EAST-WEST STUDIES

Journal of Social Sciences of Tallinn University School of Governance, Law and Society

EWS Number 10 (49) 2019

EAST-WEST STUDIES

Journal of Social Sciences of
Tallinn University School of Governance,
Law and Society

EWS Number 10 (49) 2019

EAST-WEST STUDIES

Journal of Social Scienses of Tallinn University School of Governance, Law and Society

Narva mnt. 29
10120 Tallinn
http://publications.tlu.ee/index.php/eastwest/index
ISSN 1736-9541
ISBN 978-9949-29-232-5

CONTENTS

PREFACE

Tallinn University's School of Governance, Law and Society is pleased to present an excellent 2019 edition of our East-West Studies Journal. It includes articles both from theoretical and practical sides of law, which is significant for the society and represents a good combination for reflecting upon the ideal and normative dimensions of law. From the theoretical side, we present the article written by Professor Emeritus Ene Grauberg and Dr Indrek Grauberg on the subject on Kantian and Hobbesian perspectives of law, as well as the article by Dr Indrek Grauberg on the matter of truth in international law. We find it inevitable that also practitioners of law from time to time reflect upon the broader issues and therefore these articles are well deserved to complement the daily attention of practicality. From the side of application of law, we bring to your attention the issues related to Estonia maritime practice (Dr Heiki Lindpere), entrepreneurial freedom in the field of liguids (Dr Ilmar Selge) and the regulation of technology (Álvaro Fernández). I trust that the readers will enjoy these articles as much as the editors have in the course of editing and review process.

Yours Truly,

Mart Susi, Editor-in-chief

Professor of Human Rights Law

CONTEMPORARY INTERNATIONAL SOCIETY AND LAW
KANT VERSUS HOBBES

INDREK GRAUBERG
ENE GRAUBERG

ABSTRACT

In the Age of Enlightenment people began to believe that knowledge provided the power to change society in order to move towards a better, more progressive international society and law. The new issues dealt with concerned political freedom and sovereignty. How have these views affected the contemporary understanding of society and law? In the general context we can speak of two opposing approaches towards international society and law:[1]

REALISM VERSUS NORMATIVISM

Realism, focusing on "international anarchy" and "power politics" in the area of sovereignty, dates from between the 15th and 17th centuries in Europe when economic development facilitated better communication and the formation of armies.[2]

Machiavelli and Hobbes, both among the founders of realism, highlighted the idea of international relations as an unlawful natural state, *bellum omnium contra omnes* (war of all against all). The government is primarily necessary for the establishment of security and order in society. There can be no justice, international society, and law where power dominates. To survive, states must have power and security. In order to govern and protect states, power and force are primary necessities, not democracy, solidarity or human rights. In this way, Hobbes compared the sovereign with authority and not law. Hobbes identified the state – the Leviathan – as the man-made *magnum artificium*, the truth and right of which is self-contained.[3] This state is no longer in need of God because the publicly important truth is the truth of the state. A contract of all with all terminated the natural state according to Hobbes and elevates the Leviathan to sovereign status.[4] By appointing a sovereign, individual freedom is exchanged for individual security.

Following Grotius, Hobbes believed that the universal self-preservation instinct is the fundamental basis of power and law, and that the state is created as its tool. The state is the only political society and moral community that helps prevent the "war of all against all".[5] Absolute authority is necessary because people do not trust each other. "I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his actions in like manner".[6] Such a person or an assembly of persons is a sovereign. A sovereign is not merely a higher authority but also a higher judge upon the resolution of issues that are of importance for the state. One may think that it was not part of Hobbes's intentions to justify unlimited power because the authority of the sovereign and the limits of power end outside the boundaries of the state. First, if imprisoned in war, for example, one must be loyal not to the person

---

1 See E. Grauberg, I. Grauberg. 2017. Tõe ja õiguse legitimeerimise modernistlikust piirist (The Modernist Boundry of Legistimising Truth and Justice). Argo, pp.177- 189.

2 M. Wight. 1991. International Theory: The Three Traditions. – London: Leicester University Press for Royal Institute of International Affairs.

3 C. Schmitt. Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols. Köln 1982, p. 70.

4 T. Hobbes. Leviathan. Available at https://www.ttu.ee/public/m/mart-murdvee/EconPsy/6/Hobbes_Thomas_1660_The_Leviathan.pdf

5 See I. Grauberg. 2013. Sovereignty in International Law and Politics: Theory and Practice. Kings College London, pp.47- 60.

6 T. Hobbes. Leviathan. Available at https://www.ttu.ee/public/m/mart-murdvee/EconPsy/6/Hobbes_Thomas_1660_The_Leviathan.pdf

who sent him to fight but to the person who imprisoned him. Second, the sovereign still proceeds from natural law within the state because he is not completely free in his governance. It is his duty to protect the well-being of the state. The state is characterised by peace and welfare. Third, the lack of full freedom is usually compensated for by defending the freedom of private property.[7]

Freedom can be inhibited not only by laws and violence but also by economic regulations. A conflict arising from economic inequality also needs to be resolved. The question is what mechanisms could be used to ensure the minimum of freedom necessary for everyone. As the subjection of personal goals and choices to the state is considered important in negative freedom, such freedom is generally not characteristic of a democratically organised state. Hobbes analysed society, too, from the same perspective. The fact that people are free means that they lack the opportunity to combine freedom with coercion and power. However, this does not yet mean that it would be possible to live free. The other precondition on which Hobbes founded his approach was that people were egoistic by nature. This is caused by the self-preservation instinct. That is why the natural state is never a pleasure but a war of all against all. Freedom precludes a secure society. For this reason, it is practical for people to forget freedom for the sake of security. This gives rise to the social contract theory in the 17th and 18th centuries.

Schmitt opines that Hobbes is greatly concerned about the absolute power of the sovereign as, according to such an interpretation of the sovereign, the state will inevitably acquire divine status. Hobbes's view of sovereignty, according to which the state should be an ultimate source of political power, continued to develop along with the upsurge of absolute monarchy in Continental Europe in the 18th century.[8]

From the perspective of **value-normative apology,** the international society is, first and foremost, a community of states that is closely bound by justice and other moral values. From this angle, sovereignty resembles a Lego brick by means of which we create different structures. The **value-normative approach** is attributed to Kant. His characterisation of the international society is based on the idea of "moral unity". Kant asks, "Are we now living in an enlightened age? The answer is, No, but we live in an age of enlightenment. ... Still, we have some obvious indications that the hindrances against general enlightenment or the emergence from self-imposed nonage are gradually diminishing."[9] Kant published his three critiques[10] and the legendary "Perpetual Peace"[11] that outline the cosmopolitan order. Kant's ideal form of statehood was a parliamentary republic. According to Kant, the benefit for people does not lie in happiness but in the conformity of the organisation of state with legal provisions.

According to Kant, the law, the legal basis of the state, has to originate from the principle of justice. The principle itself has been substantially influenced by Rousseau. Being a human is a goal in itself because an individual is a value, the acknowledgement of which is due to moral law.[12] Proceeding from Kant, a responsible moral actor should, first and foremost, adopt moral laws and not act only in response to obligations imposed by a superior power. Kant was an advocate of a global federation of constitutional republics united in global citizenship, respect for the rule of law and common interest in trade, which would create perpetual peace.[13] At the same time, according to Kant's "perpetual peace doctrine", not a single state is allowed to dominate over another, regular armies have to be banned, and not a single state is permitted to interfere with the governance of another state. No agreement is valid if it refers to war as a tactical option and, in the case of war, it is necessary to avoid anything that might lead to distrust later on. Internal obligations are, first and foremost, derived from moral laws, while the

---

7 T. Hobbes. Leviathan. Available at https://www.ttu.ee/public/m/mart-murdvee/EconPsy/6/Hobbes_Thomas_1660_The_Leviathan.pdf

8 Q. Skinner. In: Political Innovation and Conceptual Change. – Cambridge University Press 1989.p. 214.

9 I. Kant. What is Enlightenment.1784. Available at http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html.

10 I.Kant. Three Critiques: Critique of Pure Reason, Critique of Practical Reason, Critique of Judgment. Hackett Publishing Company 2002.

11 I.Kant. Kant, I. Perpetual Peace: A Philosophical Essay (1917 ed.) 1795. Translated by Camell Smith, M. with a preface by Letta, L. – George Allen and Unwin.

12 K. Einbund. Õiguslik riik. (Lawful State) Tartu. 1918, p. 40.

13 I. Kant. Perpetual peace. Available at https://www.mtholyoke.edu/acad/intrel/kant/kant1/htm

external ones stem from the law. Law and morality are both necessary in order to ensure freedom because a man may abuse his freedom vis-à-vis others of his kind.

Kant's categorical imperative – "Act only according to that maxim whereby you can, at the same time, will that it should become a universal law" – has been compared with Kelsen's concept of the basic norm, the foundation of later continental European states with written constitutions.[14] Kelsen maintained within the framework of his "pure" theory of law that it was impermissible to link the basic norm to political or ethical principles. Nevertheless, we can ask regarding Kelsen's basic norm as well as Kant's categorical imperative: why should they be observed? Where does the justification of the objective coercion of the norm lie? Why should one behave in a certain manner and not in any other? What is the basis for the applicability of general norms? If, according to Kant, a hypothetical imperative has authority only under certain conditions, the categorical imperative, just like Kelsen's basic norm, is an unconditional and irrefutable obligation. It lays down the format and the principle that must be adhered to in a particular behaviour. It is a kind of general form that gives content or validity to other norms of the same system.[15] Consequently, the basic norm is the foundation of all provisions of law.

Habermas has noted that Kant arrives at his idea of a cosmopolitan order by extending the concept of a "constitution" from the national to the global level (the type of constitution which, in his day, had just emerged from the American and French Revolutions). In this way he anticipates the present idea of the constitutionalisation of international law. The innovation consists in the transformation of "international" law as the law of states into cosmopolitan law as a law of individuals.[16]

The Peace of Westphalia in 1648 recognised the sovereign rights of all European states, including the sovereign rights of vassals of the Holy Roman Empire. It created the basis for the present-day international political system and international law. The Peace of Westphalia was pivotal for separating the church and the state.[17] The international society spread beyond Europe to other countries, international relations developed. "Science and technology represented progress – not only in the sense that they improved the material well-being and labour conditions but also in the sense of advancing the form of life called civilisation."[18]

Law becomes a neutral system of codified subjective rights that enables people to pursue their goals instead of supporting a common communitarian concept of kindness. In modern society, status starts to be replaced by law. The rise of the rule of law when relations between individuals are, first and foremost, contractual is closely related to the technification of the society in the 18th century.

CONTEMPORARY INTERNATIONAL SOCIETY AND LAW: KANT VERSUS HOBBES

How have the ideas of freedom and sovereignty introduced by Hobbes and Kant influenced today's understanding of contemporary international society and law? Needless to say that today one can refer to a variety of versions of both realism and normativism.[19]

The views of Hobbes on the need to limit freedom in the interest of general security and protection of human rights started to be taken seriously only in today's globalising society that is focusing on the issues of cyber space alongside the protection of global peace, security and humanitarian law. Contemporary realism can be broadly divided into extreme and moderate

---

[14] H. Schneider. Riigiteoreetilisi probleeme: miks nad on tekkinud ja kuidas neid lahendada (Theoretical Issues Related to the State).– Juridica 1998, Vol. 7 (in Estonian).

[15] H. Kelsen. Pure Theory of Law. – University of California Press 1967, pp. 201, 217.

[16] J. Habermas. A Political Constitution for the Pluralist World Society. Available at http://www.yale.edu/sociology/colloquia/2005/fall/habermasPluralWorldSoc.pdf pp. 1-10

[17] H. Schilling. War and Peace at the Emergence of Modernity: Europe between State Belligerence, Religious Wars, and the Desire for Peace. – Münster: Westfalishes Landesmuseum 1998, pp. 23–46.

[18] G. H. Wright. 1996. Progressi müüt.- Minerva öökull (Myth of Progress. The Owl of Minerva), p. 62.

[19] C. R. Beitz 1999. Political Theory and International Relations. – Princeton, NJ: Princeton University Press.

varieties. The extreme arm, with its roots already in the works of Hobbes, is of the opinion that in general the international policy of states is always based on interests, not on international law.[20] It is stressed that national interests have to be defined by means of power.[21] In the opinion of realists not a single sovereign state actually has an obligation to obey any other sovereign state. International law is seen mostly from the perspective of major powers, of their interests and responsibility. Moderate realism has been substantially influenced by the rationalism of Grotius and partly by Locke. Grotius was immortalised by his work "Rights of War and Peace"[22] (1625) published more than two decades before the Peace of Westphalia (1648), when the international society only started to take shape. Grotius was of the opinion that states form a universal community due to their natural law status. Grotius has, among others, influenced Hobbes who, like Grotius, considered that the universal instinct for self-preservation is the fundamental basis of law. The state is created as its tool. The state is the only political society and moral community that helps to prevent the "war of all against all."[23]

Hobbes' model of power – law as power – has impacted more the international behaviour of major states (e.g. the USA and Russia). Over the last decades their international behaviour in preventing violence has focused on the use-of-force principle. The authors think that the Charter of the United Nations is also based on such extreme realism. We know that the right to secure peace and security in the world has been put in the hands of five superpowers (the USA, Russia, China, the United Kingdom, and France). The UN Security Council has been endowed with an extraordinary constitutional responsibility to maintain international peace and security. The Security Council acting in this way resembles a Hobbes-type sovereign. States may join the UN or decline to do so but generally they have no right to disregard the edicts of the Security Council. Their compliance is scrutinised by five major powers that have a permanent right to veto. The Security Council became especially active at the end of the Cold War. At that time, the Security Council started acting simultaneously as a legislator, an adjudicator as well as an executive. Naturally, from the perspective of the separation of powers this is something unheard of. From a political standpoint, however, this fact has been subjected to different interpretations. In the case of the conflict in the former Yugoslavia, its resolution by the UN is highly appreciated, primarily because of its speed.[24] [25] [26] Instead of the traditional, time-consuming process of international agreements, the Security Council started to provide fast and effective case by case solutions. Nevertheless, this raises questions about the legitimacy of the so-called effective legislative drafting. To what degree is it acceptable to ignore international agreements in law at all? Can an international agreement be sacrificed to the principle of procedural effectiveness *et cetera*? International law is seen mostly through the prism of interests and the responsibility of the major powers.[27] Moderate realists emphasise that in international relations one must be guided by "integrity, moderation, modesty, and generosity towards others".[28] At the same time, it is acknowledged that national interests have a leading and legitimate role in international relations.

---

[20] H. Morgenthau. Politics Among Nations: the struggle for power and peace. – New York: Knopf 1948.

[21] M. Hirsh. 2003. At War With Ourselves. Why America Is Squandering Its Chance To Build a Better World. Oxford University Press, p. 129.

[22] H. Grotius. 1992. Rights of War and Peace: An Abridged Translation. – London.

[23] T. Hobbes. Leviathan. Available at https://www.ttu.ee/public/m/mart-murdvee/EconPsy/6/Hobbes_Thomas_1660_The_Leviathan.pdf

[24] A. Obote Odora. 1997. The Judging of War Criminals: Individual Criminal Responsibility Under International Law. Stockholm.

[25] G. Sluiter. 1999. Obtaining Evidence for the International Criminal Tribunal for the Former Yugoslavia: An Overview and Assessment of Domestic Implementing Legislation. – Netherlands International Law Review. Vol. XLV, pp. 87- 112.

[26] Notable is also the promptness and speed at which the International Criminal Tribunals for the former Yugoslavia and Rwanda were set up upon relatively short debates (in 1993 and 1994 respectively). For instance, the resolution of the Security Council on the establishment of the criminal tribunal for Yugoslavia, published in 1993, offered the General Secretary of the UN just 60 days to issue an opinion. "The charters of the tribunals set out the main features of modern international criminal law, including the necessary elements of war crimes against humanity ... The activities of the Security Council are referred to as "shortcut legislation". See M. Roger. Rahvusvahelise õiguse kujunemine ÜROs ja Eesti võimalused (Development of International Law in the UN and Opportunities for Estonia).- Diplomaatia: 1

[27] See H. Grotius. 1992. Rights of War and Peace: An Abridged Translation. – London.

[28] See G. F. Kennan. 1984. American Diplomacy. The University of Chicago.

While in recent years the USA has rather relied on Hobbes' principle of power (i.e., the prevention of violence by the use of force) in its international behaviour, the European Union has in post-World War II military conflicts tried to follow the idea of the legitimacy of the agreement-based mechanism of power derived from Kant's concept of "perpetual peace".[29] The large-scale and bloody conflicts in the first half of the 20th century forced Europe to seek a new model for society and power that would, instead of conflict, be based on consensual power relations among the nations of Europe. Such a model has been sought since the 1950s. The first step towards this was made by signing the Treaty establishing the European Coal and Steel Community by six states – France, Germany, Italy, Holland, Belgium, and Luxembourg – in Paris, on 18 April 1951.[30] Regularisation of European integration processes continued in 1957 when the same six states signed, in Rome, the Treaties establishing the European Economic Community and the European Atomic Energy Community; that is, the Treaties of Rome which entered into force on 1 January 1958.[31] The three aforementioned alliances became known as the European Communities. Their task was to underpin the establishment of the common market and the monetary union. Nowadays, the ideas put forth by Kant are still influencing the apologists of the European Federation as well as the authors seeking cosmopolitan support for human rights.[32]

Robert Kagan, comparing Europe and the USA, says that while Europe is entering into the post-historical paradise of peace and relative prosperity, the dream come true of Immanuel Kant's "perpetual peace", the United States remains mired in history, exercising power in the Hobbesian world where international laws and rules are unreliable, where true security and the promotion of a liberal order still depend on the possession and use of military might.[33] Given America's willingness to spend considerable sums on the protection of Europeans, the latter prefer to spend their own money on social welfare programmes, long vacations, and shorter working weeks.[34] The authors do not fully share Kagan's viewpoint, especially as far as the protection of Europe is concerned. In order to justify this opinion, it should be stressed again that the USA and the European Union represent different models of society and power.

Nowadays, Kant's ideas keep influencing those who justify the creation of the European Federation as well as those who seek support for the cosmopolitan protection of human rights. Revolutionists have laid emphasis on moral solidarity, human rights, and on 'world' citizenship. They believe that the interstate system and anarchy are a temporary departure from the conscious path towards the establishment of "federative unions" (Kantianism) or the "world government" born out of a revolution.[35]

Revolutionists are united in their humanistic values and their belief in the moral unity of mankind which are elevated above the state. In their opinion, a solidarity-based cosmopolitan society is more important than the state accepting pluralism. Often the revolutionist international theory has an outright messianic flavour. It aims to improve the world by means of revolutionary social change derived from a great idea – be it Christianity, republican liberalism or Marxism-Leninism.[36] In their opinion, history is not a succession of events and facts. It is human destiny that gives history its meaning. The ultimate

---

[29] I. Kant. Perpetual Peace. Available at https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm

[30] The Treaty of Paris. Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF Was concluded for 50 years and it was ratified in June 1952. In the preamble the Treaty of Paris sets out that the contracting states "resolved to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions capable of giving direction to their future common destiny."

[31] The Treaty of Rome. Available at http://www.gleichstellung.uni-freiburg.de/dokumente/treaty-of-rome

[32] I. Kant, *op. cit.*, pp. 143–160.

[33] R. Kagan. 2004. Paradiis ja jõud: Ameerika ja Euroopa uues maailmakorralduses (Paradise and Power: America and Europe in the New World Order) . Tallinn, p. 7.

[34] *Ibid.*

[35] K. Marx. F. Engels. Manifesto of the Communist Party. Available at http://www.marxists.org/archive/marx/works/1848/communist-manifesto/index.htm.

[36] M. Wight. 1991. International Theory. The Three Traditions. London: Leicester University Press for Royal Institute of International Affairs.

value of history is the attainment of freedom. Karl Marx was of the opinion that in order to transcend the total alienation of an individual and achieve freedom, it is necessary to demolish the state based on capitalist values and to establish a communist society instead.[37] In their later works Marx and Engels associated the development of a communist society with the extinction of any statehood and with a "world society" where the workers of the whole world are united.[38]

Modernist dreams of a cosmopolitan society of free and equal people, mainly from the 19th century and the first half of the 20th, found new support even as late as the end of the previous century. The interstate system and anarchy were considered to be a temporary departure from the conscious path towards the establishment of "federative unions" or the "world government" born out of a revolution[39], or of a "cosmopol" created by the unification of various forces.

Nowadays, one of the most "airtight" arguments for the justification of "world governance" or "world society" arises from the great risks and dangers the globalising world is facing.[40] [41] It is difficult to deal with the risk of militarism and terrorism, economic uncertainty, loss of freedom, inequality and ecological catastrophe, genocide, and so on, solely within the borders of one state. It is possible to tackle these issues only on the international level. This is why the last decades have seen an increasing number of advocates for the replacement of the classical doctrine of sovereignty by the concept of shared sovereignty.[42] As the idea of a world government did not find much support among politicians and the peoples of the world alike, it was replaced with the idea of "world governance".[43]

Held has observed that globalisation has not only integrated people and nations but has also created new forms of antagonism.[44] This creates the preconditions in the globalising world for global governance. The institutional aims of "world governance" are related to the rule of law, political equality, democratic policies, global social solidarity, and the realisation and development of ideas about the economic efficiency and ecological balance of the community.[45] Harvey argues that the introduction of the new concept is related to a shift in the globalising world, whereby the welfare state has started mutating into a workfare state. In such a society the integrated socio-political government is being replaced by fragmented economic and political governance. It is important to note that in the authors' opinion, Estonia, with its recent social and political reforms, is undergoing the transformation from the socio-democratic welfare model to the mainly neoliberal workfare model. Under these new circumstances a supporting state is turning into an opportunities-offering state.[46] The authors feel that the launch of a new term in this context is a case of terminological hocus-pocus rather than a fundamental desire to change the meaning of the concept "world governance".

Today, when speaking of the USA as one of the leading global countries from the perspective of "ruling the world", it is interesting to remember President Woodrow Wilson, who introduced the principle of "destroying every self-governing state in the world which separates itself from others and insidiously and out of its free will violates world peace; or if it cannot

---

[37] K. Marx 1982. Majandusteaduslikud ja filosoofilised käsikirjad (Economic and Philosophic Manuscripts).Tallinn. Eesti Raamat.

[38] K. Marx, F. Engels. Kommunistliku partei manifest (Manifesto of the Communist Party). Available at http://www.marxists.org/archive/marx/works/1848/communist-manifesto/index.htm.

[39] *Ibid.*

[40] U. Beck. 1992. Risk Society: Towards a New Modernity. – London: Sage.

[41] A. Giddens. Available at https://www.amazon.co.uk/Runaway-World-Professor-Anthony-Giddens/dp/1861974299

[42] R. Cooper. 2000. The Post-modern State and the World Order. London: Demos, Foreign Policy Centre.
R. Cooper. 2003. The Breaking of Nations: Order and Chaos in the Twenty-First Century. London: Atlantic Books.

[43] See D. Held. 1995. Democracy and the Global Order: From the Modern State to Cosmopolitan Governance. Cambridge: Polity; D. Held. 2008. Global Covenant. Cambridge: Polity.

[44] D. Held. 2004. Global Covenant. The Social Democratic Altrnative to the Washington Consensus. Polity Press. USA, p. 164. Held stresses that the global covenant manifests itself in law -- "Convene an international convention to begin the process of reconnecting the security and human rights agendas through the consolidations of International humanitarian law"

[45] *Ibid.*, p. 165.

[46] D. Harvey. See From Managerialism to Entrepreneurialism: The Transformation in Urban Governance in Late Capitalism (below)

be immediately destroyed, it must be practically divested of legal competence."[47] This means that in Wilson's opinion any secretive diplomacy is suspect, and one has to accept open relations between citizens and states. Wilson considers this to be the conditional precedent of world peace. In his vision, the post-World War I world had to be based on principles, not on force; on legality, not on self-interest – because there were no longer any winners or losers. This view is usually looked upon as the idealistic or liberal trend in American foreign policy, which is deeply engrained in the democratic tradition of the United States.

In his famous address to Congress of 8 January 1918, which contained 14 points on ending World War I and the creation a safer world for democracy, Wilson highlighted eight mandatory and six recommended points.[48] "The mandatory points, which had to be executed at any cost, laid stress on open diplomacy, access to seas, general disarmament, removal of trade barriers, impartial solution of colonial conquests, restoration of Belgium, return of the occupied Russian territories, and finally – as a crown jewel – the establishment of the League of Nations."[49]

Never before had such revolutionary plans been made with such meagre instructions on how these goals were to be met. Wilson envisioned that thereafter the world was to rely on principle, not force; on lawfulness, not self-interest – because there were no longer any winners or losers. After World War I, millions of people all over the world were convinced that it had been – to make reference to an observation by Wilson – the war to end all wars. Unfortunately, the authors of the Versailles Peace Treaty – the winners – made a number of errors that fuelled World War II. The humiliation of the enemy after World War I kept the flame alive and created the conditions for the convergence of nationalist forces in order to take revenge.

The self-determination of nations put forth by Wilson in Point 14 after World War I, has, alas, until now had no practical application in international law. Furthermore, Wilson obviously had no clear idea of the repercussions his thesis on the right of nations to self-determination might have in Eastern Europe or that "it would be the beginnings of the aspirations to independence of non-Russian nations in the Russian Empire".[50] Among others, the right of nations to self-determination took hold also in the Baltic states, and at least in the first half of the 1920s it seemed that Wilson had come up with a truly novel idea. The Charter of the League of Nations, adopted at the Paris Peace Conference in 1919, aimed to maintain peace and resolve conflicts all over the world. In addition, it dealt with collective security, peaceful dispute settlement, international arbitration, disarmament, defining an aggressor, and economic and military sanctions against aggressors.

After World War I, a number of important changes took place in international law. The principle supporting *de jure* recognition of nation states – *ex factis jus oritur* (the law arises from the facts) – was replaced by a new principle *ex injuria jus non oritur* (law does not arise from injustice). The USA devised the doctrine of non-recognition based on the Kellogg-Briand Pact adopted in 1928, which banned war as a political means. The Kellogg-Briand Pact was developed further by the Montevideo Convention in 1933, originally signed by six Latin-American countries. Later on, the United States and eleven European countries also became signatories of this Convention on the Rights and Duties of the States. Article 1 of the Convention gives a definition of the state as a person of international law. The state has three characteristics: a permanent population; a defined territory; government, and capacity to enter into relations with other states.[51] The last trait, according to the three-parameter doctrine of the state by Georg Jellinek, is an aspect of the government. Under Article 3 of the Montevideo Convention, the political existence of the state is independent of its recognition by other states. The Convention was a further development of the Kellogg-Briand Pact, stressing that no occupation has any legal validity and that conflicts have to be ended.[52]

---

[47] 1918.

[48] W. Wilson's speech. Available at http://www.historyplace.com/speeches/wilson-points.htm

[49] H. Kissinger. Diplomacy. – London: A Touchstone Book 1944, pp. 230–232.

[50] V. Made. 2008. Välispoliitika võimalustest julgeoleku kadudes: 1920–1930 (Opportunities of Foreign Policy under Disappearing Security: 1920-1930). Tuna 1, pp. 52–58.

[51] Montevideo Convention on the Rights and Duties of States. Available at https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf

[52] Kellogg-Briand Pact 1928. Available at: http//www.uni-marburg.de/icwc/dateien/briandkelloggpact.pdf

To sum up the Paris Peace Conference, it could be said that, on the one hand, "the entire historical experience and the usual practices of major powers were overturned".[53] This perspective has usually been treated as an idealistic or liberal trend in American foreign policy with its deep roots in the democratic tradition of the United States. On the other hand, time has shown that Wilson's idea of a collective security system was not viable. Furthermore, the United States was not involved in the Versailles Peace Conference or in the League of Nations. In 1925, the United Kingdom announced that it would not ratify the League of Nations Geneva Protocol for the Pacific Settlement of International Disputes, which established conditions for the implementation of sanctions against aggressors set forth in Article 16. Soon other members of the League of Nations followed the example of the United Kingdom.

It is assumed that one of the reasons why the League of Nations system created after World War I failed was embedded in the Versailles Peace Treaty, which made it possible to compromise the sovereignty of a state. The system was in contravention with the principles of the Peace of Westphalia respected so far, under which it was unacceptable to interfere with the internal affairs of a state, even if it was done for the protection of democracy and overall security.[54] Since the League of Nations had been founded, sovereignty was treated more as a source of conflict and not as its solution. For example, the League of Nations had the authority to curb the sovereignty of states in order to serve the common good. We know from history that the restrictions were applied mostly in the case of Eastern European countries. For example, the *de jure* sovereignty of Finland, Czechoslovakia, and Poland was recognised already either during the war or at the Paris Peace Conference. The Baltic states (Estonia, Latvia, and Lithuania), Ukraine and others were *de facto* not recognised and had to wait their turn. The Entente recognised the Baltic countries *de jure* only in 1921 and the USA in 1922.

Kennan, one the most renowned representatives of extreme realism in the 20th century, has been very critical of the legalistic-moralistic trend in the foreign policy of the United States, acknowledging at the same time that national interests have the leading role and legitimacy in international relations.[55] Hirsh is of the opinion that the disputes of today focus on the issue of how to create international order in the contemporary multipolar society.[56] When new small states started to emerge, some major ones, first and foremost the USA, were apt to reconsider their position in international relations. The USA did not "wait simply for the development of free institutions and did not limit itself only to warding off the threats endangering its own security. Instead it was urgent to actively promote democracy by helping the countries that followed American ideals, while punishing those that did not."[57]

In the opinion of Kissinger, American foreign policy should be based on realistic calculation with limited choices. Kissinger believes that both statesmen and citizens should always consider the balance of hope and opportunity in international politics. "It is the touchstone of society whether or not it is capable of repressing its differences in the name of common goals and whether it keeps in mind that the prosperity of a society is always achieved through reconciliation, not conflict. America failed that test in Indochina."[58] The authors agree with Kissinger that the world can never be made permanently secure for democracy. It is a naive hope but the possibility should always be recognised. Hence, such ideas must be defended or else we allow someone else to govern the international society. This, Kissinger notes, might not be in the national interests of the United States of America.[59]

In fact, the international political system of states and international law was created by Westphalian sovereignty. If before 1648 the main authority organising Europe was religion, the embodiment of unity in the Christian world, then, after the Peace of

---

[53] *Ibid.*, p. 279.

[54] S. D. Krastev. 2014. Demokraatia tõus ja langus? Meritokraatia? (Rise and Fall of Democracy? Meritocracy?) Vikerkaar. Available at http://www.vikerkaar.ee/archives/650

[55] G. Kennan. 1954. Realities of American Foreign Policy. – New York: Princeton University Press.

[56] M. Hirsch. 2003. At War with Ourselves. Why America Is Squandering Its Chance to Build a Better World. Oxford University Press, p. 29.

[57] *Ibid.*

[58] H. Kissinger. H. Kissinger. Diplomacy. – London: A Touchstone Book 1944

[59] *Ibid.*, p. 754.

Westphalia, it was the balance of power between nation states.[60] According to Westphalian sovereignty, the highest legitimate power for controlling domestic conflicts, including ethnic conflicts, is the state. The highest power in any state can establish its own rules concerning the nations residing on its particular territory, including in issues pertaining to the protection of human rights. Interference in the domestic matters of a state by other states violates its sovereignty. In the context of the present globalising world, many countries, international organisations, corporations, and so on, have considerably increased opportunities to act outside the territory of their own country with great impact. This also applies to the settlement of domestic conflicts. From the viewpoint of international law, the most important provision in a constitution is the one setting out that the state has been established on the right to national self-determination. For example, the preamble to the Constitution of the Republic of Estonia proclaims that the Estonian State "… embodies the inextinguishable right of the people of Estonia to national self-determination and was proclaimed on 24 February 1918, which is founded on liberty, justice and law, which is created to protect the peace and defend the people against aggression from the outside..."[61]

In general international law, the right to national self-determination was declared by the Atlantic Charter in 1941 and conclusively by the Charter of the United Nations in 1945. The Charter of the United Nations has been viewed as the only universally applicable document protecting world peace,[62] according to which the right to interfere can be applied. When speaking, on the one hand, about the principles of equality between nations as well as their self-determination and sovereignty and, on the other hand, about refraining from the threat to use force in any manner inconsistent with the purposes of the United Nations, it is emphasised in the UN Declaration 2625(XXV) of 1970, adopted by the General Assembly,[63] that in international relations states shall refrain from military, political, economic or any other form of coercion if aimed against the political independence or territorial integrity of any state. No territorial acquisition resulting from a threat or the use of force shall be recognised as legal. States shall settle their international disputes and conflicts without exception by peaceful means. In the case of an immediate threat to peace or a breach of peace, or act of aggression, the UN Security Council has the right and duty to apply various enforcement measures, including military intervention, by using either the military forces of the UN itself or of its Member States. It is mandatory for Member States to comply with such decisions.

Such an interpretation of sovereignty refers to its firmly established links with the territorial-nation state. This provides the only context in which sovereignty can be realised. Only in a nation state can its leaders acquire the decision-making monopoly in the fields of their authority that no longer require any supreme power or limitation. Although nation states of the international community are sovereign, they are bound to follow generally recognised international norms and rules, and to meet their obligations. Order and stability are ensured by the principles underlying the Peace of Westphalia: first, the balance of powers, the aim of which is to prevent the rise of larger and mightier states, thus limiting the possibility of aggression; second, the obligation of all parties to follow the rules and principles engrained in international law; third, the resolution of major conflicts by international consultation; fourth, the enhancement of diplomatic communication in order to improve contacts between states to solve problems.[64]

In the Westphalian system of nation states, the sovereign or nation and their representatives continue to be the source of *de facto* law. Their power has three key features. First, absoluteness as independent nation states cannot be limited. Second, unitary because power must apply to all things and acts, and cannot be divided or relinquished. Third, it is the supreme power because power has to be final in all its decisions. Westphalian sovereignty laid the foundation for the entire international political system and international law. It started the aspiration to create an international society whereby independent nation states have full power over the territory under their jurisdiction, whereby they consider the interests of other states and do

---

[60] R. Cooper. *Id*, p. 16.

[61] Põhiseaduse teel. Dokumente ja materjale kogunud ja selgitanud Eerik- Juhan Truuväli (On the Road to Constitution. Documents and Materials Collected and Explained by Eerik-Juhan Truuväli). Tallinn. 2008, p. 399.

[62] Charter of the United Nations. Available at https://www.riigiteataja.ee/akt/555597

[63] UN General Assembly Resolution 2625. Available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20A%20RES2625%20(XXV).pdf

[64] A. Watson. European International Society and its Expansion. Oxford. Clarendon Press. 1984.

no harm to the interests of their own population. The Westphalian Peace is the pillar of sovereignty by which the church was separated from the state.[65] Included are realist concepts based on the consideration of interest and power balance by a modern state, as well as extreme versions of value-normative concepts according to which chaos and anarchy can be replaced by the hegemony of the "world government" or by a system of collective security.

The United Nations as a global international organisation is undoubtedly an integral part of the modern world. On the one hand, it emphasises the sovereignty of its member states, however on the other hand, it attempts to stabilise the current modern order, and, if need be, resort to force for this purpose as interventions into other states are illegal as a rule. Nevertheless, there are quite a few recent or current examples of certain behaviour or actions undertaken by states that may lead to international intervention, regardless even of relations laid down in formal agreements. It happened to Iraq, in the aftermath of its occupation of Kuwait, or to Serbia for its treatment of Albanians in Kosovo. Such cases are usually justified by the need to protect global peace and security. But how should we interpret a situation when the main argument justifying aggression turns out not to be true? For example, let's consider the intervention of the US and its allies in Iraq that began in 2003 or the annexation of Crimea by Russia in March 2013. As we know, the above-mentioned acts of aggression were also justified, in the first case, by the need to protect world peace and global security allegedly threatened by the nuclear arsenal of Iraq, and in the second case "by the need to protect the interests and sovereignty of Russians in their ancestral Crimean homeland." Today we know that in both cases these arguments found no proof. However, the annexation is still ongoing. In the debates the world is having on international law, the case of Kosovo included, there are references primarily to Kant. On 9 December 2007, addressing the Security Council, Prime Minister of Serbia V. Kostunica summed up the situation by saying that in the opinion of Serbia, from 2004 onwards, anyone can apply the Kantian concept based on human rights as opposed to the Grotian concept focusing on the state.

The 21st century began with an attempt to reconsider and re-word the concept of humanitarian intervention through the "Responsibility to Protect" doctrine.[66] The report on the panel discussion in 2004 is being looked upon as a mere policy document. Actually, there are no grounds for optimism in the development of international law and collective security. Since the report by the High Level Panel in 2004,[67] not a single state has succeeded in starting proceedings for the amendment of the UN Charter, which is still considered to be a robust legal document despite the controversies it contains. For instance Article 2 (7): "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII," could be a full guarantee of sovereignty of a UN member state but, on the other hand, it is emphasised that the sovereignty of member states is not important when implementing a decision of the UN Security Council if it serves to "maintain or restore international peace and security".[68] The 2004 report of the High Level Panel has been treated as a mere policy paper. It may be taken into account but there is no obligation to do so. Following Kant, a responsible and moral actor should above all recognise the moral laws and refrain from acting merely upon obligations imposed by supreme power.

---

[65] H. Schilling. 1998. War and Peace at the Emergence of Modernity: Europe between State Belligerence, Religious Wars, and the Desire for Peace. – Münster: Westfalishes Landesmuseum, pp. 23–46.

[66] The issue was first discussed by the International Commission on Intervention and State Sovereignty in its report *The Responsibility to Protect* in 2001. In 2004 the idea was developed further by the UN High Level Panel on Threats, Challenges and Change in its report *A More Secure World: Our Shared Responsibility*. It was followed by the report of the UN General Secretary *In Larger Freedom: Towards Development, Security and Human Rights for All* which, eventually, reached the General Assembly and is included in the ***UN General Assembly 2005 Outcome Document.*** One is free to take it into account or not.

[67] UN Report. A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change. Available at https://www.un.org/ruleoflaw/files/gaA.59.565_En.pdf

[68] UN Charter. Chapter VII, Article 51. Available at https://www.un.org/en/sections/un-charter/chapter-vii/index.html

The collapse of communism in the 1980s and 1990s gave such a boost to the development of the information society and liberalism that it enabled Fukuyama to declare the end of history.[69] Fukuyama believed only a few decades ago[70] that the state emerging at the end of history would be liberal as its system of laws recognises and protects the right of people to universal freedom. It would also be democratic as it exists only by the consent of the government. The universal homogeneous state has overcome all prior disagreements and strife and there is no fight and conflict over "major" issues. Therefore, there is no need for generals and statesmen. The thing that remains is primarily economic activity.[71] The end of history in Fukuyama's interpretation is, first and foremost, the end of any kind of ideology. Ideologies are going to be replaced by solutions to problems in economy, environmental matters, and consumption.[72] Fukuyama is of the opinion that religion and nationalism pose the only threat. Huntington remarks in this context that there are two perceptions of the might of the West. First, after the collapse of the Soviet Union the Western countries became the only ones on whom the future of the world depends. "As the only remaining superpower the United States, together with England and France, takes decisions on the issues of politics and security. The United States, with Germany and Japan, make fundamental decisions in the sphere of economy. The other understanding of the West is very different from the first. It is considered to be a civilisation in decline whose relative importance in political, economic, and military power is diminishing in comparison with other civilisations."[73]

The Post-Cold War period can be looked upon as a period of rapid globalisation that has had an unprecedented influence on the financial integration of a large number of states. The global financial order is now virtually universal in its reach (e.g. cf. World Bank and IMF).[74] Issues related to technological systems and the political order of the globalising society are reflected in postmodern values of the value and cultural world. "Parts of the least developed world are suffering from hunger and growing relative poverty while fighting desperately for a larger chunk of the progress and modernisation pie."[75] The imperial ambitions of major powers for a new world order have not disappeared either, no matter whether they act under the banner of liberalism or democracy. One could mention the US intervention into the Philippines, the war in Vietnam, the issue of Jerusalem in the dispute between Israel and Palestine, the aggression in Iraq and Afghanistan, the occupation of Crimea by Russia, etc. The European Union is often quoted as a sterling example of our hyper-globalising and profit-oriented world.[76]

In this context it is important to ask for an explanation for why sovereign states have started to give up part of their national sovereignty and subject themselves to the jurisdiction of a semi-global government.[77] Might Fukuyama still be right about the end of history? The desire to turn liberalism into a universal ideology is directly related to the hegemonic aspirations of the West. While for Fukuyama liberalism is the universal ideology of the contemporary globalising society, then Huntington has equated liberalism with Western civilisation.[78] In light of the serious crisis of liberal ideology and its diminishing importance in contemporary society, according to Huntington, it is possible predict that the importance of Western society is on the decline in the whole world. The desire to turn liberalism into a universal ideology is directly related to the Western aspiration

---

[69] F. Fukuyama. 1992. The End of History and the Last Man.

[70] See F. Fukuyama, 1990. Ajaloo lõpp (The End of History). Looming nr. 3, pp. 376- 388; F. Fukuyama 2006. Riikluse ehitamine: valitsemine ja maailmakord 21. sajandil (State-Building: Governance and World Order in the 21st Century). Tänapäev. Marx believed that the development of history is purposeful and determined by the mutual impact of material forces, and it would end only when the Communist Utopia has been achieved, putting an end to all earlier conflicts.

[71] F. Fukuyama. 1990. Ajaloo lõpp (The End of History). Looming nr. 3, 1990, pp. 326- 388.

[72] *Ibid.*, p. 388

[73] *Ibid.*, pp. 107- 108.

[74] I. Clark. 2005. Globalization and the Post- Cold War Order.- The Globalization of World Politics. Oxford University Press, p. 735.

[75] G.H. Wright. 1996. Progressi müüt (Myth of Progress), p. 44.

[76] Soros believes that the only goal of today's hyper-globalised world is to earn more profit. It is a difficult task as systems and money have become the main drivers of society instead of personal responsibility. According to M. Weber it was capitalism that set and realized this goal.

[77] See I. Grauberg. Sovereignity in International Law and Politics: Theory and Practice. Kings College London. The Dickson Poon School of Law. 2013.

[78] S. P. Huntington. 1999. Tsivilisatsioonide kokkupõrge ja maailmakorra ümberkujunemine (The Clash of Civilizations and the Remaking of World Order). Fontes. 1999.

for hegemony. The authors are of the opinion that compared to Fukuyama, Huntington is more realistic in his viewpoints. Life has shown that Fukuyama made a mistake predicting the end of ideology. Later on he acknowledged the error himself. [79]

At the end of the 20th century, people still believed that the Cold War had ended, primarily because the rivalry of the two superpowers, the USA and Russia, seemed to be over. The collapse of the communist system allowed many countries, the Baltic states included, to restore their independence. Robert Cooper has said that "what ended in 1989 was not merely the Cold War, not even the Second World War. What ended in Europe (and not in Europe alone) was the end of a political system prevalent during the last three centuries: the balance of power and imperial aspirations."[80]

The European political elite trusted that the end of the Cold War meant the establishment of a new order in Europe. At the end of the 20th century, it was optimistically assumed that the confrontation between the two political systems was over and the threat of war diminished. Therefore, military expenditure could be reallocated to the globalising economy in order to strengthen one's power in the world. The White House advisers and political analysts Nye and Owens stressed that knowledge was power, more than ever before. "The one country that can best lead the globalisation and the information revolution will be more powerful than any other. America has apparent strength in military power and economic production more than anybody else"[81] The Post-Cold War period can be looked at as the period of rapid globalisation that has had an unprecedented influence on the financial integration of states. The global financial order is now virtually universal in its reach (e.g. cf. World Bank and IMF).[82] Today the world is borderless, more multicultural, more pluralistic, more fragmented, and more prone to conflict. One of its important characteristics is the coexistence of different worlds – the pre-modern world, the modern world and the postmodern one.

"Even at a glance it is apparent that in the last ten years a paradigmatic shift has happened in the society – the modernist paradigm has disintegrated in its final stages (postmodernism, hypermodernism, transmodernism): in addition to the banking crisis that had the characteristics of a general economic crisis, we have seen a surprising growth of populism and nationalism."[83] It is hereby important to note that the discourse of the post-postmodernising world tries to get rid of all kinds of closed systems and look at the world in relation with other systems. Consequently, in pragmatism, derived from instrumentalism, the meanings of international law concepts (e.g. sovereignty, human rights, etc.) may not correspond to any "real world". One and the same concept could, depending on the aim of its use, acquire different meanings in different linguistic contexts. Everything hinges on the objective behind why a concept is used, and on the context, for example, often on the specific goal sought when an international conflict is being resolved.

Creation of the postmodern world was boosted by two international agreements: the Treaty of Rome (1957), the well-known source of integration in Europe, and the Treaty on Conventional Armed Forces in Europe (CFE in 1990), which, according to Robert Cooper, was born of the failure, wastefulness, and absurdity of the Cold War. "The path toward this treaty was laid through one of the few real innovations in diplomacy – confidence-building measures."[84] In the core of the CFE Treaty is intrusive verification, which Cooper believes is a key element of the postmodern order where state sovereignty is no longer an absolute. In a situation where sovereignty has been sacrificed to state security and foreign policy, one follows the principle which allows intrusion upon the internal aspects of foreign affairs. The aspirations of the Organization for Security and Co-operation in Europe (OSCE) to provide internal standards of conduct (freedom of press, the treatment of minorities, etc.) for sovereign states are even more far-reaching.

---

[79] Fr. Fukuyama. 1999. Suur vapustus. Inimolemus ja ühiskondliku korra taastamine (Great Disruption: Human Nature and the Reconstruction of Social Order). Tänapäev.

[80] R. Cooper. The Breaking of Nations: Order and Chaos in the Twenty-First Century.

[81] J.S. Nye and W.A. Owens.1996. America`s Information Edge. Foreign Affairs. 75(2), p. 20.

[82] Ian Clark. 2005.Globalization and the Post-Cold War Order.- The Globalization of World Politics. Oxford University Press, p. 735.

[83] J. Soolep. 2018. Digitaalreaalsusest ja postmodernse haridusparadigma kujunemisest- Eesti jätkusuutlik areng ja haridus: kutse- ja kõrghariduse stsenaariumid 2020- 2035 (On Digital Reality and the Shaping of a Postmodern Paradigm in Education – Sustainable Development in Estonia and Education: Scenarios for Vocational and Higher Education). Nord kirjastus, p. 36.

[84] R. Cooper 2004, p. 34.

In Cooper's opinion, the postmodern world resembles the world prior to the establishment of the modern order because it was also an era when the system of states was on the verge of collapse. However, the difference lies in the fact that the present collapse leads to organisation rather than to order. If the first is characterised by post-imperial chaos and pre-state status when the state has lost its legitimacy (Somalia, Liberia, Chechnya, etc.), then the modern world operates in the classical system of states, manly of nation states.[85] In such a world the states retain their "monopoly of force and may be prepared to use it against each other. If the system enjoys order, the reason for it is in the balance of power or in the presence of hegemonic states which see an interest in maintaining the *status quo*, as the United States does in the Pacific. The modern world is for the most part orderly, but it remains full of risks."[86]

An important characteristic of the new postmodern world is the loss of distinction between internal and foreign affairs, which inevitably impinges upon state sovereignty. "Mutual interference in some area of domestic affairs and mutual surveillance (of food safety, of state subsidies, of budget deficits) is normal for postmodern states. (…) In most European countries the judgements of the European Court of Human Rights on all kinds of domestic matters (whether you can beat your children, for example) are accepted as final. Force is rejected as a way of settling disputes."[87] As the postmodern world is borderless, the borders of postmodern states are losing their importance. Even "court decisions are enforced across state borders, right down to parking fines. In this environment security, which was once based on walls, is now based on openness and transparency, and mutual vulnerability."[88] At the same time, some postmodern relations are restricted by agreements, for example, with Russia, the transparency is restricted by the CFE Treaty. The old imperialism is dead in the postmodern world because states are reluctant to war with each other. The European Union and NATO have attempted to maintain greater openness.

However, in the search for the new world order, little attention has been paid to the fact that the Western society makes up but a third of the whole world. This means that on top of Western civilisation, comprising mostly of Christian Europe and America, there are many other civilisations that do not share the Western values of freedom and democracy. Earlier, these civilisations used to be separated and did not pose any particular danger. Today, however, the situation has changed as "a country without much law and order can still have an international airport".[89] Such countries may evoke our sympathy; television may bring their suffering to our own homes.

In such a radically new situation the democratic world is confused. "We have imposed sanctions but the situation is escalating. We have no unanimous solution as to what to do next. But we have to understand that when rules – the Helsinki Accords and all other agreements – have been dismissed by one of the signatories, the situation has changed for all of us. It is important to understand that we do not talk only about Ukraine. The ongoing crisis is not specifically the problem of Eastern Europe, the problem of "our region". The issue is Russia, the relations of Russia with the West and with the Western values of free society"[90] And so we are back in the situation described by Hobbes in the 17th century, in the situation when agreements have lost their validity and we face "the war of all against all".[91] We have to agree with Žižek that today we see the downside of "perpetual peace" in the "perpetual war" against those who are perceived as a threat to peace, that the war against terror is today's reality of perpetual peace.[92]

It has also become absolutely clear that the imperialist ambition of superpowers for a new world order has not disappeared at all. It does not matter whether it is pursued under the banner of liberalism or democracy. We can mention the occupation of

---

[85] R. Cooper. 2004. Riikide murdumine, kord ja kaos 20. Sajandil (Breaking of Nations: Order and Chaos in the Twenty-First Century). Fontes, p. 31.

[86] *Ibid.*, p. 31.

[87] *Ibid.*, p. 37.

[88] *Ibid.*

[89] R. Cooper 2004, p. 28.

[90] T.H. Ilvese kõne 2014. Muutuv julgeolukord ja Euroopa väärtused (Address by T.H. Ilves. 2014. Changing Security Situation and European Values.) Tartu Ülikooli aulas (At Tartu University). 12.12.2014. Available at http://www.uttv.ee/naita?id=21016

[91] T. Hobbes. Leviathan. https://www.ttu.ee/public/m/mart-murdvee/EconPsy/6/Hobbes_Thomas_1660_The_Leviathan.pdf

[92] S. Zizek. 2010. Living in the End Times. Verso. London-New York.

Crimea by Russia, the US invasion of the Philippines, the issue of Jerusalem in the dispute between Israel and Palestine, the aggression against Iraq and Afghanistan, etc. Sometimes the European Union has been cited as a shining example of today's hyper-globalised and fast-profit oriented world.[93] Still, how to explain why sovereign states have started to give up part of their national sovereignty in order to submit themselves to the jurisdiction of semi-global governance?[94]

As the model of a welfare society prevalent after World War II and the long-dominant system of modernist international society (enjoyed in Europe for quite a while) are about to exhaust themselves, then, alongside that, Kant's concept of "perpetual peace", the foundation of liberal ideology in modern society, has also reached its breaking point.[95] Žižek, one of the most forceful critics of contemporary liberal capitalism, has been critical of Kant's concept of "perpetual peace" in a number of interviews, primarily because Kant designed his "perpetual peace" world order without any external enemy. In reality it means that the enemy is contained everywhere within the self. Žižek notes that today we can see the enemy in the way the West has been bragging about its role as the world policeman over the last decades, as if the world state were actually the long dominant system of modernist international society.[96]

The authors believe that the key question in the evolving international society and world order is how the states, as subjects of international law, communicate with each other in the shared world. Are relations built on international society as a large network-based institution where relations between states are regulated by laws drafted via consensus and not conflict? Or to put it another way: would relations be based on the method of conflict whereby major powers, especially the United States, set themselves against all of Eurasia, or will it be a method of consensus that attempts to find common interest among all the differences?[97]

Old solutions for the issues of international order – balance or hegemony – seem to have lost their appeal. If balance means the balance between a growing number states in possession of nuclear or other arms of mass destruction, then we are facing a problem, not a solution. In the "world in fluctuation" where "context, mood and personalities have a greater impact on international relations than we can assume by reading textbooks"[98], it is necessary to change the context. Robert Cooper thinks that "what ended in 1989 was not merely the Cold War, not even the Second World War. What ended in Europe (and not in Europe alone) was the political system prevalent during the last three centuries: the balance of power and imperial aspirations." The postmodern system is not based on the balance of power nor does it stress sovereignty or the separation of internal and foreign policy. It discards the use of force as a means of conflict resolution and favours consciously the interdependence and vulnerability of European states."[99]

---

[93] Soros believes that the only goal of today's hyper-globalised world is to earn more profit. It is a difficult task as systems and money have become the main drivers of society instead of personal responsibility. According to M. Weber it was capitalism that set and realised this goal.

[94] See I. Grauberg. 2013. Sovereignty in International Law and Politics: Theory and Practice. King's College London. The Dickson Poon School of Law.

[95] I. Kant. Perpetual Peace. 30.06.2007. A Philosophical Sketch. – Filiquarian Publishing, LLC.

[96] S. Zizek. 2010. Living in the End Times. Verso. London-New York.

[97] I. Grauberg 2013, p.138.

[98] See R. Cooper. 2004. Riikide murdumine, kord ja kaos 20. Sajandil (The Breaking of Nations: Order and Chaos in the Twenty-First Century). Fontes.

[99] S. D. Krasner. 2001. Rethinking the Sovereign State Model—Review of International Studies. Available at https://books.google.ee/books?id=tHJ5m56sBX4C&printsec=frontcover&hl=et&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

THE END OF GRAND NARRATIVES AND LEGITIMATION OF TRUTH AND SOVEREIGNITY

INDREK GRAUBERG

ABSTRACT

The paradigm of the modern state started to be more widely criticised in the 1960s and 1970s, when it became clear that many Enlightenment ideas were losing their relevance in the rapidly changing contemporary world. Criticism of the modern paradigm declared an end to grand narratives.[1] **This included narratives about sovereignty and the state, freedom, truth and progress. The desire for an object and objectivity came to be replaced by a focus on the subject. Variety, fragmentation and difference are the key words of postmodern society. The goals and desires of the subject living in a particular society and culture are those that construct the world we live in, including the concept of national sovereignty.** The author agrees with Lyotard that the actual great values—freedom, truth and progress that were born in the Enlightenment and 'hovered' in western culture for almost one and a half centuries, and now that the paradigm of globalism is changing—have turned against themselves in crisis. Whilst postmodernism in the midst of the 1980s and 1990s was still optimistic and saw the grand narratives of modernism as surpassed, one could notice signs of deep pessimism in postmodernism from the start of the 21st century. Such emotions have particularly expanded since the terrorist attack on the WTC in New York on 11 September 2001, and also since Western intervention in Iraq in 2003.

THE POSTMODERN PARADIGM

The postmodern paradigm as an era has in fact been understood in a variety of ways:[2] as a period when we reached the end of history;[3] as a new situation in the production of knowledge;[4] [5] as a new aesthetic formation;[6] [7] as a cultural dominant.[8] Because of the variety of approaches to postmodernism and the related terms of postmodernism and postmodernisation, the author is of the opinion that it is very difficult to unambiguously define the terms.[9] For Baudrillard, the postmodern world was a world of simulacra, where we could no longer differentiate between reality and simulation. Simulacra represented nothing but themselves: there was no other reality to which they referred. Consequently, Boudrillard could claim that Disneyland and television now constituted America's reality to which, and, even more intriguingly, the Gulf War did not contribute, but was merely a simulation (something along the lines of a video game, it would seem).

Foucault stresses that certain forms of knowledge, after periods of stability in which the fundamental processes of a discourse remain largely unquestioned, undergo rapid transformation. There is not only a change in the content of a discourse, but also

---

1 Indrek Grauberg. Philosophical Perspective of the Concept of Sovereignity: Modern versus Postmodern- "Sovereignity in International Law and Politics. Theory and Practice." Kings College London, 2013, pp. 72- 88

2 Pippin. R.B. Modernism as a Philosophical Problem.– Basil Blackwell, 1991 pp. 156–164.

3 Fukuyama, F. The End of History. New York, 1992.

4 Lyotard, J.F. The Postmodern Condition: A Report on Knowledge. 1984.

5 See Foucault, M. The Archeology of Knowledge. Routledge, London, 1989.

6 Baudrillard. J. Simulacra and Simulation. University of Michigan Press. 1994. p. 1-17

7 Hassan, I. 1987. The Postmodern Turn. Ohaio State University. p. 5-16

8 Jameson, F.R. Postmodernism, or the Cultural Logic of the Late Capitalism. Duke University Press, 1991, p. 3-7.

9 The Routledge Companion to Postmodernism. Routledge, London, 2010 p.160.

a fundamental change in what might count as knowledge itself. The most radical of Foucault's claims is that the very concept 'man' was the creation of a unique set of historical contingencies, a consequence of certain relationships of power, a figment of discourse. For Foucault, man means the relatively modern idea of man as a self-contained rational agent, that knowing subject assumed by rationalists, and triumphant in the French Revolution.

For Giddens, in late modernity, it is the process of reflection itself which has become the topic of reflection. This fits with the self-consciousness and irony of postmodernism and illustrates the extent to which the self has also become a reflexive project. Giddens agrees with the theorists of postmodernity that massive changes have occurred in the late 20th century, which have led to a restructuring of social experience, identity and knowledge. But he does not agree that these changes constitute a complete break with modernity.[10]

The term postmodernism appears in dictionaries simultaneously with the term globalisation. For example, in the Cambridge Dictionary of Philosophy: "Postmodern, of or relating to a complex set of reactions to modern philosophy and its presuppositions, as opposed to the kind of agreement on substantive doctrines or philosophical questions that often characterises a philosophical movement."[11] These days, the use of postmodernism can be noticed in a variety of publications starting from academic essays to newspaper advertisements. The meaning of 'postmodernism' has been sometimes compared with a compass that guides us toward a better understanding of value and cultural change in contemporary society. A postmodern worldview focuses on the unusual, on diversity and pluralism, in its attempt to prove alternative narratives. However, it never appeals to the universal requirements of knowing. In the issue of legitimisation, postmodernism represents a pragmatic position.

The precondition of postmodernism can already be traced in Kierkegaard's and Nietzsche's philosophy. Nietzsche's declaration of the death of God is replaced by postmodernism with the declaration of the end of philosophy and criticism of the Enlightenment. The author emphasises through the notion of postmodernism the transformation process of the grand modern narratives—truth, freedom, progress.[12] Postmodernity, hence, denotes an era based on suspicion about the grand ideas of truth, freedom and progress as well as any other grand narratives. Lyotard writes in this context as follows:

> *I define postmodern as incredulity toward metanarratives. This incredulity is undoubtedly a product of progress in the sciences: but that progress in turn presupposes it… The narrative function is losing its function, its Great hero, its Great dangers, its Great voyages, its Great goal.*[13]

According to Lyotard, postmodernity is about calling into question the "'grand narratives' that gave knowledge to its legitimacy". Postmodernism doubts that grand narratives are good in themselves, as was regarded during the first years of modernism.[14] Lyotard adopted a working hypothesis that knowledge changes its status when a society enters the post-industrial age and culture enters the so-called postmodern age. Some authors are of the opinion that postmodernity dates back to the 1970s.[15] The author agrees with Lyotard that:

> *…this transition has been under way since at least the end of the 1950s, which for Europe marks the completion of reconstruction, … Rather than painting a picture that would inevitably remain*

---

[10] See The Routledge Companion to Postmodernism. Routledge, London, 2010 , p 258. A. Giddens.

[11] The Cambridge Dictionary of Philosophy. Paw Prints, 2008, p. 725.

[12] See F. J. Lyotard 1984. Postmodern Condition. R. Inglehart 1997. Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies.– Princeton, N.J.: Princeton University Press.

[13] Lyotard, J.F. The Postmodern Condition: A Report on Knowledge. 1984. p. vii-ix

[14] Grauberg, E. On Paradigmatic Changes in Society and its Reflection in Education. Education Theories and Concepts in Central East Europe.– New York, 1994. pp. 148–158.

[15] See Harvey, D The Condition of Postmodernity.– Basil Blackwell. 1990.

> *incomplete, I will take as my point of departure a single feature, one that immediately defines our object of study. Scientific knowledge is a kind of discourse.*[16]

The notion of postmodernism is also closely related to the connotation of the postmodern era. Deconstruction is a method of postmodernism.[17] The objective of deconstruction is to pay attention to values outside the system in order to rid oneself of modernist logocentrism and closure. It emphasises that any text, including a legal text, always functions amid and in the sphere of the influence of other texts. Text is any written sign system that has a meaning (academic text, legal text, work of art, film, etc.) Hence, the meaning of sovereignty, state and other notions also depends on the context in which they are used. In this way, science is losing its hegemonic status.[18] [19] Within the framework of the postmodern paradigm, when there is no agreed discourse, concepts of sovereignty will also become relative. Temporariness and fragmentation inevitably prevail over grand narratives in a rapidly changing world.

In this context, irony, ideas of the disunion of the world, difference, playfulness and hyperreality become important. It is stressed that all social, humanitarian and also physical processes must be regarded as language. Language is what gives meaning to our world. Knowledge and truth only reflect the ideologies, values and power relations that depend on the relevant social and political context. Hence, we should stop pursuing absolute meaning in the case of sovereignty as in the case of any other notion. Any notion, including sovereignty, should be understood functionally. Consequently, if there is no reality independent of the subject,[20] but everything ultimately depends on our point of view, science does not examine so much the objectively existing world as our knowledge and opinions about this world.[21] In order to understand the social gaps and shifts that inevitably characterise the new postmodern era, we will analyse postmodern values, using the conflict and consensus method.

CRITICISM BASED ON CONFLICT

When sceptical postmodernism[22] positions itself through a complete opposition to modernism, using the conflict method, then 'moderate' postmodernism takes the position that the present era is characterised rather by the need to rewrite modernist narratives according to the new social and cultural context.[23] For example, the sceptical wing of postmodernism mainly directs its attention to analysing binary oppositions—fundamentalism in modernism is contrasted with antifundamentalism, realism with antirealism, epistemology with anti-epistemology, etc. Moderate postmodernism, however, is characterised by the pursuit of consensus. Perhaps Lyotard has made the most successful attempt among the 'sceptics' to position postmodernism on the cultural map and Habermas represents the consensual position of society.

Hence the author hereafter will concentrate on the critique of modernism based on Lyotard and Habermas. First, when analysing the methodology of opposition aimed at the conflict of sceptical postmodernism, it is important to note that it is not the system but the network that is the object of research in postmodernism. A network can be hierarchical but it is

---

[16] Lyotard, J.F. The Postmodern Condition: A Report on Knowledge, 1984. p. 3.

[17] See Derrida, J. Positions. University of Chicago. 1981.

[18] See Feyerabend, P.K. Against Method: Outline of an Anarchistic Theory of Knowledge.– London: NLB. 1975

[19] Grauberg. E Tänapäeva ühiskonna ja Eesti arengu teedest. Eesti uue aastatuhande lävel (Development Paths of Contemporary Society and Estonia's Development. Estonia on the Threshold of New Millennium).– Tallinn. TEA, pp. 335–342.

[20] Bohr, N. Essays 1958–1962 on Atomic Physics and Human Knowledge. Interscience. 1964

[21] Grauberg, E. Semantilise keeleparadigma murdumisest (Crumbling of Semantic Language Paradigm). – University Nord Publications No. 25, 2005 pp. 3–16.

[22] See Lyotard, J-F. The Postmodern Condition: A Report on Knowledge, 1984; Rorty, R. Philosophy and the Mirror of Nature, Princton University Press; Foucault, M. Power/Knowledge. Selected Interviews and Other Writings 1972-1977. Pantheon Books, New York.

[23] See G.H. von Wright 1996. Progressi müüt (Myth of Progress); J. Habermas. The Theory of Communicative Action, Reason and the Ratzionalisation of Society. Beacon Press, Poston 1984.

important that it does not have a centre. A network is actually a multitude of nodes. Nodes and the interrelationships between them are in the process of constant change, they create and move. Second, it is important to note that focus on the subject in postmodernism is opposed to the pursuit of the object and objectivity in modernism. It is the wishes and desires of the subject that serve as the basis for instability and relativity in contemporary society according to postmodernists.

Wishes are regarded from the point of view of a small community that strives to expose the power of various structures and systems, and if necessary, resorts to resistance. Pluralism, fragmentation and difference are largely related to culture and values. Cultural area, region and location are not notions that speak for themselves. Being part of social processes, they can be regarded as social constructs. Postmodernism thus denies not only the object that has its roots in the era of Enlightenment, but also the notion of the subject. Truth and knowledge are not objective and the subject is not a whole nor persistent. Rather, both are ideological and political constructs necessary for justifying their pursuit of power and dominance. The notions of subject and object are used to ensure the monolithic nature of the present political and legal system, precluding the forces that could contest the present cultural domination. The approach to culture originating from Nietzsche in fact means that culture is not the reflection of deeper cultural processes but the foundation that can be used to understand also other phenomena.[24] Third, the renouncement of the concept of the conformity of objective truth also casts doubt on whether the grand narrative and ideology are necessary for legitimising social processes. Since postmodernism signifies, as noted above, the end of history and the grand narratives or metanarratives of politics,[25] knowledge, including also scientific knowledge, can never be regarded as a totality. Issues of legitimation must always be regarded in a pluralist manner. This means that social processes can be analysed solely from a different angle. However, none of the approaches are truthful in themselves. Eventually, everything depends on the goal, point of view and the language game.[26] There is in fact no consent about its significance for political philosophy. The author agrees with Raymond Plant who writes:

> *We can now see how this Wittgensteinian framework provides something of an intellectual backround to communitarian and interpretive political philosophy. It is possible to see arguments of the sort we have been considering as forming a backcloth to these more directly political arguments. Indeed Richard Rorty acknowledges this as a central theme in his book Contingency, Irony and Solidarity.*[27]

The goal of postmodernism is to crush modernist values and seek to radicalise democracy. It is opined that since there is no absolute philosophical truth or objectivity, all views and opinions are merely interpretations that proceed from certain interests. This also concerns the notion of sovereignty. Hence, from the point of view of postmodernism, it is pointless to speak about a single big and universal objective truth. What is useful, is the truth. The truth depends on differences in the worldview and the goals for which knowledge is sought. The latter, in turn, is related to issues of power and legitimation. The truth is what works, rather than what is theoretically correct. Lyotard writes:

> *...has encouraged us to see postmodernism as a rejection of all-encompassing cultural theories (such as Marxism) and has argued for a much more pragmatic attitude to political life and artistic expression that simply ignores the oppressive rules laid down by grand narrative.*[28]

But Lyotard himself sees postmodernism and modernism as cyclical movements which alternate throughout the course of history. Rorty maintains that the truth is sooner a practical than a theoretical issue. Rorty saw pragmatism's role as the dissolution of such issues as the nature of truth, arguing that a pragmatist was uninterested in taking sides or weighing up

---

[24] Grauberg, E. Haridusest ja teadmisest kaasaja ühiskonnas. Haridus, 1997. 23 - 26.

[25] See Lyotard, J.F. The Postmodern Condition: A Report on Knowledge, 1984

[26] See Wittgenstein, L. Philosophical Investigations. Blackwell Publishers, 2005, J.-F.

[27] Plant, R. Antinomies of Modernist Political Thought; reasoning, context and community. The Politics of Postmodernity. Cambridge University Press, Cambridge. 1998. p.86

[28] The Routledge Companion to Postmodernism, 2001 p. 340.

the pros and cons of the argument, but instead merely wanted 'to change the subject' to something more interesting. [29] For a pragmatist like Rorty there is no objective truth at all. All claims need only to satisfy the group's expectations for verification. Science is just one of many groups with its own rules and criteria. As there are multiple groups with different criteria, there can be multiple truths. Rorty's antifoundationalism argues against any quest for ultimate reality or such absolutes as Platonic 'Truth', 'Goodness' and so on.

To continue the discussion, we could perhaps suggest that sovereignty should no longer be regarded in ontological but constructivist terms. This means that it is not so much about the question of what sovereignty is but whether the use of the notion of sovereignty would help regulate extremely complicated international relations. According to the pragmatic approach, the function of sovereignty would be to contribute to ensuring peace and security in the contemporary world. Before defining sovereignty, one should understand, according to Rorty, that language is just a set of tools to accomplish one's desires. Referring to Kuhn and Dilthey, Rorty recommends giving up the idea that science produces adequate models of reality. Scientific discourse should be regarded as a language among other languages. The main question is what kind of tool would help us better attain the goal. When sovereignty is important to justify the goals of peace and security, we should by no means renounce the notion. Hence, in the contemporary rapidly changing world, globalisation is taking on increasingly relative meaning related both to factual pressure from outside and an ever-growing amount of regulatory limitations. The author of this paper shares the opinion that the protection of common interests always involves the partial subordination of people to an external foreign will and restrictions. For example, let us take the subordination of the security and defence policy of the European Union member states, including Estonia, to common goals—the security and defence policy of the European Union. In contemporary society, such subordination in its legal meaning may even be more commonplace than some time ago. When subjecting to a foreign will, not only law but also force is used according to Foucault.[30] Foucault asks if power is the balance of forces, shouldn't power be analysed not through relinquishment contract and alienation but through struggle, opposition and war. In other words, should political power be treated as a war by other means? This gives rise to the question of what kind of a situation would justify the use of force? Is the fight against terrorism by NATO allies in Afghanistan justified? If the war is fought to protect peace and security in the contemporary world, it is a justified war in our opinion. However, if its main goal is to transport the principal values of Western civilisation from the West to a different culture and society in order to achieve hegemony, the war is naturally not justified. In our opinion, it is largely determined by different views of the state and sovereignty as well as society and freedom.

> *Western civilisation depends on an idea of citizenship that is... rooted in territorial jurisdiction and national loyalty. By contrast, Islam, which has been until recently remote from the Western world and without the ability to project its message, is founded on an ideal of godliness which is entirely global in its significance, and which regards territorial jurisdiction and national loyalty as compromises with no intrinsic legitimacy of their own.*[31]

Foucault is of the opinion that power compels us to produce the truth that it requires and needs to function. 'Power never ceases its interrogation, its inquisition and its registration of truth: it institutionalises, professionalises and rewards its pursuit. We are required to produce truth much as we produce wealth.'[32] 'Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true.'[33]

According to Foucault, 'the truth also serves as law because truthful discourse is the one that decides, that carries expressions of power and in the end, we are judged, condemned, classified', etc. The relations of power, as they function in a society like

---

[29] See Rorty, R. Consequences of Pragmatism. University of Minnesota Press, 1982.

[30] Foucault. M. Two Lectures. Power/Knowledge. Selected Interviews and Other Writings 1972-1977. P. 78–109

[31] Scruton R. The West and the Rest. Continuum.– London. New York 2002, p. 125

[32] Foucault, M. Truth and Power. Power/Knowledge. Selected Interviews & Other Writings 1972–77.– Pantheon Books. New York, 1980 p. 132

[33] *Ibid.,* p. 131.

ours, according to Foucault, essentially rest upon a definite relation of forces that is established at a determinate, historically specifiable moment, in war and by war.

> *If it is true that political power puts an end to war, that it installs, or tries to install, a reign of peace in civil society, this by no means implies that it suspends the effects of war or neutralises the disequilibrium revealed in the final battle.*[34]

The author agrees with Foucault that the task of political power according to this hypothesis has always been rather to retain the balance of powers and to record this through the operation of various institutions, as well as economic inequality and the use of language. Recent wars in Iraq, Afghanistan, and so on could serve as examples. **Relying on the international practice of the past 20–25 years concerning interventions and the emergence of several new peripheral states and the integration processes in Europe, the author agrees with Foucault that the contract-oppression schema becomes important from the point of view of de jure sovereignty, as well as issues of the legitimacy of power, its transfer and alienation. From the aspect of de facto sovereignty, the pursuit of domination or hegemony, and as well the pursuit for supreme power becomes important. In such cases, the model of power is based on the struggle-repression or war-repression schema rather than on the contract-oppression mechanism. If power is regarded merely through oppression, a de jure concept of power would be adopted according to Foucault. In that case, power is identified with the law that says no.**

The power of authority in such an approach is prohibitory and narrow. As a comparison, it should be noted that if the representatives of the social contract have interpreted sovereignty based on the contract-oppression schema, then starting from Hegel and Marx, power has been mostly regarded from the repressive aspect. We can only wonder, with Foucault, why the war-oppression schema is so popular these days. Popper is of the opinion that several misleading and wrong positions on power issues date back to the formulation of the question of power when Plato asked to whom power had to belong.[35] Instead, we should ask how political power could be arranged so as to prevent bad and unskilled governors from causing too much damage. Popper believes that all power paradoxes have one trait in common: the supremacy or supreme authority of any individual or class of individuals, principle or rule is unstable, as such supremacy can deny itself and collapse as a result. For example, the paradox of democracy highlights dangers arising from (a presumably democratic) principle that majority-rule is the highest authority because if the majority decides that a tyrant should rule, then the principle no longer applies.[36]

In order to abandon the pursuits of hegemony, in discussing sovereignty, Foucault believes that 'we have to abandon the model of Leviathan, that model of artificial man who is at once an automaton, a fabricated man, but also a unitary man who contains all real individuals, whose body is made up of citizens but whose soul is sovereignty.'[37] Power must be examined outside of the limited field of juridical sovereignty and state institutions. Foucault maintains that power is above all a desire to dominate. That is why it should be studied based on the techniques and tactics of domination.[38] The author is of the opinion that proceeding from the point of view of globalising society, when new issues of centre vs. periphery come into focus, the issue of statehood can be largely put down to the desire to be at the helm. This desire to dominate can be compared to Weber's desire to enforce order, which is related to the ability to dispatch someone dressed in a uniform and armed against people to make them comply with the laws of the state.[39] The desire to dominate is above all characteristic of strong countries such as the US and many other Western countries. These states also have supervisory agencies to enforce law to regulate everything from traffic rules to statutory fundamental rights.[40] Foucault does not think

---

[34] *Ibid.,* p. 134.

[35] Popper, K 2010. Avatud ühiskond ja selle vaenlased (Open Society and Its Enemies). Tallinn, p. 32. p. 121.

[36] See *ibid.*

[37] Foucault, M. Truth and Power. Power/Knowledge. Selected Interviews & Other Writings 1972–77.– Pantheon Books. New York, 1980 p. 121

[38] *Ibid.,* p. 119

[39] Weber, M. From Max Weber: Essays in Sociology. New York: Oxford University press, 1946.

[40] Fukuyama, F. **State Buildings:** Governance and World Order in the 21st Century, Profile Books, 2006 p. 20–50

that power is ever, even in an absolutely sovereign state and centralised monarchy, concentrated in one location.[41] That is why power must be captured at its extremities, in its ultimate destinations, with those points where it becomes capillary.[42] Foucault maintains that power and sovereignty should not be examined from the perspective of where (i.e. which countries) such things could happen. Rather, power should be examined in terms of what kind of a state accommodates people who do such things. People can be subjected to power or the discourse of truth, however, only through a system of discipline and punishment. The state has taken over such subjection techniques from the church. Norms are required to control and categorise people. Nevertheless, norms do not only subject people to the state through which people are subjectivised. Norms can also be used to objectivise people, which means their expulsion from a system. Such a justification of subjection to norms can also be transferred to international society. Countries that do not comply with certain international norms have been called pariah states.

From the point of view of the modern state model, Afghanistan is such a country in our example. Hence, a sovereign state derives its legitimate justification from legal provisions recognised by society. They entitle the political power to rule within a certain territory.[43] There are also those who believe that states develop statehood and exercise power irrespective of the legitimate basis of their activity.[44] Here, the Soviet Union can be used as an example, which, regardless of the weak legitimate basis of the state, was still able to participate as one of the main actors in the super league of world countries for nearly 70 years. In a democracy, the abuse of power is nearly always related to the transgression of the conditions of the social contract provided in the Constitution. In this way, power becomes oppression.

From the point of view of postmodern sovereignty, it should be regarded in relation to the goals and interests of a certain subject. The goals and desires of a certain subject—be it the state, a social group or an individual—serve as the basis of instability and relativeness in contemporary society. Acceptance of the diversity, fragmentation and difference of society, however, supports the position that the contemporary world is multicultural on various levels. The renouncement of the concept of the conformity of objective truth also casts doubt on whether the grand narrative and ideology are necessary for legitimising social processes. It is opined that issues of legitimation should always be discussed from a pluralist point of view, which means that social processes can be analysed from different perspectives. At the same time, none of the approaches is truthful or false. Everything depends on the goal, point of view and language game.[45]

When further analysing the issues from the aspect of critical constructivism, we could also make the claim about sovereignty that the connotation of the notion of sovereignty in the contemporary postmodernising world depends not only on the cultural and political background and identity, but that identity largely develops also in the course of the decision-making process as a kind of social practice. **When interpreting the notion of sovereignty, the key words these days are independence, security and world peace; that is, the extent to which such constructs are used in justifying the relevant interpretation. Furthermore, the extent to which the relevant issue of sovereignty is associated with traditional but, at the same time, softer—cultural and humanist—aspects of security. Each sentence and notion, including sovereignty, has so many connotations and contexts in which it is used.** Hence, in the present-day world, it is very difficult to justify a single universal objective truth that is interpreted in the same way in all cultures and societies, just as it is difficult to justify a single universal and objective notion of sovereignty that is equally understandable for everyone.

The author is of the opinion that questioning sovereignty as a notion that can be objectively examined does not mean that our knowledge of sovereignty is prejudiced. How, then, can we explain the fact that knowledge helps us orientate in the world, change the world, etc.? The criticism of objective truth, including the objectivism of sovereignty, within the

---

[41] Foucault, M. Truth and Power. Power/Knowledge. Selected Interviews & Other Writings 1972–77.– Pantheon Books. New York, 1980 p. 118.

[42] *Ibid.,* p. 119

[43] Jellinek, K 1937.

[44] Huntington, S, P. The Clash of Civilizations and the Remaking of World Order. Simon and Schuster, New York, 1996. p. 9–99.

[45] See Lyotard, J.F. The Postmodern Condition: A Report on Knowledge, 1984; Wittgenstein, L. Philosophical Investigations. Blackwell Publishers, 2005,

framework of the postmodern paradigm is targeted against its universal character. An objective truth about a phenomenon, including sovereignty, cannot be universal or eternal because the truth is the ideological construct of reality, legitimacy, power and morality. Such a view of knowledge paves the way to an alternative and pluralist understanding of the world. This is also a precondition for understanding the contemporary democratic model of society. Our goals and interests serve as the yardstick of social processes for all kinds of approaches and methods. The debate about goals must be continually open in a democratic society. Contemporary Western, including Estonian, society cannot overlook this if it wishes to be democratic.

Argumentation, substantiated positions and objectivity in an intersubjective sense are the rules of any scientific thinking even these days.[46] In this sense, objectivity has not disappeared from scientific discussion. We must inevitably agree with sceptical postmodernists that in the contemporary rapidly changing world, it is unreasonable to talk about a single 'true' and 'homogeneous' ideology or theory. No statement can be limited to a single connotation. Each sentence has as many meanings as there are contexts in which it is used. Hence, there is no universal truth. Rather, the truth is something deeply subjective, which is rather a function of language.[47] Consequently, it is impossible to speak about conformity or nonconformity with objective reality these days. Renouncement of the metanarrative that describes reality unavoidably means also the renouncement of the concept of the correspondence of truth that dates back to Aristotle because there is no basis to which the truth could be related. The truth is constantly recreated depending on the relevant language game. This is also the cause of the relative nature of truth. Based on the above information, the criticism of these opinions also becomes topical, when one ideology striving to be universal is sought to be replaced by another similar effort: be it the desire to replace Marxism-Leninism with liberalism, national conservatism or socialism. Such an approach has been probably also upheld by the common-sense understanding of the truth, according to which there is a single possible truthful relationship between social reality and its description, which is uniformly determined. Kuhn,[48] Rorty,[49] and Lyotard[50] convince us in their works that it is not only the sole domination of positivism in research methodology that has come to an end but the era of the Marxist-Leninist reflection metaphor in discussing the truth has also ended. The search for a universal approach according to which it is sought to replace one ideology or grand narrative with another, in which all social processes would be treated functionally as a biological organism, in which certain parts are connected with others based on their teleological objective, has been repeatedly criticised not only by postmodernists, but also by hermeneutics[51] and synergetics.

Regarded this way, social processes are as if phenomena beyond an individual and outside the reach of his will, subjected to independent objective logic. These inevitably pre-determine the development of each individual as well as society as a whole. The author of this paper is of the opinion that questioning sovereignty as a notion that can be objectively examined does not mean that our knowledge of sovereignty is prejudiced. If knowledge is not objective one could ask about the nature of implementing knowledge. How can we explain the fact that knowledge helps us orientate in the world, change the world, etc.? Rather, the postmodern criticism of objective truth is targeted against its universal character. **An objective truth cannot be universal or eternal because the truth is an ideological construct of reality, legitimation, power and morality. Such a view of truth and knowledge paves the way to an alternative and pluralist understanding of the world.**

This is also a precondition for understanding the contemporary democratic model of society. Goals serve as a yardstick for all kinds of approaches and methods for social processes. The debate about goals must be continually open in a democratic society. Contemporary Western, including Estonian, society cannot overlook this if it wishes to be democratic. Argumentation, substantiated positions and objectivity in the intersubjective sense are also the rules of any scientific thinking these days.[52] In

---

[46] See G.H. von Wright 1996. Progressi müüt (Myth of Progress);

[47] See Lyotard, J.F. The Postmodern Condition: A Report on Knowledge, 1984; ; Rorty, R. Philosophy and the Mirror of Nature, Princton University Press;

[48] Kuhn, T. The Structure of Scientific Revolutions. The University of Chicago Press. 1980.

[49] See Rorty R. Consequences of Pragmatism. University of Minnesota Press, 1982.

[50] See Lyotard, J.F. The Postmodern Condition: A Report on Knowledge, 1984;

[51] See Gadamer H.G. Truth and Method. Continuum, London, 2004.

[52] See Wright. G,H von 1996. Progressi müüt. – Minerva öökull (Myth of Progress. The Owl of Minerva) . Vagabund, p. 27.

this sense, objectivity has not disappeared from scientific discussion. Here it must be noted that in his later works, Lyotard wished to distance himself from his earlier opinions in which postmodernism acquired a general meaning. Modernity should be rewritten through political notions according to Lyotard. This means that the Enlightenment should be asked again if mankind can be liberated by means of scientific and technological knowledge. Hence, both Lyotard and Foucault consider the political conclusion on the forms of knowledge extremely important.

The above information can be used to conclude that the application of the conflict method in analysing social processes has several advantages. First, focusing attention on binary oppositions also helps perhaps better understand the paradigmatic shift that characterises contemporary postmodernising society on a larger scale, the impact of which can already be detected now on the political and legal system of society. Second, in light of using the conflict method, the structural controversies of the transfer society become more prominent (to be discussed below). Third, the postmodern criticism of objective truth helps us better understand contemporary democratic society characterised by a plethora of different views and opinions. None of the positions are truth or error in themselves but depend on the social context on the basis of which they are constructed. Hence, the objectivity of truth can only be discussed in its intersubjective meaning. Based on this, how we find the shared part of various interests, goals and approaches becomes important, which, nevertheless, leads us to the consensus method. Lyotard (1984) sees Habermas's concept of truth and an Enlightenment narrative, in which the hero of knowledge pursues a good ethical and political goal – universal peace. This is the dialectics of levelling that says nothing about truth, **hence nothing about sovereignty either.** The language game is a creative fight, not the levelling consensus offered by Habermas. The goal of the language game is not to wipe out differences or to seek consensus, but quite the opposite, their creation, or paralogy. The task of a philosopher is to prevent a situation in which one language practice or genre starts to **prevail over the other.** This can prove disastrous to social relationships.[53]

CRITICISM BASED ON CONSENSUS

When seeking an answer to Lyotard's criticism, Habermas asks: "Is modernity as passé as postmodernists argue? Or is it the widely trumpeted arrival of postmodernity itself 'phoney'? Is 'postmodern' a slogan which unobtrusively inherits the affective attitudes which cultural modernity has provoked in reaction to itself since the middle of the nineteenth century?"[54] Unlike Lyotard, Rorty and the other representatives of the sceptic wing in the criticism of modernism, Habermas represents the moderate approach. According to him, one should seek to interpret modernist values proceeding from the context of a new, globalising society. Consensus means reaching agreement on certain issues – that one makes an effort to identify an intersection based on certain goals between different approaches accepted by all participants in the debate. When discussing issues of consensus in his earlier works, Habermas proceeds from Kant that the Enlightenment must in practice create the preconditions for identifying scientific truth – a forum in which all people can freely and equally discuss what is the truth and what is right.[55] To achieve this, there must be forces in society that seek a deeper freedom and justice than offered by the modern state based on the rule of law.

The author agrees with Lyotard that it is difficult to understand Habermas' approach to legitimacy because he relates it to the issues of truth in his early period,[56] while legitimate order also deserves recognition. In his later works, Habermas abandons the requirement of truth and fully focuses on communicative discourse as the main legitimation procedure. The functioning of civil society and a democratic decision-making mechanism presumes that every individual has unlimited access to the public sphere. The autonomy of the public sphere requires that it is located an equal distance both from the state and the market. Hence, the public sphere should not be under the immediate influence of intervention by the state or pursuit of profit by the market. It is an arena where people must be able to freely and fearlessly discuss any problems that are of interest for

---

[53] See Lyotard, J.F. The Postmodern Condition: A Report on Knowledge, 1984;

[54] Habermas, J. Modernsus, lõpetamata projekt (Modernity: An Unfinished Project). – Akadeemia: 1996, No.1, p. 76.

[55] Habermas, J. Modernsus, lõpetamata projekt (Unfinished Project of Modernity). – Akadeemia, Tartu 1996 p. 75 (in Estonian).

[56] Habermas, J. Legitimation Crisis. Beacon Press, Boston 1992.

them. An adequately and freely operating public sector keeps the other elements of democracy in place and in purposeful performance.[57]

The public sphere is a common space for free communication that is secured by legal rights to freedom of expression and assembly. In this sphere, problems are discovered and formed into opinions of the public that formal decision-making agencies are to act upon. The public sphere is a precondition for realising popular sovereignty because it entitles everybody to speak without limitation.[58] The notion of the public sphere signifies that equal citizens assemble into a public and set their own agenda through open communication. The public sphere is non-coercive, secular and rational. It is established through individual rights that provide citizens with protection from state incursions. The modern public sphere is founded on rational debate. Public discussion is considered an arena of political discussion,[59] in the course of which the existing power relations are also desacralised and in this way, 'pure' problems, free of domination, are reached in society.[60] The development of a public sphere has profound implications for the conception of democratic legitimacy. With this development, the power holder's basis of legitimacy has changed, as citizens are equipped with rights against the state. Decision-makers are therefore compelled to enter the public arena in order to justify their decisions and gain support.[61]The approach of deliberative democracy is also related to the notion of the public sphere, according to which politics is regulated by public discussion. According to this approach, opinions are shaped in public discussion and people can change their opinions if they are convinced by a better argument.

Democratic politics means that only those provisions and laws can in fact be legitimate that are accepted by the people concerned and that are adopted by the majority as a result of free discussion.[62] Habermas even proposes a relevant technique for reaching consensus, called an ideal speech situation. In the opinion of Habermas, equal conditions give all the participants a uniform opportunity to express their attitudes and feelings through which subjects become transparent for each other. As an abstract construct, the ideal speech situation has a unique and special status. It is not an existing concept in a Hegelian sense because no historical society could completely meet the requirements of rational discourse, or a regulatory principle in a Kantian sense because it is mentioned in every act of linguistic communication.[63] A trend based on Habermas' consensus has been greatly influenced by hermeneutical methods.[64] Habermas is of the same opinion with the hermeneutics that human conduct can only be understood from the interpretive and not the essentialist aspect. What anyone understands as the truth or sovereignty, eventually depends on the language game and the game played at the moment.

Hence, both the truth and sovereignty are constructed only through language and this depends on our membership of a social group, tradition, etc.[65] A truth about a thing and a phenomenon, including about sovereignty and the state is continually recreated, proceeding from traditions, social values and norms. **Consequently, any truth, including knowledge of sovereignty is always relative.** Based on the above, we may conclude that, regardless of certain differences between the two approaches—justification based on conflict as per Lyotard, Foucault and Rorty and justification based on consent as

---

[57] Maruste. R. Sõnavabadus ja selle piirid (Freedom of Speech and its Limits.–- Juridica 2001, No.1, pp.14–22.

[58] Eriksen, E.O, Fossum, J, E. 2002. Democracy through Strong Publics in the European Union? – Journal of Common Market Studies, Vol. 40, No. 3, p. 403.

[59] Habermas, J. 1962/2001. Avalikkuse struktuurimuutus. Uurimused ühest kodanikuühiskonna kategooriast (The Structural Transformations of the Public Sphere. An Inquiry into a Category of Bourgeois Society).– Translated by Andres Luure. 1962/2001. Tallinn: Kunst, pp.140–141. (Estonian translation)

[60] Keane, J. 1998. Civil Society: Old Images, New Visions.– Stanford: Stanford University Press, p.169.

[61] Eriksen, E.P. Fossum, J.E. 2002. Democracy through Strong Publics in the European Union?– Journal of Common Market Studies, Vol. 40, No. 3, p. 403.

[62] Habermas, J. 1996: Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy.– Cambridge, MA: MIT Press, p. 339.

[63] Thompson, J, B. Jürgen Habermas ja kriitiline ühiskonnateooria I. Akadeemia no.1, 1996 p. 94.

[64] See Gadamer H.G. Truth and Method. Continuum, London, 2004.

[65] Grauberg. E. 2004. Teadusest ja tõest ning tehnoloogiast ja humanismist (About Science and Truth as well as Technology and Humanism). – Teadmine, Tõde ja Vabadus. University Nord, p. 7–22.

per Habermas—in the criticism of the modern paradigm, they also have common features, such as: 1) it is maintained that there is nothing in nature, society, the truth or God that could ensure an independent and objective perception of the world. The truth always depends on a context that is constructed based on differences in worldview but also based on the goal for which knowledge is obtained (issues of power and legitimacy); 2) it is stressed that all social, humanitarian and also physical processes, including sovereignty, must be regarded as language. Language constructs the domain of meanings and values for people. In other words, a reality is nothing else than a linguistic construct; 3) the world is constructed based on complementarity. The principle of complementarity originated from 20th century scientific discoveries, above all in quantum mechanics, and claims that mutually exclusive descriptions of a phenomenon are required to understand it;[66] 4) the principle of complementarity is inseparable from the notion of deconstruction. The goal of deconstruction is to be liberated from modernist logocentrism as a closed system and emphasises that any text always exists and functions among other texts and their sphere of influence.[67] It is common to various approaches to deconstruction that from the point of view of understanding the text, it is always considered more important that the text is open to other texts rather than closed.

Discussion and comprehension of contemporary issues of the state and sovereignty requires that they are fully and continually open to rapid changes in society. Considering this, it is unreasonable to discuss whether sovereignty is a political, legal or philosophical concept or none of them. Proceeding from a closed system, it is not possible in the contemporary world to understand the complexity and interrelationships of law, politics, economy and culture.

[66] I. Grauberg 2006. Riik muutuvas maailmas: modernsest postmodernsesse (State in Changing World: from Modern to Postmodern).– University Nord, p. 22–24.

[67] Derrida, J. Positions. University of Chicago. 1981.

ARREST OF SHIPS
ESTONIAN MARITIME LAW AND PRACTICE UNDER REVIEW

HEIKI LINDPERE

In 2015, the Ministry of Economy and Communications commissioned an analysis of the necessary tasks for the codification of the existing Estonian maritime law (*de lege lata*) and the law firm Consolato del Mare OÜ was assigned the task. A report on the analysis on 265 pages was then compiled and delivered to the ministry by three experts: Indra Kaunis as owner of that law firm, Alexander Lott and the author of this article.[1] Based on this knowledge, the Ministry proceeded with the State procurement tender #176195 "Maritime Law Review" and a 3-year project (2017 – 2019) was launched. These three experts – Indra Kaunis, Indrek Nuut[2] and the author – agreed among themselves which maritime laws they will analyse as the primary experts, and who will be the secondary expert helping the first in certain specific questions.

This article is written solely by the author as the primary expert on the basic elements of the arrest of ships and is devoted to the general analysis of past and present international commitments and national legislation of Estonia concerning the arrest of ships. This has been conducted without thoroughly dealing with the contradictory and disputable court and bailiff practice in this century, which has been covered in detail by Indrek Nuut and Indra Kaunis. The analysis conducted on this important topic shows unequivocally that revision of the existing law is imminent and definitely necessary not only in order to meet the interests of the creditors of shipping but also to improve the image of Estonia as arrest issues have arisen with foreign flagged vessels. Therefore, the arrest of ships calling on Estonian ports or terminals is prevalent as an international commercial law problem, not a domestic one.

THE MEANING AND SOURCES OF LAW ON THE ARREST OF SHIPS FOR ESTONIA

"From world maritime practice a number of unique institutes in the field of maritime law have developed, such as general average, the limitation or release of the liability of the carrier, and salvage of property at sea, which make maritime law an interesting subject for lawyers. Among them, the ***arrest of ships***[3] on the basis of a maritime claim or maritime lien is an instrument which provides the possibility for a creditor to obtain an acceptable security for his or her valid claim through the detainment of a ship by the responsible Court. It could be a paradox but this institute of the arrest of ships has been elaborated not only in the interest of shipping service providers in order to get their bills paid but also in the interest of ship owners and operators who aim at sailing their ships without delays in ports because of unpaid invoices for the bunker, other supplies, port dues and so on. For this reason, ship owners have to accept this kind of conservatory arrest of ships aimed at

---

1 This analysis is in Estonian only: http://www.just.ee/et/oiguspoliitika/kodifitseerimine-ja-oigusloome-arendamine/tegevused/mereoiguse-revisjonist

2 Owner of the law firm MALSCO AS.

3 "Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument – Article 1 (2) of the International Convention on Arrest of Ships (adopted 12 march 1999 in Geneva, entered into force 14 September 2011; hereinafter – Geneva 1999 Convention), see: *Official Gazette* – RT II, 2001, 9, 51.

securing the claims of their creditors against debtors in default or *in rem* proceedings in the United Kingdom (UK)[4] getting in return the possibility to effectively use their main assets – ships without any interruption."[5]

As we have understood from the legal definition of the "*arrest of ships*" the main reason for that is to obtain security for the creditor's maritime claim by detaining the ship usually in port by judicial procedure whether she is ready for sail or not. Usually, the owner or operator of the ship will put up the security requested by the Court and the ship will be released from arrest and if necessary the civil case will be decided later on the merits in the arresting Court or in any contracted (agreed) court or in arbitration. In legal literature, professionals bring up two other purposes for an arrest of a ship:

a) arrest of the debtors vessel is a preliminary step to assist the creditor, which makes it reasonable to submit further a claim for the adjudication of the case on the merits to the competent court or arbitration together with payment of any fees. Quite often it is the only way to get the debtor into that court. In this respect Professor Robert Grimes states: "In some states, the idea of taking possession of the defendant`s property as a preliminary, so as to get him into court, "provisional security", is well established."[6] The author has underlined himself the necessary secondary purpose of an arrest but with a critical remark that the legal definition of an arrest of a ship provides nothing about taking possession of that vessel but just prohibiting her removal during this detention.

b) the third purpose could be the intention to determine the jurisdiction for the adjudication of this civil dispute on the merits if the parties have no agreement on that issue. For this situation where *forum shopping* is possible for the holder of a maritime claim Article 7 (1) of the Geneva 1999 Convention provides as follows: "*The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.*"

A court order for the arrest of a ship will be ffected in Estonia by a bailiff by presenting it to the master of this ship and seizing the main documents of the ship. When the requested security has been provided, the Court will order the release of this vessel and bailiff will return those documents to the master.

Among the sources of law related to the arrest of ships in Estonia, we must conduct an analysis of the priority of different sources – international conventions and national laws – in order to fully understand the applicability of legal norms. To that end, the important provision in the Constitution of the Republic Estonia is § 123 (2), which provides that "*when laws or other legislation of Estonia are in conflict with an international treaty ratified by the Riigikogu,[7] provisions of the international treaty apply.*" This confirms unequivocally that Estonia honours one of the basic principles in public international law – *pacta sunt servanda* (accepted obligations should be fulfilled in good faith), which is embodied in the UN Charter (Article 2 (2)) as well as in the Vienna 1969 Convention on the law of treaties (Article 26). Moreover, the second sentence of § 3 (1) states: "*Generally recognized principles and rules of international law are an inseparable part of the Estonian legal system.*" Conclusively, the named part of international law has priority over Estonian national law (except the Constitution) and should be analysed first.

The Republic of Estonia was first declared on the 24th of February 1918 and regained that, temporarily lost, (1940) independence on the 20th of August 1991. The restoration of independence took effect on the basis of the principle of the continuity of a State in public international law which has been accepted by the world community of States except Russia. Therefore, in identifying the historic development of international obligations related to the arrest of ships, one has

---

4 Robert Grime, *Shipping Law,* 2nd ed., London: Sweet & Maxwell, 1991, pp. 11–20.

5 Heiki Lindpere, Maritime Claims & Liens, Arrest of Vessels and Estonian Perspective – in: *China Oceans Law Review,* 2012, No 1, pp. 156–157.

6 Robert Grime, *ibid.*, p 15.

7 *Riigikogu* is the parliament of the Republic of Estonia.

to start with the Brussels 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (hereinafter – Brussels 1926 Convention)[8] and which the *Riigikogu* ratified in 1928.[9]

The Government did not pay due attention to the Brussels 1926 Convention when the draft ships property law (hereinafter – SPL[10]) was being deliberated and preferred to incorporate into that law the list of internationally accepted maritime liens[11] from article 4 (1) of the modern Geneva 1993 International Convention on Maritime Liens and Mortgages[12] (hereinafter – Geneva 1993 Convention). It should be noted that the Brussels 1926 Convention has one additional maritime lien on its list – namely, "all debts according to the contracts or operations which the master of the vessel (whether owner of her or not) has made in order to preserve the vessel or continue the trip." "Experts for the parliamentary Legal Commission, the author and Indra Kaunis recommended denouncing this old convention first, and then adopting this law together with Section 74."[13] "In fact, the *Riigikogu* deliberately created such a unique situation where the adopted law was not in full conformity with Estonia's international commitments consented by the ratification of the Brussels 1926 Convention in 1928. It took more than two and a half years to denounce the convention of 1926 and liquidate the dispute. After all, Estonia has been a Party to the Geneva 1993 Convention since 5 September 2004."[14] This dispute was tested in Court in November 1998 when the author had to provide legal opinion in relation to the arrest of *M/V UNISELVA*, which will be discussed in more detail in the next subsection of the article.

There are two international conventions specifically regulating the arrest of ships today: 1) International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952 (entry into force 24 February 1956, around 85 State Parties; hereinafter – Brussels 1952 Convention) and 2) International Convention on the Arrest of Ships, 1999, Geneva, 12 March 1999 (entry into force 14 September 2011, 17 State Parties by 2014 ; hereinafter – Geneva 1999 Convention).[15] When the Geneva 1999 Conference on the arrest of ships was announced, the Estonian Government decided not to become a Party to the Brussels 1952 Convention but the delegation participated at the Geneva conference, signed the text of the Geneva 1999 Convention on 12 March 1999 and later ratified it on 14 March 2001;[16] nevertheless, the latter was not in force at that time and had achieved very few changes in the text in comparison to the Brussels Convention. The author found in his study the following changes:

a) The list of maritime claims as the basis for the arrest of a ship in both conventions has been made as a closed list (only legal basis with no additions possible), and the lapsing of 47 years led to increasing the types of maritime claims from 17 to 22 different items;

b) The two conventions have different rules concerning application. Namely, the Brussels 1952 Convention is applicable and arrest is only possible (limited) on the basis of all listed maritime claims in cases when the arresting State and the State the flag of which the ship is flying are both Contracting Parties. In other words, for non-contracting parties to the

---

[8] Brussels 1926 Convention entered into force 2 June 1931, see: 120 *League of Nations Treaty Series 187;* according to the CMI there were 23 States only as Parties to that older convention, at: http: //www.comitemaritime.org/status_of_ratifications_of_maritime_conventions, 20 December 2011.

[9] *Official Gazette* – RT 1928, 42, 244.

[10] SPL was adopted 11 March 1998, in force 1 July 1998 – RT I 1998, 30, 409.

[11] Maritime lien is a non-registrable pledge (charge) on a vessel which according to the law secures a certain preferred maritime claim and makes for the holder of such a maritime claim much easier to apply for the arrest of the vessel encumbered with.

[12] *Official Gazette* – RT II 2002, 37, 176.

[13] See: Heiki Lindpere, Maritime Zones and Shipping Laws of the Republic of Estonia: Some Selected Critique – in: *Estonian Law Reform And Global Challenges.* Essays Celebrating the Tenth Anniversary of the Institute of Law, University of Tartu. Tartu University Press, 2005, pp. 13, 14.

[14] Heiki Lindpere (2012), *op. cit*, p 158.

[15] See in: Francesco Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions,* 5th ed., London/New York: Lloyd`s Shipping Law Library, 2011.

[16] *Official Gazette* – RT II 2001, 9, 51.

Brussels 1952 Convention, the basis of the arrest of a ship could be much wider and depend only on the civil law of the arresting State (Article 8 (1) and (2)). The Geneva 1999 Convention does not make such a difference and Article 8 (1) provides instead: "*This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.*"

c) The Geneva 1999 Convention has incorporated Article 6. "Protection of owners and demise charterers of arrested ships" which was not present in the older convention. It starts as follows:

> *"1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:*
> *(a) the arrest having been wrongful or unjustified; or*
> *(b) excessive security having been demanded and provided."*

We notice that this kind of counter-security could be imposed by the arresting Court but in Estonia the legislator has made this possible in another way. Paragraph 383 (1, 1^1 and 1^2) of the Code of Civil Procedure[17] (CCP) in the case of a monetary claim imposes on the applicant of the arrest to furnish for such a security 5% of the value of the maritime claim, not less than 32 and not more than 32,000 euros. The Court has liberty to allow some easements if the financial situation of the claimant makes it necessary as well as for other acceptable reasons. Coastal States of the world do not have any harmonised legislation in that respect;

d) The Brussels 1952 Convention provides in matters of the settlement of disputes Article 11 as follows:

> *"The High Contracting Parties undertake to submit to arbitration any disputes between States arising out of the interpretation or application of this Convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice."*

The Geneva 1999 Convention does not have such an arbitration clause, which was necessary in 1952 because in the meantime a large number of international conventions have been concluded covering possible disputes on almost all maritime claims listed on it. In particular, there should be mentioned the United Nations Convention on the Law of the Sea, 1982 (hereinafter – UNCLOS; in force for Estonia since 25 September 2005[18]), in which first, Article 28 regulates the rights of a coastal State in enforcing civil jurisdiction towards a foreign ship during her voyage through the waters of the coastal State. Second, the comprehensively elaborated Part XV "Settlement of Disputes" and Section 2 "Compulsory Procedures Entailing Binding Decisions" in UNCLOS, which differs from the statute of the ICJ and its Article 36 (2) in that Article 287 (1) provides compulsory jurisdiction in 4 different means for the settlement: the ICJ, the International Tribunal for the Law of the Sea (hereinafter - ITLOS), and two kinds of arbitration.[19] This same Section 2 contains a novel item in the law of the sea, Article

---

[17] *Official Gazette* – RT I 2005, 26, 197 (CCP has been in force since 01.01.2006).

[18] *Official Gazette* – RT II 2005, 16, 48.

[19] Referred to as "the Montreaux (Riphagen) Compromise" – see: the United Nations Convention on the Law of the Sea 1982. A Commentary. Vol. V. Myron H. Nordquist, editor-in-chief, Shabtai Rosenne and Louis B. Sohn, volume editors. Martinus Nijhoff Publishers. Dordrecht, 1989, p. 8; or what UK Professor Alan E. Boyle is calling "the cafeteria approach" – see Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," (1997), 46 *International and Comparative Law Quarterly,* pp. 39, 40.

292, which provides the possibility that the flag State could provide diplomatic protection to ships registered there as a way of applying for the prompt release procedure of ships detained/arrested by the coastal State, presumably in the ITLOS.[20]

It is also worth mentioning that Article 2 (4) "Powers of arrest" in the Geneva 1999 Convention provides as follows: "*Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.*" This is in conformity with the private international law principle that procedural law provisions are law of the forum – *lex loci*.

THE DEVELOPMENT OF ESTONIAN NATIONAL LAW AND FIRST PRACTICES ON THE ARREST OF SHIPS

"In December 1991, shortly after Estonia had regained its independence, the Merchant Shipping Code with 372 articles was adopted, which among other provisions accepted that ships could be detained in ports for a maximum of 72 hours by order of the Master of the port.[21] These three days were provided to creditors for obtaining a court order for the arrest of the debtors vessel. The private law provisions of the Merchant Shipping Code were replaced in 2002 by the Merchant Shipping Act[22] and the right of the masters of ports to detain vessels was abolished. At that time, article 139 of the Law of Civil Procedure, for instance, provided for the arrest of ships in order to secure claims for salvage rewards only."[23] It should be noted also that if the author has on page 3 of this article described the adoption of the SPL by the *Riigikogu* on 11 March 1998 then at that time no articles on the arrest of ships had been incorporated in that law. It was the same day the Geneva 1999 Convention was ratified that the amendment of the SPL was passed to add Part IV` "Securing maritime claims and civil claims with arresting the ship" (§§-s 78^1, 78^2 and 78^3), where the first paragraph copied all the maritime claims from the list in Article 1 (1) of the Geneva 1999 Convention.[24] Nevertheless, this convention was not in force internationally, and it "promptly contributed to the fulfilment of the gap in the Estonian national law related to the arrest of ships by amending the SPL accordingly."[25]

"The first time the possibility of the arrest of a foreign debtor's ship in Estonia was questioned was in 1998. She was the M/V "Uniselva" flying the flag of the Dutch Antilles and owned by the Peruvian company Uniselva Naviera S.A. The judge, Mrs. Mare Odakas of the Tallinn City Court arrested her by order dated 18 November 1998. The ship had arrived in Tallinn after repairs at a German shipyard with two invoices with a total value of 4.3 m DEM left unpaid. In reality, this shipyard gave away the security – possessory lien – by letting M/V "Uniselva" sail although the contract on the payment of debts was concluded in August 1998." [26] Moreover, for a better understanding of the real complications in this case it is important to know that the ship had been mortgaged in favour of a German shipping bank for a couple of million USD and the owners' financial situation did not promise the avoidance of a forced sale of the vessel. Consequently, if some of the costs of the repairs by the shipyard could qualify as secured by maritime lien, then the German shipping bank could be in danger of not having the mortgage satisfied in full because maritime liens have priority over mortgages.

"The Yard had approached solicitor Mr. Asko Pohla. A Member of the Estonian Bar, who succeeded in persuading the judge to arrest the ship on the basis of § 139 (3) and (10) of the Civil Procedure Law. Based on subsection 3 of the aforementioned article, the vessel was considered an economic unit of the debtor. Similarly, subsection 10 provided the right of arrest at the place of the debtor's presence. … This was a court case where the definition of a maritime lien could have been questioned because some of this debt to the Yard – masters disbursements – could be considered on the basis of the Brussels 1926

---

[20] See: Heiki Lindpere, Applicability of the prompt release procedure of the UN Convention on the Law of the Sea of 1982 in matters of prevention, reduction and control of pollution from vessels -in: *Scandinavian Institute of Maritime Law Yearbook 2004 (Simply 2004)*, Marius no. 321, Sjörettsfondet, University of Oslo, pp.209-265.

[21] *Official Gazette* – RT 1991, 46/48, 578.

[22] *Official Gazette* – RT I 2002, 55, 345.

[23] See: Heiki Lindpere (2012), *op. cit.*, pp. 157, 158.

[24] Law amending the SPL see: *Official Gazette* – RT I 2001, 34, 186.

[25] See: Heiki Lindpere (2012), *op. cit.*, p 159.

[26] See: Heiki Lindpere, *ibid.,* p 160.

Convention as a privileged maritime lien in favour of the Yard. Judgement on this legal issue was not made by the responsible court, which only had to accept the agreement of the German creditors about the distribution of the proceeds of a forced sale which took effect in Rotterdam."[27]

The author turns now to two of the many contradictory and disputable court orders, where judges have made mistakes in applying the law on the arrest of ships, which have been discovered by the aforesaid maritime law review on page one. This is presented only to show that some judges in applying the law are not making the necessary distinction between two procedures: a) arrest on the basis of a maritime claim according to the application of the holder, and b) adjudication of the case on the merits based on the submitted claim to the court or arbitration. The second reason for those mistakes in regard to refusing the arrest of a ship on the basis of an application of the holder of a maritime claim is related to the application of the CCP instead of giving priority to the Geneva 1999 Convention as the confirmed international commitment.

"For instance, in February 2003, the Malta flagged vessel "Megaluck" owned by Ballito Bay Ltd. called at the Port of Muuga in Tallinn and the Greek sailor Efstratios N. Leontaras had a maritime claim for unpaid wages in 1999 in the amount of 23,167 USD. It is worth noting that he applied for the arrest having lost maritime lien as a pledge on the vessel as the duration of one year had already lapsed. This shows that the only connection with that claim for an Estonian legal order was the presence of this vessel in Tallinn. The *lex fori arresti* applies to all vessels arrested in Estonia irrespective of their flag and consequently irrespective of the flag State's participation in international conventions on the arrest of ships. The claimant always has the right to "forum shopping" because it is up to him or her to apply for the arrest of the vessel at the most responsible jurisdiction. But, assisted by AB Lawin, Leontaras had to apply to the Tallinn City Court twice because the first judge denied the arrest on the false grounds in the case. More specifically, the judge based her refusal on the grounds that first, the insolvency of the defendant had not been proven, and second, that nothing had prevented the submission of the claim. Obviously, she had only read the CCP provisions and had not paid any attention to the fact that submitting a claim together with the payment of state (court) fees is a useless action if the ship is not arrested and sails away. The next morning the same application was presented to another judge and she immediately issued a court order for the arrest."[28]

The judge refusing to arrest vessel "Megaluck" on 18 February 2003 was wrong on the first point of the refusal because both the Geneva 1999 Convention Article 2 (2) provides that "*a ship may only be arrested in respect of a maritime claim but in respect of no other claim*" and § 782 provides the same but without a direct denial of any other civil claims. On the second point, she was wrong because the analysis of the Geneva 1999 Convention shows clearly that it has nothing to do with the jurisdiction of the case on the merits aiming at the submission of a claim to the responsible court or arbitration – this is clearly recognisable from Article 7 (4), which provides as follows: "*If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this article then the ship arrested or the security provided shall, upon request, be ordered to be released.*" Even the word "claimant" is defined in Article 1 (4) – "*means any person asserting a maritime claim*" but not a person who has submitted a claim for a civil proceeding on merits. A procedure on the arrest of a ship is commenced with an application by the claimant. It is worth mentioning that Germany has recently reformed their maritime law effective from 25 April 2013 to modernise and simplify the maritime law. Hamburg law firm BlaumDettmersRabstein has commented in February 2014 that changes concerning the arrest of ships are as follows: "Finally, an important change was made in respect of the pre-requisites of a ship arrest. Contrary to the old law to successfully apply for a ship arrest order it is not necessary for the applicant to show a reason why an arrest be granted (Section 917 German Civil Procedure). This was understood as the creditor being at risk of recovering the claim if forced to wait for the enforcement of a judgement on merits. Under the new law, it is sufficient for the applicant to demonstrate a good *prima facie* claim only."[29]

Another case of a refusal to arrest a Russian flagged vessel "Petropavlovskaja Krepost" on 24 July 2006 in Tallinn while she was under repairs at the Baltic Ship repair yard quay, and the owners had not paid an invoice from the Klaipeda Ship repair

---

[27] See: Heiki Lindpere, *ibid.,* pp. 160, 161.

[28] See: Heiki Lindpere (2012), *op. cit.,* p 161.

[29] See: Christoph Horbach`i (Blaum Dettmers Rabstein) "New German Maritime Legislation" - www.bdr-legal.de .

yard for the modernisation of the fuel system of the ship. Among other comments, a judge of the Harju County Court presented the silly reason that the plain statement of the applicant about the unpaid invoice is not sufficient legal basis for such an arrest.[30] Therefore, it is necessary to figure out what are the real reasons why the application of civil law on the arrest of ships is so difficult for judges in Estonia and what are the main points for changes in order to succeed with the ongoing revision of maritime law.

"BOTTLENECKS" LEADING TO MISUNDERSTANDING THE LAW ON THE ARREST OF SHIPS IN ESTONIA

The analysis of Estonian law on the arrest of ships during this revision have revealed a considerable number of mistakes or insufficient regulation of the SPL or even odd provisions of the CCP, which all contributed to the improper understanding of how these sources should work together and have to be applied. Those are: the Geneva 1999 Convention original text translation into Estonian, where numerous substantial mistakes were made as *lapsus linguae*, which could be considered as mysterious for the Ministry of Justice to pass through to the executive and legislative branches of the government. Experts – the head of the Estonian government delegation, the author and member Indra Kaunis at the Geneva Conference in March 1999 were not asked to make any analysis to check the correctness of this translation as the drafted amendments in the SPL and the CCP in 2001. All three sources of Estonian law in this respect have contributed to the prevailing mistakes of courts and judges so the convention remains misunderstood or not applied at all and paying full attention to the CCP as an everyday source of law for civil judges. It is a clear cut case that those two procedures: a) the arrest of a ship in order to get sufficient security for the maritime claim, and b) the seizure of a ship (NB In Estonia also referred to as "arrest") for the enforcement purposes of the judgment are different procedures, which should be better separated and understood.[31] The first procedure (a) should be applied according to the Geneva 1999 Convention. The task for the CCP is not meant to regulate the arrest of ships to obtain a security for a maritime claim but it should deal with adjudicating the case on merits (whether a ship is still arrested or released because she has been exchanged for another sufficient security). Moreover, the SPL with its 3 provisions is today almost "next to nothing" in regulating the arrest of ships because it provides nothing additional to the Geneva 1999 Convention and repeats some *lapsus linguae* as mistakes from the abovementioned translated text of the convention.

Therefore, the author's task in this article is to cease the analysis of all three sources of law in order that the reader will understand better the content of the above critique. The following will not pretend to provide a full analysis but is oriented to reveal the basic obstacles to a proper understanding of the international commitments of Estonia according to the Geneva 1999 Convention and the SPL as well as the CCP as may it call "subsidiary sources" in dealing with the arrest of Ships:

1) Some of the main substantial mistakes which the author has selected to be presented here in this short article are simply related to the translation of the original text of the Geneva 1999 Convention. Some of these mistakes are:

- in the legal definition of "arrest" in Article 1 (2) (see footnote 3) in the Estonian version the phrase *order of the Court* has been translated as *judgement*, which makes the whole definition meaningless because if one has already made a judgement on the civil case he or she will proceed to the enforcement procedure, which is excluded from the definition by the second part of the sentence;

- in Article 1 (4), which provides in the original that *"Claimant" means any person asserting a maritime claim;* this person is translated as "hageja" (who has submitted a claim to the Court for a proceeding on merits and has paid the requested state duty). This difference in translation shows the judges that the CCP should likely be applied;

---

[30] See: Heiki Lindpere, Merinõue ja merivõlg: nende erinevusest ning laeva arestimisest. - *Juridica* 2008/I, p 60.

[31] As a matter of fact the same notion "arrest" should mean in procedure "a" *restriction on removal of a ship by order of a Court* but in procedure "b" the seizure or taking possession of the ship.

- in Article 2 "Powers of arrest" paragraph 3 have used the term "State" 3 times while in the translation we could find a substantially different term "State Party" used twice. This makes a big difference in terms of whether the convention is applicable to less than 20 State Parties or to all States in the world;

- in Article 3 "Exercise of right of arrest" paragraph (2) the "sister ship arrest doctrine" is provided, which means that "*arrest is also permissible of **any other** ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim ...*" The two words in bold are not produced in the translation, which could cause confusion in the application of that doctrine. In this case, paragraphs 1 and 2 give the right to arrest all the same ships but the second parts of those paragraphs provide different criteria for ownership or chartering of the vessel and how the certain maritime claims are secured – for example, any other ships could be arrested only if that person was:

  > *"(a) the owner of the ship in respect of which the maritime claim arose; or*
  > *(b) the demise charterer, time charterer or voyage charterer of that ship;"*

- Article 4 deals with the release of the arrested ship "*when sufficient security has been provided in a satisfactory form*" ***shall be done*** according to paragraph 1. But in the Estonian translation the term "may" has been used, which is completely inappropriate because the aim of an arrest has been achieved and the ship as security shall be substituted with another security of that maritime claim. The author concludes that "the Court has discretion only to assess whether the security provided is sufficient for the release but not whether to release" the vessel;[32]

- Article 9 "Non-creation of maritime liens" provides that "*Nothing in this Convention shall be construed as creating a maritime lien.*" It is disappointing that in the Estonian text the translation says that "The Convention is not applicable to the maritime liens" which is a completely incorrect statement. For example, please look at Article 3 "Exercise of right of arrest" paragraph 1 (e)

  > *"1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:*
  > *(e) the claim is against the owner, demise charterer, manager or operator of the ship and **is secured by a maritime lien** which is granted or arises under the law of the State where the arrest is applied for;*

The only correct solution which has been proposed to the respective ministries by experts in the revision of Estonian maritime law is to make a new legally sound translation into Estonian for approval by the *Riigikogu* and further publication in the *Official Gazette* as has been done with the text of the Vienna 1969 Convention on the Law of Treaties (see: New redaction of previously published document – in: RT II 2007, 15; first publication was: RT II 1993, 13/14).

2) The second basic problem this article must deal with is related to the unprofessional method of the incorporation of necessary substantial and procedural legal norms on the arrest of ships according to the Geneva 1999 Convention into the SPL (Chapter IV[1] "Securing maritime claims and civil claims with arresting the ship" (§§-s 78[1], 78[2] and 78[3])" and Chapter 40 "To obtain security for a claim" in the CCP. The analysis showed that those drafting that incorporation have achieved and posed a very messy picture for the application of these national legal acts. The main problem seems to correspond to a lack of understanding, as we have already mentioned above, that the arrest of a ship based on a maritime claim commenced via an application by the holder of it to the Court is by nature a different specific procedure compared to that which commences by submitting a civil claim to the Court or arbitration by the claimant. Therefore, the author will try to present some thoughts about these problems.

First, the general provision on the scope of the SPL in sub-paragraph 4 provides: "*Arrest of a ship whether immovable or movable property in order to obtain a security for a maritime claim and a submitted civil claim will be effected according to the*

---

[32] See: Heiki Lindpere (2012), *op. cit.,* p 159 and footnote 2.

present law and the international convention to which Estonia has acceded" (translated by the author).[33] What is really missing for clarity of the national law on the arrest of ships is the standard of appreciation for a maritime claim.

Second, the SPL has only 3 paragraphs and the first of them – 78[1] is just a copy of Article 1 (1) of the Geneva 1999 Convention as the list of different types of maritime claims. Paragraphs 78[2] "Arrest of a ship" and 78[3] "Substitution of an arrest with another security" are randomly selected and copied from the Geneva 1999 Convention and it is not clear why precisely this minor incorporation has been included at all. Moreover, nothing new has been provided in the regulation compared to that which is already provided by the Geneva 1999 Convention. The author names here at least one criterion in the assessment of the value of the security, which the Court is entitled to establish while there is no agreement on the security between the holder of the maritime claim and the owner or charterer of that vessel. Article 4 (2) of the Geneva 1999 Convention provides as follows: "*In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.*" This provision is reproduced in the SPL in paragraph 78[3] (2) but as we all know that in the carriage of goods or passengers the liability of the carrier is limited by law as well as in case of pollution damage to the marine environment, and therefore the maritime claim is also subject to such a limitation, except when the carrier or owner in question has deliberately acted in a way and lost his or her right to the limitation. This could be the second criteria in determining the value of the security for a maritime claim, which ought to be regulated in the SPL for the clarity of the law.

Third, the real problem – to clarify which provisions or law should be applied in principle – is made clear in the essence of paragraph 78 (1). It is provided there as follows: "*A ship may be arrested in respect of a maritime claim specified in § 781 of this Act.*[34] *Provisions of the civil claim procedure concerning the securing actions apply to the arrest of ships for the purpose of securing an action, taking into consideration the norms especially established in this Act.*" The second sentence of this provision is likely trying to make the SPL *lex specialis* in relation to the CCP, which in practice has created some problems for judges who have been used to turning firstly to the CCP (which does not include a similar kind of reference to the SPL and moreover has not used the term *maritime claim* at all).[35] Therefore, the second sentence provided here actually nullifies this attempt (because nothing has been especially legislated in Chapter IV[1] of the SPL) and on the contrary leads the attention of all the judges, advocates and the business community to read the CCP instead of turning their attention to the Geneva 1999 Convention when an application for an arrest is presented to the respective Court by the holder of that maritime claim.

The content of Chapter 40 of the CCP on ordering the arrest or preservation of such an arrest of ships after a civil claim for the adjudication of the case on merits is submitted to the respective court will need special consideration and will be a topic for another article. Consequently, the author is hoping that with the present article he has convinced readers that the need for the revision of the Estonian maritime law is acute and necessary.

---

[33] The author feels it is a mistake first that the title of the Geneva 1999 Convention is not specified and second, that this convention is one of the rare multilateral agreements which Estonia has signed and ratified.

[34] Here the important word ***only*** is missing because Article 2 (2) of the Geneva 1999 Convention provides unequivocally that *"A ship may only be arrested in respect of a maritime claim but in respect of no other claim."*

[35] See also: Heiki Lindpere (2012), *op. cit.,* p 159.

UNTERNEHMERISCHE FREIHEIT IM BEREICH DER FLÜSSIGEN BRENNSTOFFE IN ESTLAND UND IN ANDRERN EUROPÄISCHEN STAATEN

ILMAR SELGE

I. EINLEITUNG UND HINTERGRUND

Der Anlass, das Thema der Regulation des Rechts der unternehmerischen Freiheit im Bereich der flüssigen Brennstoffe in Estland zu behandeln, ergibt sich aus den Fragwürdigkeiten und aus den möglichen Widersprüchen mit dem sich aus § 10 des Grundgesetzes (*Põhiseadus*)[1] ergebenden Grundsatz bei der rechtlichen Regulation des Bereiches der flüssigen Brennstoffe, aus dem Einfluss der Regulation auf die Entstehung der Monopole, auf die Bremsung der technischen Entwicklung und auf die Reduzierung des Steuerbetrugs. Es ist wichtig, im Vergleich zu den Garantieansprüchen im Bereich flüssige Brennstoffe weniger restriktive und mit geringerem Aufwand verbundene rechtliche Lösungen zu finden, die es ermöglichen, die Vorkehrungen für die Bereitstellung der Informationen, die in den Tankstellen mit dem Treibstoff für Kraftfahrzeuge in Verbindung stehen, zu treffen und die Vertrauenshaftung der Betreiber zu erhöhen. Bei der Bestimmung der Qualifikationsanforderungen für die Personen ist die Beschränkung der unternehmerischen Freiheit im Bereich weniger belastend, macht die Versteuerung mit Verbrauchssteuer genauer und ermöglicht es festzustellen, wer die Steuerbetrüge veranlasst hat.

Das estnische Gesetz, das die Grundlagen und die Ordnung des Betreibens der flüssigen Brennstoffe, der Haftung und der Ausübung der staatlichen Aufsicht festlegt, heißt *Vedelkütuse seadus* (Gesetz über flüssige Brennstoffe).[2] Das Gesetz über flüssige Brennstoffe ist in den letzten Jahren 15 Mal geändert worden. Im Laufe der letzten zehn Jahre sind sämtliche Paragraphen dieses Gesetzes geändert worden. Die meisten Änderungen verfolgten das Ziel, die Einziehung der staatlichen Steuern zu gewährleisten. Vom Standpunkt des Grundsatzes der Rechtssicherheit wird die Erwägung nicht klar, warum der Gesetzgeber in § 8 Absatz 1 des Gesetzes über flüssige Brennstoffe die technische Norm nicht aufgestellt hat und ohne detailliertere Feststellung (ohne genauer festzulegen, was Ziel, Inhalt und Umfang der Befugnis zum Erlass von Verordnungen ist) dem zuständigen Minister übertragen hat, auch wenn aufgrund des Luftreinhaltegesetzes für Estland (*Välisõhu kaitse seadus*) § 58 Absatz 2 diese bereits mit der Verordnung festgestellt worden ist. Die Rechtssprache des Bereichs bedarf für die Rechtsklarheit bei der Feststellung der Bedeutung und des Inhalts der Begriffe passendere Ausdrücke, die die Staatssprache besser berücksichtigen, dabei haben die Aufsteller der Änderungsvorschläge die Anmerkungen des Institutes für Estnische Sprache (*Eesti Keele Instituut*) und der Fachexperten nicht berücksichtigt. Die Verfolgung der Tradition der guten Rechtsetzung setzt die Benutzung klarer, eindeutiger und genauer Termini für die Bezeichnung der Begriffe in unterschiedlichen Rechtsakten voraus. Wenn ein Terminus in den Rechtsakten in einer anderen Bedeutung eingesetzt wird, als bisher kodifiziert gewesen war, oder wenn ein Terminus mehrere Bedeutungen haben kann, muss die Bestimmung des Terminus mit der Formulierung „im Sinne dieses Gesetzes“ ergänzt werden. Wenn ein Terminus, der in den Änderungsvorschlag des Gesetzes passt, bereits in einem anderen Gesetz festgelegt worden ist, soll im Sinne der Rechtsklarheit auf dieses Gesetz hingewiesen werden, in dessen Bedeutung der Terminus benutzt wird.[3]

Auch wenn sich aus § 113 des Grundgesetzes, in dem die staatlichen Steuern festgelegt werden, in Verbindung mit § 31 (unternehmerische Freiheit) in der Konsequenz die Restriktionen der Unternehmung ergeben, soll die Behandlung der Eintreibung egal welcher staatlichen Steuern und Gebühren nicht die Entstehung von Monopolen begünstigen. Die heutige

---

[1] RT 1992, 26, 349; RT I, 15.05.2015, 2; im Folgenden abgekürzt – PS bzw. Põhiseadus (Grundgesetz).

[2] RT I 2003, 21, 127; RT I, 15.03.2019, 15; im Folgenden abgekürzt – VKS bzw. Vedelkütuse seadus (Gesetz über flüssige Brennstoffe).

[3] RT I 2004, 43, 298; RT I, 05.07.2016, 25; im Folgenden abgekürzt – VÕKS bzw. *Välisõhu kaitse seadus* (Luftreinhaltegesetz).

Regulation des Bereichs begünstigt als Betreiber des Treibstoffs für Kraftfahrzeuge denjenigen Unternehmer, der eine umfassende Garantie besitzt.[4] Dessen ungeachtet haben die Aufsichtsbehörden weiterhin zu große Umsatzsteuerbetrugsfälle festgestellt. Der Umstand weist auf die Konsequenz hin. Die heutigen Restriktionen der unternehmerischen Freiheit und disproportional hohe Garantieansprüche in den Rechtsakten können für diejenigen Unternehmen, die sich tatsächlich mit dem Bereich auseinandersetzten wollen, zu belastend sein, und schützen den Staat dennoch nicht vor den Umsatzsteuerbetrügern, die sich nur zum Schein mit dem Bereich auseinandersetzen.

Da der Staat keine Verpflichtung hat, den Ertrag des Unternehmens zu gewährleisten,[5] ist es immer mehr wirtschaftlich fragwürdig, ob infolge der Wirkung der hohen Garantieansprüche auf Wettbewerbsbedingungen der Verkauf der Treibstoffe für Kraftfahrzeuge in den dünn besiedelten Gebieten in einer anderen Rechtsform als in der der kommunalen Tankstellen möglich sei. Die Unternehmen, die einzelne kleine Tankstellen besitzen, sind nicht imstande, dem im Gesetz festgelegten Umfang der Garantie nachzukommen. Dabei sind die großen Tankstellenketten nicht daran interessiert, über die wenig erträglichen Tankstellen das lokale Leben zu unterstützen. Die Vertiefung dieser Situation übt einen negativen Einfluss auf die Bildung der Wettbewerbsbedingungen sowie auf das Zusammenwirken der in den dünn besiedelten Gebieten lebensnotwendigen Infrastruktur. Dieser Gedankengang zeigt, inwieweit die funktionierende Wirtschaft von der betonten Befolgung der sich aus dem Grundgesetz ergebenden Rechtsgrundsätze in der Rechtssetzung abhängig sein kann. Das Eintreiben von Steuern ist für die Existenz des Staates sehr wichtig, doch die Gewährleistung der Steuereinnahmen sollte in einer Art und Weise ausgeführt werden, dass es die Unternehmung weniger belastet. Das estnische Staatsgericht hat den Grundsatz der Proportionalität in mehreren Fällen erläutert und betont. Der zweite Satz des § 31, der vorsieht, dass das Gesetz die Bedingungen und die Ordnung der Ausübung der unternehmerischen Freiheit festlegen kann, gibt dem Gesetzgeber große Freiheit, die Bedingungen der Ausübung der unternehmerischen Freiheit zu regulieren und dabei Restriktionen aufzustellen. Für die Einschränkung der unternehmerischen Freiheit reicht jeder berechtigte Grund aus. Dieser Grund muss vom öffentlichen Interesse bzw. von der Notwendigkeit, die Rechte und Freiheiten anderer Personen zu schützen, ausgehen, triftig und selbstverständlich legitim sein. Je intensiver der Eingriff in die unternehmerische Freiheit ist, desto triftiger müssen die Gründe sein, die den Eingriff legitimieren.[6] Ausgehend vom Prinzip der Proportionalität muss zunächst erklärt werden, aus welchen Erwägungen im Gesetz die Restriktionen der Unternehmung festgelegt worden sind bzw. zugunsten der Rechte welcher anderen Personen oder kollektiven Vorteile hat der Gesetzgeber sich entschieden, das Recht der Person, sich unternehmerisch zu betätigen, einzuschränken. In der Folge ist es möglich einzuschätzen, ob bei der Einschränkung der unternehmerischen Freiheit die Anforderungen des § 11 im Grundgesetz, die die Einschränkung der Rechte und Freiheiten nur dann zulassen, wenn diese Einschränkungen in der demokratischen Gesellschaft notwendig sind und das Wesen der eingeschränkten Rechte und Freiheiten nicht entstellt. Wenn es nicht möglich zu verstehen ist, aus welchem Grund in die unternehmerische Freiheit eingegriffen worden ist, kann weder die Notwendigkeit des Eingriffs in der demokratischen Gesellschaft noch ob das Wesen des Rechts entstellt wurde erwogen werden. Solch ein Eingriff steht im Widerspruch mit dem Grundsatz der Proportionalität des Grundgesetzes.

Folglich lässt das Grundgesetz die Einschränkung der unternehmerischen Freiheit[7] nur gemäß den im innerstaatlichen Recht festgelegten Bedingungen und Verfahren zu, ohne dem Gesetzgeber oder der vollziehenden Gewalt hierin eine uneingeschränkte Befugnis zuzuteilen. Welche weniger belastenden und stärker die Grundrechte berücksichtigenden Möglichkeiten stehen dazu zur Verfügung? Aus welchen Gründen eignen sich diese, unter der Berücksichtigung auch

---

[4] Zum Beispiel beträgt die Höhe der Garantie des Verkäufers, wenn Brennstoff zum Verbrauch zugelassen wird oder der Brennstoff das Steuerlager verlässt, 1.000.000 Euro. Das Steuer- und Zollamt (*Maksu- ja Tolliamet)* hat aufgrund der Gefahreneinschätzung das Recht, vom Verkäufer des Brennstoffs auch eine höhere Garantie zu verlangen, darunter auch die bereits festgelegte Garantie zu überprüfen (VKS § 4^2 Abs. 1). In der Praxis entsteht die Garantie aufgrund des Kapitals der Gesellschaft, des bargeldnahen Instruments der Garantie und der ohne Beurteilungsleitfaden festgestellten geschäftlichen Reputation des Inhabers sowie der Mitglieder der Leitungs- und Aufsichtsorgane und der Geschäftspartner, in Verbindung mit ihren Zukunftsabsichten. Ebenfalls werden die Fälle der begangenen Verstöße gegen Steuergesetze, Zollvorschriften und gegen das Gesetz über flüssige Brennstoffe berücksichtigt.

[5] RKHKo 20.12.2011, 3-3-1-59-11, Punkt 19.

[6] RKPJKo 10.05.2002, 3-4-1-3-02, Punkt 14.

[7] RKÜKo 09.12.2013, 3-4-1-2-13, Punkt 106.

der in der Zukunft entstehenden möglichen Situationen, das positive Recht in der näheren Zukunft zu ersetzen? Eine gut funktionierende Rechtsnorm, die das öffentliche Gut schützt, ist bereit neben dem Schützen der Güter in der Gegenwart diese auch in der Zukunft zu schützen.

II. REGULATION DES BEREICHS FLÜSSIGE BRENNSTOFFE IN DER EUROPÄISCHEN UNION

Als Brennstoff kann jede brennbare Substanz aufgefasst werden. Um die genauere Brennstoffart festzustellen, müssen zunächst der Einsatzort, die Sicherheit beim Verwenden in der Anlage zur Energieumwandlung, womit zugleich auch Ähnlichkeit und Vertretbarkeit bestätigt wird, bestimmt werden. Von der Feststellung der Art ist die Einschränkung der Vermarktung der brennbaren Substanz als Brennstoff zu unterscheiden. Die Zulässigkeit der Vermarktung ist mit Hilfe des Vorsorgeprinzips mit Verfügungen, Richtlinien und Beschlüssen der Europäischen Union[8] streng geregelt.

Die Einschränkung ergibt sich zunächst aus der Verordnung (EWG) Nr. 2658/87 des Rates der Europäischen Gemeinschaften,[9] mit Artikel 1 Abs. 1 wird die Nomenklatur der Waren[10] eingeführt. Durchführungsverordnung der Europäischen Kommission 927/2012/EU[11] Anhang 1 Kapitel 27 bringt Erläuterungen zu mineralischen Brennstoffen. Nichts schließt aus, dass ein Erzeugnis, das zu einem anderen Kapitel zugeordnet ist, technisch nicht als flüssiger Brennstoff verwendet werden kann. Dies trifft bei diversen chemischen Erzeugnissen des Kapitels 38 zu, zu denen Biodieselbrennstoff mit dem Anfang des Codes 3826 zählt. Zugleich hat der emulgierte Dieselkraftstoff[12] keinen genauen KN-Code, auch wenn die Bezeichnung auf Brennstoff hinweist. Die Zuordnung des KN-Codes hängt vom Belieben desjenigen ab, der die Konformitätsbescheinigung ausstellt, der Code beruht auf den vom Hersteller vorgelegten Beschreibungen, die ursprünglich keinen Hinweis auf die Möglichkeit des Einsatzes als flüssiger Brennstoff enthalten soll. Daher ist es möglich, den EmDK als Ware mit dem KN-Code 3824 90 97 (zubereitete Bindemittel für Gießereiformen oder -kerne) zu verkaufen. Zugleich werden auf EU-Ebene fehlerhafte statistische Angaben gesammelt. EmDK kann aufgrund des Kapitels 27 im 927/20/2012/EU nicht als Treibstoff für Kraftfahrzeuge angesehen werden, da es aufgrund der zusätzlichen Anmerkung 2d als Schweröl angesehen werden soll. Der Grund dafür ist der hohe Anteil an Wasser, der die Bestimmung des Siedeverlaufs nach der Methode des ISO 3405 nicht ermöglicht. Diese Tatsache ist wichtig, um zu verstehen, dass es einzelstaatlich nicht sinnvoll ist, die Sorten der flüssigen Brennstoffe nur anhand KN-Codes festzulegen. Der freie Warenverkehr kann dadurch eingeschränkt sein und dem Brennstoff gleichwertige neue Erzeugnisse können nicht als Treibstoff im Sinne des VKS angesehen werden.

Um die Besteuerung von Energieerzeugnissen zu vereinheitlichen, wird die Bestimmung der KN-Codes in der Richtlinie 2003/96/EG[13] Artikel 2 und im Anhang I behandelt. Technisch können als Treibstoffe alle Brennstoffe angesehen werden, bei deren Benutzung die Anlage zur Energieumwandlung ausgehend von ihren aus technischen Bedingungen folgenden Mindestanforderungen betrieben werden kann. Dies ergibt sich auch aus dem BImSchV[14] (2014) § 1, es muss feststellbar sein, ob die brennbare Substanz der Anlage zur Energieumwandlung passt. In der Regel kann das dem Treibstoff für Kraftfahrzeuge ähnliche Erzeugnis auch dort eingesetzt werden, wo in der Regel leichter oder schwerer Brennstoff eingesetzt wird. Umgekehrt nicht, dies würde der Anlage zur Energieumwandlung, die an den Brennstoff höhere Ansprüche stellt, schaden.

---

[8] Im Folgenden abgekürzt EU oder Europäische Union.

[9] EÜT L 256, 7.9.1987, S. 1.

[10] Im Folgenden abgekürzt – KN.

[11] ABl. L 142, 31.10.2012, S. 1.

[12] Im Folgenden abgekürzt – EmDK.

[13] ELT L 283, 31.10.2003, S. 51.

[14] Erste Verordnung zur Änderung der Verordnung über die Beschaffenheit und die Auszeichnung der Qualitäten von Kraft- und Brennstoffen; BGBl. I 2014, S. 1890.

Die Kommission kann bei der Festlegung der Behandlungsbeschränkungen der brennbaren Substanz entsprechend Artikel 114 Absatz 3 der konsolidierten Fassung[15] des Vertrags über die Europäischen Union und des Vertrags über die Arbeitsweise der Europäischen Union in den Bereichen Gesundheit, Sicherheit, Umweltschutz und Verbraucherschutz von einem hohen Schutzniveau ausgehen. Der Aufsteller der Rechtsakten ist verpflichtet, bei der Festlegung der Einschränkung der Indikatoren der Qualitäten der brennbaren Substanz vom Vorsorgeprinzip auszugehen.

Um eine bessere Übersicht über die Umweltvorschriften zu bekommen, müssen die Richtlinien 98/70/EG[16], 2003/17/EG[17], 2009/30/EG[18] und 2011/63/EU[19] im Zusammenhang betrachtet werden. Die Rechtsunklarheit besteht in den in diesen verwendeten Hinweisen. Es kommen Fälle vor, wo auf eine Tabelle hingewiesen wird, die bereits durch einen anderen Hinweis ersetzt worden ist. Dieser Hinweisverfahren ist nicht irreführend, doch kann der Gedanke nicht ausreichend verfolgt werden. Als Beispiel kann die Änderung des Artikels 8 Abs. 1 98/70/EG (2009/30/EG Artikel 1 Abs. 7) angeführt werden, in dem bei der Ausübung der Aufsicht über die Treibstoffe für Kraftfahrzeuge auf die in den Standards EN 228:2004 und EN 590:2004 genannten analytischen Verfahren hingewiesen wird. 2011/63/EU ändert in demselben Artikel das Jahr des Inkrafttretens des Standards nicht, legt jedoch in den Anhängen zu 98/70/EG für die Testverfahren EN 228:2008 und EN 590:2009 fest. Folglich sollen gleichzeitig sowohl die ältere als auch die erneuerte Version des Standards berücksichtigt werden. Zurzeit sind die beiden Versionen der Standards unwirksam, da Erneuerungen in Kraft getreten sind. Die Mitgliedsstaaten haben die Aufgabe, mit Rechtsakten Testverfahren für die obligatorische Verfolgung festzulegen, nicht die in diesen enthaltenen die Qualitäten beschreibenden Werte der Indikatoren. Die Werte der Indikatoren, die obligatorisch verfolgt werden müssen, werden in denselben Richtlinien festgelegt, doch es wird nicht darauf hingewiesen, dass diese mit den Standards verbunden sind. Die Hersteller und Händler der flüssigen Brennstoffe müssen den Marktaufsichtsbehörden gegenüber das Verfahren ihrer Stichproben bescheinigen, auf Aufforderung auch deren Ergebnisse, um zu überzeugen, dass nicht gefährliche Erzeugnisse vermarktet werden. Es ist nicht verboten, auf die Konformitätsbescheinigung oder auf das als Vorbereitung zu dieser aufgestellten Testprotokoll noch weitere Daten, die nach der Meinung des Herstellers wesentliche Eigenschaften des Treibstoffs für Kraftfahrzeuge beschreiben, bei denen aufgrund der Richtlinie 98/70/EG Artikel 3 Abs. 2 und Artikel 4 Abs. 1 die Bescheinigung der Übereinstimmung verlangt wird, einzutragen.

Sind Versuche mit Stoffen erforderlich, um Informationen über Stoffeigenschaften zu gewinnen, so müssen diese aufgrund der Verordnung der Europäische Kommission 1907/2006/EG[20] Artikel 13 Absatz 3 von der Kommission, einem anderen entsprechenden Gremium festgelegt oder von der Europäischen Chemikalienagentur anerkannt sein. Die Anforderung Belegmaterial zu sammeln wird im 3. Absatz in der Anlage, Teil A.2 der Verordnung 440/2008/EG[21] festgelegt: „Alle zur Bewertung der Ergebnisse notwendigen Informationen und Bemerkungen sind zu notieren, insbesondere diejenigen über Verunreinigungen und den Aggregatzustand des Stoffes." Dieser Satz liefert die Grundlage, im Fall von Streitigkeiten bei der Feststellung des Siedeverlaufs die Bestimmung der Verluste zu verlangen. Laut guter Verfahrenspraxis übersteigt der Verlust nicht 2 %, die technisch beeinflussbaren Verluste des Motors im Leerlauf die Verluste des Ottokraftstoffs nicht 5 %. Bei den Verlusten, die 7 % übersteigen, kann von der spontanen Blockierung des Motors gesprochen werden. Die Arbeit der Kraftstoffpumpe ist gestört, statt der Flüssigkeit erreicht lediglich der Dampf des Kraftstoffs die Pumpe.

Wenn wir die technische und außerrechtliche Analyse, ob die festgelegte Einschränkung des Indikators der Eigenschaft ausreichend ist, außer Acht lassen, soll die Möglichkeit der Berücksichtigung der sich aus der guten Verfahrenspraxis ergebenden Anforderungen der Herstellung der Brennstoffe und der Anlagen zur Energieumwandlung analysiert werden.

---

[15] ELT C 83, 30.3.2010, S. 1. im Folgenden abgekürzt Abl. L.

[16] EÜT L 350, 28.12.1998, S. 58.

[17] ABl. L 76, 22.3.2003, S. 10.

[18] ABl. L 140, 5.6.2009, S. 88.

[19] ABl. L 147, 2.6.2011, S. 15.

[20] ABl. L 396, 30.12.2006, S. 1.

[21] ABl. L 142, 31.5.2008, S. 1.

Der Begriff „man darf nur, wenn es entspricht“[22] soll ausgelegt werden. Falls den Anforderungen entsprochen wird, wird ein ausreichend großer Beurteilungsspielraum beim Betreibender neuer Erzeugnisse gewährt. In der Formulierung des geänderten Artikels 1 Punkt a Richtlinie 98/70/EG wird auf die Berücksichtigung der technischen Anforderungen der Motoren hingewiesen. Der Begriff befreit den Verkäufer weder von der Einhaltung der sonstigen Anforderungen, die sich aus der guten Verfahrenspraxis für die Herstellung der Treibstoffe für Kraftfahrzeuge sowie der Motoren ergeben, noch macht er sie verpflichtend, sondern es soll von den Grenzwerten, die in den Anhängen der Richtlinie angeführt sind, ausgegangen werden. Ausgehend von diesem Gedanken müssen die Verkäufer der Treibstoffe für Kraftfahrzeuge nicht nur die Umweltvorschriften berücksichtigen, sondern auch die Anforderungen, die sich aus der vorher erwähnten guten Verfahrenspraxis ergeben. Um den Sinn dessen, was im Rechtsakt festgelegt worden ist, zu öffnen, muss der Hintergrund der Zukunft weit empfunden werden, wobei der Entwicklung der Technik eine sehr grundlegende Rolle zukommt. Auch wenn die Treibstoffe für Kraftfahrzeuge Chemieerzeugnisse sind, müssen beim Treffen der Vorkehrungen, die sich aus ihrer Gefährlichkeit ergeben, die Bestimmungen der Verordnung 765/2008/EG[23] Artikel 20 Absatz 2 berücksichtigt werden. Das Erzeugnis darf nicht mit einem Rechtsakt vom Markt genommen werden, seine Bereitstellung auf dem Markt untersagt oder eingeschränkt werden, wenn auf der Grundlage der Risikobewertung Ersatzerzeugnisse bestehen, von denen eine geringere Gefährdung ausgeht. Die Entscheidung wird auf der Grundlage der Risikobewertung getroffen. Es ist nicht wichtig, ob der Einfluss des gefährlichen Stoffes unmittelbar ist oder nicht.

Ausgehend von der Richtlinie 2014/94/EU[24] muss die Inanspruchnahme der neuen umweltverträglicheren Technologien ermöglicht werden. Unter Berücksichtigung der Verpflichtung in Artikel 4 Absatz 1 müssen in den Mitgliedstaaten bis 31.12.2020 in ausreichender Anzahl öffentlich zugängliche Ladepunkte für Elektrofahrzeuge und bis 31.12.2025 Wasserstofftankstellen sowohl für Fahrzeuge mit Brennstoffzellenantrieb als auch für solche Fahrzeuge, die mit einem herkömmlichen Verbrennungsmotor ausgestattet sind, vorhanden sein. Im Artikel 7 wird der Verbraucherinformation besondere Aufmerksamkeit zugewandt. Die Fahrzeugbesitzer sollen wirksamer informiert werden, welcher Brennstoff für das Betreiben des Motors passend ist. Ausgehend davon hat die Kommission bei der CEN/TC 19 ein Komitee[25] beantragt, dass eine harmonisierte europäische Norm aufgestellt wird. Estland hat bereits der Aufstellung dieser zugestimmt.

Die Ausstellung der Konformitätsbescheinigung für flüssige Brennstoffe wird von der Verordnung des Europäischen Parlaments und des Rates 765/2008/EG reguliert, die den Beschluss 765/2008/EG ergänzt.[26] Ausgehend vom Auslegungsgrundsatz *lex specialis* muss beim Ausstellen der Konformitätsbescheinigungen für Treibstoffe für Kraftfahrzeuge auf EU-Ebene nur von den Anforderungen des Umweltschutzes ausgegangen werden. Entsprechend Artikel R8 des 768/2008/EG wird die Konformität bei den Erzeugnissen vorausgesetzt, die der harmonisierten europäischen Norm bzw. deren Teil entsprechen. In bestimmten Fällen (Artikel R6) soll der Einführer bzw. der Händler als Hersteller behandelt werden. Solch eine Behandlung ist notwendig, um die Rahmen der Zuständigkeit festzustellen. Wenn der Einführer/Händler auf dem Produkt seinen Namen/Marke oder wenn er die Eigenschaften des bereits auf dem Markt vorhandenen Treibstoffs für Kraftfahrzeuge ändert, was die Verfolgung der in den Rechtsakten genannten Forderungen beeinflussen kann, gelten für ihn die Verpflichtungen des Herstellers. Unter welchen Umständen es möglich bzw. notwendig ist, den genannten Artikel im Falle der Treibstoffe für Kraftfahrzeuge anzuwenden, bedarf der Auslegung.

Entsprechend der Richtlinie 2001/95/EG[27] Artikel 3 Absatz 1 darf der Hersteller nur sichere Produkte in Verkehr bringen. Laut Artikel 5 Absatz 1 obliegt dem Hersteller die Pflicht, Stichproben bei den eigenen Produkten durchzuführen. Bei den Treibstoffen für Kraftfahrzeuge liegen dafür stichhaltige Gründe vor, die durch die Verunreinigung und Veränderung der

---

[22] Hinweis 15, Artikel 3 Absatz 2.

[23] ABl. L 218, 13.8.2008, S. 30.

[24] ABl. L 307, 28.10.2014, S. 1.

[25] Im Internet: http://standards.cen.eu/dyn/www/f?p=204:7:0::::FSP_ORG_ID:6003&cs=1FAF2D8F6A6FE92BF5C85E6AAFDBDD16D (15.07.2019).

[26] ABl. L 218, 13.8.2008, S. 82.

[27] ABl. C 11, 15.1.2002, S. 14.

Eigenschaften bei der Lagerung bedingt sind. Stichproben ermöglichen es dem Händler Informationen zu ermitteln, ob das Erzeugnis den Anforderungen entspricht. Die Händler sind verpflichtet keine Produkte zu liefern, die den Anforderungen nicht genügen.

III. DIE REGULATION DES BEREICHES DER FLÜSSIGEN BRENNSTOFFE IN ESTLAND

Das Betreiben der flüssigen Brennstoffe wird in der Gesetzgebung der Republik Estland mit mehreren Gesetzen des Zuständigkeitsbereichs geregelt. Dazu gehören *Vedelkütuse seadus* (Gesetz über flüssige Brennstoffe); *Välisõhu kaitse seadus* (Luftreinhaltegesetz); *Vedelkütusevaru seadus*[28] (Gesetz über Bestände an flüssigem Brennstoff); *Vedelkütuse erimärgistamise seadus*[29] (Gesetz über die steuerliche Kennzeichnung der flüssigen Brennstoffe); *Alkoholi-, tubaka-, kütuse- ja elektriaktsiisi seadus*[30] (Alkohol-, Tabak-, Brennstoff- und Stromsteuergesetz). Vor der Klassifikation der Brennstoffe in den Rechtsakten ist es sinnvoll zu erwägen, ob und wann die Aufstellung der Übersicht über die verschiedenen Ingenieurwerkstoffe bei der gesetzlichen Bestimmung und Festlegung notwendig ist, wie triftig die Klassifikation der Ingenieurwerkstoffe bei der Gewährleistung der sicheren Behandlung, der Festlegung der Umweltvorschriften und der Eintreibung von Steuern ist.

Wie die staatliche Aufsicht in den Fällen durchzuführen ist, wenn eine Gesellschaft sich nur mit dem Verkauf bzw. der Herstellung des gleichwertigen Heizstoffes beschäftigt, bedürfen einer Auslegung. Laut ATKEAS § 66 Absatz 18 steht dem Staat die Möglichkeit zu, egal welche flüssige brennbare Substanzen zu versteuern. Der Gesetzgeber hat im ATKEAS den Unterschied der Begriffe heizstoffähnliches Erzeugnis und flüssige brennbare Substanz nicht genauer erläutert. Unter der Benutzung der Methode der grammatikalischen Auslegung kann man ableiten, dass ein heizstoffähnliches Erzeugnis als Ersatz der mehrbenutzten Heizstoffe gedacht worden ist, wobei es selbst ebenfalls mit bestimmten Spannen der KN Codes festgelegt worden ist, und flüssige brennbare Substanzen sind alle sonstigen gleichwertigen Heizstoffe.

Laut VÕKS § 58 Absatz 1 ist Heizstoff „... brennbares Material oder eine brennbare Substanz, die in den Feuerungsanlagen zwecks Energiegewinnung benutzt wird...“ Ohne genaue Klassifikation der flüssigen Brennstoffe besteht die Möglichkeit, nachdem die technischen Umstände klargestellt sind, den gleichwertigen Heizstoff ausgehend von den Umweltanforderungen zu klassifizieren. Die Harmonisierung mit der Richtlinie 98/70/EG widerspiegelt sich in der Verordnung des zuständigen Ministers,[31] die auf der Grundlage des § 58 Absatz 2 aufgestellt worden ist, mit der die Umweltansprüche für die Brennstoffe, die in die mit KN Codes genauer festgelegten Liste gehören, festgelegt werden.

Der Gesetzgeber hat die Klassifikation der sonstigen brennbaren Substanzen als flüssiger Brennstoff mit dem Sinn des VKS § 1 Absatz 1 nicht ausgeschlossen, auch wenn VKS § 2 Absatz 3 dem zuständigen Minister die Befugnis erteilt, eine genauere Klassifikation vorzunehmen. Die Ermächtigung stellt *expressis verbis* fest: „Die genauere Liste der Brennstoffe wird ... vom zuständigen Minister mittels einer Verordnung festgelegt.“ Aufgrund der Ermächtigung hat der Minister ausgehend von derselben Bestimmung mit einer Verordnung die Liste der Brennstoffe[32] mit einer anderen die Anmeldepflicht für

---

[28] RT I 2005, 13, 66; RT I, 01.07.2017, 19; im Folgenden abgekürzt – VKVS.

[29] RT I 1997, 73, 1201; RT I, 12.12.2018, 75.

[30] RT I 2003, 2, 17; RT I, 20.06.2019, 3; im Folgenden abgekürzt – ATKEAS bzw. *Alkoholi-, tubaka-, kütuse- ja elektriaktsiisi seadus* (Alkohol-, Tabak-, Brennstoff- und Stromsteuergesetz).

[31] 21.06.2013, Verordnung des Umweltministers Nr. 45, die Umweltvorschrift für flüssige Brennstoffe, Nachhaltigkeitskriterien für Biokraftstoffe, die Ordnung der Überwachung und Berichterstattung über die Umweltvorschriften der flüssigen Brennstoffe sowie die Methodik der Bestimmung der Reduktion der sich aus der Benutzung der Biokraftstoffe und der flüssigen Biokraftstoffe ergebenden Treibhausgasemissionen; RT I, 28.06.2013, 7; RT I, 29.07.2014, 10; im Folgenden abgekürzt – Verordnung Nr. 45.

[32] 30.06.2014, Verordnung des Wirtschafts- und Kommunikationsministers Nr. 46, genauere Liste der Kraftstoffe; RT I, 02.07.2014, 3; im Folgenden abgekürzt – Verordnung Nr. 46.

Betreibergesellschaften festgelegt.[33] Des Weiteren sind die Kraftstoffe mit Hilfe der KN-Codes in den Gesetzen bestimmt worden: VÕKS, VKVS und ATKEAS.

Nach VKS § 3 Absatz 1 muss die Person, die sich mit dem Betreiben der Treibstoffe beschäftigt (im Folgenden Betreiber), die notwendige technische Ausstattung sowie das Personal besitzen, um den Vorgaben des Gesetzes zu entsprechen. Zu den Aufgaben des Personals gehören die Produktion der passenden Brennstoffe, die Auswahl zum Verkauf, die Durchführung der Stichproben und der Konformitätsbewertung, die sich aus der Veränderung der Eigenschaften des Brennstoffes ergibt; das Personal muss die Notwendigkeit dieser Maßnahmen verstehen und der Erläuterungspflicht nachkommen. Der Besitz bedeutet nicht unbedingt Eigentum, sondern Bereitstellung. Es besteht die Pflicht, durch mögliche Ausstattung und Verfahren diese auf einem ausreichenden Niveau zu organisieren. Es ist nicht verboten, die Verpflichtungen mit egal welchen Vereinbarungen aus Schuldverhältnissen[34] zu gewährleisten. Die Ausgestaltung der Personalanforderung setzt die Ausarbeitung einer Methodik voraus, die ausgehend vom VKS zurzeit auch gemacht sein soll.

Laut VKS § 4 Absatz 5 verpflichtet sich der Verkäufer, dem Verbraucher den Zugang zu den Informationen zu gewährleisten. Solch eine Formulierung sollte umfassend ausgelegt werden. Die Berichterstattung dem Verbraucher gegenüber setzt voraus, dass das Bedienungspersonal bestimmte Fertigkeiten haben soll. Es ist notwendig, der Erläuterungspflicht zu den, zum Zweck der Feststellung, ob der Treibstoff den Anforderungen entspricht, in den Prüfbericht eingetragenen Informationen und sonstige relevante Informationen, nachzukommen.

Die Erläuterung sonstiger relevanter Informationen neben dem Zweck des Treibstoffs verlangt, dass man auf einem bestimmten Niveau die Technik versteht. Anhand der in den Prüfbericht eingetragenen Werte müssen die Indexe errechnet werden, die vom Treibstoff bedingte Erwärmung des Motors sowie die Eigenschaften bei der Ingangsetzung und Beschleunigung müssen analysiert werden.

Vom Absatz 4 im VKS § 4^2 sind die Gründe für die Erhöhung der Garantie, darunter die Überprüfung bzw. Erneuerung der bereits bestimmten Garantie, die *expressis verbis* von folgenden Aspekten beeinflusst sind: „Geschäftsplan oder anderem Aktionsplan; … Zahlungsfähigkeit und Einhaltung der Zahlungstermine für Steuern; … von der geschäftlichen Reputation der Geschäftspartner; ...". Der Gesetzgeber hat der Anstalt für staatliche Aufsicht einen großen Beurteilungsspielraum gewährt, die dazu führt, dass entsprechende Bewertungsmethoden für Handelsgesellschaften ausgearbeitet werden müssen, womit die Verwaltungsverpflichtungen und der Verwaltungsaufwand vom *Maksu- ja Tolliamet* (Steuer- und Zollamt)[35] erhöht wird.

Auch wenn das Verlangen einer Garantie nicht zum Sinn der Richtlinie der EU 98/70/EG Artikel 5 im Widerspruch steht und als Maßnahme die Vermarktung derjeniger Treibstoffe einschränkt, die den Umweltvorschriften entsprechen, kann es sich um eine technische Norm handeln, von der wegen der Einschränkung des Prinzips des freien Warenverkehrs der Kommission gemeldet werden muss. Für das MTA sind bei der Durchführung des Verwaltungsverfahrens die geschäftlichen Reputationen derjenigen, die von anderen Mitgliedsstaaten aus den Markt erschließen, sonstige Geschäftspläne oder ausgehend von VKS § 4^2 Absatz 5^1 die Fähigkeit des Mitglieds des Leitungs- bzw. Aufsichtsorgans im Bereich der Brennstoffbetreibens nicht unbedingt anwendbar, da die Bestimmung nichtig ist.

Die wesentlichen an die Treibstoffe gestellten Anforderungen ergeben sich aus der auf der Grundlage des § 8 Absatz 1 VKS aufgestellten Verordnung Nr. 46 und die Umweltvorschriften aus der auf der Grundlage des § 58 Absatz 2 aufgestellten Verordnung 45 des zuständigen Ministers. Das Ziel der Aufstellung der wesentlichen Anforderungen ist es, die Konformität des Treibstoffs mit dem Zweck von dessen Benutzung und mit den Umweltvorschriften zu gewährleisten. Der Gesetzgeber hat die Möglichkeit gewährt, für die Treibstoffe zwei Umweltvorschriften festzulegen. Daher muss der Inhalt der beiden

---

[33] 04.05.2012, Verordnung des Wirtschafts- und Kommunikationsministers Nr. 37, Liste der Brennstoffe, für deren Betreiben eine Registrierung erforderlich ist; RT I, 09.05.2012, 3; RT I, 05.08.2014, 20.

[34] *Võlaõigusseadus* (Schuldrechtgesetz) § 2, RT I 2001, 81, 487; RT I, 20.02.2019, 8, im Folgenden abgekürzt – VÕS.

[35] Im Folgenden abgekürzt – MTA.

Verordnungen gleichzeitig interpretiert werden, um die Umweltvorschriften einzuhalten. Man kann schlussfolgern, dass für die im Gesetz benannten Treibstoffe zusätzlich zu den in der EU Richtlinie 98/70/EG vorliegenden noch weitere Umweltvorschriften festgelegt worden sind. Zugleich hat der Gesetzgeber des estnischen Staates – *Riigikogu* – das Recht, die Vermarktung der mit dem EU-Recht nicht regulierten Erzeugnisse mit technischen Normen entweder zu fördern oder einzuschränken.

In den Absätzen des § 9 VKS werden die Begriffe Konformitätsbescheinigung und Konformitätserklärung verwendet. Die Konformitätsbescheinigung ist eine Bescheinigung, die von der Konformitätsbewertungsstelle ausgestellt worden ist, die bescheinigt, dass der Hersteller imstande ist, den Treibstoff in Übereinstimmung mit der EU Richtlinie 98/70/EG herzustellen. Der Begriff der Konformitätserklärung steht mit den Artikeln 3 und 4 derselben Richtlinie nicht im Einklang. Die Konformitätserklärung ist eine Erklärung des Herstellers, womit die Entsprechung des Produkts allen Anforderungen der EU Rechtsakten bestätigt wird. Entsprechend dem Beschluss 768/2008/EG Artikel 5 muss der Hersteller die Entsprechung des Produkts den Anforderungen mit einer Erklärung bestätigen, wenn dies die Rechtsakten der EU verlangen. Die Vorlage der Konformitätserklärung steht mit der Bestätigung der CE Kennzeichnung in Verbindung, die ein untrennbarer Teil dieses Vorgangs ist. Der Sinn der CE-Kennzeichnung besteht darin, sichtbar die Informationen vorzustellen, auf deren Grundlage die Harmonisierung des Produkts mit den Rechtsakten der EU vorausgesetzt werden kann. Als Pflicht des Herstellers wird bei der Herstellung der Produkte aufgrund des Artikels R2 zunächst die Aufstellung technischer Vorschriften und danach die Durchführung der Konformitätsbewertungsverfahrens angesehen. Treibstoffe gehören zum Bereich, wo die Konformität belegt werden muss. Da der Staat verpflichtet ist, die Konformität mit den Anforderungen zu gewährleisten, setzt dies den Vergleich der Prüfberichte mit den geltenden Anforderungen voraus. Auch wenn laut VKS § 9 Absatz 6 die Bescheinigung der Konformitätsbewertung alle sechs Monate erneuert werden soll, soll ausgehend vom EU-Recht dies auch der Händler tun, wenn er als Hersteller behandelt wird. Ein neues Verfahren der Konformitätsbewertung soll durchgeführt werden, wenn sich eine Eigenschaft des Brennstoffs ändert. Dies ist im Regelfall die Harmonisierung einer Eigenschaft mit der Anforderung oder eine Verbesserung. Während es sich im ersten Fall um eine Stichprobe handelt, die der Händler selbst durchzuführen hat, wird im zweiten Fall ein neues Erzeugnis hergestellt.

Wenn keine EU-Rechtsakten vorliegen, können die Mitgliedsstaaten die Regulationen im Bereich der flüssigen Brennstoffe mit einzelstaatlichen Rechtsakten festlegen. Dennoch muss für die Gewährleistung des freien Warenverkehrs die gegenseitige Anerkennung der Erzeugnisse benutzt werden. Um dies zu gewährleisten, muss laut dem allgemeinen Teil des Kodex über Wirtschaftstätigkeit (*Majandustegevuse seadustiku üldosa seadus*)[36] § 6 Absatz 1 in Verbindung mit der Richtlinie 98/34/EG[37] Artikel 8 Absatz 1 die Kommission über die technische Norm, die die wirtschaftliche Aktivität einschränkt, unterrichtet werden. Auch wenn es bei den flüssigen Brennstoffen nicht erlaubt ist, einzelstaatliche Einschränkungen zusätzlich zu den Indikatoren der Eigenschaften einzuführen, schließt dies die Einführung sonstiger technischer Anforderungen nicht aus.

IV. RECHTSPRECHUNG DES EUROPÄISCHEN GERICHTSHOFS BEI DER AUSLEGUNG DER RECHTSAKTEN DES BEREICHS

Die Rechtsprechung des Europäischen Gerichtshofs von den verbundenen Rechtssachen C-43/13[38] und C-44/13[39] legt den Absatz 3 des Artikels 2 der Richtlinie 2003/96/EG aus. Um den Inhalt des Begriffs „gleichwertiger Kraftstoff" zu bestimmen, soll zunächst festgestellt werden, als was das Erzeugnis verwendet worden ist und erst als zweites muss man die Konformität mit den in den Tabellen derselben Richtlinie angeführten Eigenschaften belegen. Dadurch wird der Grundsatz der Gleichbehandlung gewährleistet und die Erzeugnisse, die dieselbe Aufgabe erfüllen, werden auf demselben Niveau besteuert. Technisch gibt dies bei der Bewertung der Gleichwertigkeit die Möglichkeit, nicht von den festgelegten Prüfverfahren,

---

[36] RT I, 25.03.2011, 1; RT I, 13.03.2019, 22.

[37] ABl. C 204, 21.7.1998, S. 37.

[38] ELT C159, 26.5.2014, S. 9.

[39] Ebd.

sondern von den technischen Anforderungen der Anlage zur Energieumwandlung, den Grundlagen des sicheren Betreibens in Verbund mit anderen Maßnahmen des Vorsorgeprinzips auszugehen.

Die Konformität mit Umweltvorschriften muss bei Kraftstoffen mit zweierlei Verwendungszweck nicht belegt werden, solange dieser nicht als flüssiger Brennstoff vermarktet wird. Den Sinn der Verwendung des flüssigen Brennstoffs mit zweierlei Verwendungszweck erläutert die Gerichtsentscheidung C-426/12[40] S. 23: „...nicht als Kraftstoff für Motoren oder zu Heizzwecken verwendete Mineralöle."

In den Schlussanträgen des Generalanwalts zur Gerichtssache C-26/11[41] vom 19.07.2014 wird der Begriff des freien Verkehrs, der sich aus der Richtlinie 98/70/EG ergibt, in Verbindung mit anderen Rechtsakten der EU interpretiert. Die Auslegung der Einführung der Zusatzbedingungen bei der Vermarktung von den den Anforderungen der Richtlinie entsprechenden Kraftstoffen ergab sich aus dem Grundsatz der Einschränkung der Grundfreiheiten. Der Generalanwalt argumentiert in seiner teleologischen Interpretation der Frage „warum muss lediglich die Änderung der Werte der technischen Anforderungen berücksichtigt werden?" mit dem Ziel der Richtlinie; warum das Ziel der Richtlinie nicht die EU-weiten Harmonisierung der ganzen Vermarktung des Kraftstoffhandels, sondern nur der technischen Anforderungen ist. Das Ziel der Harmonisierung ist die Prävention der Möglichkeit, dass die sich aus den unterschiedlichen Normen ergebenden technischen Anforderungen als Handelsbeschränkungen benutzt werden. Daher ist die Beschränkung des Artikels 5 nur auf diejenige Rechtsakten anzuwenden, die die technischen Anforderungen beeinflussen. Wenn es sich um ein umfassendes Beschränkungsverbot handeln würde, hätte der Gesetzgeber auch bei der Ausnahme die Wirkung des Artikels 6 berücksichtigen müssen. Die Ausnahme sollte auch unter der Berücksichtigung der Preisreglementierung, der Bildung des Bestandes an flüssigem Brennstoff und der Werbung für flüssige Brennstoffe erfolgen. Eben aufgrund der Wirkung des Artikels 6 hat der Mitgliedsstaat die Möglichkeit, mit eigenen Rechtsakten strengere Umweltvorschriften aufzustellen, doch dies muss dem Artikel ABl. L 114, Absätze 5-7 entsprechen, in denen eine Genehmigung der Kommission vorausgesetzt wird.

Im Verfahren des Vorabentscheidungsersuchens C-343/09[42] wird das Vorsorgeprinzip behandelt. In technischen Sachen illustriert die Erklärung zum Punkt 28, wie kompliziert die Stellungnahme sein kann: „in Bezug auf die Beurteilung der hoch komplexen wissenschaftlichen und technischen tatsächlichen Umstände ... die Kontrolle durch den Gemeinschaftsrichter auf die Prüfung beschränkt ist, ob ... der Gesetzgeber die Grenzen seines Ermessens offensichtlich überschritten hat." Bei der Zulassung des Brennstoffs, von Komponenten oder Zusatzstoffen, die sich von herkömmlichen unterscheiden, ist das Fehlen der wissenschaftlichen Information, die ihre schädliche Auswirkung belegen, nicht ausschlaggebend. Die Aufstellung der Beschränkung aus diesem Grundsatz ermöglicht es, die Gefahren zu vermeiden, auch wenn die tatsächliche Gefahr nicht vollständig, sondern nur in einem geringen Umfang belegt ist.

Der Verkauf von flüssigen Brennstoffen setzt nicht voraus, dass der Händler den ganzen zu verkaufenden Brennstoff zu einem Ort liefert und dieser von dort auf der Grundlage von Begleitdokumenten weiter transportiert wird. VKS § 6 Absatz 1, 3, 4, 6 und 7 geben dem aufsichtführendem Amt zwar die Möglichkeit, das Vorhandensein der Unterlagen am Registrierungsort zu verlangen, doch schließen sie die Übergabe des Verkaufsgegenstandes auf der Grundlage des Sachenrechtgesetzes (*Asjaõigusseadus*)[43] § 93 nicht aus. Auch wenn der Händler verpflichtet ist, der Rechenschaftspflicht nachzukommen, um die Feststellung des Umfangs und der Käufer zu ermöglichen, hat dies keinen Einfluss darauf, wo der flüssige Brennstoff sich zum Zeitpunkt des Verkaufs befindet. Wenn die Vorschriften für die Handhabung eingehalten werden, schließt das Gesetz über flüssige Brennstoffe nicht ausdrücklich die Möglichkeit aus, dass beim Verkauf die Normen aus den Gesetzen VÕS und AÕS eingesetzt werden können.[44] Daraus muss man schlussfolgern, dass beim Verkauf von flüssigen Brennstoffen die Parteien alle schuldrechtlichen Vertragsformen einsetzen können, incl. Beauftragungsvertrag.

---

[40] Im Internet: http://eur-lex.europa.eu/legal-content/ET/TXT/?qid=1424888396281&uri=CELEX:62012CJ0426 (15.07.2019).

[41] European Case Law Identifier (ECLI): ECLI:EU:C:2012:480.

[42] Sammlung der Urteile des Europäischen Gerichtshofs 2010 I-07027, ECLI:EU:C:2010:419.

[43] RT I 1993, 39, 590; RT I, 29.06.2018, 7 im Folgenden abgekürzt – AÕS.

[44] RKKKo 27.09.2010, Nr. 3-1-1-63-10, Punkt 12.

Die Garantie ist als Zielsetzung völlig zulässig.[45] Die Garantie ist eine Maßnahme, die vor Umsatzsteuerbetrug schützt und daher sicherlich dem öffentlichen Interesse dient. Dennoch soll bei der Festsetzung, Erhöhung und Reduzierung der Garantie die angemessene Verfahrensdauer berücksichtigt werden. Der Unternehmer muss ausreichend Zeit haben, um eine Garantie zu stellen. Während es möglich ist, dies bei der Unternehmensgründung gleich zu Beginn zu berücksichtigen, wenn man in dem Bereich tätig werden will, so kann dies von einem bereits aktiven Wirtschaftsakteur nicht erwartet werden. Bei der Person, die flüssige Brennstoffe betreibt, ist nicht nur wesentlich, passende Mittel für die Garantie zu finden, sondern auch zu ermöglichen, die Tätigkeit im Bereich zu beenden. Wenn man die Tätigkeit in dem Bereich beendet, muss der bereits angeschaffte Brennstoff verkauft werden, die bestehenden Verträge (Arbeitsverträge, sonstige Kooperationsverträge) müssen gekündigt und aus den Unternehmensregistern gelöscht werden. Darüber hinaus ist es nicht vernünftig, wenn der Gesetzgeber vermutet, dass sich die Wirtschaftsakteure über die Schaffung eines neuen Gesetzes oder einer neuen Bestimmung in einem bereits geltenden Gesetz bewusst wären oder dies verfolgen würden. *Vacatio legis* als Rechtssicherheit[46] soll eine angemessene Anpassung mit den Normen gewährleisten. Die genügende Zeit erklärt sich daraus, dass bei der Planung und Ausführung notwendige Tätigkeiten durchgeführt werden müssen. Der Gesetzgeber hat das Verwaltungsorgan nicht dazu verpflichtet, eine Methodik oder Richtlinie für die Bestimmung, Änderung und Erhöhung der Garantie festzulegen. Es besteht keine Pflicht, eine einheitliche Maßnahme für die Bestimmung der Garantie festzustellen. Es handelt sich um eine Lücke im geltenden Recht.

Ausgehend von der Bestimmung des Gesetzes über flüssige Brennstoffe und deren Sinn muss interpretiert werden, dass der Gesetzgeber als Betreiber nur das Betreiben in der wirtschaftlichen und beruflichen Tätigkeit angesehen hat. Dies kann von den dem Betreiber gestellten Anforderungen abgeleitet werden. Der Händler muss über technische Ausstattung und das notwendige Personal verfügen. Die Erfüllung dieser Ansprüche von dem Verbraucher zu verlangen, ist keine vernünftige Erwartung. Folglich kann beim Transport des Kraftstoffes für Eigenbedarf weder die Entsprechung des Kraftstoffs mit den geltenden Normen noch die Haftung auf der Grundlage des VKS verlangt werden.[47] Solch eine Interpretation ermöglicht es den Personen, die keine Betreiber sind, größere Mengen des Treibstoffs zu transportieren. Folglich können die staatlichen Aufsichtsorgane den Transport einer größeren Menge des Treibstoffs aufgrund des Vertrages einer Gesellschaft bürgerlichen Rechts in einer kleinen Gegend nicht als Betreiben des Treibstoffs auffassen. Dasselbe gilt beim Treibstoff, der aus einem anderen EU Staat eingeführt wurde.

V. DIE RECHTLICHE HAFTUNG DES GESCHÄFTSHERREN BEI DER EINRICHTUNG EINER VERSORGUNGSKETTE

Durch Bezug auf das Grundgesetz führt der Rechtswissenschaftler Lasse Lehis die Widersprüche, die mit der Weiterübertragung wesentlicher Elemente der steuerrechtlichen Beziehung verbunden sind, an.[48] Diese bestehen eben in der Verbindung der Bestimmungen des PS § 4, § 10, § 11, § 19. In anderen Worten verletzt die Weiterübertragung wesentlicher steuerrechtlicher Elemente an die Exekutive die Prinzipien der Gewaltentrennung, des demokratischen Rechtstaates, der Proportionalität der Einschränkung der Rechte und Freiheiten sowie den Grundsatz von jedermanns Recht auf freie Entfaltung der Persönlichkeit.[49] Die Pflicht dem Betreiber die Garantie zu bestimmen obliegt laut Gesetz dem MTA. Daher sind die Wirtschaftsakteure, die sich mit flüssigen Brennstoffen tatsächlich auseinandersetzen, dem MTA „ausgeliefert", das laut Gesetz und den konkreten Umständen über Ermessensspielraum verfügt und das über die Erhöhung bzw. Reduzierung der Garantie entscheidet. Das VKS schreibt weder die Obergrenze/Höchstgrenze der Garantie als die mit der steuerrechtlichen Beziehung verbundenen

---

[45] RKPJKo 31.01.2012, Nr. 3-4-1-24-11, Punkt 53.

[46] 46 Grundgesetz der Republik Estland (*Eesti Vabariigi Põhiseadus*), kommentierte Ausgabe 2017, § 108 Erläuterung 4. Im Internet: https://pohiseadus.ee/public/EVPS_kommeteeritud_valjaanne_2017.pdf (15.07.2019).

[47] RKKKo 09.03.2009, Nr. 3-1-1-4-09, Punkt 13.

[48] L. Lehis, Maksuõigus, Juura 2012, S. 39.

[49] Das Steuer- und Zollamt hat aufgrund der Gefahreneinschätzung das Recht, vom Verkäufer des Brennstoffs auch eine im Vergleich zu den im Gesetz festgelegten Sätzen höhere Garantie zu verlangen (VKS § 4^2 Abs. 1).

öffentlich-rechtlichen monetären Verpflichtung noch die Pflicht für die Exekutive, für deren Änderung eine Richtlinie aufzustellen vor. Diese Situation widerspricht der sich aus dem Grundgesetz (PS) ergebenden Anforderung, laut der sämtliche Elemente der steuerrechtlichen Beziehung, incl. Nebenverpflichtungen wie Steuerzins und Garantie, mit einem Rechtsakt, das Gesetz heißt, festgelegt sein müssen. Zugleich unterstützt solch eine Situation die Entstehung der Monopole, da von neuen Akteuren auf dem Kraftstoffmarkt eher Steuerbetrug als Wettbewerb erwartet wird. Wenn die geringe Wirkung der im VKS § 3 Absatz 3 festgelegten Mindesthöhe des Grund- bzw. Stammkapitals von mindestens 31 950 Euro die Einführung des Garantieanspruchs bewirkt hat, so sollte überlegt werden, ob die Pflicht des Grund- bzw. Stammkapitals als eine unpraktische Maßnahme aufgehoben werden sollte, was auch dem Wettbewerb förderlich wäre.

Die Urschrift des Gesetzesänderungsvorschlags[50] über flüssige Brennstoffe schlug mildernde Bedingungen bei der Zulassung des Kraftstoffes in den freien Verkehr vor. Das VKS § 4² bestimmte die Einschränkung, dass das MTA solch ein Erwägungsrecht ab 01.01.2013 hat. Unter anderem war die Grundgesetzkommission des estnischen Parlaments (*Riigikogu*) in dieser Sache zu ihrer Meinung befragt worden. Rait Maruste hat es im Punkt 2.2 seiner Antwort für notwendig gehalten, den Begriff der geringeren Belastung durch das 5. Kapitel des VKS, staatliche Aufsicht, zu erläutern. Unabhängig von den bestehenden Prüfmaßnahmen sind die Steuerbetrüge weiterhin ausreichend umfassend. Dies muss man so verstehen, dass der Staat hinreichend wirksam die Bestimmungen des VKS § 3, insbesondere die organisatorischen und technischen Bedingungen, geprüft hat, und dass dies keine Ergebnisse erzielt hat. In der weiteren Antwort hat die Grundgesetzkommission dennoch zugegeben, dass es keine Möglichkeit gibt, 370 in das Wirtschaftsregister eingetragene Gesellschaften innerhalb des Sektors nach Tätigkeitsbereichen zu unterscheiden. In anderen Worten ist es nicht möglich zu unterscheiden, wer die Kraftstoffe in den Verkehr zulässt, wer die Steuerveranlagerung betreibt. Wenn diese Behauptung stichhaltig ist, sollte zunächst überprüft werden, wie die Exekutive den Sinn der vom Gesetzgeber aufgestellten Bestimmung des VKS verstanden hat und mit welchen Maßnahmen die Aufsichtsorgane bisher die Konformität damit, was das VKS § 3 bestimmt, überprüft haben.

Die Überführung der Anschaffung des Treibstoff für Kraftfahrzeuge auf die Grundlage des Geschäftsbesorgungsvertrags ermöglicht es, die tatsächlichen Gründer der langen Versorgungsketten, in denen die Zwischenhändler mit Hilfe der gefälschten Rechnungen die Umsatzsteuerpflicht reduzieren, herauszufinden. Heute kann jeder Käufer die Verbundenheit mit der Teilnahme am Täuschungsmanöver lediglich mit der bejahenden Antwort auf das Angebot des Verkäufers und der Einhaltung der erforderlichen Sorgfalt begründen. So erfüllt er alle Verpflichtungen, die sich aus dem Gesetz ergeben.

Aufgrund von VKS § 3 Absatz 1 in Verbindung mit § 4 Absatz 1 Punkt 4 ist es möglich, den Willen des Gesetzgebers den Händler neben der Entsprechung den vom zuständigen Minister aufgestellten Anforderungen an die flüssigen Brennstoffe auch andere üblicherweise mit dem Bereich einhergehenden technischen Vorschriften des verkauften Erzeugnisses auszudrücken zu interpretieren. Die sonstigen wesentlichen Informationen bei der Benutzung von flüssigen Brennstoffen können lediglich von einem Kenner des Bereichs festgestellt und erläutert werden. Folglich muss der Betreiber über die am meisten beschreibenden Umstände des verkauften flüssigen Brennstoffs mehr wissen als nur das, was die Rechtsakten der EU bzw. Norm vorschreibt.

Bei der Feststellung der Fälle des Steuerbetrugs ist es sehr wichtig, qualifizierende Beweismittel zu finden. Die beste Art und Weise dafür ist nicht so sehr die Feststellung der Versorgungskette, sondern die Feststellung des Urhebers der Versorgungskette und des Verursachers der dies ermöglichenden Umstände. In anderen Worten muss der Geschäftsherr feststellbar sein.

Beim Verhindern des Steuerbetrugs ist es nicht relevant, wie die Parteien sich zueinander verhalten haben. Relevant ist es, ob die Parteien für die Anschaffung des flüssigen Brennstoffs einen Geschäftsbesorgungsvertrag oder eine andere Art des Vertrags abgeschlossen haben. Um die Umstände festzustellen, unter denen der Auftrag gestellt worden ist, muss die Möglichkeit ausgeschlossen werden, dass der Betreiber der flüssigen Brennstoffe als Käufer das angeschafft hat, was angeboten worden ist, sondern den Auftrag gestellt hat, dass ein Erzeugnis geschaffen oder vermittelt wird, dass die eindeutigen Merkmale

[50] Vedelkütuse seaduse muutmise seaduse eelnõu 24 SE. (Gesetzesentwurf über die Änderung des Gesetzes über flüssige Brennstoffe. Im Internet: http://stenogrammid.riigikogu.ee/et/201105101000#PKP-8440. (15.07.2019).

der von ihm vermittelten aufweist. Die Erteilung des Auftrags ist mit dem Geben der Anweisungen,[51] wie das zu kaufende Erzeugnis zu sein hat, beschrieben. Der Beauftragte kann in jenem Fall nur den Treibstoff für Kraftfahrzeuge vermitteln, der den vom Auftraggeber gestellten Bedingungen entspricht. Es ist nicht relevant, ob der Hersteller des flüssigen Brennstoffes und der Händler einen Beauftragungsvertrag abgeschlossen haben, da die Versorgungskette in jenem Fall kurz ist und der Vorsteuerabzug nicht innerhalb der langen Versorgungskette stattfindet und das MTA dies leichter prüfen kann. Die Erteilung des Auftrags ist durch die Aufstellung der Standardindikatoren durch den Händler charakterisiert. Die Aufgabe des Personals des Händlers ist es, diese festzustellen, sie mit technischen Mitteln öffentlich zu machen und den Vermittlern bzw. den Beauftragten die Anweisung zu geben, diese anzuschaffen. Der Vermittler muss dem Auftraggeber gegenüber die erforderliche Sorgfalt walten lassen und der Anmeldungspflicht nachkommen. Da laut VKS das Herkunftsland des flüssigen Brennstoffes bekannt sein soll, muss der Beauftragte die damit verbundenen Umstände ermitteln. Dafür ist es notwendig, Einsicht in die Konformitätsbescheinigung zu nehmen und den Transporteur festzustellen. Der Auftraggeber kann zwar behaupten, dass der Beauftragte seinen Pflichten nicht nachgekommen ist, jedoch kann er mit der Gründung der Versorgungskette in Verbindung gebracht werden und hat Personen ausgewählt, die sich berufsunwürdig benehmen.

Auch wenn es für das Verwaltungsorgan zu belastend und zu kompliziert sein kann, die Gründung der Versorgungskette festzustellen, kann das MTA dennoch, da der Händler nicht die erforderliche Sorgfalt nach VKS hat walten lassen, in Erwägung ziehen, die mit der Obergrenze nicht belegte Garantie zu erhöhen. Es darf nicht vergessen werden, dass in der langen Versorgungskette beim jeweiligen Verkauf stets ein Fachmann herangezogen werden muss, der die Konformität des flüssigen Brennstoffs mit den Anforderungen des Käufers bestätigt. Während eine geschäftsfähige Person das Recht hat, eine Gesellschaft zu gründen, setzt die Arbeit als Fachmann die Kenntnis des Faches auf einem bestimmten Niveau voraus.

VI. SCHLUSSFOLGERUNGEN UND VORSCHLÄGE *DE LEGE FERENDA*

Die Vorschläge zur Änderung des Gesetzes über flüssige Brennstoffe zielen auf die genauere Bestimmung des Bereichs des Betreibens der Brennstoffe. Ausgehend von dem Vorsorgeprinzip, das wir aus dem Recht der Europäischen Union und von Deutschland kennen, muss auch der Staat selbst während des Betreibens des Kraftstoffes der Erläuterungspflicht nachkommen. Da aufgrund des geltenden Gesetzes alle Arten des Brennstoffes besteuert werden können, ausgehend vom Ort von dessen Verwendung und unabhängig von dem Rohstoff und der Produktionsweise, sind ausgehend vom Grundsatz der Gleichbehandlung der Personen (PS § 12) auch in demselben Ausmaß die Anforderungen der Garantie und das mit der Erläuterungspflicht Verbundene anzuwenden. Als Änderungsvorschlag zum Rechtsakt gilt die Möglichkeit, Qualifikationsniveaus des kompetenten Personals zu bestimmen, die auf der Grundlage des Nachkommens der Erläuterungspflicht entstehenden rechtlichen Fragen sind genauer festgelegt worden (Aufstellung der Standardindikatoren incl. Vorlage vor dem Kauf).

> Vorschlag 1. VKS § 1 Absatz 1: *Das Gesetz bestimmt die Grundlagen und die Ordnung des Betreibens von Brennstoffen, die Organisation der Durchführung der einzelstaatlichen Aufsicht und die Haftung für die Zuwiderhandlung.*

Der Gesetzesänderungsvorschlag sieht vor, dass die Betreiber aller Brennstoffe unabhängig von der Art des Brennstoffs gleich behandelt werden. Unter Berücksichtigung der Anlage zur Energieumwandlung und der Umweltvorschriften bedürfen gleichwertige Brennstoffe einer Regulierung im mindestens demselben Umfang wie die am meisten benutzten Treibstoffe für Kraftfahrzeuge. Die Steuerfakturierung und die Prinzipien des Eintreibens der Steuer ergeben sich aus anderen Gesetzen. Eben die genauere Registrierung der Kompetenz des Brennstoffbetreibers und der Personen, die in diesem Bereich tätig sind, ist wesentlich.

---

[51] Varul, P. u. a. Võlaõigusseadus II. Kommenteeritud väljaanne (Kommentierte Ausgabe), Tallinn, Juura, 2007, S. 2.

> Vorschlag 2. VKS § 1 Absatz 3²: *Das Gesetz reguliert nicht den Verkauf des Brennstoffs durch staatliche Institutionen, mit der Ausnahme der Erfüllung der Erläuterungspflicht in Bezug auf den durch die staatliche Institution verkauften Brennstoff.*

Die Begründung des Gesetzes[52] macht nicht klar, in welch einer Art und Weise die Standardindikatoren und die Erfüllung der Erläuterungspflicht bei dem Brennstoff, den die staatlichen Institutionen verkaufen, festgestellt werden. Die staatlichen Institutionen können von der Garantie- und Registerpflicht befreit sein, nicht jedoch von den Pflichten in Bezug auf die technischen Mittel, Anforderungen an das Personal und die Erläuterungspflicht. Der Staat muss beim Verkauf der Brennstoffe in gleicher Weise wie die Händler behandelt werden.

> Vorschlag 3. VKS § 3 Absatz 1: *Die Person, die sich mit dem Betreiben der Treibstoffe beschäftigt (im Folgenden Betreiber), muss über die notwendigen technischen Mittel und kompetentes Personal verfügen, um die sich aus dem vorliegenden Gesetz ergebenden Anforderungen zu gewährleisten. Der Minister stellt mit der Verordnung das Qualifikationsniveau des Personals fest, das die Erläuterungspflicht bezüglich betriebener Kraftstoffe erfüllt und die Standardbestimmungen festlegt.*

Dass Bescheinigungen der Qualifikation bzw. beruflichen Fertigkeiten verlangt werden, ist nichts Besonderes.[53] Die Ausstellung dieser kann die Stiftung SA Kutsekoda organisieren, deren Tätigkeit von den Hochschulen und Universitäten unterstützt wird. Der Minister kann mit der Verordnung die Liste des kompetenten Personals genauer bestimmen,[54] wenn es im Gesetz vorgeschrieben ist. Das Einhalten der Bestimmungen des VKS § 4 Absatz 1 Punkt 4, Absatz 2, § 8 und § 9 seitens des Betreibers setzt fachliche Kompetenz voraus, z. B. muss man die technischen Eigenschaften der Treibstoffe für Kraftfahrzeuge und Motoren kennen. Unter Berücksichtigung der Wissenschaft und der Technik ist es nicht sinnvoll, die technische Norm als eine Liste anzuführen. Eine Durchschnittsperson muss nicht verstehen, warum man keinen Ottokraftstoff benutzen sollte, wenn der Unterschied von ROZ und MOZ größer als 10 ist oder warum es für den Händler nützlich ist, 90 kPa anstatt des im Sommer verlangten Dampfdruckes von 70 kPa zu verwenden. Wer einen Befähigungsnachweis hat, verfügt über die Kenntnisse, darunter über die Kenntnisse in Bezug auf die Arten und die Eigenschaften der flüssigen Brennstoffe, und ist daher die am besten geeignete Person, um die Standardindikatoren der Treibstoffe für Kraftfahrzeuge aufzustellen und Erklärungen zu geben. Daher berücksichtigen die Standardindikatoren sowohl die Anforderungen der Richtlinie 98/70/EG als auch die Unterschiede, die die Einzelstätten bzw. die Unternehmen selbst geschaffen haben. In diesen Fällen ist es nicht notwendig, im Rechtsakt einen verbindenden Standard festzustellen, um die Qualität zu gewährleisten, da die Gesellschaft beim Verkauf des Brennstoffs dafür haftet, dass die von ihr selbst aufgestellten Standardindikatoren eingehalten werden.

> Vorschlag 4. VKS § 3 Absatz 3: *Das Betreiben der Kraftstoffe setzt die Registrierung im Register der wirtschaftlichen Tätigkeit voraus.*

Die Registrierungspflicht der Betreiber der Kraftstoffe egal welcher Art ermöglicht die Feststellung, ob kompetentes Personal vorhanden ist, in welchem Umfang die Erläuterungspflicht erfüllt ist und ob die Aufsicht führenden Personen informiert sind. Im Vergleich zu den Rechtsverordnungen der Bundesrepublik Deutschland, der BImSchV (2014) § 1, ist der Tätigkeitsbereich zusätzlich zum KN-Code offen beschrieben: „zum Betrieb von … bestimmt ist".

---

[52] Begründung zum Entwurf der Gesetzesänderung des Gesetzes über flüssige Brennstoffe und des Luftreinhaltegesetzes, SE 675. http://www.riigikogu.ee/?page=eelnou&op=ems&eid=da929829-584b-495f-b983-4a949eff5f2b. (15.07.2019); S. 10.

[53] *Ravimiseadus* (Arzneimittelgesetz) § 45 Punkt 4² legt die Pflicht der Apotheker und der Pharmazeuten fest, sich beruflich fortzubilden und die Kompetenz zu erhöhen. – RT I 2005, 2, 4; RT I, 13.03.2019, 140.

[54] *Elektroonilise side seadus* (Telekommunikationsgesetz) § 78 Absatz 4: Der für den Bereich zuständige Minister kann anhand des Paragraphen 1 dieses Gesetzes die der Öffentlichkeit zugänglich gemachten Daten in Bezug auf Inhalt, Form und der Art und Weise, wie sie der Öffentlichkeit zugänglich gemacht werden, genauer festlegen, um den Zugang zu den Daten zu gewährleisten. Elektroonilise side seadus – RT I 2004, 87, 593; RT I, 13.03.2019, 47.

> Vorschlag 5. VKS § 4 Absatz 2: *Der Verkäufer ist verpflichtet, dem Käufer die Standardindikatoren des zum Verkauf stehenden Brennstoffs vorzulegen, er muss gewährleisten, dass die Erläuterungen bezüglich Eigenschaften oder Ersetzbarkeit oder der Biokraftstoffbeimischungen gegeben werden. An der Verkaufsstelle, wo kein Bedienungspersonal anwesend ist (Tankautomat), müssen Informationen, an welcher Stelle man zusätzliche Erläuterungen bekommen kann, zur Verfügung gestellt werden, incl. Info-Telefon.*

Bei Verbrauchergeschäften ist der Wirtschaftsakteur laut VÕS § 14[1] Absatz 1 Punkt 2 dazu verpflichtet, dem Kunden die zentralen Elemente der von ihm vertriebenen Sache, Dienstleistung oder sonstiger Leistung vor dem Geschäft zu erläutern. Bei der Anwendung dieses Grundsatzes müssen in der Tankstelle die Werte, die die von der Herstellung des zu kaufenden Treibstoffs und von seinem Verbrauch im Motor bedingt sind, charakterisieren, vor dem Kauf für den Verbraucher zugänglich sein. Die frühere Formulierung des Gesetzes ermöglichte es, dass der Käufer die Erläuterungen mit erheblichen Verzögerungen übermitteln konnte und deren Überprüfung sich unter Berücksichtigung der Geschwindigkeit des Brennstoffverbrauchs in der Anlage zur Energieumwandlung als unmöglich erweisen konnte.

> Vorschlag 6. VKS § 8 Abs. 1: *Unter Berücksichtigung der Entwicklung der Technik, der Möglichkeiten der Brennstoffbenutzung und der Umweltvorschriften verfügt der Betreiber über Standardindikatoren in Bezug auf die Brennstoffe, die sich in seinem Besitz befinden, und stellt diese für denjenigen Brennstoff auf, den er sich anschafft.*

Das Gesetz muss Bedingungen schaffen, die den Betreibern helfen, die Qualität der Brennstoffe zu betonen. Die Übermittlung der Standardindikatoren der Brennstoffeigenschaften an die Käufer und deren Einhaltung ist unter Berücksichtigung der heutigen Möglichkeiten der Telekommunikation weder kompliziert noch übermäßig belastend. Damit kommt der Händler der Erläuterungspflicht mit mehr Inhalt nach. Es muss vorausgesetzt werden, dass das erforderliche Personal des Händlers bei der Wahl der Werte der Standardindikatoren sorgfältig erwogen hat, welche Eigenschaften stärker berücksichtigt werden müssen, um die besten Eigenschaften der Treibstoffe für Kraftfahrzeuge auszudrücken. Die zu harmonisierenden Umweltvorschriften (Richtlinie 98/70/EG) sind aufgrund des VKS § 58 Absatz 2 mit der Verordnung des Umweltministers festgelegt. Ihre Wiederholung durch einen Minister eines anderen Bereichs führt zu Rechtsunklarheit. Wenn Standardindikatoren geschaffen werden, wird damit die rechtliche Haftung des Auftraggebers geschaffen, diese festzustellen. Bei der Einschätzung, inwieweit die für die flüssigen Treibstoffe geltenden Vorschriften eingehalten werden, kann die Qualität des Brennstoffs nicht vorausgesetzt werden, da keine den Bereich regulierenden harmonisierten Standards vorhanden sind. Erfüllt sein können lediglich die Restriktionen, die sich aus der Nachhaltigkeit und von den Motoren ausgehen. Daraus wird nicht deutlich, ob der Brennstoff eine hohe, eine mittlere oder eine niedrige Qualität hat. Die ausgeführten Analysen des Motoröls weisen in der Praxis darauf hin, dass die Treibstoffe für Kraftfahrzeuge minderer Qualität Rückstände enthalten. Daher muss das Öl bereits nach 16 000 km ausgetauscht werden und nicht erst nach 32 000, wie die Motorhersteller dies vorsehen. Beim Tatbestand des Vertrauensbruchs handelt es sich um die objektive Seite des Tatbestands der Vertrauenshaftung.[55] Die estnischen Händler flüssiger Brennstoffe haben den Brennstoff, den sie verkaufen, von anderen Brennstoffen lediglich durch die ihnen beigeführten Kraftstoffzusätze unterschieden. Die Angabe von anderen wichtigen charakteristischen Werten wie dem Wert der Standardindikatoren, ist vermieden worden. Solch eine Situation ermöglicht es, Erzeugnisse zu vermarkten, die zwar den EU-Vorgaben entsprechen, die Wirkung der ihnen beigefügten Zusatzstoffe ist jedoch nicht belegt. Als Vergleich: die Rechtsakten der Republik Lettland legen die Pflicht fest, dass die Standardindikatoren der Brennstoffe vorgelegt werden müssen.[56]

---

[55] U. Volens, Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid. Tartu Ülikooli Kirjastus, 2011, S. 75.

[56] Punkt 13.3 auf der Grundlage des Artikels 7 im Artikel über Konformitätsbewertung aufgestellten Verordnung. Im Internet: http://likumi.lv/doc.php?id=11217. (15.07.2019).

Die Erweiterung der Pflichten des Herstellers auf den Händler des Treibstoffs für Kraftfahrzeuge ist vom estnischen Staatsgerichtshof nicht interpretiert worden. In bestimmten Fällen ist ausgehend vom Beschluss des Europaparlaments und des Rates 768/2008/EG Artikel R6[57] der Einführer bzw. Händler als Hersteller zu behandeln. Meistens sucht der Hersteller beim Testen der Zusatzstoffe den verwendeten flüssigen Brennstoff sorgfältig aus. Die Grundlagen der sorgfältigen Auswahl sind den estnischen Händlern meistens nicht zugänglich, ebenfalls ist das Personal des Kraftstoffhändlers nicht imstande, in Bezug auf diese Erklärungen zu geben. Daher ist es nicht klar, inwieweit die Verbesserung der Eigenschaften die Konformität mit den Umweltvorschriften beeinflusst hat. Der zweite Umstand, die bei der Pflicht die Standardindikatoren öffentlich zu machen die Situation verbessert, ist, dass so vermieden wird, dass der Händler egal welchen gefundenen Kraftstoff verkauft. Als gefundener Kraftstoff kann ein den Umweltvorschriften entsprechender flüssiger Brennstoff angesehen werden. Im Moment können die Werte jeder zu verkaufenden Partie erheblich schwanken, während manche Eigenschaften mit den Grenzwerten in Übereinstimmung gebracht worden sind. In diesen Fällen ist weder der tatsächliche Hersteller des Kraftstoffs noch das Ursprungsland belegt.

[57] ABl. L 218/82, 13.8.2008.

HOW TO REGULATE THE FUTURE OF TECHNOLOGY
CHALLENGES AND PRINCIPLES

ÁLVARO GARCÍA FERNÁNDEZ

KEY WORDS

regulation, technology, digital law, startups, future, Sandbox, EU

ABSTRACT

The intention of this paper is to reflect on the future of regulation in order to face the great challenges that new technologies are poposing, especially for regulators. The current regulatory system is forced to make enormous efforts to keep up with technological changes. For this reason, we want to think about whether the current model of slow and deliberate regulation is fully valid, or on the contrary whether we should aim for a more agile form of regulation to reach a balance between allowing innovation and the development of technology, while never forgetting the defence of the rights of the consumers or users of these technologies. The European Union has proposed developing a harmonized legal framework that provides legal security to all citizens of the union as a fundamental piece of this "new regulation" and in turn allowing European companies to compete internationally, and not just in the European context.

1. INTRODUCTION

When we look back and observe the drastic changes that have occurred in such a short time, we are aware that we are leaving one world behind. An "analogue" world that is falling increasingly into oblivion with each day in order to make way for a new world, a "digital world" that is being forged at great speed in front of us. We are going through a no-return frontier in which the weight and influence of technology in our lives is increasing. This change opens before us new horizons; horizons that seem distant, but that arrive quickly thanks to the speed with which we are advancing.

This rapid advance into the future forces us to be more "Darwinian" and adapt to change quickly and effectively. Society is advancing faster than we ourselves can assimilate: blockchain, the Internet of Things (IoT), artificial intelligence, smart contracts or the sharing economy, to mention a few, are concepts that have been appearing in our day to day life; concepts that have come to stay, changing forever the world as we know it. Technological change has come to transform everything, to revolutionise our lives from top to bottom, the way we communicate, the way we learn or the way we transport ourselves. If this is what is already here, what will the future bring us? Robotics? Quantum computers? This is practically unpredictable; what is easier to understand is that a future full of questions awaits us, a future full of challenges to overcome, and a future that will change exponentially.

We have heard on many occasions the assertion that technological change is exponential, but what does this mean? It implies that technologies such as landlines took around 75 years to reach as many as one hundred million users, while mobile phones took 16, the internet, about 7 years to reach that figure, the WhatsApp messaging application surpassed this in 4 and the social network Instagram crossed that border in just 2 years. This means that the penetration of technology into society is increasing, and with it, the changes that take place occur much more quickly, affecting a higher percentage of the world's population.

How should we manage this? Like all disruptive advances, technological change has two sides: on the one hand, it brings with it new solutions, new opportunities, new ways of doing things; but it also brings insecurity, and where there is insecurity, fraudulent or reproachful behaviours proliferate. This is what we, as "jurists of the future", should try to avoid. We must be protagonists of the change, not follow the slipstream of technology. We have been entrusted with the difficult task of regulating what is to be developed, and it is a task that nobody thinks is going to be easy, but it is a challenge that we must face.

The social and economic change that we experienced, and will continue to experience, for our environment is unstoppable. What has been called "the new paradigm" or "industrial revolution 4.0" has come as a high-speed train onto which we must climb without trying to stop it; knowing in advance that the speed will increase. We are faced with the arduous task of regulating technology without stopping its advance, without being the hand brake that derails it; but without forgetting, in turn, the most important thing: the rights of the users or consumers of these new technologies.

The effort of the legislator during these last years has been a titanic effort, managing to resolve in a brilliant way many of the conflicts posed. However, the increasing speed of the technological evolution together with the effect of globalization and the disruption of social and technological changes makes us reflect in this article whether this legislating model will continue to be effective in the future or on the contrary, we should try to adapt our way of working to the requirements of a faster development. We should tend towards a more flexible and more easily adaptable regulation, which gain weight through international collaboration. This is where the role of the European Union can be postulated as decisive. By creating a harmonized regulatory framework, it will allow companies within the Common Market to participate in a wider market with the legal security that would provide a common and coordinated regulation, while ensuring the inviolability of the rights of all European citizens.

Given the challenges that await us in the not too distant future, we cannot begin this work in any other way than analyzing the enormous difficulties we are going to face, trying to shed some light on how we believe the laws should be that in the future will regulate the likely advances in technology.

The methodology we will use to develop this article is an analytical methodology based on the study of the problems or difficulties that we must face and the proposal of solutions or principles based on success stories.

2. DIFFICULTIES WE FACE

There are many challenges that we will have to face in order to provide a safe and effective regulatory framework and achieve the correct protection of consumer rights, without thwarting the advancement of technology and development. In this article, we will make a brief analysis of the factors to consider when designing a new technological regulation, such factors as the speed of change, the transversality of the advances, the disruption that these changes produce in traditional markets, the global nature of the technology, and finally, the challenges of an operational or technological point of view.

2.1. The speed of the change

The dizzying pace at which technological innovation advances, along with its rapid penetration in society, is a constant issue for international regulators; they try, without complete success, to keep up with the incorporation of a regulation that resolves current concerns. Simon Beswick, CEO of Osborne Clarke, considers that it is inevitable that there will be a regulatory revolution for countries in order to adapt to the latest technological advances. "The laws go between five to seven years behind technology" he states (Sanz, 2016)[1].

[1] Sanz, S (2016) Interview: Simon Beswick: "*Las leyes van siete años por detrás de la tecnología*". Expansión, online newspaper.

The existing regulatory mechanisms are often slow, or rather, not fast enough, to adapt to the changing economic and social circumstances. "If the volume and pace of the digital transformation remains the way it is, the existing regulatory approach will not work," says Bakul Patel, director for Digital Health at the US Food and Drug Administration (FDA) associate center (Eggers, W. and Turley, M. 2018)[2]. The worst news is that the existing gap between regulatory security and the rate at which technological development is advancing is widening and we should expect that this situation is going to get worse (Marchant, 2011)[3].

Digital products and industries can grow considerably in a very short time, while the current regulatory cycle, depending of the technology, can take between five and twenty years to be effective. There are many examples that we find throughout the world in which regulation has not been quick enough to face the new conditions proposed by technology. Disputes such as those of Airbnb against the French hotel- lobby AhTop, which is ongoing, or the famous examples of mobility companies fighting against the establishment of startups such as Uber or Blablacar in their perceived traditional business territories, are some of the cases in which the regulation has been taking time to provide an environment of legal security, where these new companies can operate and coexist with traditional sectors. The regulator is still trying to adapt to these new conditions, while it is torn between a stricter regulation and a reluctance to change, which allows the current position of the traditional sectors to be maintained in exchange for suffocating the growth of a developing economy such asthe digital economy; or a soft regulation in which situations of unfair competition may arise (Abbot, 2012)[4].

Raymond Kurzweil (awarded in 1999 with the National Medal of Technology and Innovation; the highest honour in technology in the United States) wrote in 2001 "every decade our overall rate of progress was doubling, we won't experience 100 years of progress in the 21st century; it will be more like 20,000 years of progress (at today's rate)[5]."

2.2. Transversality

Transversality is another concept that has recently been strongly linked to technology. If we try to describe what technology is, perhaps it would be easier to start by asking what technology is not, given that, as we know it today, technology affects "everything". It affects each and every aspect of our life: from our education or how we learn and how we interact with others, to the way we do business or travel. Nonetheless, what happens when the big technology companies, such as Google, Facebook, or Amazon, affect these different aspects – they control the way we communicate with others, the way we seek information, the way we advertise ourselves as companies, the way we move using a map, or how we buy or watch movies. That is precisely the power that technology has granted these tech giants: the possibility of operating in numerous business areas that *a priori* have no relationship between them. This raises the following question: How can we, the legislators, set guidelines for companies that today offer their services in the form of a social network and tomorrow could operate in the healthcare sector or space travel, for example.

Transversality is analysed considering the differences and proximity of the networks and in terms of application in the industry, especially based on technology. Using this kind of analysis it can be concluded that the new technology industry is highly transversal and interconnected, that transversality means that it affects many sectors simultaneously[6].

---

[2] Eggers, W. and Turley, M. (2018): "*The future of regulation*". Deloitte insights.

[3] Marchant, Gary Elvin, 1958-, (editor.) & Allenby, Braden R., (editor.) & Herkert, Joseph R., (editor.) & French, Peter A., (forewordiser.) (2011). *Growing gap between emerging technologies and legal-ethical oversight: the pacing problem*. Springer, Dordrecht.

[4] Abbot, C. (2012), Bridging the Gap – Non state Actors and the Challenges of Regulating New Technology. Journal of Law and Society, 39: 329-358

[5] Kurzweil R. (2004) The Law of Accelerating Returns. In: Teuscher C. (eds) Alan Turing: Life and Legacy of a Great Thinker. Springer, Berlin, Heidelberg.

[6] Keller, Wolfgang. 2004. "International Technology Diffusion." Journal of Economic Literature, 42(3)

This transversality of technology companies is closely related to their ability to pivot, where startups –normally with lighter structures than the big traditional companies – can change direction very quickly and start developing another activity that, at first, seemed foreign to its purpose (Ries, 2011)[7]. The changing and interconnected nature of their business models is a challenge for the legislator, as they cross the limits of the traditional industry, breaking with the previous one and on many occasions leaving behind traditional operators of different industries without that ability to "turn the boat" with the same agility. This break leads us to another concept, also linked to technology – disruption. Disruption in technological jargon means the rupture or abrupt interruption of something; it is used when the appearance of innovation changes the rules of a market, the way in which people consume, or even how a whole society behaves. It happened with the printing press, the internet or the smartphone and it will continue to happen, and more frequently, in the future. From the point of view of the legislator, we must expect that this will happen, and it is a great challenge that, overnight, technological innovation appears irreversibly changes the rules of a market and forces us to reset or reformulate the rules applicable to it (Downes, 2013)[8].

2.3. Internationality

Globalisation makes the task of the national regulator more complex, since we live in a time when the most important forces that affect all economies are global, not local (Keller, 2004). What happens abroad has a powerful effect on our economy, our markets, and therefore our way of regulating. In many cases, the legislator loses his capacity to avoid, in practice, certain activities. As an example of this, Deng Jiapeng, a professor at the University of Beijing, in respect to the ban on operating cryptocurrency exchange sin China, stated that *"blockchain or digital currencies have a typical global nature, and as a result a simple prohibition does not have much effect in the physical space. The exchange platforms continue working and lending their services in spite of the express prohibition on the part of the legislator, simply changin the place from which they provide the services"* (Smith, 2018)[9].

In addition, new companies no longer develop themselves with a focus on the local market, but with aspirations to conquer the international market, with all the resulting legal formalities. This international quality opens the door to two relevant issues: first, the location of the company in that country where conditions are more favourable for its development, which implies that, depending on the level of regulatory restriction, a country can lose investments. In this sense, countries like Estonia have identified the opportunity to attract technological companies, even allowing a person to become a "virtual resident" of Estonia and very easily registering their company in Estonia.

The second issue is the increase in tax evasion due to the relative simplicity with which multinational companies use their structures in other countries to legally reduce their tax bill, and thus avoid paying their fair share of taxes. These companies transfer the majority of their profits to countries with a more beneficial tax treatment, such as Ireland, the Netherlands or Luxembourg, establishing their European headquarters there and subsidiaries in other countries (Serraller, 2014)[10].

These are just some of the challenges we have in the difficult task of regulating technology in the future. In addition, we will find complications of an operational nature or that the technology uses a typical computer programming language to carry out functions like the management and control of huge amounts of data, and legislators must therefore become familiar with that programming language. In addition, there will be many other issues that technology itself will probably have to solve, such as the algorithmic biases that occur in the use of artificial intelligence, or the resistance to cyber-attacks, and these and other issues will have increasing importance and certainly should not go unnoticed, but the brevity of this study does not allow me to delve into them.

---

[7] Ries, E. (2011): "The Lean Startup". Crown Business. USA

[8] Downes, L. and Nunes, P. (2013): *Big Bang Disruption* (March 1, 2013). Harvard Business Review, March, 2013, pp. 44-56.

[9] Smith, K. (2018) "China ICO ban proving ineffective". Brave Newcoin. Doi 77-108 The Hague: T.M.C.

[10] Serraller M. (2014): ¿Por qué pagas más impuestos que Apple? Trampas y montajes de las grandes empresas y de los millonarios para no pagar. Editorial Conecta, Madrid, pp 12-55.

3. HOW SHOULD WE REGULATE TECHNOLOGY IN THE FUTURE?

In view of the complications, no one can foretell how to regulate technology in the future, let alone affirm how to achieve effective regulation. However, it is true that technological advances will be increasingly complex. In spite of this, we will try to analyse the principles of the regulation of technology.

3.1. Neutrality

The principle of "technological neutrality" is a principle that has been studied at great depth, since it contains numerous meanings: from the principle of the technological neutrality of Public Administration, to those that identify it as a regulatory criterion of the law. We are going to focus on the latter principle.

As a regulatory principle, it was first used in 1999 in an official document of the European Commission on the revision of the regulatory framework for electronic communications. Subsequently, it has been included in the preamble of the *Framework Directive 2002/21/EC* and later articulated in *Directive 2009/140/CE that incorporates it as a basic principle of the regulation of electronic communications typical of a converging environment, when they use the same technology to carry out activities.* The principle of "technological neutrality" implies that regulatory activity should not focus on the technology, but on the effects that derive from its use. For this reason, the aforementioned legislation states that the legislative technique must be based on a *sustainable, subsidiary and proportionate* regulation that is, at the same time, transparent. In addition, the regulation must be inspired by the *"principle of neutrality",* and therefore it must avoid the effects of discrimination between different technologies, while favouring, at the same time, the development of ICT.

What is then understood by "non-discrimination"? In that specific sense, non- discrimination would also have different implications.

In the first place, the principle of neutrality seeks to guarantee an equitable regulatory treatment between electronic communications, preventing the legal framework from changing according to the technology used to provide a service. That is, its objective is to prevent the application of different regulatory regimes to different competing agents offering the same services but with different technologies.

Another aspect of this "non-discrimination" is found from a more markedly economic point of view. Economic analysis shows that a specific technological regulation can have a really negative effect on market efficiency. To achieve an efficient regulation, it should avoid any course that leads to an excess of regulation, which limits the potential technological development; and, in turn, ensures that one type of technology is not being favoured to the detriment of another.

The final aspect to consider regarding "non-discrimination" is that which exists from the point of view of the consumer and seeks to grant security where, regardless of the technology used for the consumption of services or products, the provision of this service is guaranteed (Écija, 2015)[11].

In conclusion, ITC regulation ought to be value-neutral with respect to technology: it should not favour some specific technologies over other specific technologies (Koops, 2006)[12].

Technological neutrality is also directly associated with the idea of regulatory sustainability, which starts from the basic principle that technology evolves quicker than regulation. The regulation must be sustainable and avoid continuous legal reviews, with the aim of adapting it to the constant technological changes. To ensure this objective, the regulation should not limit its scope to a specific technology; rather, it should focus on the effects emanating from its use, allowing flexible

---

[11] Écija, A. (2015): "*Una aproximación jurídica al concepto de neutralidad tecnológica". Ecix Group*.

[12] Koops, B. (2006) *Should ICT Regulation Be Technology-Neutral*?. Starting points for ict regulation. Deconstructing prevalent policy one-liners, it & law series, Bert-Jaap Koops, Miriam Lips, Corien Prins & Maurice Schellekens, eds., Vol. 9, pp.

regulation and being open to change, advances or innovations that occur in its scope, allowing for its continuous application even if new technologies are developed. Regulations should not be static but flexible and dynamic enough to evolve along with technological development, without the need for constant regulatory revisions[13]. This brings us to our next principle – the flexibility of the law.

3.2. Flexibility

The presumption that regulations should be elaborated slowly and deliberately and then remain static for long periods of time is no longer applicable in the current paradigm. Existing regulatory structures are often too slow to adapt to changing economic and social circumstances. This slowness of the regulatory processes, in the face of the constant progression of technology, means that the regulatory projects currently promoted by the European Union, when they are about to be definitively implemented at national or local level, are really difficult to fit within the existing regulatory environment, either because of the rapid evolution of technology or due to the excessive burden of internal regulations. Therefore, we must attend to the need for more flexible and adaptive regulations aimed at adapting effectively to the continuous changes that go along with technological progress. As Aaron Klein, policy director of the Center on Regulation and Markets in the Brookings Institution, stated:

> *"We have a legal regulatory framework built on the basis of mail, paper, words, versus a new world order which is digital, continuous, 24/7, and built on bits and bytes. Somehow we need to square these two worlds."*

Flexible regulation does not mean starting from a blank slate, but starting with a retrospective review of the regulations, which obliges regulators to evaluate whether regulatory alternatives or readjustments in the current rules could adequately address the problem. This exhaustive review should serve in turn to identify those regulations that may be blocking innovation and those regulations that are obsolete or duplicated, and then try to release the regulatory burden. This is precisely one of the objectives of the *Better Regulation* project of the European Union, which emphasises the importance of reducing regulatory burden and simplifying existing regulations in the European Union, in order to create a more agile, flexible and adaptive regulation:

> *Better — and, if possible, less — lawmaking has been an abiding objective of single market policy. It has been consistently supported by the EESC in various opinions, with the aim of f inding the best ways to make the legislative environment more user-friendly and understandable to business, workers, consumers and civil society organisations […].*[14]

One example of this "less" regulation can be found in The Ministry of Environment and Food in Denmark. This ministry is one which is making more aggressive efforts at regulatory modernization. This includes reducing the number of regulations in your portfolio by a third, plans to reduce the number of laws you administer from 90 to 43 and an update of all existing laws to comply with the digital era[15].

In the case of the need for new regulations, we should be oriented not towards slow and overly deliberate models but towards more adaptive and interactive models, based on previous study, trial, error and adaptation, which allow the rapid incorporation of changes or qualifications. One possibility is agile methods, which are characterized by teamwork, sometimes multidisciplinary, and by breaking down large projects into phases, with limited or very limited deadlines. These methods

---

[13] Van der Haar, I.M. (2008): "*The principle of technological neutrality: Connecting EC network and content regulat*ion". 5 decemember 2008.

[14] Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework (2015/C 291/05).

[15] Danish Ministry of Business, "Disruption task force", accessed July 25, 2019.

make it easier to work in a more flexible and adaptive way, in contrast to the traditional way of working, which is usually more linear and inflexible in introducing new changes during the course of the project. The type of regulatory instrument matters – the government is typically behind the curve of technology, and as regulations take years to promulgate and enforce, the "best technology" mandated by regulation may often be inferior to the best that industry could actually deploy. (Wiener, 2004)[16]

Another possibility is precisely the mechanisms of *soft law* or self-regulation, which have often been cited for the regulation of technology because they allow a rapid response to changes, notwithstanding the European Union statement 2015/C291/05 that *"They should be viewed as important instruments for complementing or supplementing hard law, but not as an alternative to it unless there are fundamental rules providing a sufficient enabling basis" […]*[17].

3.3. Qualification

As we have shown in this article technology is a source of challenges, but it can also be a helpful tool to face them. In this way, it allows for a more direct and fluid communication among those involved, as well as the collection and rapid processing of a large amount of data. We can use the collected data to regulate in a "qualified" manner, which in the context we are dealing with means combining consultation and data-based results.

3.3.1. Consultation

In many cases, regulators can benefit from working directly with companies, innovators and other actors, in order to define the rules to be applied to emerging technologies. That is, representation of the industry in the regulatory process should be allowed, due to the complexity of the subject to be treated and the great difficulty of reaching an understanding of the possibilities for its development. This will help regulators understand the nuances of technology and the possible consequences.

> *[…]The institutions intend to promote agreements between stakeholders, defining the bounds of such agreements in legislative acts, verifying that they comply with fundamental legislative texts and with the rules governing their drafting, and monitoring their application.* Legislative framework 2015/C 291/05[18].

Not only is the participation of companies from specific sectors important, but also the assistance from consumers and users. The *Better Regulation*[19] project promoted by the European Commission aims to improve and increase opportunities to contribute throughout the legislative and policy-making cycle, so that citizens and stakeholders can make their views known, while always underlining the importance of transparency in the European legislative process. As per the Inter-institutional Agreement of 13 April 2016 on Better Law-Making: "*Public and stakeholder consultation is integral to well- informed decision-making and to improving the quality of law-making.*[20]"

---

[16] Wiener, J. B. (2004) "*The Regulation of Technology, and the Technology of Regulation*", 26 Technology in Society 483-500.

[17] European Commission (2015): *Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework* (2015/C 291/05). Pp. 1-7.

[18] European Union (2015): Opinion of the European Economic and Social Committee on Self-regulation and co-regulation in the Community legislative framework (2015/C 291/05).

[19] European Commission Better Regulation project of the European Union

[20] European Commission (2016): *Agreement of 13 April 2016 on Better Law-Making.*

3.3.2. Based on data

We live in the information era, where the recompilation of big data and the exhaustive analysis of data prevails, and we should take advantage of this knowledge also for the regulatory process. With the guidance of data analytics and, in many cases, artificial intelligence, data can be studied to detect new patterns and trends, and to obtain more effective, accurate, safe and personalized information. This knowledge can be used for qualified legal approvals based on data and certainties, but the possibilities do not stop there. This potential of knowledge can be extended to a dynamic regulatory approach in which, based on real-time data flows between companies and their regulators, it is possible to evaluate the effectiveness of the rules applied, and to analyze whether the regulation is complying or not with the goals stated by the legislator, and ultimately to correct ineffective regulations more quickly and safely.

Many regulatory organisations, from the European Commission to the USA Securities and Exchange Commission, have established such data flows with the industry. Once the data flows are integrated, this part of the regulatory process can be automated. The application can become dynamic, and review and monitoring can be integrated as part of the regulatory system.

This has been called "Smart Regulation". This also extends to all those regulatory processes that allow innovating and streamlining the regulatory techniques, placing emphasis on ensuring that these new formulas are rigorous. Smart regulation should be inspired, based on and informed by an accurate knowledge of the factors at play and by a acute awareness of its potential impact on society[21].

With this "preliminary study" and this qualified information compiled by the regulators consulting with users and participants in the industry, we will move to the second step of the adaptive process – prior study, trial and error.

The National Highway Traffic Safety Administration (NHTSA) 2016 Federal Automated Vehicles Policy offers an example. By taking an iterative approach in designing policy for autonomous vehicles, the NHTSA responded to new data and technologies to make significant revisions to its initial policy of 2017[22].

3.4. Experienced: "Sandbox"

The current circumstances have shown that even with all this information and advance study, we cannot predict how the industry will behave, what factors will have an affect and what the scope of its consequences will be. Against this, there are already many countries that have resorted to the application of a new regulation strategy "the regulatory Sandbox".

The Sandbox idea first came from Britain's former chief scientific adviser Sir Mark Walport, who suggested the financial services industry would benefit from having something equivalent to the clinical trials of the health and pharmaceutical sectors.

A Sandbox is a controlled environment that allows innovators to test their products, services or new business models without the need to follow all the standards applied to the sector. The focus of the Sandbox seeks to help regulators better understand new technologies and to work collaboratively with industry in the most appropriate and effective way possible to subsequently develop the rules and regulations that will govern these products, services or emerging business models. It allows innovation to be accelerated while controlling its risks, preventing them from affecting the final consumer. What are the advantages of this model? (Asociación Española de Fintech, 2018)[23]

---

[21] Commission Communication on Smart Regulation.COM (2010) 543.

[22] Marc Scribner, "NHTSA Releases Improved Federal Automated Driving System Guidance," Competitive Enterprise Institute, September, 12, 2017.

[23] Asociación Española de FinTech e Insurtech And Hogan Lovells, (2018): *Decálogo para la implantación de un Sandbox*. 2018.

It develops innovation allowing the creation of a work environment where new business models that allow the use of data and new technologies can be launched in a controlled manner, to obtain innovative and more efficient solutions. In addition, it reduces the time and cost of generating and validating innovative ideas in the market.

It promotes competition by initially reducing the total compliance with all the established rules, and by helping to reduce entry barriers, favouring the increase ofcompetition, and promoting the improvement of products and services made available to the final consumer.

It allows a constant legislative update developing a dynamic environment for the observation and validation of how regulatory frameworks should adapt to the changes that the sector needs in order not to stop innovating.

It minimizes risk as an optimal tool for supervisors to keep abreast of the latest innovations and to develop mutual learning about the risks and opportunities of applying these new technologies to business models.

All this implies **greater safeguards** for the consumer who receives a final product that has been tested under the conditions of legal certainty.

This new form of regulation allows for the development of regulations to be synchronized with rapid technological development, helping to close the gap between innovation and regulation, providing secure conditions for both companies and consumers, conditions that help promote innovation and, at the same time, protect users. It is a novel form of regulation and able to solve the problems caused by the rapid progress of technology.

The Financial Conduct Authority (FCA), the financial authority of the United Kingdom, created the first fintech Sandbox for companies in 2016. The Sandbox has accepted almost 90 companies since its creation and has just finished receiving applications for its fifth cohort.

The FCA says "the Sandbox helps it understand new technologies before products hit the mass market, and that it helps start-ups build in safeguards for consumers at an earlier stage than would otherwise have been the case". It also says it sees innovation playing an important role in driving more effective competition in Britain's financial services market[24].

3.5. Coordinated and collaborative regulation:

The last of the principles is closely linked with the last of the challenges or difficulties we discussed at the beginning of this article. In an increasingly globalised environment in which external forces drastically affect our economy, we must aim for a coordinated and harmonized regulation, where different countries agree to grant a clear security framework, without regulatory mosaics. The European Union has a great opportunity here to become a broad environment where innovation has a place.

A recent global survey conducted by the OECD[25], which involved more than 250 experts and leaders of financial institutions, concluded that regulation incompatible with regulatory divergence in different nations costs financial institutions between 5 and 10 per cent of their income annual totals. The mosaic of international financial regulations costs the world economy approximately $780 billion. Therefore, it concludes that a global ecosystem approach must be encouraged; one in which regulators from different nations coordinate with each other to encourage innovation while protecting consumers more effectively from possible fraudulent practices.

The European Union must seize this opportunity by developing its integrating role, whose objective is effective and competitive regulation. The objective of the policy of research and technological development of the EU has been, as inferred from the Single European Act 1987, to strengthen the scientific and technological bases of European industry and promote

---

[24] Global Financial Innovation Network (GFIN), Consulation Document, August 2018

[25] International Federation of Accountants and Business at OECD, "Regulatory divergence: Costs, risks, impacts," February 2018, p. 4.

its international competitiveness. On the other hand, Article 179 of the Treaty on the Functioning of the European Union specifies that "*the Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive[…]*". Since then, the EU has realised this in programmes such as "Horizon 2020" or "Digital Europe".

However, what is the role that Europe should play in the regulation of these new technologies? "*Our role is to foster a regulatory environment that allows new business models to develop while protecting consumers and ensuring fair employment taxes and conditions*" said Commission Vice President Jyrki Katainen[26], responsible for Jobs, Growth, Investment and Competitiveness. A fragmented method of regulation creates uncertainty among international operators, new service providers and consumers, and can severely undermine innovation, job creation and economic growth within the Union.

This integrating role of the European Union has resulted in one of the most ambitious projects promoted in recent years, the "Digital Single Market".

> *"Internet and digital technologies are changing the world. But the obstacles on the internet mean that citizens lose goods and services because internet companies and emerging companies have limited horizons, and companies and administrations cannot fully benefit from digital tools. The time has come to achieve the adaptation of the EU's single market to the digital era by tearing down the walls of different legislations and moving from 28 national markets to a single one".* Andrus Ansip, Vice President for the Digital Single Market.

The European Union aims to move towards the digitization of the freedoms of the EU's single market, with the adoption of Europe-wide standards for telecommunications services, copyright and data protection. The digital single market strategy has delivered the main legislative proposals that have been previously established as a priority, focusing on electronic commerce, copyright, audiovisual and media, privacy, harmonization of digital rights, delivery of affordable packages and harmonized VAT rules. Its objective is to guarantee a fair, open and secure digital environment. To this end, the Commission has identified three main emerging challenges: ensuring that online platforms can continue to benefit our economy and society, developing the European data economy to its full potential, and protecting Europe's assets by addressing the challenges of Cybersecurity. Just between 2015 and 2017, the European Commission has presented 35 legislative proposals and political initiatives within the scope of its strategy for the effective achievement of a digital single market.

With this project, the European Union is clearly taking the reins of technological regulation with a vision for coordinated and collaborative work between the different countries of the EU, tending towards the creation of a broad harmonized space and a framework of full legal security. For example, the EU emphasises this need in one of its last projects, based on the incorporation of 5G technology. *"The interconnected and transnational nature of the infrastructures underpinning the digital ecosystem, and the cross-border nature of those involved, mean that any significant vulnerabilities and/or cybersecurity incidents concerning 5G networks happening in one Member State would affect the Union as a whole"* Recommendation (EU) 2019/534 Cybersecurity of 5G networks[27].

The digital politics of the EU must be adequate for the digital transformation and data economy. The European Union, since its founding act, has always looked to the future, and the future is to understand and regulate technology. The European Commission aims to create an inclusive digital society that benefits from the digital single market, seeks to build smarter cities, improve access to e-government, eHealth services and digital skills, which will allow a truly digital European society. It is taking concrete actions for the development of cross-border digital public services, and apportioning them major significance in the future of the European Union. Intelligent digital technologies, such as the development of autonomous automobiles or Smart Cities, are being strongly supported by the Commission.

---

[26] A European Agenda for the collaborative economy. Daily News 02/06/16.

[27] European Commission (2019): Recommendation (EU) 2019/534 Cybersecurity of 5G networks.

Technology involves everything and is eminently global in nature; therefore, it is increasingly difficult to regulate everything that concerns, so we must join forces and regulate in a coordinated and collaborative manner to allow their development without losing sight of the rights of all citizens.

However, this is not only a European task, but the whole world should also tend to this kind of coordination and cooperation to create a harmonization of regulation for the technology industry, helping to build an effective framework to protect consumers, to improve transparency and increase the cross-national comparability of corporate information.

In a digital world without borders and where everything is connected, global regulation should also be connected and coordinated to avoid the lack of protection of consumers.

4. CONCLUSION

> "*We can only see a short distance ahead, but we can see there is a need for that*". Alan Turing, Computing machinery and intelligence.

This phrase by Alan Turing, a character very much linked to technology, perfectly serves to describe what lies ahead, the challenges we have to face, knowing that our work as regulators can tremendously mark the future of technology. It can serve as a catalyst, encouraging development, or be an obstacle, a break that derails the process, since the advance of technology will not stop.

Therefore, we must find a way to adjust the balance and promote the development of technology, while we adequately protect the rights of the consumers and users of these new products and services. We have to avoid fraudulent actions arising in this new global ecosystem and provide a framework of broad legal security that benefits every participant in the industry. After the study, we believe that the best way to approach these objectives is through regulation: neutral, flexible, qualified, experienced, and coordinated among the different countries.

AUTHORS

INDREK GRAUBERG is the Director of the School of Governance, Law and Society, Tallinn University, Estonia.

ENE GRAUBERG is Estonian logician and philosopher, former Rector of University Nord and currently Professor emeritus at the School of Governance, Law and Society, Tallinn University. She is also the founder editor of East-West Studies Journal.

HEIKI LINDPERE a former Rector, Vice-Rector for Research and Professor of Marine Law at Estonian Maritime Academy. He is currently lecturer of International Law at the School of Governance, Law and Society at Tallinn University, Estonia

ILMAR SELGE is a former Dean at the Faculty of Law for University Nord and currently an Associate Professor of Public Law at the School of Governance, Law and Society at Tallinn University, Estonia

ÁLVARO GARCÍA FERNÁNDEZ is a PhD student at the University of León (Spain). He specializes in corporate law. He is passionate about the regulation of new technologies. In 2019 he conducted a research stay at Tallinn University to investigate about blockchain regulation.