.^{*73} This view conflicts with the findings of Krommendijk, who found that the states he studied took their obligations under the CRC very seriously and implemented the recommendations of the CRC Committee at a pace more rapid than that of the other treaty bodies.^{*74} The analysis of the Estonian case revealed only two recommendations that had no impact on Estonia in that Estonia did not discuss them during the review process. At the same time, there were no recommendations that Estonia explicitly contested. Instead, the country seemed to take the proposed changes seriously, and many of the adjustments to the national child-protection system were made in the wake of submission of the second report.

In conclusion, even though the legislative developments took some time, Estonia did review its central child-protection and family-law legislation and reformed the national child-protection system. There was a connection between the recommendations of the Committee and the amendments to the legislation. In its second report, Estonia displayed that it had striven to address the COs of the Committee. This was evident also from internal communication in the explanatory report connected with the Child Protection Act and during the parliamentary debate preceding adoption of the CPA. Other legislative changes, such as those with the Family Law Act 2009, were not focused on the recommendations by the Committee, although they did draw some inspiration from the CRC.

The analysis showed that the COs of the Committee were effective in initiating work to adopt corresponding national legislation, while the implementation practice was less effective. Estonia was relatively successful, albeit slow in adopting relevant legislation and integrating the requirements of the CRC into national legislation with respect to COs 2–4. This position is quite consistent with the Committee's general view that incorporation of the CRC's requirements into the national legislation is central to the implementation of the rights enshrined in the CRC.^{*75} However, as discussed above, the policies and legislative changes did not go far enough, and there was no clear evidence of successful implementation in practice. During the second review, the shadow reports gave the Committee further insight into the limited national practice and showed that implementation of legislative changes takes time, illustrating also that the effectiveness of these measures should be amenable to analysis in the following reporting cycle.

⁷¹ Ministry of Social Affairs of Estonia (n 66).

⁷² Ibid.

⁷³ Simmons (n 23) 60.

⁷⁴ Krommendijk (n 7) 505.

⁷⁵ See, for instance: Hoffman and Stern (n 3).

Finally, the study presented above correlates with the findings of Lundy et al., who showed that the CRC reporting process itself is a fundamental element of building a culture of respect for rights.^{*76} Constructive engagement in the reporting process is evidenced by the number of changes that immediately followed report submission. Along similar lines, the CRC reporting process gave a voice to the national NGOs and the Ombudsman for Children, who reviewed the entire child-protection system and supported the national changes.

⁷⁶ Lundy and others (n 59) 325.



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The Child's Autonomy in Decision-making on Medical Treatment:

Theoretical Considerations

1. Introduction

With the adoption of the United Nations Convention on the Rights of the Child (CRC), children were given a voice. Article 12 of the CRC stipulates that 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child'. The coin has another side, however, as the second part of the sentence reads thus: 'the views of the child being given due weight in accordance with the age and maturity of the child'. It is an inherent paradox of children's rights that they address subjects 'who, on the one hand[,] lack the full autonomy of adults but, on the other, are subjects of rights', as the matter is characterised in a statement from the Committee on the Rights of the Child (CRC Committee)¹ that is included in said committee's General Comment 12^{*2}. The gradual shift toward full autonomy that is conceptualised in the CRC as 'evolving capacities' renders it a challenge to establish legal norms that address the legal capacity of children in real-world situations.

That setting may explain why the theories surrounding Article 12 have conceptualised this as 'participation'; i.e., children participate in decision-making but are often not themselves the decision-makers. According to the CRC Committee, the term 'participation' is 'widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes'^{*3}. It is also the reason children's participation has been criticised; their participation can easily remain in a 'virtual box', consisting of activities that run in parallel with those of adults^{*4}:

¹ The Committee on the Rights of the Child is a treaty body created under Article 43 of the CRC. According to rule 73(1) of its 'Provisional Rules of Procedure', said committee may prepare general comments based on the articles and provisions of the convention, with a view to promoting its further implementation and assisting States Parties in fulfilling their reporting obligations.

² CRC Committee, General Comment No. 12: The Right of the Child To Be Heard (UN Doc CRC/C/GC/12, 2009).

³ *Ibid.*

⁴ Jason Hart, 'Children's Participation and International Development: Attending to the Political' [2008] *International Journal of Children's Rights* 16. DOI: <https://doi.org/10.1163/157181808x311231>.

a 'separate process of representation tends toward tokenism, placing an inherent distance between representation and real power'.⁵

But why is the topic of the child's autonomy in health care important? It is vital because it is bound up with very fundamental questions pertaining to children's rights: Do children have the right to self-determination and autonomy as adults do? And are children competent to decide on their own health and life? According to Farson, '[t]he issue of self-determination is at the heart of children's liberation. It is, in fact, the only issue, a definition of the entire concept. The acceptance of the child's right to self-determination is fundamental to all the rights to which children are entitled'.⁶

In this article, I analyse the theoretical framework for the child's autonomy in decision-making related to medical treatment. The principles of children's rights are derived from the CRC; therefore, the CRC and the general comments of the CRC Committee are analysed in sections 2–4, below, as the main source of interpretation of the concept of the child's autonomy. However, as the CRC does not give detailed guidance on how to assess children's autonomy, the concept of competence is elaborated upon from a philosophical perspective in Section 5.

2. A child's right to health

In health care, the autonomy of a child should be reflected in honouring the principle of the child patient's consent to medical treatment. The patient's autonomy (exercised through informed consent) is a core principle of contemporary medical ethics.⁷ In the case of children, however, the application of this anchoring principle is not so clear.

A child's right to health is stipulated in Article 24 of the CRC, according to which

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

The CRC Committee has explained that children's right to health encompasses both freedoms and entitlements, where the freedoms, 'which are of increasing importance in accordance with growing capacity and maturity, include the right to control one's health and body, including sexual and reproductive freedom to make responsible choices'.⁸

The child's right under Article 24 does not explicitly include the right to give free consent to medical treatment. However, it has been argued that,

although the CRC Committee did not mention this principle in its general comment on children's right to health, it is a derivative of the established principle that the right to respect for private life, which includes bodily integrity, requires that informed consent [...] be obtained before any medical procedure can be performed lawfully.⁹

In recent years, the CRC Committee has taken steps toward stronger emphasis on autonomy, stating in its General Comment 20 that 'the voluntary and informed consent of the adolescent should be obtained whether or not the consent of a parent or guardian is required for any medical treatment or procedure'.¹⁰

Although the analysis here concentrates on the principles of the CRC, it is worth mentioning the principle of the patient's autonomy, following from what is enshrined in the Council of Europe's 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application

⁵ John Wall, 'Can Democracy Represent Children? Toward a Politics of Difference' [2011] *Childhood* 19(1). DOI: <https://doi.org/10.1177/0907568211406756>.

⁶ David Archard, *Children: Rights and Childhood* (3rd edn, Routledge 2015) 71. DOI: <https://doi.org/10.4324/9781315740676>.

⁷ Jonathan Herring, *Medical Law and Ethics* (7th edn, Oxford University Press 2018) 24–25. DOI: <https://doi.org/10.1093/he/9780198810605.001.0001>.

⁸ CRC Committee, General Comment No. 15: On the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (UN Doc CRC/C/GC/15, 2013).

⁹ John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 915.

¹⁰ CRC Committee, General Comment No. 20: On the Implementation of the Rights of the Child during Adolescence (UN Doc CRC/C/GC/20, 2016).

of Biology and Medicine: Convention on Human Rights and Biomedicine (or Oviedo Convention), which is the only binding international legal instrument on the subject of bioethics. The principle of ensuring the ability to give free and informed consent to medical treatment and interventions is anchored in Article 5 of the Oviedo Convention. Article 5 specifies that an intervention in the health field may only be carried out after the person concerned has given free and informed consent.

Article 6 of the Oviedo Convention addresses those persons who are not able to consent, including children, stipulating that where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided by law. The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity. Thus, the Oviedo Convention leaves it open to the signatory states to determine the relevant threshold of capacity of minors.

The following can be stated in conclusion on the child's right to health: the boundaries of this right have to be analysed in combination with other articles and principles stemming from the CRC, foremost in conjunction with the child's right to be heard (per Article 12) and the principle of evolving capacities (enshrined in Article 5).

3. A child's right to be heard

'The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention'^{*11}, the committee has stated. According to Article 12 of the CRC, 'all States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. For this purpose, the CRC requires that the child be heard in any proceedings affecting him or her. Article 12 articulates this assurance as one of the four general principles of the CRC, together with the right to non-discrimination, the right to life and development, and granting of primary consideration to the child's best interests. It is evident that Article 12 must be applied to a child's decision-making with regard to medical treatment, because such decisions affect the child directly.

With specific regard to the child's right to be heard in health care, the CRC Committee has expressed the need to^{*12}:

- (i) involve even young children in decision-making processes (para 100);
- (ii) introduce legislation to ensure that children have access to confidential medical counselling and advice without parental consent being required (para 101);
- (iii) provide clear and accessible information to children (para 103);
- (iv) introduce measures enabling children to contribute their views and experiences to the planning and programming of health services (para 104).

Most importantly, in the context of children's autonomy, the CRC Committee has welcomed the introduction in some countries of a fixed age at which the right to consent transfers to the child, and the committee encourages other states to introduce such legislation but at the same time to ensure that a child younger than this age limit could demonstrate capacity to express an informed view.

As Article 12 refers to the child 'who is capable of forming his or her views', it is important to ask whether the wording of said article limits the scope of its application in stating that this right must be assured (only) for the 'capable' child. The CRC Committee has explained that '[t]his phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. [...] States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them'.^{*13} Hence, 'for the purposes of article 12 the requirement that a child be "capable" does not impose a requirement that he or she must be competent, accomplished, or skilful in the formation of their views'.^{*14}

¹¹ CRC Committee's General Comment No. 12 (see Note 2).

¹² *Ibid.*

¹³ *Ibid.*, para 20

¹⁴ John Tobin (see Note 9), 404.

The key aspect of Article 12 pertains to how due weight shall be given to the opinion of the child. According to its text, age and maturity are the determining factors in the weight to be accorded to the child's opinion. The CRC Committee has explained that age alone must not be taken to determine the significance of a child's view; rather, there is research showing that 'information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view. For this reason, the views of the child have to be assessed [on the basis of] case-by-case examination'.^{*15} The second criterion to be used when one is assessing what weight to give a child's view is the child's maturity. The CRC Committee defines maturity as the 'capacity of a child to express her or his views on issues in a reasonable and independent manner'.^{*16} Acknowledging the challenges that such assessment entails, the CRC Committee has articulated the need to develop good practice for assessing the child's capacity accordingly.^{*17} In light of this, the concept of maturity is analysed in detail in Section 5 of this paper.

The key elements addressed by Article 12 of the CRC are expressed comprehensively in the model Laura Lundy developed for conceptualising said article.^{*18} Lundy's model comprises four elements, which all must be established, in the following order:

- Space: Children must be given safe, inclusive opportunity to form and express their views.
- Voice: Children must be facilitated to express their view.
- Audience: The view must be listened to.
- Influence: The view must be acted upon, as appropriate.

The model presented above serves as a useful framework via which professionals who work with children, health practitioners included, can more readily think through the steps that are necessary for enabling meaningful participation of the child.

It is important to stress that Article 12 focuses on the right to express one's views and participate in decision-making, not on the right to decide. In the framework of Article 12, there is always an adult who decides how much weight the child's view is to be given. Therefore, it is difficult to agree unreservedly with those authors who contend that Article 12 'expresses true respect for the child as an autonomous person'.^{*19} By criticising the above statement, it is not argued that children should always be given the right to decide regardless of their age, maturity and circumstances. Rather, the contention in this paper is that precision is necessary in specifying what we mean with the concept of autonomy, as a right to participate in decision-making is not synonymous with the right to decide, and this distinction has direct legal implications. In the health-care systems of those jurisdictions in which a child may be deemed capable of deciding, once a qualified doctor finds the child capable of forming a rational and considered opinion about treatment, that doctor is obliged to honour the child's decision. The CRC supplies little, if any, guidance on the autonomous decision-making of children. Therefore, a more elaborate analysis of the autonomy of children is given in section 5 of the article.

4. A child's evolving capacities

The CRC Committee has explained that a child's autonomy with regard to health issues is dependent on the child's evolving capacities.^{*20} The concept of evolving capacities is presented in Article 5 of the CRC, where the convention stipulates a right and duty of a parent to provide appropriate direction and guidance to the child, in a manner consistent with the evolving capacities of the child. The concept is mentioned also in the CRC's Article 14, in the context of parental responsibility related to the freedom of thought of a child:

¹⁵ CRC Committee's General Comment 12 (Note 2), para 29.

¹⁶ *Ibid*, para 30.

¹⁷ *Ibid*, para 44.

¹⁸ Laura Lundy, 'Voice Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' [2007] *British Educational Research Journal* 33(6). DOI: <https://doi.org/10.1080/01411920701657033>.

¹⁹ Eva Brems, 'Children's Rights and Universality' in J C M Willems (ed.), *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities* (2nd edn, Intersentia 2007).

²⁰ CRC Committee's General Comment 15 (see Note 8), para 21.

parents have to provide direction to the child in the exercise of his or her right to freedom of thought, in a manner consistent with the child's evolving capacities.

The CRC Committee has defined the concept of evolving capacities in its general comments as follows:

The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights. (General Comment 20, para 18)

The more the child himself or herself knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child's development, but will steadily increase as the child is encouraged to contribute her or his views. (General Comment 12, para 84)

The language above nicely illustrates the dynamics of the concept – positioning the child's right rather than that of a parent at its core. As one commentary has noted, 'Article 5 is therefore best characterised as the right of a child to receive appropriate direction and guidance from his or her parents to secure the enjoyment of his or her rights rather than a right of parents to have their rights regarding their parenting respected by the state'.^{*21} Appropriate guidance of this sort must be given to a child for every facet of his or her life. Therefore, it has been argued that the principle of evolving capacities should have been laid down as one of the general principles of the CRC, possessing relevance for the interpretation of all rights enshrined in the convention.^{*22}

The principle of evolving capacities ties in closely with the 'best interests' principle derived from Article 3 of the CRC, which expresses the ideal that the child's best interests be a primary consideration in any action or decision concerning the child. Both principles respond to the fact that the child, although granted certain autonomy under the convention, cannot exercise his or her rights autonomously and that there is a need for protection and guidance – a need conditional to the age and maturity of the child. Thus, the convention encourages the emancipation of children (per articles 12–17), hand in hand with their optimal development (see Article 6) while, on the other hand, also requiring their protection (see Article 19 and provisions further on in the CRC), to be guaranteed primarily by the parents or those acting with equivalent responsibility (see Article 18).

The above is reflected in Lansdown's^{*23} three dimensions of the concept of evolving capacities: it is described as (i) a developmental concept, emphasising the child's right to development; (ii) a participatory or emancipatory one focused on the shift wherein rights are transferred from adults to the child; and (iii) a protective concept acknowledging the child's right to protection while his or her capacities are still evolving.

With this framing, the concept of evolving capacities clearly addresses the gradual shift from dependence to independence/autonomy, and parents (or other legal guardians, as the case may be) have a crucial role in enabling the capacities of their children to evolve.

5. The meaning of competence

The key question in the debate over a child's autonomy (autonomous decision-making) with regard to medical treatment pertains to competence. Laws provide for autonomy of individuals who are deemed to be or proved to be competent/capable.^{*24} Children are generally not deemed competent but may be judged so by adults. This places an enormous responsibility on adults and on professionals charged with making such decisions, and it confirms the necessity of understanding what competence as a prerequisite for autonomy actually means. Laws, the CRC among them, determine only general principles for such assessment. Therefore, addressing it in greater depth demands another framework. With the following subsections, the

²¹ John Tobin (see Note 9), 161.

²² *Ibid*, 162.

²³ Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Research Centre 2005).

²⁴ In clinical practice, competence is generally addressed as decision-making capacity (Irma M Hein and others, 'Informed Consent Instead of Assent Is Appropriate in Children from the Age of Twelve: Policy Implications of New Findings on Children's Competence to Consent to Clinical Research' [2015] *BMC Medical Ethics*. DOI: <https://doi.org/10.1186/s12910-015-0067-z>).

meaning of competence is analysed from a philosophical perspective, through the lens of David Archard's approach to competence of children. Archard posits that a right to self-determination may be viewed as a capacity to make sensible choices, most frequently described as rational autonomy.^{*25} According to Archard, rational autonomy comprises at least three elements – rationality, maturity, and independence.

5.1. Rationality

Archard defines rationality as the ability to form generally reliable beliefs about the world, doing so requires cognitive competence. He contends that an inability to form reliable beliefs or take well-founded decisions has been 'the most fundamental, recurring argument against autonomous rights for children'^{*26}. Indeed, cognitive competence, as necessary for 'well-founded' or 'generally reliable' decision-making, may be one of the most challenging factors in assessment of someone's rational autonomy or competence in the broader sense. One of the most influential experts in child cognitive development, Jean Piaget, associated certain levels of cognitive competence with certain stages of development and saw children's intellectual development as 'progression through a series of qualitatively distinct stages of intellectual ability'^{*27}. "According to Piaget's findings, children would be capable only from around 12 years old as this is the age at which they attend the concrete operative stage where they have the cognitive competence to make their own rational and moral judgements."^{*28} However, we now have accumulated enough evidence to conclude that children's competence does not hinge on their physical (biological) development alone. Rather, it may depend just as much on the characteristics of the adults living and working with them, such as each adult's competence, training, support, willingness, and generosity.^{*29}

As rationality is connected with knowledge and experience, both elements that must be acquired, one can rightly conclude that rationality increases with age.^{*30} Therefore, age can be seen as only one of many criteria by which a child's competence may be assessed.

Rationality comes under particularly close scrutiny in the context of informed consent in health care. A child's decision is often assessed in terms of rationality: is the child's decision rational in the eyes of others (physicians, parents, etc.) or is it irrational in others' eyes and therefore not 'well-founded'?

5.2. Maturity

Archard talks about maturity, with regard to which he borrows from the theory of John Stuart Mill, who most likely employed the term to mean 'fully developed, where this implies [the individual being] settled and unlikely significantly to change'.^{*31} He also refers to maturity as emotionally balanced. This is probably the most common approach to maturity, as we often hear someone being described as mature because he or she does not make decisions fired by the heat of emotions. Small children are known for not being fully able to separate themselves from their emotions and, therefore, letting emotions direct their decisions.

In the context of this article, it is important to refer to maturity in the sense of accumulated life experience. As research shows, children's understanding of their health and treatment issues depends far more on their experience than on age or aptitude.^{*32} The Ethics Working Group of the Confederation of Euro-

²⁵ David Archard (see Note 6), 88–91.

²⁶ Eugeen Verhellen, 'The Convention on the Rights of the Child: Reflections from a Historical, Social Policy and Educational Perspective' in *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 51.

²⁷ William Corsaro, *The Sociology of Childhood* (3rd edn, SAGE 2011) 12.

²⁸ Karl Hanson, 'Schools of Thought in Children's Rights' in *Children's Rights from Below: Cross-Cultural Perspectives* (Palgrave Macmillan 2012) 67. DOI: https://doi.org/10.1057/9780230361843_5.

²⁹ See Priscilla Alderson, 'Competent Children? Minors' Consent to Health Care Treatment and Research' [2007] *Social Science & Medicine* 2272. DOI: <https://doi.org/10.1016/j.socscimed.2007.08.005>; Karl Hanson, 'Schools of Thought in Children's Rights' in *Children's Rights from Below: Cross-Cultural Perspectives* (Palgrave Macmillan 2012) 68. DOI: https://doi.org/10.1057/9780230361843_5.

³⁰ David Archard (see Note 25).

³¹ *Ibid.*

³² Priscilla Alderson (see Note 29); Irma M Hein and others, 'Informed Consent Instead of Assent Is Appropriate in Children from the Age of Twelve: Policy Implications of New Findings on Children's Competence to Consent to Clinical Research' [2015] *BMC Medical Ethics*. DOI: <https://doi.org/10.1186/s12910-015-0067-z>.

pean Specialists in Paediatrics notes that '[c]ompetence has often been associated with cognitive capacity, rationality and age. However, it is now regarded to be also a function of a child's experience of the illness in question'.³³ Alderson³⁴ offers an example wherein a child's long-term condition may confer 'maturity' with regard to his or her health very early in life:

Everyday evidence of children aged 3 and 4 years, with such conditions as cystic fibrosis or type 1 diabetes, shows how responsible they can be when adults are not present. For example, children with diabetes refuse sweets, which their friends enjoy, and cope in sophisticated ways with being different yet sustaining friendships.

The above illustrates the danger of considering children solely on a general single-dimension scale of mature–immature. Therefore, it is hard to agree entirely with Woodhead's statement that 'immaturity remains one of the most distinctive features of the young of the human species (Bruner, 1972), whether constructed in terms of nurturance and vulnerability, teaching and learning, socialization and development or respect for their rights'.³⁵ Since maturity is connected with life experience, a child with a long-term health condition and related experience may be much more mature with regard to the accompanying health issues than an adult having only little or no experience with the same.

'Maturity' is a central term in the language of the CRC. Article 12, being one of the four general principles of the CRC, states that the views of the child must be given due weight in accordance with age and maturity, yet, as Freeman rightly points out, 'the Convention gives no indication as to how to judge the maturity, or indeed what is meant by maturity'.³⁶ As noted above, the CRC Committee has characterised the concept of maturity, in its General Comment 12, as the 'capacity of a child to express her or his views on issues in a reasonable and independent manner' (para 30). In this, we can see that the committee links maturity with independence and reasonability. Independence is the third of the key concepts applied by Archard.³⁷

5.3. Independence

Proceeding from Kantian philosophy, Archard states that 'the strongest sense of independence or "self-maintenance" is self-sufficiency, that is, an ability to sustain oneself physically by providing for one's own food, clothing and shelter'.³⁸ Of course, Archard accepts that in modern societies this definition is inapplicable, as societies and economies are much more complex than in Kantian times. Archard therefore concludes that a 'broader interpretation of self-maintenance is that people are self-maintaining when they can actually act out their choices'.³⁹ It is in this connection that one of the main challenges of a child's participation and implementation of children's rights is best reflected upon:

Presumed unable to do something, children may simply not be allowed to show that in fact they can. More subtly, it may be the case that a competence can only be acquired in the exercise of the appropriate activity. A child may display incompetence just because she has been prevented from doing what would give her the ability.⁴⁰

Allowing children to practise independence/independent decision-making and, thereby, autonomy is key to more meaningful and effective implementation of children's rights. Naturally, this practice cannot be completed overnight, and independence and autonomy are acquired gradually. Freeman agrees with the assessment of Virginia Morrow, who explains that autonomy requires 'not the straightforward delegation

³³ Maria De Lourdes Levy, Victor Larcher, and Ronald Kurz, 'Informed Consent/Assent in Children: Statement of the Ethics Working Group of the Confederation of European Specialists in Paediatrics' [2003] *European Journal of Paediatrics*. DOI: <https://doi.org/10.1007/s00431-003-1193-z>.

³⁴ Priscilla Alderson (see Note 29).

³⁵ Martin Woodhead, 'Child Development and the Development of Childhood' in *The Palgrave Handbook of Childhood Studies* (Basingstoke: Palgrave Macmillan 2009) 56.

³⁶ Michael Freeman, 'Children's Rights As Human Rights: Reading the UNCRC' in *The Palgrave Handbook of Childhood Studies* (Basingstoke: Palgrave Macmillan 2009) 386.

³⁷ David Archard (see Note 6).

³⁸ *Ibid*, 90.

³⁹ *Ibid*, 90.

⁴⁰ *Ibid*, 91.

of decision-making to children, but rather enabling children to make decisions in controlled conditions, the overall intention being to enhance their capacities for mature well-founded choices'.^{*41} Freeman also cites John Eekelaar, who defines the same process of gradual maturation as 'dynamic self-determinism', the goal of which is 'to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice'.^{*42}

Independence could be viewed equally as physical autonomy or freedom. With regard to this type of independence, a large contrast can be seen between the children of the Global South and the Global North. In Lancy's description of the issue, typically children in the Global South are granted considerable agency in the form of physical autonomy but little efficacy, in the sense of effect on others and responsiveness from adults. In the Global North, the opposite is true: children are granted little physical autonomy but a large amount of efficacy.^{*43} This illustrates how much independence, as a component of autonomy, depends on the context.

One can sum up the matter of competence thus: the competence of a child depends on many factors, and there is no universal criterion for determining whether a person is competent to decide on a certain matter or not. The complexity of the issues related to the element of competence are summarised well by De Lourdes Levy, Larcher, and Kurz:

Competence depends on the context which may involve the physical surroundings of the child. It also depends on the relationship between the child, the parents and the health professionals and must be seen within the child's experience of their illness. Competence also varies over time and with the state of the illness. For example a child who is in severe pain may not be competent to make decisions which they could otherwise make. [...]. There is a complex relationship between competence and information. It would be difficult for a child to be competent if they had not been adequately informed.^{*44}

However, there is a position among many child-rights specialists that one must presume the competence of children, not absence of competence, and that the burden of proof lies with those who wish to deny rights to children.^{*45} Setting fair and balanced rules for determining competence remains a challenge for legislators.

6. Conclusion

With the adoption of the CRC, especially Article 12, a whole new approach evolved, one that promotes children's participation and the right of children to be heard. Starting in the 1990s, within this participation framework, step-by-step movement toward recognising the autonomy of children, from a certain age and maturity level, can be identified. That incremental process is illustrated by the shift whereby the CRC Committee's general comments have changed over time toward acceptance of adolescents' full autonomy in health care. As discussed above, the committee expressed the need to include children in decision-making processes in health care in 2009, whereas in 2016 it invited states to introduce minimum-age thresholds that 'recognize the right to make decisions in respect of health services or treatment' and emphasised that 'voluntary and informed consent of the adolescent should be obtained whether or not the consent of a parent or guardian is required for any medical treatment or procedure'.

Even though the CRC Committee, in its current interpretations of the convention, recognises a right of the adolescent to make autonomous decisions (though without specifying the threshold age for this), it clearly accepts the existence of a need to assess the maturity of the child in question. In paragraph 44 of General Comment 12, the committee refers to the need to develop good practice for assessing the capacity of the child to form his or her own views.

There is not much theory to be found in the CRC or in the General Comment materials by the CRC Committee on the subject of the criteria for regarding a child as competent for autonomous decision-making.

⁴¹ Michael Freeman (see Note 36).

⁴² *Ibid.*

⁴³ David F Lancy, 'Unmasking Children's Agency' [2012] *AnthropoChildren*.

⁴⁴ See the Ethics Working Group statement (Note 33).

⁴⁵ See notes 26, 28, and 36.

Neither does the Oviedo Convention offer any clarification, stating only, in Article 6, that 'where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided by law'. Both the CRC and the Oviedo Convention leave it open to the ratifying states to specify the age from which children should be able to make decisions in respect of health services or treatment.

The key question in the debate over children's autonomous decision-making with regard to medical intervention is competence. In this article, competence was analysed through the lens of Archard's (2015) division of rational autonomy into rationality, maturity, and independence. These three are also key words the CRC Committee has employed when discussing children's competence. All three qualities – rationality, maturity, and independence – are acquired by children gradually. This is precisely why the concept of evolving capacities, introduced in Article 5 of the CRC, is so important. Parents have a right and duty to provide appropriate direction and guidance to a child, in a manner consistent with the evolving capacities of that child. The concept of evolving capacities addresses the gradual shift from dependence to independence/autonomy, and parents (or other guardians) have a crucial role in enabling the capacities of the children in their care to evolve. It is important that children be given opportunities to practise decision-making and weighing among options, so that they eventually become autonomous.

As long as there is no universal set of guidelines clarifying how one might assess children's competence, health practitioners could benefit from protocols and guidelines articulating appropriate consent procedures developed by health-care institutions. Archard's breakdown of rational autonomy could guide institutions in developing such best practice.

In summary, the autonomy of a child depends on the attitudes and understandings of all participants in the decision-making process related to medical intervention. This proves the necessity of research to study the associated attitudes and understandings among children, parents and equivalent persons, and medical practitioners.



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The Abkhazian Conflict:

A Study on Self-determination and International Intervention

1. Introduction

The Crimean conflict in 2014 followed in many respects the pattern of Russia's previous interventions in a neighbouring state – e.g., the 2008 Georgian conflict. Yet its similarities with the forgotten Abkhazian conflict in 1992–1993 are not widely acknowledged.

The conflict in Abkhazia broke out in the turbulent aftermath of the collapse of the Soviet Union. In consequence of the *de facto* statehood of Abkhazia,¹ the conflict over the breakaway region was 'frozen' for approximately 15 years and escalated again in 2008. This article addresses questions regarding the right of self-determination, unlawful threat and use of force, territorial integrity, and armed conflict by using the example of the Abkhazian conflict.

The substantial complexity of the related matters, the difficulty in establishing facts, and the associated political quagmire have contributed to the modest list of literature published on the Abkhazian conflict, *a fortiori* in the legal field. It has been regarded as a 'forgotten conflict'.² The principal aim of the present study is to determine whether Abkhazia had the right to claim statehood and to examine Russia's actions in support of the Abkhaz separatist forces during the conflict in 1992–1993.

2. Abkhazia's secession in comparison with the Crimean case

Georgia and Ukraine declared independence from the Soviet Union in 1991. However, for reason of domestic political power struggles, their state authority was fragmented and territorial integrity challenged. Like many other former Soviet republics,³ Georgia and Ukraine were torn into domestic rivalry between different factions that represented the population's heterogeneous ethnic composition.⁴

Subsequently to the dissolution of the Soviet Union, three breakaway regions emerged in Georgia, *viz.* Abkhazia in the north-west, South Ossetia in the north, and Adjara in the south-west. The Adjarians'

¹ D Lynch, *Engaging Eurasia's Separatist States: Unresolved Conflicts and De Facto States* (United States Institute of Peace Press 2004) 13–16.

² A Petersen, 'The 1992–1993 Georgia–Abkhazia War: A Forgotten Conflict' [2008] 2 *CRIA* 188.

³ E.g., the Nagorno-Karabakh conflict in Azerbaijan in 1988–1994, the Transnistria conflict in Moldova in 1990–1992, and the 1992–1997 civil war in Tajikistan.

⁴ H Tagliavini (ed.), *Independent International Fact-Finding Mission on the Conflict in Georgia* 1 (2009) 64. Georgia's (often regionally centred) ethnic groups include Armenians, Avars, Azeris, Greeks, Ossetians, Russians, and Abkhazians.

strivings for separatism were effectively curtailed in 2004 pursuant to a political solution according to which Adjara was granted autonomous status under Georgia's central government's effective control.^{*5} The status of Abkhazia and South Ossetia, however, continues to be a source of conflict.^{*6}

In Ukraine, Crimea was granted the status of an autonomous parliamentary republic. Sevastopol, which serves as the base for the Russian Black Sea Fleet, was a separate municipality in Crimea and continues to be, as it was declared a federal city by the Russian Federation under Article 2 of the 2014 Treaty on the Accession of the Republic of Crimea to Russia (with analogous status granted only to Moscow and St Petersburg).^{*7}

2.1. The Abkhazians and Crimeans as a 'people'?

The Abkhazians are ethnically, linguistically, and culturally distinct from the Georgians and related to the peoples of the North Caucasus in Russia.^{*8} The Georgians have recognised the Abkhazians as indigenous,^{*9} thus acknowledging their principal right to retain their corresponding autonomous political status.^{*10} By contrast, the majority of Crimea's population – i.e., Russians – are not indigenous. Instead, the Crimean Tatars may be regarded as the indigenous people of Crimea, but, because of the deportation during the Soviet era, they constitute only about one tenth of the current Crimean population.^{*11}

Owing to the absence of a clear definition of a 'people' in international law, the term has been subject to various legal interpretations in the context of self-determination.^{*12} The general meaning of 'minorities'^{*13}, as well as 'communities'^{*14}, may be indicative for interpreting the term 'people'. In this context, the Crimean Russians have no profoundly distinct characteristics. In comparison, the fact that the Abkhazians have their own culture, traditions, and language implies that they may be regarded as a 'people' according to the more liberal view.^{*15} Yet the recognition of Abkhazians as a people is not sufficient for the Abkhazians to enjoy the right to external self-determination,^{*16} since it is subject to additional and more stringent criteria, as examined next.

⁵ In 2004, the central government as well as the local people confronted Adjara's authorities. Adjara's autocratic ruler was forced to resign, and Georgia's government re-imposed its control over the province.

⁶ See also: A Lott, 'The Tagliavini Report Revisited: Jus ad Bellum and the Legality of the Russian Intervention in Georgia' (2012) 28/74 UJIEL 4–21. DOI: <https://doi.org/10.5334/ujel.aw>.

⁷ Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation. Moscow, 18.3.2014, art 2.

⁸ B Coppieters, 'The Roots of the Conflict' in J Cohen (ed.), *A Question of Sovereignty: The Georgia–Abkhazia Peace Process* (Accord 1999) 16–17; S E Cornell, *Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus* (Routledge 2001) 56. DOI: <https://doi.org/10.4324/9780203988879>.

⁹ D Ennals et al. (eds), *Report of a UNPO Mission to Abkhazia, Georgia and the Northern Caucasus* (UNPO 1992) 6.

¹⁰ However, note the different historical narratives and the respective claims of Abkhazia and Georgia over Abkhazia's territory in B Coppieters, 'A Moral Analysis of the Georgian–Abkhaz Conflict' in B Coppieters and R Sakwa (eds), *Contextualizing Secession: Normative Studies in Comparative Perspective* (OUP 2003) 205–206. DOI: <https://doi.org/10.1093/0199258716.001.0001>.

¹¹ According to the 2001 census, 10.1% of the population of the Autonomous Republic of Crimea indicated Ukrainian as their native language, and 77% specified Russian and 11.4% Crimean-Tatar as their native language. State Statistics Committee of Ukraine. 'About Number and Composition Population of Autonomous Republic of Crimea by All-Ukrainian Population Census' 2001 Data'. <http://2001.ukrcensus.gov.ua/eng/results/general/language/Crimea/> (accessed 7 February 2020).

¹² K Knop, *Diversity and Self-Determination in International Law* (CUP 2002) 52–57. DOI: <https://doi.org/10.1017/cbo9780511494024>.

¹³ F Capotorti, 'Minorities' in R Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3 (Elsevier 1997) 412.

¹⁴ *Greco-Bulgarian Communities (Advisory Opinion)* [1930] PCIJ (ser. B) No. 17, para 30.

¹⁵ A Nussberger, 'The War between Russia and Georgia – Consequences and Unresolved Questions' (2009) 1 GoJIL 355; C Ryngaert and C Griffioen, 'The Relevance of the Right to Self-Determination in the Kosovo Matter: In Partial Response to the Agora Papers' (2009) 8 Chinese JIL 577. DOI: <https://doi.org/10.1093/chinesejil/jmp021>.

¹⁶ For the difference between 'external' and 'internal' self-determination generally, see: T Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal* (Kluwer 2001) 34, quoting Michla Pomerance in *Self-Determination in Law and Practice* (Nijhoff 1982) 37; B Simma (ed.), *The Charter of the United Nations: A Commentary* 1 (2nd edn, OUP 2002) 56–57.

2.2. The right of external self-determination: *Utī possidetis juris*

Forming part of customary international law,^{*17} the right of self-determination, as granted under Article 1(2) of the United Nations (UN) Charter,^{*18} constitutes an *erga omnes* norm.^{*19} Additionally, in terms of Article 53 of the Vienna Convention on the Law of Treaties^{*20}, it has been deemed by some scholars to possess a *jus cogens* character.^{*21} However, the right of self-determination has been used in practice restrictively, which is mirrored in the principle *uti possidetis juris*.

According to the Badinter Arbitration Committee, 'it is well established that, whatever the circumstances, the right of self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise'.^{*22} Derived from the 19th-century post-colonial Latin American context, the *uti possidetis* rule re-emerged in the 1960s when African successor states were required to accept borders that they inherited from the colonial era.^{*23} The International Court of Justice (ICJ) noted in the *Frontier Dispute* case that the purpose of the rule is to prevent the independence and stability of new states being endangered by fratricidal struggles.^{*24}

The *uti possidetis* principle thus safeguards the balance between the right of self-determination and territorial integrity of a state. It reflects particular significance in regard of the Abkhazian and Crimean breakaway regions.

Georgia restored its independence in 1991 under the principle of state continuity, whereby its statehood is – pursuant to Georgian constitutional law – founded on the independence of the Georgian Democratic Republic in 1918–1921, which was later annexed by the Soviet Union.^{*25} Abkhazia was part of Georgia under the independent 1921 Constitution, according to which the region was granted autonomy in Georgia along with Zaqatala^{*26} and Adjara.^{*27}

Abkhazia unilaterally declared its sovereignty in August 1990,^{*28} thereby proclaiming itself a sovereign union republic within the Soviet Union.^{*29} However, notwithstanding certain claims to the contrary,^{*30} this was not a declaration of independence, nor did the declaratory document alter the state-legal status of the breakaway region in light of Georgia's territorial integrity.^{*31} This also corresponds to the views of Abkhazian historians.^{*32} Therefore, the 1990 declaration of sovereignty should not be regarded as an act

¹⁷ *Western Sahara (Advisory Opinion)*, ICJ Reports 1975 12, para 56.

¹⁸ Charter of the United Nations, 26 June 1946, 1 UNTS XVI.

¹⁹ *Case Concerning East Timor (Portugal v Australia)*, ICJ Reports 1995 90, para 29.

²⁰ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art 53.

²¹ A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 140; B Simma (Note 16) 62; A Nussberger (Note 15) 363; *Opinion no. 2*, Arbitration Commission of the Conference on Yugoslavia, 11 January 1992, reproduced in A Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 EJIL 180. DOI: <https://doi.org/10.1093/oxfordjournals.ejil.a035802>. Cf. J Crawford, 'Book Review of Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal*' (1996) 90 AJIL 332. DOI: <https://doi.org/10.2307/2203697>.

²² A Pellet (Note 21) 184.

²³ J Mayall, 'Nationalism, Self-Determination, and the Doctrine of Territorial Unity' in M Weller and B Metzger (eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Nijhoff 2008) 9–10. DOI: <https://doi.org/10.1163/ej.9789004164826.i-794.6>.

²⁴ *Frontier Dispute (Burkina Faso v Republic of Mali)*, ICJ Reports 1986 554, para 20.

²⁵ E.g., R O'Keefe, 'The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States' (2001) 1 BaltYIL 173. DOI: <https://doi.org/10.2139/ssrn.3496677>. The Georgian claim to state continuity has not been recognised in State practice. See L Mälksoo, 'State Identity, Deconstruction and "Functional Splitting": The Case of Illegal Annexations' (2002) 7 Austrian Rev Int'l & Eur L 104–106. DOI: <https://doi.org/10.1163/157365102x00037>.

²⁶ Zaqatala constitutes a part of modern Azerbaijan.

²⁷ The Constitution of Georgia, 21 February 1921, art 107.

²⁸ 'Declaration of the State Sovereignty of the Abkhaz Soviet Socialist Republic, 25 August 1990' in T Diasamidze, *Regional Conflicts in Georgia – the Autonomous Oblast of South Ossetia, the Autonomous SSR of Abkhazia (1989–2006). The Collection of Political-Legal Acts* (Regionalism Research Centre 2006) 27.

²⁹ A Petersen (Note 2) 193.

³⁰ A Nussberger (Note 15) 361.

³¹ 'Decree issued by the Supreme Council of the Abkhaz SSR on Legal Guarantees of Protection of the Statehood of Abkhazia' in T Diasamidze (Note 28) 29–31; H Tagliavini (Note 4) 73.

³² R Flawn, 'The Georgian–Abkhaz Conflict: Perception of Its Origins and Prospects for Its Resolution' in S Cummings (ed.), *War & Peace in Post-Soviet Eastern Europe* (Royal Military Academy Sandhurst 2000) 49.

of secession. The critical date, which is necessary for determining the legality of the secession, is in 1999, when, pursuant to a referendum in October,^{*33} the Abkhazians declared independence.^{*34}

The UN and its Security Council have unequivocally supported Georgia's territorial integrity.^{*35} This has been confirmed in numerous UN Security Council resolutions.^{*36} Hence, prior to the August 2008 conflict in South Ossetia, no UN Member State, including Russia,^{*37} recognised Abkhazia as an independent state. The UN Security Council confirmed its support to the territorial integrity of Georgia in Resolution 1808,^{*38} less than four months prior to the outbreak of the international armed conflict between Russia and Georgia in 2008, as a result of which Abkhazia, in effect, claimed statehood.

Russia's unstable stance toward treaty law is mirrored also in the fact that in 1994 Ukraine agreed to send its strategic nuclear weapons arsenal (the third largest in the world) to Russia for dismantling and Russia, correspondingly, reaffirmed its commitment to Ukraine to respect its borders and also recognised that 'border changes can be made only by peaceful means and consensual means' and reaffirmed its 'obligation to refrain from the threat or use of force against the territorial integrity' of Ukraine.^{*39} In 2009, the United States and Russia confirmed 'that the assurances recorded in the Budapest Memoranda will remain in effect'.^{*40} Despite these commitments, Russian forces occupied Crimea in 2014 to facilitate the Crimean secession from Ukraine.

The critical date for determining the legality of the Crimean secession is 16 March 2014. On that date, following a declaration of independence adopted on 11 March 2014, an independence referendum was held. In a key result of the referendum, Crimea was declared independent, only to join the Russian Federation two days later.^{*41} The referendum was declared illegal by the UN General Assembly by a recorded vote of 100 in favour to 11 against.^{*42} In particular, pursuant to the ICJ's advisory opinion on Kosovo, the illegality attached to the Crimean declaration of independence and the following referendum stemmed from the fact that they were connected with the previous unlawful use of force by Russia.^{*43}

Pursuant to the *uti possidetis* principle, Abkhazia and Crimea did not have the right to claim statehood. The *uti possidetis* principle results in exemption from the right of external self-determination for the sub-regional entities of the former Soviet republics. Thereby, the dissolution of the Soviet Union did not continue beyond federal level, which was composed of Ukraine and Georgia, instead of sub-regional Abkhazia and Crimea.^{*44} The *uti possidetis* principle was thus equally applicable to Abkhazia and Crimea, with the latter granted, analogously to Abkhazia, Autonomous Soviet Socialist Republic status following a referendum on 20 January 1991.

Whether the right of remedial secession provides a legal basis for Abkhazia's and Crimea's statehood is examined next.

³³ B Coppieters 2003 (Note 10) 211.

³⁴ On the complex and ambiguous process of negotiations on the status of Abkhazia, see H Tagliavini (Note 4) 82–83, 87; S E Cornell (Note 8) 188, 347. Although it has been sometimes argued that Abkhazia declared its independence in July 1992, it has been generally agreed that 'Abkhazia had technically not proclaimed full independence [in 1992] and did not commit *de jure* secession, although the war led to *de facto* secession'. Abkhazia was an autonomous republic in the Soviet Union, although in 1922–1931 it was an independent Soviet republic.

³⁵ R Muzalevsky, 'The Russian–Georgian War: Implications for the UN and Collective Security' (2009) 4 OAKA 31.

³⁶ E.g., UN SC Resolution 1781, 15 October 2007, para 1.

³⁷ E.g., UN SC Provisional Verbatim Record 3295, 18 October 1993, 7–8.

³⁸ UN SC Resolution 1808, 15 April 2008, para 1.

³⁹ UN GA Resolution 49/66 and UN SC Resolution 91, 'Trilateral Statement by the Presidents of the Russian Federation, Ukraine and the United States of America issued on 14 January 1994', 27 January 1994.

⁴⁰ 'U.S.–Russia Joint Statement on Expiration of the START Treaty' (4 December 2009). <https://2009-2017.state.gov/r/pa/prs/ps/2009/dec/133204.htm> (accessed 6 March 2020).

⁴¹ Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов, 18 March 2014, art 1(1).

⁴² UN GA Resolution A/68/L.39, 27 March 2014, 5.

⁴³ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, 403, para 81.

⁴⁴ One may thus consider that the situation might have been different if Abkhazia's status as an independent Soviet Republic had not been downgraded in 1931, as a result of which it was declared to be part of the Georgian Soviet Socialist Republic.

2.3. The right of external self-determination: Remedial secession

The right of remedial secession *per se* is questionable under international law.^{*45} Nonetheless, it has been characterised in the influential *Reference re Secession of Quebec* case as a measure of ‘self-help’ where a ‘people’ is oppressed.^{*46} Some authors have considered it a customary rule.^{*47} It has been noted in legal literature that, for the right of remedial secession to apply, the group invoking the right needs to constitute a ‘people’.^{*48} As analysed above, the Russians who constitute the majority in Crimea have no distinct identity and, hence, may not be regarded as a ‘people’, unlike, potentially, the Abkhazians.

Yet it is unclear whether the Abkhazians represented a clear majority in Abkhazia, which is thought to constitute another criterion for a legitimate remedial secession. The situation in Abkhazia in the 1990s should be analysed from the critical-date standpoint.^{*49} As analysed above, the critical date is 1999 when the declaration of independence was announced.

In 1989, prior to the outbreak of the conflict, the population of the Abkhaz autonomous republic was 525,000. This comprised 45.7% Georgians and only 17.8% Abkhazians, while also Armenians, Greeks, and Russians constituted significant minorities.^{*50} However, this last internationally recognised census is not accurate in its reflection of Abkhazia’s demographic situation in 1999.

The conflict in 1992–1993 resulted in drastic alterations in the composition of Abkhazia’s population, primarily due to the internal displacement of most of the ethnic Georgians whose residence had been in Abkhazia. According to the 2003 census, conducted by Abkhazia’s *de facto* government, the Abkhazians’ representation in the region’s population rose to approximately 44.1%. In Georgian data, on the other hand, the corresponding figure remained close to 20%.^{*51} It is important to determine whether this constituted a clear majority in the breakaway region, which is a precondition for claiming the right to remedial secession.

It has been noted that ‘as the risk of creating a large minority in the newly established State must be brought to a minimum, a majority of at least 80% would be required’^{*52} in order to constitute a ‘clear majority’. Although the precise level for a ‘clear majority’ may be debatable, it is clear that, under this criterion, the Abkhazians, who probably accounted for around 30–35% of Abkhazia’s population, did not constitute a clear majority to legitimately claim remedial secession.^{*53}

In addition, by the time of the declaration of independence in 1999, the Georgian government had shown good will in respect of resolving the crisis in the breakaway province,^{*54} and the political process for peaceful settlement of the dispute was still under way.^{*55} After its restoration of independence, Georgia offered Abkhazia the broadest autonomous status within a federal framework, leaving the main governmental functions under the control of the Georgian executive power.^{*56} The Abkhazian authorities, for reason of their preference for a confederative state, did not accept these proposals.^{*57} A model based on a confederative state would have provided the Abkhazians with international recognition of their sovereignty and thus, potentially, the right to secede.^{*58}

⁴⁵ T Potier (Note 16) 35–37. Cf. B Simma (Note 16) 58.

⁴⁶ *Reference re Secession of Quebec* (1998) 2 S.C.R. 217, para 138.

⁴⁷ C Ryngaert and C Griffioen (Note 15) 579.

⁴⁸ *Ibid*, 575–576.

⁴⁹ The right to remedial secession does not have proactive effect, which means that the events occurring subsequently to the secession do not affect the lawfulness of the act itself.

⁵⁰ H Tagliavini (Note 4) 65.

⁵¹ Anonymous, *Abkhazia Today: Europe Report N° 176*, 15 September 2006; International Crisis Group 9.

⁵² C Ryngaert and C Griffioen (Note 15) 577.

⁵³ In contrast, the Kosovo Albanians constitute 90% of Kosovo’s population.

⁵⁴ UNPO Mission Report (Note 9) 9.

⁵⁵ H Tagliavini (Note 4) 82–83, 87.

⁵⁶ G Nodia, ‘Georgian Perspectives’ in J Cohen (Note 8) 23; V Baranovsky, ‘Russia and Its Neighbourhood: Conflict Developments and Settlement Efforts’ in *SIPRI Yearbook 1995: Armaments, Disarmament and International Security* (OUP 1996) 252; G Khutsishvili, ‘The Abkhazia and South Ossetia Cases: Spoilers in a Nearly Collapsed Peace Process’ in E Newman and O Richmond (eds), *Challenges to Peacebuilding: Managing Spoilers during Conflict Resolution* (UNUP 2006) 287.

⁵⁷ T Potier (Note 16) 116–118.

⁵⁸ H Tagliavini (ed.), *Independent International Fact-Finding Mission on the Conflict in Georgia 1* (2009) 29.

Moreover, the 1999 Security Council Resolution 1255,^{*59} in combination with the Security-Council-backed 'Boden paper',^{*60} which regarded Abkhazia as a sovereign entity within Georgia, essentially promised a breakthrough in the years-long negotiations over Abkhazia's status. Furthermore, there was considerable room for debate on issues such as internal self-determination. Georgia's willingness to establish an Abkhazian autonomous region was demonstrated by the fact that in August 1991 a compromise was reached between the Abkhaz and the Georgians according to which the composition of the Abkhaz Parliament was to be based on ethnic quotas strongly in favour of the Abkhaz.^{*61}

3. Russia's intervention in the Abkhazian conflict

The warring parties in the 1992–1993 conflict in Abkhazia, if one leaves aside the participation of mercenaries and the alleged intervention of Russian forces, were represented by Georgian armed forces on one side and Abkhaz separatist forces on the other.

The Abkhaz forces were under the authority of the Abkhazian Defence Ministry.^{*62} They had a command structure and exercise of leadership control.^{*63} These forces were governed by rules, and there were provision of military training^{*64} alongside recruitment of conscripts,^{*65} organised acquisition and provision of weapons and supplies, and established communications infrastructure.^{*66} Additionally, Abkhaz forces gained control over most of the breakaway region's territory prior to the August 2008 Georgian conflict, are in control of the whole province at present, and controlled a varying but significant proportion of the entity's territory throughout the 1992–1993 conflict.^{*67} In light of these circumstances, it may be concluded that the Abkhaz forces were established as organised armed groups in the conflict.^{*68}

It has been estimated by the warring parties' human rights committees that on the Georgian side at least 4,000 individuals were killed in the Abkhazian conflict (both civilians and combatants) and 10,000 were wounded, whereas on the Abkhazian side 4,040 persons died (2,220 combatants, 1,820 civilians) and approximately 8,000 were wounded.^{*69} By contrast, the August 2008 conflict in South Ossetia resulted in approximately 300 fatalities and 500 injuries on the South Ossetian and Russian side and in 364 fatalities and 2,234 injuries on the Georgian side.^{*70} Hence, the fighting in Abkhazia in 1992–1993 was categorised as a major armed conflict under the Uppsala Conflict Data Program's definition, according to which the conflict needs to involve at least 1,000 battle-related deaths in at least one calendar year,^{*71} whereas the Georgian conflict in August 2008 remained at the level of a minor conflict.^{*72}

Furthermore, according to an independent estimate, approximately 300,000 people fled Abkhazia during the conflict in 1992–1993, including almost the entire Georgian population of about 250,000, and the majority of the internally displaced persons have still not had the opportunity to return to their original

⁵⁹ UN SC Resolution 1255, 30 July 1999.

⁶⁰ B Coppeters, 'The Georgian–Abkhaz Conflict' in B Coppeters et al. (eds), *Europeanization and Conflict Resolution: Case Studies from the European Periphery* (AP 2004) 203–211; H Tagliavini (Note 4) 87.

⁶¹ UNPO Mission Report (Note 9) 9.

⁶² V Baranovsky, 'Post-Soviet Conflict Heritage and Risks' in *SIPRI Yearbook 1993: Armaments, Disarmament and International Security* (OUP 1994) 100.

⁶³ International Crisis Group (Note 51) 14.

⁶⁴ *Ibid.* Approximately 15,000–25,000 reservists trained around three or four times a year.

⁶⁵ V Baranovsky (Note 56) 100.

⁶⁶ International Crisis Group (Note 51) 14. An estimated 35% of the region's budget was spent on the military and police.

⁶⁷ A Petersen (Note 2) 195–197.

⁶⁸ See *Prosecutor v Milošević* (International Criminal Tribunal for the Former Yugoslavia, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, 16 June 2004), 23. *Prosecutor v Boskoski & Tarculovski* (International Criminal Tribunal for the Former Yugoslavia, Judgment, Case No. IT-04-82-T, 10 July 2008), 199–203.

⁶⁹ HRW Arms Project & HRW/Helsinki (1995) 7 *Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict* 5; V Baranovsky (Note 56) 100.

⁷⁰ Parliamentary Assembly of the Council of Europe, 'The Consequences of War between Georgia and Russia', Resolution 1647, 28 January 2009, 14; H Tagliavini (Note 58) 5; H Tagliavini (Note 4) 223–224.

⁷¹ L Harbom and P Wallensten, 'Appendix 2A: Patterns of Major Armed Conflicts, 1999–2008' in *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (OUP 2009) 77–78.

⁷² E Stepanova, 'Trends in Armed Conflicts: One-sided Violence against Civilians' in *SIPRI Yearbook 2009* (Note 71) 57.

residence in Abkhazia.^{*73} In the 1992–1993 conflict, the most prominent actors in the cease-fire negotiations were the UN Security Council and Russia.^{*74} When these indicative figures are considered in light of the *Milošević* case^{*75} and the *Tadić* case,^{*76} the Abkhazian conflict from 1992–1993 was an armed conflict for the purposes of Common Article 2 of the 1949 Geneva Conventions.

In the ordinary meaning, ‘international armed conflicts’ are conflicts between states, whereas ‘non-international armed conflicts’ are those between states and armed groups within the territory of a state or states.^{*77} International armed conflicts encompass interventions that are generally understood as implying ‘dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things’.^{*78} This necessitates an examination of Russian alleged intervention in the Abkhazian conflict.

At the time of the 1992–1993 conflict in Abkhazia, Russia had an extensive military presence in the breakaway region (e.g., amounting to 2,500 troops in 1994).^{*79} Also, analogously to the Crimean self-proclaimed leaders in 2014, the separatist rulers of Abkhazia engaged in manipulation whereby Russia’s military presence acted against Georgian authorities during the 1992–1993 conflict by, *inter alia*, calling for Russia’s participation in the conflict.^{*80} Correspondingly, Russia repeatedly threatened Georgia in 1992–1993 with military intervention.^{*81} This implies a threat of force, which is deemed to exist in cases of implicit demonstrations of force if accompanied with a military presence that makes the threat credible.^{*82}

Georgia alleged in the *Georgia v Russia* case before the ICJ that Russia extensively supported separatist movements in the Abkhazian conflict.^{*83} Russia purportedly supplied Abkhaz secessionists with tanks and other modern weaponry during the 1992–1993 armed conflict.^{*84} Independent observers also have acknowledged that Russia provided assistance to the Abkhaz separatists in Georgia.^{*85} Whilst third states may provide assistance to the *de jure* and *de facto* legitimate government of a particular state (e.g., the Georgian government), it is not permitted with regard to internal opposition –e.g., Abkhaz forces or secessionists in eastern Ukraine.^{*86}

It has been noted that Russian assistance to the Abkhaz side included the transfer of weapons: T-72 tanks, Grad rocket launchers, over 100,000 landmines, and other heavy equipment.^{*87} Human Rights Watch (HRW) has observed that possible sources for Abkhaz weapons included ‘supplies and support authorized by branches of the Russian army or government in Moscow’^{*88}, and HRW concluded that Russian forces supplied Abkhaz troops with at least some heavy weapons, transport, and fuel^{*89}, though it could

⁷³ H Tagliavini (Note 4) 79; C Dale, ‘The Dynamics and Challenges of Ethnic Cleansing: The Georgia–Abkhazia case’ (1997) 16 RefSQ 82–86. DOI: <https://doi.org/10.1093/rsq/16.3.77>; T Potier (Note 16) 122.

⁷⁴ H Tagliavini (Note 4) 76–77.

⁷⁵ *Prosecutor v Milošević* (Note 68) 26–40.

⁷⁶ *Prosecutor v Tadić* (International Criminal Tribunal for the Former Yugoslavia, Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995) 70.

⁷⁷ M E O’Connell (ed.), *Final Report on the Meaning of Armed Conflict in International Law* (ILA 2010) 8.

⁷⁸ L F L Oppenheim, quoted in A Tanca, *Foreign Armed Intervention in Internal Conflict* (Nijhoff 1993) 17.

⁷⁹ V Baranovsky (Note 56) 252.

⁸⁰ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, ICJ Reports 2011, 53.

⁸¹ N Stürchler, *The Threat of Force in International Law* (CUP 2007) 305. DOI: <https://doi.org/10.1017/cbo9780511494338>. V Baranovsky (Note 56) 99. S E Cornell (Note 8) 172–173. An analogous statement was made by Russian Defence Minister Grachev in the immediate aftermath of the Abkhaz offensive that had resulted in the capture of Sukhumi in September 1993; M D Toft, *The Geography of Ethnic Violence: Identity, Interests, and the Indivisibility of Territory* (PUP 2003) 103–105. DOI: <https://doi.org/10.1515/9781400835744>.

⁸² H Tagliavini (Note 4) 232; N Stürchler (Note 81) 260–261.

⁸³ *Georgia v Russia* (Note 80) 52–53, 56. See also D Lynch, ‘Separatist States and Post-Soviet Conflicts’ (2002) 78 Int Aff 845. DOI: <https://doi.org/10.1111/1468-2346.00282>; B Simma (Note 16) 120–121.

⁸⁴ *Georgia v Russia* (Note 80) 51.

⁸⁵ H Tagliavini (Note 58) 13.

⁸⁶ R Müllerson, ‘Intervention by Invitation’ in L F Damrosch and D J Scheffer (eds), *Law and Force in the New International Order* (Westview Press 1991) 132–133. DOI: <https://doi.org/10.4324/9780429034244-10>.

⁸⁷ S E Cornell (Note 8) 171; C Zürcher, *The Post-Soviet Wars: Rebellion, Ethnic Conflict, and Nationhood in the Caucasus* (NYU Press 2007) 141.

⁸⁸ HRW Arms Project & HRW/Helsinki (Note 69) 52–53.

⁸⁹ *Ibid.*, 38; N M Shanahan Cutts, ‘Enemies through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict’ (2007–2008) 40 Case W. Res. J. Int’l L 295.

not determine which Russian State organs were involved in this and at what level of command.^{*90} Nevertheless, under the law of state responsibility, the conduct of any state organ is regarded as an act of a state.^{*91} Thus, irrespective of the level of command, the acts of Russian military forces are principally attributable to Russia.^{*92}

Hence, it appears that Russia bore direct responsibility for the conduct of its forces that were rearming Abkhaz secessionist troops. It was noted by the ICJ in the *Nicaragua* case that the provision of arms to separatist forces in another state would not reach the threshold for an armed attack against a state in terms of Article 51 of the UN Charter.^{*93} This has been disputed by many authoritative views.^{*94} In any case, Russia's actions gravely violated Georgia's sovereignty. Under Article 22 of the Articles on State Responsibility and in conformity with ICJ case law, Georgia was entitled to take proportionate countermeasures not involving the use of force under the terms of Article 2(4) of the UN Charter.^{*95}

During the 1992–1993 conflict in Abkhazia, Russia's overall control was reflected in financing and provision of training, logistics, and weapons to the armed groups.^{*96} It is not verified that Russia exercised direct control over the unmarked troops in Abkhazia. Possibly Russia only exercised overall control in respect of the troops that had no fixed distinctive emblem recognisable at a distance, mercenaries, irregulars, and volunteers during the Abkhazian conflict.

Nonetheless, in the first half of 1993, Russia also directly used force against Georgia when it carried out air raids on Sukhumi. Abkhazia's capital, Sukhumi was at that time under effective control of the Georgian government. Yet hostilities continued between the conflicting sides. In February, Georgian forces attacked the former Soviet military laboratory in Novi Esher and raided weapons depots.^{*97} Allegedly, Russian troops were present at the laboratory so had the right to take self-defence measures if attacked.

In response, however, Russia launched bombings of civilian areas in Sukhumi from the air, which seems to fail to meet the conditions for lawful self-defence: immediacy, proportionality, and necessity.^{*98} The aerial bombings of Sukhumi marked direct Russian military intervention in the Abkhazian armed conflict.^{*99} They were commenced on 20 February 1993, subsequent to the incident in Novi Esher, and lasted at least until early April.^{*100} On 19 March 1993, Georgian forces downed an SU-27 fighter-bomber that was piloted, according to independent UN military observers, by a Russian major.^{*101} Russian Defence Minister P. Grachev claimed that the raids were Russia's response 'in revenge'^{*102} for the confrontation between Georgian and Russian forces in the military laboratory in February 1993.

⁹⁰ HRW Arms Project & HRW/Helsinki (Note 69) 18.

⁹¹ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN GA A/56/49 (Vol. I)/Corr.4 and 56/83, 2001, art 4(1).

⁹² Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, UN GA A/56/10, 2001, arts 4(1) and 7; *Estate of Jean-Baptiste Caire (France) v United Mexican States*, Arbitral Award of 7 June 1929, 5 *Reports of International Arbitral Awards* 516–534. <http://untreaty.un.org> (accessed 7 February 2020).

⁹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986 14, para 230; K Oellers-Frahm, 'The International Court of Justice and Article 51 of the UN Charter' in K Dicke et al. (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück* (Duncker&Humblot 2005) 507.

⁹⁴ S M Schwebel, *Justice in International Law* (CUP 1994) 142–144; B Simma (Note 16) 801.

⁹⁵ See criticism of this precedential concept in S M Schwebel (Note 94) 145. See also T Ruys and S Verhoeven, 'Attacks by Private Actors and the Right of Self-defence' (2005) 10 JCSL 309. DOI: <https://doi.org/10.1093/jcsl/kri016>; N A Shah, 'Self-defence, Anticipatory Self-defence and Pre-emption: International Law Response to Terrorism' (2007) 12 JCSL 108. DOI: <https://doi.org/10.1093/jcsl/krm006>; K Oellers-Frahm (Note 93) 508; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Reports 1997 7, paras 82, 85; R O'Keefe, 'Proportionality' in J Crawford, A Pellet, and S Olleson, *The Law of International Responsibility* (OUP 2010) 1160, 1165–1166; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ICJ Reports 1980 3, para 53; *Military and Paramilitary Activities in and against Nicaragua* (Note 93) 248.

⁹⁶ See criticism in this regard in S M Schwebel (Note 94) 142–144.

⁹⁷ HRW Arms Project & HRW/Helsinki (Note 69) 37; V Baranovsky (Note 56) 100. See also S E Cornell (Note 8) 171.

⁹⁸ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports 1996 226, para 41.

⁹⁹ S E Cornell (Note 8) 349. Allegedly, Russia intervened militarily also in the Abkhaz offensive against Sukhumi in late winter 1993. However, not enough evidence has been provided to ground these claims. The Russian Defence Ministry has denied Russia's participation in these hostilities.

¹⁰⁰ *Ibid*, 350. The Russian Defence Ministry admitted that Russia had undertaken air raids in early April.

¹⁰¹ HRW Arms Project & HRW/Helsinki (Note 69) 53.

¹⁰² *Ibid*, 37.

The extensive bombings resulted in civilian casualties.^{*103} The retaliatory character of the attacks was further manifested in their political motives: Sukhumi as the target of the air raids did not have any connection with Novi Esher, where the initial confrontation had occurred. Therefore, this constituted a retaliatory campaign, which, as such, is not permitted under international law.^{*104} On the basis of this evidence, it follows that the Russian air raids in Abkhazia constituted unlawful use of force against Georgia.

4. Conclusion

The Abkhaz people in Georgia, similarly to the Russians who constitute the majority of the population in Crimea, did not have the right to external self-determination or remedial secession. The *de facto* statehood of Abkhazia that resulted from its 1999 declaration of independence violated the sovereignty of Georgia, and no state, including Russia prior to 26 August 2008, recognised Abkhazia's statehood.

It was also established that, primarily because of the organisation of armed groups and the intensity of their fighting, the 1992–1993 conflict in Abkhazia meets the criteria for an armed conflict under Common Article 2 of the 1949 Geneva Conventions.

Russia acted in a demonstrably covert manner in the Abkhazian conflict, which bears resemblances to the annexation of Crimea and the recent conflict in eastern Ukraine. Yet Russia intervened in the conflict directly also, when it carried out air raids against the civilian population and Georgian forces stationed in Sukhumi in 1993. This effectively allows one to categorise the 1992–1993 Abkhazian war as an international armed conflict.

¹⁰³ *Ibid*, 38.

¹⁰⁴ Principle II of the 1975 Helsinki Final Act; *Corfu Channel Case (United Kingdom v Albania)*, ICJ Reports 1949 4, para 35; *Case Concerning Oil Platforms (Iran v United States of America)*, ICJ Reports 2003 161, para 78.



Erik Franckx

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Book Review:

Alexander Lott's *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage*

Published as the seventeenth volume in Brill Nijhoff's prestigious series titled 'International Straits of the World', Alexander Lott's *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage* (Leiden, 2018, 306 pages) brings this series back to the Baltic Sea after a span of nearly 40 years. It follows a more general work by G. Alexandersson, *The Baltic Straits* (Leiden, Brill Nijhoff, 1982, 150 pages), which appeared in this series in 1982, four years after the series first saw the light of day, in 1978. Written at a time when notions such as 'Comecon' and 'Warsaw Pact' still justified a separate heading in such volumes, the work did not focus much on the eastern part of the Baltic, south of the Gulf of Finland, as far as straits used for international navigation were concerned, as the Soviet Union extended across that entire stretch of coastline. Moreover, not long after the work's publication, that country closed off the majority of these straits by means of a system of straight baselines, in 1985. Lott's volume fills the gap in some sense, as it zooms in on several straits in the vicinity of Estonia that fully deserve renewed attention in view of the major geopolitical changes that occurred in the area in the early 1990s.

It addresses first of all Viro Strait, north of Estonia. This represents new nomenclature, introduced by the author for purposes of distinguishing between the strait north of Estonia that leads into the Gulf of Finland and the Gulf of Finland proper. The term 'Gulf of Finland' has, in practice, been used to cover a much wider area than Viro Strait, leading to a situation whereby the former term has been used to designate either body of water, or both. Secondly, it discusses Irbe Strait, which lies to the south of Estonia – i.e., the main entrance to the Gulf of Riga. The third main body of water dealt with, lying between the two above-mentioned straits, is the Sea of Straits, a water area surrounded by the Estonian mainland to the east, the Island of Vormsi to the north, and the islands of Hiiumaa and Saaremaa to the west. In discussing these areas, the book appears to be a timely addition, filling in a certain void left in the International Straits of the World series ever since the Soviet Union's disappearance from the political map of the world. In setting this work in general context, it is interesting to note, finally, that the series remains in the Baltic with its next volume, Pirjo Kleemola-Juntunen's *The Åland Strait* (Leiden, Brill Nijhoff, 2019, 173 pages). This strait, situated to the north of the Gulf of Finland, had at least been touched upon specifically in connection with the strait issue through the 1982 book by Alexandersson, albeit in a rather succinct manner.

¹ The author has been serving as the president of the Belgian Society of International Law since 2017 and also holds teaching positions at Université Libre de Bruxelles; the University of Kent's Brussels School of International Studies; the Vrije Universiteit Brussel Institute of European Studies; Sorbonne University Abu Dhabi, in the United Arab Emirates; and the University of Akureyri, in Iceland.

Lott's volume builds on the doctoral dissertation he successfully defended at Estonia's University of Tartu in early 2017, in which public defence this reviewer served as opponent. The volume in the straits series is a slightly reworked and expanded version of that sound piece of research.

The book starts out by providing a legal categorisation of the various straits in general. In decades gone by, the issue of straits used for international navigation had for a long time been considered to constitute a mere side aspect of the international law of the sea, normally settled by means of either international treaties guaranteeing passage rights in a few problematic straits with overlapping territorial seas, such as the Bosphorus and the Dardanelles or the Danish straits, or, in the absence of such agreements, decisions of courts and tribunals, as with the Corfu Channel Case, ruled on by the International Court of Justice in 1949. Once states started seriously envisaging their territorial seas as extending beyond three nautical miles, however, this attitude changed radically. In reality, this meant that as soon as the strongest opponents to such expansion started to compass among themselves the legal implications of such a possible extension, issues arose. A good example here can be found in the early ideas developed, separately, firstly by the United States and its allies, on one hand, and the Eastern bloc, on the other, in the wake of the failure of the second United Nations Conference on the Law of the Sea (hereinafter, 'UNCLOS') in 1960. In the confusion that followed, wherein sometimes widely divergent state practice started to develop, the major maritime powers of that era initially tried to resolve the few remaining issues by proposing a three-pronged approach whose guiding principles can be summarised thus: Firstly, extension of the territorial sea beyond the three-nautical-mile limit would no longer be opposed; secondly, a limited extension in fisheries jurisdiction by the coastal state, to beyond the newly enlarged territorial sea, would be acceptable; and, lastly but not least, a special regime for newly created 'territorial' straits, based on freedom of navigation, had to be established. Once the two blocs realised that they were striving to arrive at similar outcomes in parallel to contain what one author has called the siren song of the 'territorial temptation' at sea,² they even joined forces by the end of the 1960s through direct contacts in aims of stemming that tide by means of a common approach, despite the fact that all these discussions coincided with the height of the Cold War era.

Pardo's initiative in 1967, in which he addressed the General Assembly of the United Nations with a three-hour speech expounding on the fate to which deep-seabed mineral resources would be consigned, entirely changed this approach. Instead of trying, once again, to tie up the remaining loose ends from UNCLOS I and II, UNCLOS III introduced a totally new approach in efforts to get all states on board this time. Indeed, the many developing states, most of which had become independent since the conclusion of the 1958 convention framework, considered the latter to reflect the interests of the developed states. Pardo, by promoting the idea of a common heritage of mankind with respect to deep-seabed mineral resources, opened a new window of opportunity. If all these law-of-the-sea issues were to be linked together, both groups could become active stakeholders in the development of a single convention document. For that goal to be reached, though, the standard majority-voting procedures employed for UNCLOS I and II needed to be adapted and the approach exchanged for a consensus-driven form of negotiations. At the same time, a package-deal approach was to be applied to the final result to be attained. In contrast to the four separate law-of-the-sea conventions of 1958, a single final document needed to be arrived at that states could accept either *in toto* or not at all, as reflected in Article 309 of the United Nations Convention on the Law of the Sea ('the 1982 Convention' hereinafter), which, as a rule, prohibits all reservations except those expressly permitted.

In this melting pot of law-of-the-sea issues considered during UNCLOS III, lasting from 1973 until 1982, the strait issue formed a quintessential part. For those Soviet and US scholars closely related to these protracted negotiations, the issue of straits is said to have constituted not only a *sine qua non* for the conclusion of the 1982 Convention³ but also, at the same time, an issue the settlement of which formed a precondition for the resolution of many other issues the conference needed to tackle.⁴ As Lott mentions in the book, Satya Nandan, who not only co-chaired a working group that dealt specifically with the strait issue but

² Bernard H Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 *American Journal of International Law* 830. DOI: <https://doi.org/10.1017/s0002930000031912>.

³ Representing the US point of view: John Norton Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea' (1980) 74 *American Journal of International Law* 77, 77. DOI: <https://doi.org/10.2307/2200905>.

⁴ Representing the Soviet point of view: S V Vinogradov and L V Skalova, 'Proliv, ispol'zuemye dlia mezhdunarodnogo sudokhodstva: Znachenie i obshchaia kharakteristika' (Straits Used for International Navigation: Meaning and General Characteristics) in A P Movchan and A Iankov (eds), *Mirovoi okean i mezhdunarodnoe pravo: Otkrytoe more, mezhdunarodnye prolivy, arkhpelazhnye vody* (vol 3, Nauka 1988) 87 and 89 (see also the discussion on page 87).

also served for roughly a decade as Under-Secretary-General of the United Nations and Special Representative of the Secretary-General for the Law of the Sea after the conclusion of UNCLOS III (1983–1992), even labelled the matter of straits ‘by far the single most important issue at the Conference’.⁵

With this being such a crucial issue, it comes as no surprise that the application of the consensus procedure to the process of finding a compromise between states bordering a strait and user states finally resulted in a multitude of legal categories of straits. Nevertheless, one would have expected at the outset that the number of such legal categories of straits would have been fixed. However, depending on whether one prefers to read Part III of the 1982 Convention (‘Straits used for international navigation’) in isolation or, instead, as closely coupled with the other provisions of that document, this number varies. Lott distinguishes among seven distinct types of straits but admits that, as yet, there remains some doubt amongst scholars as to the exact number.⁶ Secondly, one would have assumed Part III of the 1982 Convention to provide a bagatelle-type legal classification of straits, with this analogy referring to putting in a coin at the top and thereby knowing in advance exactly which category it would end up in at the bottom. In other words, one might have expected a process that would be watertight, with no possibility of tampering *en cours de route* when attempts are made to apply these convention provisions to any given strait.

One of the main contributions of the book is that it leads the reader to recognise that this is not necessarily so. The states bordering a strait – and, in fact, even those not bordering a particular strait – can influence, by their own actions, the legal qualification of a particular strait. Moreover, the book demonstrates that the classification of a strait at a particular point in time need not be set in stone, as it may well change in the course of time in consequence of general political developments or even specific actions undertaken by relevant states.

The book opens its Part I by focusing on the legal categories of straits. As indicated above, even their mere classification is far from settled. For instance, one interesting topical question is that of whether straits located in ice-covered waters, and thereby subject to Article 234 of the 1982 Convention, constitute a separate category. The legal issue here is whether Part III trumps Article 234 in the case of straits in ice-covered waters, in line with the position taken by the United States or, alternatively, Article 234 provides the coastal state with some further competence, not referenced in Part III itself. As Article 234 is the only article giving the coastal state regulatory powers with respect to navigation issues that do not necessitate submission to the International Maritime Organization for approval, it entails a seemingly discretionary power for the coastal state. In light of the extremely vague notion of ‘due regard to navigation’ articulated in Article 234 – the only limitation to otherwise apparently limitless discretionary power – Lott opines that, given the importance attached to the strait issue during UNCLOS III, clearer expression of the precedence of Article 234, prioritising it over Part III, would have been required in the convention text, *quod non*. He therefore argues against Article 234’s standing as a basis for creation of a separate legal category of straits.

Then, Part II shifts the focus to the Baltic Sea and, more specifically, to the significance of maritime-boundary delimitation treaties for the legal regime of the straits around Estonia, as described above. The Gulf of Finland, for purposes of maritime delimitation between Estonia and Russia, is considered under two subheadings. The discussion under the first of these focuses on territorial-sea delimitation and that under the second subheading on the delimitation of the exclusive economic zone. With regard to the territorial sea, this boundary has had a tumultuous and complex evolution because of a history wherein Estonia moved from independence to forming part of the Soviet Union, then back to independence. The treaties concluded during the ‘first independence’, such as 1920’s Tartu Peace Treaty and the 1925 Helsinki Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors (referred to below as ‘the 1925 Helsinki Convention’), and their impact on the delimitation of the territorial sea (or lack thereof) create complex legal issues, which the author subsequently tries to rhyme with the present-day reality. The material under this subheading ends with a detailed analysis of the territorial sea’s delimitation in the Narva Bay, which remains pending. The presence of numerous islands in the Gulf of Finland most certainly constitutes a complicating factor in this respect.

The presentation under the subheading for the exclusive economic zone is much shorter but may be of even greater importance for the author’s project, as it proves that Russia has consistently maintained an exclusive economic zone in the eastern part of the Gulf of Finland, even though the geography of the area,

⁵ As quoted on page 9 of the book.

⁶ See p. 22 *ff.* of the book.

precisely because of the presence of numerous islands, would normally have allowed a 12-mile territorial sea to cover the whole area. By hanging on to a small exclusive economic zone north of Gogland, Russia is able to influence the legal regime of Viro Strait even though it no longer borders that particular strait.

Presented under the third and final subheading in Part II, focusing on the significance of boundary treaties with regard to the legal regime of straits concerns, is the Gulf of Riga. Here, one can make remarks similar to those offered with respect to the Gulf of Finland. Historical treaties concluded between Estonia and Latvia in the 1920s come into play once again, and also pertinent is the existence today of a rather small pocket of Latvian exclusive economic zone in the eastern part of the Gulf of Riga, which very much influences the legal regime applicable to the Strait of Irbe. Coupled with the effect of islands on maritime delimitation, contested sovereignty over the island Ruhnu, located in the middle of the Gulf of Riga, further strained bilateral relations as the two countries tried to find a solution to the conundrum of their maritime boundary in this particular area.

Part III then turns attention to the significance of the outer limits of maritime zones with regard to the legal regime of straits. Two examples are provided – namely, Irbe Strait, in the Gulf of Riga, and Viro Strait, in the Gulf of Finland. In the case of the former, the two states that border the strait are also the only two states having a coastline within the Gulf of Riga. Also, even though relying on the Soviet enclosure of the gulf by means of a single stretch of straight baseline in 1985, as already alluded to, Estonia and Latvia could in all probability have opted to continue application of that status had they both agreed,⁷ one of the parties objected to this approach and a delimitation agreement was finally arrived at in 1996. The main result of this delimitation agreement is that the Latvian side today possesses an exclusive economic zone area, making Irbe Strait an Article 37 strait for which the regime of transit passage applies, even though the normal shipping route to Riga only passes through territorial-sea areas. In stark contrast to the Russian position on the Gulf of Finland, this is a favourable position neither for Latvia nor for Estonia, leading the author to recommend the creation of an exclusive economic zone corridor in Irbe Strait itself, which would allow both riparian states to better address potential security concerns in their respective territorial seas.

Such a self-imposed corridor of exclusive economic zone, obliging states bordering a strait to refrain from extending their respective territorial seas to their maximal limit, has been a recipe tested in Viro Strait. By creating a stretch of exclusive economic zone in the middle of that strait, Estonia and Finland have been able to guarantee freedom of navigation primarily for ships from Russia, equally before World War II and after that country lost most of its Baltic Sea coastline in 1991. This particular approach taken by the states bordering a strait places the latter under the legal category of an Article 36 strait ('High seas routes or routes through exclusive economic zones through straits used for international navigation').

Part IV addresses the thorny issue of whether Viro Strait should not be considered an Article 35(c) strait instead – that is, a strait whose legal regime 'is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits', in that convention's words. A theoretical argument could be made that the 1925 Helsinki Convention, when read together with its 1926 Moscow Protocol concluded among Estonia, Finland, and the Soviet Union (creating sea lanes where freedom of the seas applied irrespective of the provisions of the 1925 Helsinki Convention), could well be considered to fall under the legal category described in Article 35(c) of the 1982 Convention. However, the chequered history of this agreement (which encompasses the Estonian Supreme Court's restrictive reading of the Moscow Protocol in 1932, Estonia's *de facto* ceasing to be a party to that convention for 40 years, and Finland's formal withdrawal in 2010) leads the author to conclude that this line of reasoning is no longer tenable at present. The 1994 bilateral agreement between Estonia and Finland, establishing the exclusive economic zone corridor mentioned above, may be of a very similar nature, but for obvious reasons this agreement cannot pass the 'long-standing' hurdle established by Article 35(c).

The fifth and final part of the book addresses the Sea of Straits, which comprises numerous passages, of various sorts, running in either a north–south or an east–west direction. Ever since 1993, when Estonia passed its Maritime Boundaries Act, all these straits have been enclosed by a 'newly' established system of straight baselines that, in fact, very much resemble the straight baselines established in 1985 by the Soviet Union.⁸ As these straits connect one part of the high seas or exclusive economic zone with another part of

⁷ Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), International Court of Justice, Judgement of 11 September 1992, para 394.

⁸ Alex G Oude Elferink, 'Estonia: The Law on the Boundaries of the Maritime Tract' (1994) 9 *International Journal of Marine and Coastal Law* 235, 237. DOI: <https://doi.org/10.1163/157180894x00106>.

the same, the regime of transit passage would normally apply in accordance with Part III. The question here is whether these straits are subject to the provision of Article 35(a) of the 1982 Convention whereby internal waters in straits are excluded from being subject to the regime of transit passage unless the establishment of a straight baseline in accordance with the method set forth in Article 7 has ‘the effect of enclosing as internal waters areas which had not previously been considered as such’, as provided in that article, in which case transit passage remains in operation. To clarify this issue, Lott delves into material from Estonian archives in attempts to demonstrate that this country, prior to 1940, already considered the Sea of Straits to be internal waters. Primarily on the basis of the 1938 Neutrality Act adopted by the Estonian Parliament, mirroring the Nordic Rules of Neutrality, by means of which Denmark, Finland, Norway, and Sweden had mutually harmonised their respective neutrality legislation, he concludes that Article 35(a) applies to the Sea of Straits today, without applicability of the exception specified in that article. Secondly, he argues that, even if a country does not accept the foregoing conclusion, the so-called Messina exception of Article 38(1) (applicable if a route of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island) would still reduce the transit regime to a regime of non-suspendable innocent passage.

For anyone interested in the issue of straits, this book is definitely to be counted as highly recommended literature. Based as it is on thorough research involving Estonian archival sources, taken in conjunction with more recent parliamentary and governmental documents, it provides the reader with a good sense of how intricate the determination of the precise legal category of a particular strait under Part III of the 1982 Convention can become in practice. This book, beyond a shadow of a doubt, adds new insights as to the exact legal regime applicable to these straits surrounding Estonia, which heretofore had not been covered by specialist literature in any comparable depth. It must be readily admitted that the particular complex relationship that exists between Estonia and its neighbours, especially Russia because of obvious historical and geographical specificities, will not provide the reader with any easy transplants ready to be applied to straits in other parts of the world. The book nevertheless brings useful insights with regard to the level of malleability that characterises Part III of the 1982 Convention when it is being applied in practice.

The book clearly proceeds from an Estonian perspective, and this reviewer would be rather interested in reading possible Finnish and Russian perspectives – grounded in a similar level of rigorous research – on the conclusions reached by the author with respect to Viro Strait, along with Latvian views on his findings related to the Strait of Irbe. Finally, it can be added that the form of the book has been attended to very well and that its author employs clear and polished language. If any additional wish might be expressed with respect to the form, it would be related to the maps reproduced in the annexes, since these were presented in a much clearer format in the publication containing the doctoral dissertation itself, as published by the University of Tartu.

Abbreviations

AktG	<i>Aktiengesetz</i>	ICB	Insurance Complaints Board
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)	ICC	International Criminal Court
BPLA	Baltic Private Law Act	IDD	Insurance Distribution Directive
BPLC	Baltic Private Law Code	ISP	Internet Service Provider
CC	Civil Code	LEA	law-enforcement agency
CCP	Estonian Code of Criminal Procedure	LPA	Law of Property Act
CJEU	Court of Justice of the European Union	LTs	language technologies
CLOUD Act	Clarifying Lawful Overseas Use of Data Act	MFC	Estonian Soviet Marriage and Family Code
CO	Concluding Observation	MFC	Marriage and Family Code of the Estonian Soviet Socialist Republic
COVInsAG	Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law	MFN	most-favoured-nation
CPA	Child Protection Act	MiFID	Directive on markets in financial instruments
CPS	child-protection system	MLA	mutual legal assistance
CRC	Convention on the Rights of the Child	NGO	nongovernmental organization
CRC	United Nations Convention on the Rights of the Child	NHRI	National Human Rights Institution
ECHR	European Convention of Human Rights	OECD	Organisation for Economic Co-operation and Development
ECT	Energy Charter Treaty	OLAF	European Anti-Fraud Office
ECtHR	European Court of Human Rights	PCA	Permanent Court of Arbitration
ENA	Estonian National Archives	PEICL	Principles of European Insurance Contract Law
Estonian SSR	Estonian Soviet Socialist Republic	PEICL	Principles of European Insurance Contract Law
FET	fair and equitable treatment	RCC	Russian Civil Code
FLA	Family Law Act	RCMFG	Russian Code of Marriage, Family and Guardianship
FOS	Financial Ombudsman Service	SCB	Securities Complaints Board
FSA	Financial Services Authority	SCC	Estonian Soviet Civil Code
GC	Committee's General Comment	SWA	Social Welfare Act
GDPR	General Data Protection Regulation	UN	United Nations
HRW	Human Rights Watch	UNCLOS	United Nations Conference on the Law of the Sea
ICA	Insurance Contract Act	VCLT	Vienna Convention on the Law of Treaties
		WP29	Article 29 Working Party



36. EESTI
ÕIGUSTEADLASTE
PÄEVAD

PÕHISEADUS |

SADA AASTAT EESTI ESIMISEST PÕHISEADUSEST

Wednesday, 7 October

20:00–22:00 Welcoming evening at the convent house of korp! Sakala (Veski 69)

Thursday, 8 October

9:00–10:00 Morning coffee (Vanemuine Concert Hall, doors will open at 8:30)

Plenary meeting

(Vanemuine Concert Hall, simultaneous interpretation, web streaming)

10:00 Opening

100 Years of the Constitution

Marju Luts-Sootak, *Professor of Legal History, University of Tartu*

The 1920 Constitution of the Republic of Estonia – is there a Reason to be Proud?

Miguel Maduro, *Professor, European University Institute*

Covid-19 and Constitutional Law / Constitutionalism

Allan Rosas, *Doctor of Laws, former Judge, European Court of Justice*

On the Relationship of the Constitutional Law of the European Union and its Member States

Awarding the “Õiguse eest seisja” prizes – **Raivo Aeg**, *Minister of Justice*

12:00–12:30 Coffee break

Has the Protection of Fundamental Rights Gone too Far?

Moderator: **Anvar Samost**

12:30–14:00 PhD **Ülle Madise**, *Chancellor of Justice, Republic of Estonia; Visiting Professor, University of Tartu*

The Significance of Fundamental Rights in Difficult Times

PhD **Dan Bogdanov**, *Cryptologist*

Data Protection During “Times of War” and “Times of Peace” Based on the Example of the Corona Crisis

Participants in the discussion: PhD **Ülle Madise**, *Chancellor of Justice, Republic of Estonia; Visiting Professor, University of Tartu*; PhD **Dan Bogdanov**, *Cryptologist*; mag. iur. **Andres Parmas**, *Prosecutor General*; **Kristjan Siigur**, *Judge, Tallinn Administrative Court*; **Hardo Pajula**, *Professor, Center for Free Economic Thought of Estonian Business School, Head of the Edmund Burke’s Society*

14:00–15:00 Lunch

Estonian Constitution(s) and International Law

Moderator: *Dr. iur.* **Lauri Mälksoo**, *Professor of International Law, University of Tartu*

15:00–16:30 **Jüri Adams**, *one of the authors of the 1992 Constitution, politician and publicist*

International Law as a Topic at the Constitutional Assembly in 1992

Dr. iur. **Julia Laffranque**, Justice, Supreme Court; former Judge, European Court of Human Rights; Visiting Professor, University of Tartu
 Constitution as Seen Through the Prism of the Human Rights Case Law of European Courts
 PhD **Tiina Pajuste**, Associate Professor of International Law, Tallinn University
 Relationship of the Constitution to International Agreements and Other Sources of International Law (§ 123 of the Constitution)
Mag. iur. **Andres Parmas**, Prosecutor General
 Meaning of § 3 of the Constitution to Material Penal Law

Applications of Artificial Intelligence in Administrative Proceedings

Moderator: PhD **Ülle Madise**, Chancellor of Justice, Republic of Estonia; Visiting Professor, University of Tartu
 15:00–16:30 **Luukas Kristjan Ilves**, Head of Strategy at Guardtime, Chair of the Council of Europe's Committee of experts on Human Rights Dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT)
 Technical Nature of Artificial Intelligence, its Opportunities and Risks
 MA **Kaimar Karu**, entrepreneur, former Minister of Foreign Trade and Information Technology
 Estonia's Ambitions in Deploying Artificial Intelligence in Public Administration
 LLM **Monika Mikiver**, Adviser, Public Law Division, Ministry of Justice; Doctoral Student, Faculty of Law, University of Tartu
 Amendments to the Administrative Procedure Act for Engaging Artificial Intelligence
 PhD **Ivo Pilving**, Chairman of the Administrative Law Chamber of the Supreme Court; Associate Professor of Administrative Law, University of Tartu
 Judicial Control over Algorithmic Administrative Decisions

Administrative Penalty I. Incorporation of the Administrative Penalties of the European Union into the Estonian Legal Space: Attempt to Fit in the Unfit in the Most Fitting Manner?

Moderator: **Kristjan-Erik Suurväli**, former Head of the Market Supervision and Enforcement Division, Financial Supervision Authority
 15:00–16:30 **Kaie Rosin**, Tartu Circuit Court, Advocate General; Assistant, European Union Criminal Law, University of Tartu
 Interference of the European Union in the Criminal Law of its Member States
Markus Kärner, Head of the Penal Law and Procedure Division, Ministry of Justice; Doctoral Student, Faculty of Law, University of Tartu
 Fitting European Union Sanctions into Estonian National Legislation: Ten Years of Discussion

On Maintenance Obligation from Cradle to Care Home

Moderator: **Indrek Niklus**, Adviser, Law Firm NOVE
 15:00–16:30 **Anneli Apuhtin**, Head of Legal Service, Tartu City Government
Katrin Orav, Attorney-at-Law, Law Firm LEXTAL; Member of the Board and Chairman of the Committee on Family Law, Estonian Bar Association
Mag. iur. **Liis Arrak**, Head of Civil Law Chamber, Tallinn Circuit Court
Rainis Int, Notary in Tallinn

Is our Constitution Well Protected?

Moderator: PhD **Uno Lõhmus**, Chairman of the Constitutional Law Endowment Panel, Estonian Academy of Sciences; former Chief Justice of the Supreme Court
 16:45–18:15 PhD **Rait Maruste**, former Chief Justice of the Supreme Court
 Is the Judicial Constitutional Review in Estonia Functioning as Originally Intended? What is Working, What is Missing?
 PhD **Hent Kalmo**, Adviser on Constitutional Review and Legal Theory, Chancellor of Justice Office
 Constitutional Review, Estonian Way

Autonomy of Local Governments: for Whom and for What?

- Moderators: *Mag. iur.* **Nele Parrest**, Justice, Supreme Court
Sulev Valner, Regional Administration Policy Adviser, Ministry of Finance
- 16:45–18:15 *LLM* **Tim Kolk**, Adviser, Supreme Court
- Would the Constitution Allow More Freedom to Local Governments?
Dr. iur. **Vallo Olle**, Senior Adviser, Law Enforcement Affairs Department, Chancellor of Justice Office
- Matters of the Right to Self Management of Rural Municipalities and Cities Under the Review of the Chancellor of Justice
Priit Lello, City Legal Director, Tallinn City Office
- Matters of the Right to Self Management of Rural Municipalities and Cities as Seen by Local Governments

Administrative Penalty II. Interference of the European Union in the Penal Criminal Procedural Law of Member States: Regulative Arbitration of the Actual Practice of the European Union's (Allegedly Quite) Harmonised Law Through the Eyes of Market Participants

- Moderator: **Mari-Liis Orav**, Attorney-at-Law, Law Firm TGS Baltic
- 16:45–18:15 **Märt Maarand**, Head of Risk and Compliance, AS Pocopay; Doctoral Student, Faculty of Law, University of Tartu
- The Impact of the Single Financial Supervision of the European Union as Seen by a Market Participant
Aleksander Kostjuevits, Head of Compliance, Olympic Entertainment Group
- The Impact of Cross-Border Regulative Arbitration on the Compliance Check Across the Group

Freedom to Conduct Business and the Green Wave

- Moderator: *Mag. iur.* **Kai Härmand**, Deputy Secretary General, Legislative Policy Department, Ministry of Justice
- 16:45–18:15 Participants in the discussion: **Maris Kuurberg**, Government Agent of the Republic of Estonia before the European Court of Human Rights; **Jüri Kaljundi**, Head of SA Koosloodus; **Allar Jõks**, Attorney-at-Law and Partner, Law Firm SORAINEN; **Kristi Klaas**, Ministry of the Environment, Deputy Secretary General, Strategic Planning and Climate Policy

Friday, 9 October

Is the Right to Die a New Human Right?

- Moderator: *Dr. iur.* **Erkki Hirsnik**, Judge, Tartu Circuit Court
- 9:30–11:00 *Dr. iur.* **Mart Susi**, Professor of Human Rights Law, Tallinn University
- Legal Theoretical Background in Emerging of New Human Rights
MD **Mari-Liis Ilmoja**, Head of Anaesthesiology and Intensive Care, Tallinn Children's Hospital
- Medical Aspect of Euthanasia
PhD **Merike Sisask**, Professor of Social Health Care, Tallinn University
- On Euthanasia from the Viewpoint of a Social Scientist
Saskia Kask, Chief Prosecutor, Northern District Prosecutor's Office
- The Right to Die versus the Right to Kill
Aigi Kivioja, Senior Adviser, Social Rights Department, Office of the Chancellor of Justice
- Issues and Possibilities Regarding a Patient's Will

Protection of Employee's Fundamental Rights in the Circumstances of Freedom to Conduct Business

- Moderator: PhD **Kadi Pärnits**, *Chairman of the Management Board, AS Mainor*
- 9:30–11:00 LLD **Annika Rosin**, *Lecturer on Labour Law at the University of Turku*
The Role of the Charter of Fundamental Rights of the European Union in Ensuring Employment Rights
MA **Seili Suder**, *Head of Work Environment, Ministry of Social Affairs; Doctoral Student, Faculty of Law, University of Tartu*
Employer's Right to Monitor Employees in the Era of Digital Technologies. Processing Employees' Personal Data during COVID-19 Pandemic
Dr. iur. **Merle Erikson**, *Professor of Labour Law, University of Tartu*
Protection of Whistleblowers in Employment Relationships
Rando Maisvee, *Attorney-at-Law, Law Firm MOSS Legal*
Collective Rights in a Sharing Economy

Legal History I. Constitutions and Statutes in the Republic of Estonia, 1918–1940

- Moderator: *Dr. iur.* **Marju Luts-Sootak**, *Professor of Legal History, University of Tartu*
- 9:30–11:00 PhD **Lea Leppik**, *Associate Professor of Legal History, University of Tartu; Curator, University of Tartu Museum*
Educational Background of Estonian Constitutionalists: Constitutional Law at the University of Yuryev/Tartu and the University of Petrograd in the Early 20th Century
Dr. iur. **Hesi Siimets-Gross**, *Associate Professor of Legal History and Roman Law, University of Tartu; Lawyer Linguist, European Court of Justice*
Constitutions of Estonia and Poland – Parallels or Opposites?
Marelle Leppik, *Doctoral Student, Faculty of Law, University of Tartu*
Implementation of the Constitution(s) at the Supreme Court, 1920–1940

Law in Prison

- Moderator: PhD **Priit Kama**, *Deputy Secretary-General for Prisons, Ministry of Justice*
- 9:30–11:00 **Ksenia Žurakovskaja-Aru**, *Senior Adviser, Inspection Visits Department, Chancellor of Justice Office*
Imprisoned Person's Right to Communicate with their Family
PhD **Anneli Soo**, *Associate Professor of Penal Law, Faculty of Law, University of Tartu*
Limits of the Detained Person's Right to Communicate
Laura Glaase, *Principal Lawyer, Prison Service, Department of Prisons of the Ministry of Justice*
Solitary Confinement: Law and Social Sciences
Sirje Kaljumäe, *Judge, Tartu Administrative Court*
Complaints from Prison to Administrative Court: Protection of Human Rights vs Unjustified Complaints

Different Time of Courts and the Press

- Moderator: **Marti Aavik**, *Deputy Editor-in-Chief, Postimees*
- 11:30–13:00 **Ramon Rask**, *Attorney-at-Law and Partner, Law Firm RASK*
Nom Nom – Who is Eating Whom?
Kretel Tamm, *Chief Prosecutor, South District Prosecutor's Office*
By That Time, No One Will Care About the Prosecutor's Story
Mag. iur. **Saale Laos**, *Justice, Supreme Court*
The Court, the Press – HELP!
Risto Berendson, *Head of the Investigative Division, Õhtuleht*
The Eternal Conflict: Collisions between Public Interest and Justice

Intellectual Property and Freedom to Conduct a Business

- Moderators: PhD **Aleksei Kelli**, *Professor of Intellectual Property, University of Tartu*
 MJur **Gea Lepik**, *Head of Intellectual Property and Competition Law Division, Ministry of Justice;*
Assistant of Civil Law, University of Tartu
- 11:30–13:00 Participants in the discussion: **Siim Timpson**, *Intellectual Property Specialist, Cleveron AS;*
Henrik Trasberg, *Adviser, Intellectual Property and Competition Law Division, Ministry of Justice;*
Mikas Miniotas, *Partner, AAA Patendibüroo OÜ;* **Liina Jents**, *Attorney-at-Law, Law Firm COBALT*

Legal History II. Constitutions and Statutes in the Republic of Estonia, 1918–1940

- Moderator: Dr. iur. **Hesi Siimets-Gross**, *Associate Professor of Legal History and Roman Law, University of Tartu;*
Lawyer Linguist, Court of Justice
- 11:30–13:00 **Marin Sedman**, *Analyst, Supreme Court*
 Penal Law Safeguards in the Constitutions of the Republic of Estonia and their Fate in an Emergency Situation (1920–1940)
Karin Visnapuu, *Doctoral Student, Faculty of Law, University of Tartu*
 Judicial Control over Land Reform in the Republic of Estonia, 1920–1940
Katrin Kiirend-Pruuli, *Doctoral Student, Faculty of Law, University of Tartu*
 Constitutional Principles in the Family Law of the Republic of Estonia, 1920–1940

Children's Rights

- Moderator: Mag. iur. **Andres Aru**, *Head of the Department, Children's and Youth Rights, Chancellor of Justice Office*
- 11:30–13:00 Mag. iur., MAS **Kristi Paron**, *Senior Adviser, Children's and Youth Rights Department, Chancellor of Justice Office*
 MSW **Birgit Siigur**, *Head of Southern District, Child Protection Department, Social Insurance Board*
 Principles of Child-Friendly Proceedings
 Mag. iur. **Karina Lõhmus-Ein**, *Attorney-at-Law, Law Firm Lillo & Lõhmus, Member of the Board and the Committee on Family Law, Estonian Bar Association*
 Mag. iur. **Risto Sepp**, *Bailiff, Ühinenud Kohtutäiturid*
 Ensuring a Relationship Between a Child and a Parent
 PhD **Katre Luhamaa**, *Lecturer, European Law and International Law, University of Tartu; Research Fellow, University of Bergen*
 MA **Merli Laur**, *Chief Specialist, Child Protection Department, Social Insurance Board, Mediation of International Child Protection Cases*
 Limits to Interfering with Family Life. Practice of Different Countries
- 13:00–14:00 Lunch

The Future of the Constitution: Evolution through Amendments or Interpretation

(Vanemuine Concert Hall, web streaming)

- Moderators: **Heiki Loot**, *Justice of the Supreme Court, Member of the Constitutional Law Endowment Panel, Estonian Academy of Sciences*
Katri Jaanimägi, *Adviser, Constitutional Review Chamber, Supreme Court*
- 14:00–15:30 Participants in the podium discussion: Dr. iur. **Villu Kõve**, *Chief Justice of the Supreme Court;*
Paul Puustusmaa, *Head of the Riigikogu's Constitutional Committee;* **Urmis Reinsalu**, *Minister of Foreign Affairs;* **Liia Hänni**, *Chief Expert on e-democracy;* PhD **Jüri Raidla**, *Attorney-at-Law and Senior Partner, Law Firm Ellex Raidla Advokaadibüroo;* PhD **Madis Ernits**, *Judge, Tartu Circuit Court*