Are Estonian Judical Procedures Harmonizable?

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It is the time of changes. The values that have been the basis of western culture for a long time are gradually disappearing. The impulse for doubting in these values was given by two World Wars of the 20th century with all their horrors. Jean-Francois Lyotard (1994) defines postmodernism as distrust in "great narratives" or all-including ideas or basic claims, which the society is based on. Hence, it could be claimed that the Western civilization and Estonia as well are in a paradigmatic crisis. Alongside with the paradigms that held good so far, there are new, often contradictory paradigms being formed. It is difficult to decide about the new paradigms by standard and rational methods of the old value system. No value system is right or wrong by itself. It all depends on purposes and interests. Even though, all existing value systems in society have this certain connective power, no paradigm is capable of explainig the entire information. Thomas Kuhn (1970) finds that researchers find more and more anomalies which they cannot explain. Anomalies mix. Then someone offers a new explanation system that explains the anomalies better. New explanation systems replacing the old ones form the revolution of science.

These rapidly changing times raise a question how are societal processes legally regulated. Practitioners have severely criticized current situation of Estonian judicial procedure. Mart Rask, the Chief Justice of the Supreme Court, gave an overview of court system's development on May 31,2007, where he referred to a risk that judicial procedure is becoming a thing in itself and regular person with average capabilities is not able to understand judicial procedure without legal help (Rask 2006). At the 2007 general assembly of Estonian Bar Association, the Chairman, sworn advocate Aivar Pilv found that the keywords of today's court procedure are frequent change of court's position and lack of consistency. It is very difficult to explain people, who are receiving legal aid, why is the decision of a certain case different in its basic principles from another decision made in analogical case in the recent past (Pilv 2007). During the Forum of Judges, June 7-8,2007, there were critical summaries of existing judicial practice made by judges as well (Pappel 2007). At the same time, the reasons behind annulment of court decisions were analyzed at the Court *en banc* in February 2007 (Gont arov 2007; Kutsar 2007). These comments refer to the fact that Estonian court procedure is also in a paradigmatic crisis at the time and sustainability of the existing development has been called into question.

How have Estonian court proceedings developed so far? What could be the reasons behind paradigmatic crisis of court procedure? What would be the possibilities of coming out of the crisis?

The development of court procedures can be characterized by a keyword of insularity. It means that court procedures - civil, criminal, misdemeanor and administrative procedures have developed independently, in different directions and there is no reason to talk about a common part of court proceedings, regardless of the common part[20] of its regulation. This article analyses the development of the mentioned four court procedures since the time when Estonia regained independence. Thus, it is necessary to briefly stop on the development of each court procedure at first.

After regaining independence, the first contemporary legislation regulating civil procedure in Estonia was the Code of Civil Procedure (TsKS, was in force 15.09.1993-01.09.1998), where adversary principle dominated with emphasis. By now, with the Code of Civil Procedure (TsMS, entered into force 01.01.2006) and decisions in civil proceedings of the Supreme Court, the active role of court (decision No. 3-2-1-135-02 of the Supreme Court) and the proportion of proceedings on petition, i.e. the proportion of procedure that

20 In unsolved issues we are guided by provisions of administration and misdemeanour procedures.

is based on investigation principle. Therefore, it can be claimed that civil procedure has developed from adversary principle towards investigation principle and depending on the object of dispute, one or the other principle is implemented. By increasing the proportion of proceedings on petition, the legislator has directed the court towards using the investigation principle more often than before in many disputes. At the same time, the need for settling matters has been stressed, which in a way is the opposite of the purpose of implemending the investigation principle - the goal of identifying truth. We are dealing with coexistent and reciprocal values of the postmodern society.

But criminal procedure has developed in a contrary way. According to the Code of Criminal Procedure (KrMK, was valid 1964 - 01.07.2004), the diminating principle was investigation principle, according to the Code of Criminal Procedure that is valid today (KrMS, valid from 01.07.2004), criminal procedure is the most competitive procedure in Estonia. The goal of KrMS was to put the participants in proceeding, i.e. the prosecutor and the counsel to "work" (Kregandberg & Pikamae 2000). At the same time, the area of regulation of the opportunity principle has widened and the majority of criminal proceedings are done through alternative procedures. The implementation of opportunity principle is solving the problem of long duration[21] of criminal proceedings that has haunted criminal proceedings and a new question has arose whether there are too many proceedings conducted in the course of alternative proceedings.

Administrative court procedures andmisdemeanourprocedures are guided by civil and criminal procedures since for the issues that haven't been adjudicated, the provisions of TsMS and KrMS are applied (§ 5 of the Code of Administrative Court Procedure; § 2 of the Code of Misdemeanour Procedure). Irrespective of the connections between regulations, they have also independently developed legal proceedings. Administrative court procedure that is guided by the standards of competitive criminal procedure has always been investigating judicial procedure (decision No. 3-1-1-21-00 of the Supreme Court). Misdemeanour procedure, which at the moment is based on competitive criminal procedure, is also an investigative procedure (decision No. 3-1-1-8-03 of the Supreme Court). Another question has arose in misdemeanour procedure: whether the misdemeanour procedure (as the procedure for less important offences) hasn't become too complicated. In the opinion of practitioners, the misdemeanour procedure takes often more resources than criminal procedure.

Independent development of judicial proceedings has reached a point where the participants in the proceeding are treated differently in different procedures. At the same time, the dispute may arise from one and the same real life situation. Administrative proceeding may be connected to civil, criminal and misdemeanour procedure as well. For example, the Supreme Court has taken the stand that the claim against the body conducting pre-trial criminal proceeding may be filed pursuant to administrative procedure (decision No. 3-1-1 -38-00 of the Supreme Court), police raid „Koik puhuvad" („A11 breathe") is an administrative procedure during which intoxication is established and not misdemeanor procedure (decision No. 3-1-1-19-05 of the Supreme Court). Many Supreme Court decisions delimit the jurisdiction of courts hearing administrative and civil matters. In this context a question arises: how justified is the difference in development of differend procedures and could this mean a risk of unequal treatment of persons? Unequal treatment of participants in the proceeding is not reasonable as well as different settlement of similar procedural questions (for example, categories of evidence, time limits, procedure for filing appeals, etc.). This brings out the legitimacy question of legal procedure. Each legal procedure may be duly lawful, but it has to be legitimate as well. Unequal treatment of alike in different procedures may bring us to the situation where a lawful judicial decision is not legitimate. Here, the proceeding does not become legitimate only for the participant of the proceeding, who has to bear the consequences of the result of the proceeding in a compulsory way, but also for the society. As we all know, it is not possible to underestimate the media in today's society. J. Baudrillard (1999) has even characterised modernity as the simulation age. People of the information society are inevitably superficial due to the flows of information. So is the media. Specific legal constructions have no meaning for the media, but unequal treatment in legal procedures matters. If judicial procedure cannot legitimise itself for the media, it will face even a greater crisis. Therefore it can be claimed that the isolated development of judicial procedures will of necessity take them to a even greater crisis that cannot be solved by one procedure independently.

This article will suggest harmonisation of judicial procedure as a solution. This idea is not new in Estonia: Eerik Kergandberg (2002), the justice of the Supreme Court and legal theorist, as well as Mart Rask, the Chief Justice of the Supreme Court, in Riigikogu, have referred to the need of finding a common part

21 Except general proceedings in criminal procedure.

of legal procedures (Rask 2006). Allar J5ks, the Chancellor of Justice, has also referred to harmonisation of regulations of similar procedures in a particular procedure (2007)[22]. At the same time, the possibility of implementing such idea has not been studied thoroughly.

The first question is whether judicial procedures, due to their different principles - adversary and investigation principles, which are so reciprocal, are harmonisable. On the basis of the brief overview given above, it can be concluded that different proceeding principles doesn't preclude legislative drafting connection of legislative proceedings. Even now, investigating proceedings (misdemeanour and administrative procedures) are based on the provisions of adversarial procedure (criminal and civil procedures). By drafting, this issue could be solved by additional regulation. The second conclusion is that regardless of the procedure, implementing the investigating principle is not absolutely "clear". Namely, agreements are allowed in each judicial procedure. In general, it could be said that entrenching of pragmatism can be noticed in judicial procedure. Even theory hasn't denied it (Kergandberg 1997). Pragmatism often means stepping back from the absoluteness requirement of ascertaining the truth. If the parties achieve conciliation, the proceeding ends with approving the agreement[23] and the court basically doesn't examine the matter. Therefore, an opinion can be formed that implementing different principles of procedure in different procedures doesn't prevent the harmonisation of procedures at least by legislative drafting. Subsequently, we should go to more substantive arguments.

From the opinions of several practitioners and legal literature glances through a viewpoint that each judicial procedure has inseparable connection with corresponding branch of substantive law (Liventaal 1999; Truuvali & Liventaal 1997). But one cannot agree with this viewpoint. A viewpoint should be taken that judicial procedures do not emanate from substantive law but are the sub-categories of social procedure. Procedure itself is a social feature and it can be also found from outside the judicial procedure, for example the procedure of passing the budget in Riigikogu, etc. According to K. Rohrl, proceeding is a process of forming decisions and achieving consensus, which is directed at fair division of society's tight resources as well as duties and which results are accepted as binding by the members of society (Rorhl, cited Kergandberg 1999). But judicial procedure is the most typical and the moste detailed regulated branch of social procedure. According to E. Kergandberg, judicial procedure is characterized by greater verbality, isolation function and division of roles between the subjects (Kergandberg 1996). The conclusion that judicial procedure derives from social procedure is also confirmed by the fact that judicial procedures, including civil procedure, are mainly classified as from the area of public law (Kiris et al 2003). Placing the procedure to the area of public law is not of a minor significance. Reputedly, different principles apply with private and public law - in private law, everything not prohibited is allowed. This principle should be complied with when solving procedural law issues, which the Supreme Court has also stressed (decision No. 3-1-1-157-05 of the Supreme Court).

The idea of harmonizing judicial procedures is supported by the common objective of all judicial procedures. The constitution of the Republic of Estonia does not draw a distinction between different judicial procedures. Even though, the constitution does not explain the concept of judicial power, it has been done by theoretics. For example, T. Annus (2001) finds that it is courts' obligation to protect societal values and therefore participate in national administration. The laws of procedures regulate the purpose of judicial procedure discontinuously and differently. At the same time, it doesn't give the basis to think that judicial procedures couldhave very different purposes. The question of judicial procedure's objective is a philosophical one. Postmodern society is the society of differences. E. Grauberg (2002) notes that postmodernists see the deadlock of science and the entire modern culture mainly in the society where the actual reality has lost its boundaries. All human activity has become more individual and more dependent on great narratives. More and more we have to get used to living in the world of plurality, consider differences that surround us and which cannot be connected. Therefore, it can be said that the key words of postmodernism are individuality or specific character, pluralism and variety. Societal value system has to cope with personalised legitimate solving of the factual question. Judicial procedure has to cope with it as well. Basically, it means that court should be given procedural provisions, which would allow as flexibly as possible to adjudicate a particular

22 In his letter of 21.11.2007, to Rein Lang, Minister of Justice, Allar J5ks, the Chancellor of Justice, referred to the need of ensuring the rights of a person subject to proceedings in procedure for administration of coercive psychiatric treatment (the area of criminal procedure) at least on the same level prescribed in civil procedure.

23 The court has the right not to approve the agreement, but on certain limited basis.

case. Adjudication regarding the specific character of the dispute is what becomes legitimate. For that reason, there cannot be "great narratives" injudicial proceedings anymore, but rather various values that of necessity can also be reciprocal. In addition to ascertaining the truth, which was already mentioned, these values also include the speed of proceeding, attainment of legitimacy, low cost of procedure, etc. which clash with each other and in certain situations preclude each other. These values are characteristic to all judicial procedures regardless of the applicable substantive law. If one would ask what could be the common procedural value, it might be thought that the general purpose of judicial procedure is to adjudicate the conflict that has emerged in the society and restore the peace of law. Ascertaining the truth cannot be a comprehensive value of judicial procedure in postmodern society anymore since the truth is not an objective feature anymore. Several theories of truth could be brought out, for example: correspondence theory, coherence theory, pragmatic theory of truth, consensus theory, semantic theory of truth, redundancy theory, etc. (Grauberg 2002, cited Kallas 2002). It arises a question what kind of truth should the court ascertain. Additionally, it could be asked whether investigating principle (that is already splintered with exceptions) has a place in postmodern society? This question is asked rather as thought-provoking and from the positions of the present article, there is no need to answer it. Rather, it should be thought that judicial procedures should be developed in a way they could produce as much legitimacy as possible, regardless of the implemented principles.

The fact that all judicial procedures take place under the same model, speaks also in favour of the possibility of harmonising the judicial procedure. All procedures start by filing the initiating document with the court. It is followed by a decision on acceptance of the matter, during which, the court may require elimination of omissions in the document. If the matter has been accepted, the procedural document will be sent to the participants in the proceeding, in case it hasn't been done earlier (in criminal procedure, for example) and is followed by ascertaining the position, petitions, evidence, etc. of the participants in the proceeding. The matter can also be adjudicated in a written proceeding. If the matter is heared in a court session, the session is held in accordance with the same structure. First, the identicication of the persons partisipating in the hearing are checked, their rights explained and removal issues solved. At the same time, filed requests are adjudicated. Examination by court means examining written evidence and hearing witnesses and other persons. Examination by court is followed by summations, where the participants in the proceeding render their legal opinion on examined evidence. It is possible to speak after summations in the form of rebuttal or final statement. After that, the court will go to make a judgment. Regardless of the similarity in conducting the session, the terms used in different procedural laws are very different (opening of a court session, opening of the hearing, a court session organised in the form of a preliminary hearing, examination by court, substantive hearing of a matter, court review/hearing, etc.). On the theoretical level, judicial procedures cannot differ from each other much. Basically, a communication process is carried through in the court, which has failed out of court. The requirements for conducting the communication process - the requirement of clear formulation of the problem, the requirement of hearing, the requirement of competency, etc. - determine the substantive similarity of judicial procedures. It can be claimed that judicial procedure is an accepted model of communication in the society.

Conclusively, it can be said that judicial procedures are basically harmonisable. Next, practical possibility of harmonising judicial procedures should be analysed, i.e. the possibility to put judicial procedure norms partially or in whole into one code. Regulating judicial procedures by one law is not a new phenomenon in Europe. It has been done in Finland, Sweden and Belgium for example. At the same time, the codes of judicial procedure have different contents in different states. For example, in Denmark, procedural law also regulates the structure of the court system, the Bar Association, Prosecutors' Offices and institutional issues of the Police (Andersen 2003). In Norway, one law regulates civil law and civil procedure (Thorkildsen & Kierulf 2003). The reasons of different contents of procedural laws seem to arise from the historical development of each country. In the context of Estonian judicial procedure, it should be asked what is this common part of judicial procedures that could be commonly regulated - is it the general part of judicial procedure or could it be codification of the entire judicial procedure into Code of Judicial Procedure? This question needs a more thorough analysis than the present article can offer. At the same time, answers to this kind of questions doesn't always depend on the will and theoretical possibility, but also on practical possibilities or in other words, on the available resources of Estonia. We are talking about financial as well as human resources. At the same time, it should be stressed that theoretically, there are no barriers to at least partial harmonisation of judicial procedures. Even a brief analysis of codes of judicial procedures enables to come to a conclusion that as a rule, these legislations regulate similar issues and there are more harmonisable areas (in addition to

the process of judicial procedure, evidence, terms, procedures for appeal, public access to a court session, jurisdiction, panel, etc.) than there are areas specific to each judicial procedure.

But this conclusion arises a question whether the possible code of judicial procedure is not too "great of a narrative" in J.-F. Lyotard's meaning. This could be the first impression. But the answer is negative - harmonisation of judicial procedures would not create a new great narrative. The harmonization of the principles of judicial procedures decreases the number of "great narratives". At the moment, each branch of judicial procedure separately is is a "great narrative". With harmonization of principles of judicial procedure, the number would mathematically decrease from four "great narratives" to one. As the second aspect, it should be brought forth that the code of judicial procedure would regulate procedural questions differently and in accordance with the needs of postmodern society. Namely, judicial procedures in postmodern world should be regulated on the level of principles for ensuring individualization of adjudicating disputes. Analogically to substantive laws, procedural law should determine general principles of the procedure and give the court a possibility to choose the process of proceeding in accordance with the particular dispute. In this case, we cannot speak about judicial procedure's norms as dogmas that live a life separate from everything else and it would abolish inflexible judicial procedure as a "great narrative".

Since the branches of judicial procedure are basically similar, it can be concluded that we can only be dealing with one language play. Hence, there is a need for harmonisation of terms. Postmodern plurality doesn't mean that one subculture or system of beliefs lacks of connective rules or system. We can talk about different language plays in different systems. It is also necessary for the society and legitimation of judicial procedure that judicial procedure uses one language play. A more understandable language play would be up to expactations of the society. There is definitely a pragmatic need for the language play to be harmonised.

What would be the benefits of harmonising judicial procedures? A need to ask this question comes from the fact that postmodern society has set new sights on science. Postmodernists deny the connecting role of science. The search for one universal truth has been given up and people are rather trying to find possibilities of how to conciliate differences that multi-cultural society has brought. Since science has given up the search for the truth and social essence and cultural context of the truths are prevalently recognised, it has set new goals for science. Science doesn't pose a question "what is the truth?" anymore but a question "what can we gain from it?" (Lyotard 1994).

What are the benefits of harmonising judicial procedure? It reduces procedural compartmentalisation. It also reduces inconsistency of judicial decisions reproached by the Bar Association and harmonises judicial practice, which would reduce the number of decisions that are annulled on procedural reasons. This way, we could start solving the problem that was raised at 2007 Court en banc. The improvement of the quality of judicial decisions would mean smaller procedural costs since the number of annullment of cases by higher courts and these of becoming new hearings would decrease. This would decrease the terms of proceedings and releases human and financial resources. At the same time, legislation and judicial procedure would become easier, which would make judicial proceedings more understandable to the participants in the proceeding as well as to the public and therefore become more legitimate as well. Greater foreseeability of justice would mean that the participants to the proceeding can assess the possibilities of agreements and the need to settle the dispute without court expenses, outside judicial procedure.

Harmonization of the principles of judicial procedures also increases the level of scientific revision of procedural institutes. Namely, different theorists-practitioners deal with different proceedings. Harmonising similar institutes would release the potential of science and the number of so called parallel researhes could be decreased. Clear separation from procedural law brings along a faster development of the science. In this case, the approach to procedural law would have a new perspective. Socio-philosophical context should be taken as the basis, not the context of substantive law. It would allow using results of other sciences. So far, results of sociology, psychology and other sciences have been implemented very rarely in judicial procedures. Differently from the United States of America, there have been no analysis made of regulation judicial procedures from the psychological aspect, which would help to increase the level of legitimation.

Harmonisation of the principles of judicial procedure would improve also the quality of legal eduucation. At the general assembly of the Bar Association of 2007, the Chairman Aivar Pilv (2007) noted that serious attention should be paid to the quality and level of legal education. At the same general assembly, Rein Lang, the Minister of Justice (2007), expressed his concerns about the quality of legal education. Procedural law is being teached in different volumes in different universities. When harmonising judicial procedures, the methodology of teaching procedural law should be revised. First, students should be taught the procedural

theory and the general problems of the administration of justice (objective of justice, the way of achieving it, legitimation, etc.) and only then, in the cource of practical study in the framework of case study by single judicial procedures acquire practical knowledge. Practical knowledge presupposes theoretical knowledge since a lawyer must be able to interpret and apply a norm purposefully.

Conclusively, this article has a viewpoint that in order to solve the problems in Estonian judicial procedure, we should give up the paradigm of legal positivism and judicial procedure should be adjusted to the needs of postmodern society. Judicial procedures should be harmonised. It is theoretically, as well as practically, possible and would benefit the society and legal theory in a short as well as in a long run.

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