Contents

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Editorial Introduction

Professor Massimo La Torre
Editor of the Journal

This first issue of a new series of East-West studies presents the proceedings of the international conference held at the University of Tallinn on 28 and 29 October 2021. The conference was titled *Still a Cold Monster? Rise and Decline of Modern State*, and it was sponsored by SOGOLAS, the School of Society, Governance and Law of the University of Tallinn. The topic discussed was the role of the state in an increasingly privatised, globalised and digitalised society. In the last thirty years, national societies have been undergone profound transformations. The first was the promise of a new global order, inaugurated by the end of the Cold War and the collapse of the Soviet Union. A new age of peace and global conversation was opened—or so it was universally believed. We thus observed a dramatisation of commitment to international law in internal affairs and the supranational dislocation of some of the traditional tools of national sovereignty. Markets were liberalised, and capital could flow freely across borders without being hindered by tariffs or borders. Within national societies, state intervention in the economy quite quickly withered away. We also observed the emergence of a third industrial revolution, one where computers and robots are replacing human beings, machines and motors. Rules seem to be replaced by algorithms. Digital platforms and the internet are irretrievably the space where people conduct their conversations and meetings. Now, these platforms are not publicly, but rather privately run, and managed and owned by tycoons, rapidly crowned as oligarchs. The state in this panorama seems to be losing its traditional grasp on societies and, with it, its proper function and special legitimacy.

Could one then say that we are facing the death of the state? This is the question we were confronted with in the Tallinn conference, a disquieting question that serves as the red thread of all the articles we are publishing in this special issue. The other question, related to this one, is the following. If we are losing the state, should we consider this loss as something determinable to our civil condition? In many doctrines and in several political theories, the state has been seen as a kind of "cold monster" (to use Nietzsche's words). People were somehow repelled by the bureaucratic and abstract nature of state organisation, being also worried about its asserted monopoly of violence over society. Should we now repeat Nietzsche's curse on the state? Once we are losing it, should we be happy about such an epochal loss? Are we not losing, together with the state, basic goods of social life, such as public care, social security, welfare, and last but not least, sovereignty— "government of the people, by the people, for the people," in Abraham Lincoln's words? Could we do without a state in the frantic and perilous arena of international relations? The final question is thus: Is the state still a cold monster? Or should we review our curse upon it, or our suspicion of it, and rehabilitate its role within society and in the international arena?

Now, this is the ground we have trodden at the Tallinn conference, and this is the theme this special issue addresses. The answers to our three questions

remain unanswered. Nonetheless, in the conference, there was some basic consensus about what is a plausible thesis in the brave new world we are approaching in the twenty-first century. The state as the holder of the public sphere and as the protecting agency of public goods, as a space where not only private interests and whims, but rather shared care and a reasonable, civic conversation, have the upper hand: such a state still has a lot to say and to contribute to a civilised and free mode of human coexistence

Can the State Carry Out Such a Thing as a Digital Transformation?

Daniel Innerarity

It is commonly accepted that we should strive for a digital transformation of society: it is one of the European Union's principal strategic guidelines, there are now many ministries that employ that name, businesses and universities have placed people in charge of the initiative and, even in families, our children—acting, as it were, as our Chief Digital Officers—offer advice about new and sometimes hostile digital environments. It is worth asking whether this outpouring of goals, designations and positions was preceded and accompanied by corresponding reflection on what a transformation of this size means and whether we have correctly understood the relationship between technology and society. The failure (or incomplete success) of some of the transformations that have been attempted can be explained precisely because the attempted interventions were external, infrequent or insufficiently negotiated with the society they were meant to transform.

When one wants to realise a transformation, one must first understand what it consists of, what differentiates it from the things that merely inject money into a sector or focus on a flagship project, without realising the in-depth changes that were the goal. In this regard, it is not helpful to focus on "disruption," which suggests that technological innovations elbow their way in and are nearly ungovernable. It is somewhat facile to make declarations about the end (of work, even of that which is human) and about the advent of new eras. In reality, social changes are less abrupt and more given to continuous and shared intervention than to a type of magic that makes things appear and disappear. Digital transformations demand reflection about the problems that exist, the structures that should be digitally transformed and the ways in which people, the actors and the corresponding institutions should be involved. Let us not forget that the true subject of digital transformation is society; what must be digitally transformed is society, not the State.

When we talk about transformation, we are referring to something more radical than an evolution or a development where an object, which remains identical, experiences a slight modification. Transformative processes are those in which the object itself undergoes change. A digital transformation does not entail the transposition of an analogue product into a digital one or of an analogue process into one carried out through digital means. If it is a transformation, there will be a change in both the product and the process. It will not be the same thing done in a different way, but something distinct and new, whether it is an administrative act, a communication, teaching and learning, attention, cultural consumption, privacy or business. Anyone who believes that digitalisation will entail doing the same thing as before, while only

the process changes, is mistaken. In the history of humanity, the movement from one means to another (orality, writing, digitalisation) has always also meant a profound change in the thing being done (reading, buying, teaching, governing, entertainment). Communications have changed with email, not only in velocity but also in intensity and quality. When computers or virtual classes are introduced, they are not simply another method; they imply profound transformations in educational activities. Digital administrations modify the relationship between citizens and the State when it comes to proximity, accessibility and trust, to the extent that the technology may represent very different things for distinct population groups and be seen as a facilitator or a barrier.

Social transformations have two enemies: poor comprehension and poor implementation, but I would like to emphasise the first of these. Many failed transformations stem from a conceptual error, from poor comprehension of what is at stake. We think of technology as a totality that is only accidentally related to society, that "impacts" society, that must be "controlled," to which some ethical components should be "added" to humanise it, and in this way, we lose sight of the extent to which technology and society are connected. This dualism leads to various errors. The utopia that believes that technology solves everything and the dystopia that sees nothing in it but danger have a profoundly ahistorical vision that localises power only in technology and not in the way people appropriate it. This diagnostic error also explains the fact that the ethics of technology are dominated by an externalist focus, envisioned as a type of "guardian of the limits." If we thought about technology as a complete reality, intertwined with society, then ethics would not mean a protection of "humanity" against "technology," but would consist of experiencing and evaluating technological mediations, with the goal of explicitly configuring the ways they contribute to shaping the subjects in our technological culture (Verbeek, 2011, pp. 40–41). There are no purely technological solutions for complex problems, such as those that are raised and addressed by digitalisation. Technology is socially constructed and acts in social contexts where its validity is ultimately at stake.

Unlike a planning process, transformation is a procedure with open results. It is not fully predictable how society will finally appropriate governmental actions focused on that process. The social transformations that were put into motion by digital hyperconnectivity are not predetermined by those technologies. They emerge from the ways in which those technologies and the practices that develop around them are culturally understood, socially organised and legally regulated. Anyone who wants to change a sociotechnical system needs to understand both what the technological problem is and the social context in which the problem should be addressed. We need to understand the technology, and we need to understand society, but most importantly, we must understand how the two things interact. We should think about technology and society at the same time and examine the ways they are interconnected.

The fact is that society does not behave neutrally when it comes to digitalisation. It is not an inert space that meekly receives technopolitical prescriptions. Society is not a "start-up," an experimental model that can be expanded upon later. Instead, it is the space in which each of the decisions taken about digitalisation has its impact, sometimes with irreparable results. Digitalisation makes more acute the thing that always happens when a technology is introduced in society: the result is rarely exactly what was expected and that is largely due to the vitality of society, which makes the technology its own in unexpected ways.

Research from the last thirty years about the sociology of technology has developed a series of concepts about the relationship between technology and society that are very relevant for the debate about digital transformation. In the first place, we should stop thinking that technology is something that is present in a complete fashion, at our disposition, offering itself unquestionably as the best solution for a permanent problem, or threatening us, like something that has an impact on us but that we are unable to configure in any way. Technology is always the result of a process of negotiation between different technologies, economic interests, social expectations, legal requirements and the political configuration. This is the case for railroads, refrigerators, bridges and algorithms (Bijker & Law, 1992). Another contribution is the concept of "affordance" to explain that technology does not determine social structures but that it opens possibilities of action (Hutchby, 2001, p. 444; Latour, 2017, p. 124; Evans et al., 2017, p. 36). This concept refers to the structural relationships between artefacts and the users who make possible or limit certain actions in a given situation.

In the context of digital transformation, people and computers are entering into an intriguing symbiosis. It is not only that algorithms act upon us, but that we act upon algorithms. When we use algorithms, we modify and reconfigure them. The algorithms of machine learning are developed in an environment that is social, not geological, so they are continually being shaped according to the user's input (Bucher, 2018, pp. 94–95). From this standpoint, the most important thing is not only the algorithm's effects on social actors, but the interrelationship between the algorithms and the social acts of adapting them: "a recursive loop between the calculations of the algorithm and the 'calculations' of people" (Gillespie, 2014, p. 183).

The fact that algorithms can be used to resist the power of those who programmed them does not mean that perfect balance is restored between the two entities, but that technological power is not employed upon passive subjects. Those relationships, no matter how asymmetrical they may be, are dynamic, incidental, socially constructed and constantly renegotiated (Bonini & Treré, 2024). In the end, the social power of algorithms—especially in the context of machine learning—stems from recursive relationships between people and algorithms. These are encounters that do not take place in a single direction; people limit and expand the ability of algorithms. The activity of an

algorithm can be read as the outline of the ways in which its encounters with the social world are evaluated. Here, we see a clear manifestation of Foucault's idea that power is a transformative ability that always implies forms of resistance (1976).

We are, therefore, facing the great challenge of how to bring technological development and social realities together. Technology does not prescribe only one possible development; in its encounter with society, many options arise: it is contested, it is used for something other than what was foreseen by its designer, inclusive uses are demanded. In sum: a dialogue of options is produced that suggests technological pluralism, a diversity of ways of viewing technology through its social implementation. A good indication that this is what happens with technologies in our societies is that, at a global level, if we consider what the United States, the European Union or China think and do with artificial intelligence, digitalisation acquires formats that are very distinct, with models that bring together technology, the state and the marketplace in diverse and even antagonistic fashions. The project of introducing artificial intelligence in Spanish or other languages is an example of the potential pluralisation of technology: it would foreground different visions of the world, and there would be increased accessibility for many people. If we talk about political or moral pluralism, we should also talk about "technological diversity;" about pluralism in relation to technology, which is neither unquestionable, immediately applicable nor unique.

The reason many transitions, in this and other areas, have failed is found in the mechanical and vertical application of new requirements without sufficient attention to the diversity of people affected and without including them in the process. The case of the ecological transition and the resulting protests by farmers reveals how hard it is to reconcile what should be done and the ramifications for a particular sector of society. Failed transformations stem from not developing a successful process of negotiation that would lead to a sustainable and satisfactory solution for everyone. Resistance to change should not be interpreted as some perverse type of boycott; instead, it often reveals that those who are promoting change have not successfully facilitated it, negotiated it and made its advantages clear to everyone.

As with any other type of transformation, we must examine the things that could make the digital transformation slower than ideal and the undesirable effects that could be produced by careless implementation. It is often the case that the imperative for digital transformation makes us value velocity over results, reaction over reflection. Its promoters tend to have an "action bias" that leads them to act before understanding. This leads to speed without reflection, adaptation without decision-making, direction without agreement, technology without society.

Solutions are often sought not *through* technology but *in* technology, making it an end in and of itself. I am referring to an immediate and unthinking "application" of technology to social problems, with the hope that this will lead

to a quick and seamless resolution. Digital transformation provides many examples of technology's social blindness, such as: the error of believing that a digitalised administration is necessarily a closer administration; trying to respond to increased demands for healthcare only with health telematics; providing personal computers in schools or creating the virtual classrooms that were necessary during the pandemic without developing the corresponding training needed by students and teachers; encouraging companies to develop digital business models regardless of whether they have the necessary capacity and whether there is a market for them. But it is worth keeping sight of the fact that if technology alone is not the solution, neither is it the problem. The problem is a lack of thoughtfulness when it comes to bringing technology and society together. There are digital divides and other types of inequalities that the digital transformation can either correct or aggravate, depending not on the nature of technology, but on the policies with which it is implemented.

As with any other profound transformation of society, digital transformation demands at least two things: thoughtfulness and inclusion. Social transformations are produced less through speed than resulting from the quality of a continuous process. It makes no sense to gain speed at the cost of supressing moments of reflection, debate and inclusion. We cannot forego the necessary step of analysing problems and needs before beginning the process of negotiation, without which there will be no successful social transformations. The processes of digital transformation should be configured in an inclusive fashion. We must keep in mind the heterogeneity of the social groups involved in or targeted by the strategy of digital transformation: rural and urban environments, different generations, people with a range of educational levels, diverse economic situations and the gender inequalities that condition access to and use of technology.

The difficult crossroads faced by globalisation efforts stem from the fact that, on the one hand, we need to accelerate our processes to keep up with rapid technological developments, but on the other hand, the necessary negotiations (legislative, regulatory, democratic) are increasingly complex, which slows down the time for action. We can bemoan this imbalance, but we should not forget that without an inclusive social debate, every political initiative is condemned to a lack of understanding and support from society, both of which are necessary for a true digital transformation.

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Politics and Antipolitics in the Modern State: Reflections on the French and American Experiences

Dick Howard

The legitimacy of the modern state in the United States and in France is paradoxical; both claim to have been founded on the experience of *revolution*, a radical break with their historical past that is realized by their creation of a *republic* based on equal rights that are valued as universal. In both cases, this revolutionary foundation made solidification of republican institutions problematic; normal discontents, conflicts of interest and ideological differences did not dissipate over time as the optimists had hoped; the universal principles that founded the republican state could be invoked to transform particular griefs into universal wrongs whose eradication demanded the refoundation of the republic on which the state was founded to denounce the triumph of special interest and to demand thefoundation of a new constitution that would assure true equality. This dialectic between universal principle and its particular realisation was illustrated in Hegel's analysis of the French revolution in the *Phenomenology of Spirit* (1807); the philosopher had little to say about its American cousin, but it retrospectively clarifies some problems implicit in its republican institutions. In both cases, the conflict between universal principle and its realisation was resolved politically by the emergence of *democracy*[1]. However, in the French case, their political revolution sought to create what I will call a *democratic republic*, whereas the three decades following the Americans' victorious war of independence from the British monarchy gradually instituted what I will call a *republican democracy*. I will explain and illustrate why this apparently semantic distinction has implications that are both analytic and political.

I.

The dialectic diagnosed by Hegel was present almost from the outset of the French revolution; the abstract universality of the revolutionary triad–liberté, égalité, fraternité—formed a stellar constellation that could not be found in terrestrial institutions. The principle of *liberté* seems to have been localised first

[1] As implied by the allusion to Hegel, my concern today will not be to ask how the contemporary challenges to democratic legitimacy have appeared in both states, particularly since 1989. The major challenge in the U.S. comes from the Black Lives Matter movement, which has been given important intellectual legitimacy from the so-called "1619 Project" initiated by the *New York Times,* which claims that America's republican democracy has been vitiated since that date, which marks the arrival of the first slaves in the colony of Virginia. Those claims have been challenged; the facts may be true, but their political significance is questioned. Meanwhile, a radical right wing, identified with Donald Trump, has become another threat. As to France, aside from the nearly year-long agitation of the "Yellow Vests" demanding a renewal of direct democracy in response to the youthful challenge embodied by president Macron's "Jupiterian" disdain for everyday politics. The organised left continued the fragmentation that followed the elected socialist François Mitterrand's 1983 "betrayal" of the quest for a democratic republic in favour the mirage of an economic and financial unitary "Europe." Once again, these facts exist, but their political significance is open to challenge. Conceptual clarity is required prior to political interpretation.

in the political sphere; the *nuit du 4 août* eliminated rule by aristocracy, but social privilege returned soon enough in the shape of a commercial, then an industrial, and more recently an intellectual aristocracy. As a result, political *liberté* shaded into (the quest for) social égalité; the promised political *liberté* was an empty form whose realisation depended on material conditions for its practical exercise. Equal voting rights were only a first stage during which various forms of political equality—limited and, and male-only (in spite of protests by women)—were experimented with; permutations of material equality were tried, before the idea of an equal *status* for all persons in the eyes of all were recognised—although today a new dialectic threatens to transform this new equality in the form of "identity politics." In the French case, the same dialectical (or 'paradoxical') logic that led *liberté* in practice to shade into recognition of social *égalité* turned that demand toward the search for that *fraternité* that seemed for a moment to have been realised on July 14, 1790, in the *Fête de la Fédération*. The contradiction between universal claims to freedom and equality seemed to have been overcome for a moment when the new principle found its incarnation in the masses gathered on the Champs de Mars. Our German Virgil's chronicle of the adventures of the dialectic takes up the next twist of the story with the account of the *fraternité-terreur* when universal brotherhood was imposed from above, by the humanitarian invention of Dr. Guillotin, or its threat, which revealed again the gap between universal principle and its realisation. Thermidor brought the triadic constellation of principle to earth; but like the moon, it would illuminate the night over the next centuries, and not only in France.

The century of French history inaugurated by its revolution was eventful; its broad outline illustrates the dialectical dilemmas that were condensed in its early years. The years of conquest that, at least at the outset, sought to spread the principles of 1789 across Europe were also those that transformed Bonaparte into Napoleon, the republic into an empire for an expansion without geographical limit, unified only by the person of the emperor and the legitimacy incarnated in armed masses represented by the chain of his victories. When Napoleon's attempted imperial resurrection during the *100 Days* was finaly doomed with the defeat at Waterloo, the politics of the restored Bourbons tried to pretend that the revolution had left no traces, ignoring the lunar reflection of the principles of the revolutionary triad that did not disappear because its realisation had failed, leaving its ideals intact. . Political freedom was demanded now by *social* interests that had benefitted from the previous forms of material equality; they in turn would find new fraternal forms that were reinforced while widening their conquests. This was the moment of republican liberalism when, in 1830, the dreams of political Restoration were awakened to the social reality first represented by the liberal Orléanist monarchy, which promised a new kind of *social* prosperity identified with the name of Guizot and, still more, with his slogan, *enrichissez-vous*. Many tried: some succeeded, others were excluded. But the excluded were not alone; they were all excluded together, their condition was equal, their exclusion political, and brotherhood was a rare commodity in the

marketplace… save among the ideas competing with one another to represent the triangle of revolutionary values.

In February 1848, a renewed revolution emerged as the excluded found that their social interests coincided with their demand for political rights against monarchical exclusivity. While this revolution introduced universal suffrage, it was only briefly able to realise a social transformation: its promise of the "right to work" remained an unfulfilled wish. The failure of universal suffrage without a material foundation engendered false fraternity among the electors, who cast their lot with Louis Napoleon Bonaparte, claiming legitimacy as the nephew of Napoleon. False hopes were quickly dashed by armed force when—only months later, in June 1848—workers without work banded together to demand the promised equality. The jaws of the dialectic had in fact remained open because the proponents of democratic suffrage had written into their republican constitution a provision that they imagined could ensure political equality, simply by treating the elected president like all other citizens by making him ineligible for a second term in office. Their institutions established the principles governing the office (of the presidency) without considering the particular character of the officeholder. Although democratically elected, the nephew of Bonaparte still nourished imperial dreams; as his term in office neared its end, he launched a coup d'état whose success was crowned by a popular referendum submitted to a defeated electorate who harboured neither the political hopes of February 1848 nor the social vision of June. The demise of the Second Republic was quickly followed by the years of the Second Empire (1852-1870). The cycle was aptly described by Karl Marx, a worthy successor to Hegel, from whom he had learned to appreciate the paradoxes of dialectics: "[t]he first time is tragedy, the second is farce"was Marx's lapidary summation of the French political dilemma. The farce came to an inglorious conclusion eighteen years later when the emperor, facing renewed political demands from those who had benefitted socially from the imperial expansion, embarked on an adventurous war with a newly united Germany, which ended with the disastrous defeat at Sedan.

The vainglorious French emperor was taken prisoner, but the victorious Germans seemed to have overplayed their hand by not recognising the attempts by moderate republicans to re-form the republic: faced with the German demands to disarm, the working class of Paris refused to surrender. Their self-governing defensive unity, the *Commune*, took over political leadership while also introducing egalitarian reforms. Although it lasted only 72 days before being crushed in blood, the Commune left its mark in French history—and beyond. Karl Marx's pamphlet, *The Civil War in France*, written during these events, claimed to see in the Commune "the *form*at last discovered" in which the proletariat could liberate itself; it was a form of self-government in which the opposition between the political state and civil society had been overcome. Because Marx's claim was only formal, it was easily forgotten by the reformist leaders of the new Social-Democratic leftist parties drew from their experience as industrialization proceeded apace and a new century began; on the contrary, they insisted that the republican political institutions provided the necessary framework within which

social reform would become possible.[2] The time for true revolution seemed to have passed for four decades when, to everyone's surprise, world war broke out in 1914, only to be followed—(in retrospect: dialectically)—by the Bolshevik seizure of power in Russia in 1917—which itself claimed legitimation as a phase in inevitable world revolution. A crucial section of Lenin's explanation of the revolutionary goals of "soviet" institutions in his 1917 pamphlet, State and Revolution, returns to the unfinished experience of the Paris Commune, stressing particularly Marx's idea that it was the "form at least discovered" for liberation of the proletariat. *This is the root of the idea of a "democratic republic,"* it seeks or claims to have overcome the opposition between state and society, between politics and economics, and between leaders and followers. With the democratic republic, the jaws of the political dialectic are to be finally closed as form and content, ideal and reality are united. *And,* with its failure to realise these promises, the illusory dialectical idealism of Hegel can be—as the young Marx had claimed in his early philosophical development—stood back on its feet.

This conceptual history of the French pursuit of a *democratic republic* suggests that it was perhaps no simple accident that communism in its Bolshevik guise found deep roots in France; Stalin's totalitarian regime seemed to be both willing and able to realise the goals of the most radical phases of the Jacobin Terror. When Stalin explained the need to strengthen the state by means of ruthless purges, whether accompanied by show-trials or not, as the precondition for its abolition, it was not only French leftists who could easily understand the scene playing before their eyes, whether or not they supported its means (i.e., Bolshevik and totalitarian), or even its goals (i.e., "communism"). For the same reason, when the Soviet Union showed not only its economic feet of clay but the fundamentally totalitarian political foundation on which it was built—being both anti-democratic and anti-republican at once—the resulting so-called "Solzhenitsyn shock," coupled with the new popularity of anti-totalitarianism and the quasi-disappearance of the Communist party (which was not the result of François Mitterrand's clever politics), was deep and ultimately definitive. Today, the political theatre is thin, *aimless* and unmoored, absurd in form and content; it is as if Karl Marx has been replaced by Luigi Pirandello, save that there are more than six characters searching for an author(ity). The quest for a democratic republic culminates (as Lenin, but not Marx, wished), in the triumph of *antipolitics*; anarchy in the guise of democracy. In short, the same legitimation that explains the rise of the "democratic republic" is a powerful factor in its present-day decline. *Anti-politics is ruled by the irascible goddess known as TINA, "there is no alternative," accompanied by the nostalgia for an imagined past whose chthonic*

[2] The French Third Republic would be founded only in 1877. Its political structures would resemble in some ways the institutional forms of the American republic; but the energies that set into motion the political dynamics of the Third Republic were distinct, as suggested in the following two paragraphs. C.f., Stephen Sawyer's forthcoming *Demos Rising,* as well as the earlier volume of the trilogy that appeared in 2018, *Demos Assembled*.

solidity offers an anecdote to anarchic individualism or technological wish fulfilment.

At the same time, anti-politics is a *modern* form of politics! It is today referred to by pejorative labels like *populism*, *identity-politics*, or twentieth century communist or fascist forms of *totalitarianism*, but it can also take an apparently more benign form referred to by concepts like *neo-capitalism, illiberalism,* or formalist *constitutionalism.* To clarify the reasons that anti-politics is indeed a form of modern politics, however paradoxical the claim first appears, I will return to the origins of modern politics, which, as explained above, can be illustrated by the American and French revolutionary experiences.

II.

The origins of the two revolutions were treated together as products, as well as expressions of a so-called "Atlantic Revolution" that heralded what the American historian R.R. Palmer described in his two-volume [NO ITALICS HERE! study as *The Age of Democratic Revolution* (1959 and 1964). Palmer's work became a classic of—as well as an expression of Cold War historiography. As an accomplished academic historian, Palmer was looking for historical similarities rather than principled differences. Nonetheless, such differences were apparent to contemporaries such as Edmund Burke, whose insights were made explicit for a wider public by the conservative German diplomat Friedrich Gentz in his account of the "*Origins and Principles of the American Revolution, Compared with the Origin and Principles of the French Revolution*" (1800). The book was immediately translated by an American diplomat in Berlin—John Quincy Adams, son of the American president, and later himself elected president—as a weapon in his father's losing re-election campaign against Thomas Jefferson. The details of Gentz's work, whose debt to Burke's *Reflections on the French Revolution* was evident, are of no present concern. It is more important to stress that his American translator was fully aware of the paradoxical antinomies found in the course of the two revolutions that became evident in the battle with the rising Jeffersonians. One such antinomy is expressed in the difference between the French attraction to the idea of a "democratic republic" and the Americans' at first unintentional creation of what I call a *republican democracy.*

Compared with the ambitious social projects that drove the French revolution, the American revolution appears to be, as Gentz argued, a "defensive revolution." The colonists thought of themselves as "true Englishmen" who had expatriated themselves to virgin lands free from the corruption of an aristocratic monarchy; their self-defence was an affirmation of the "rights of an Englishman" against the corruption of their colonial masters. This consanguinity of principle was expressed in the largely non-violent revolt that played out in the 13 colonies in the decade between the end of the Seven Years' War with the Treaty of Paris in 1763 and the outbreak of armed conflict officialised by the "Declaration of Independence" in 1776. It was no accident that the just-concluded continental war had been called the "French and Indian War" by the colonists. It became clear that wars change their participants and goals, transforming the ostensible

principles for which they were fought. A clear example is found in the life of George Washington, who was among the defeated British generals at Fort Necessity in 1758 became commander-in-chief of the rebel armies in 1775 to whom the British surrendered at Yorktown in 1781, effectively recognising American independence with the same Washington as its first president.

The political form adopted by the new nation was at its outset a "confederation" of independent former imperial colonies, jealous of their independence; their de facto constitution was defined by the "Articles of Confederation." Their composition was diverse as were their reasons for rebellion: some were predominantly agricultural, based on small self-sufficient farmers, others slave-based plantations, while artisan manufacturing took place in towns, and growing cities were oriented to foreign commerce (not infrequently smuggled, as in the case of tiny Rhode Island, which, not by coincidence, would be the last to ratify the federal constitution proposed in 1787). These economic differences do not explain the instability of the confederal government; its problem was political: the autarchic self-sufficiency of each of the newly independent states that not only led to instability but offered a temptation for foreign invasion—the British were still in Canada, the French in Louisiana, the Spanish in Florida and Mexico. Determined to act, leaders from the states met in Philadelphia in 1787. Their ostensible and public goal was to reform the Articles of Confederation; but, as the hot summer months wore on, their deliberations proposed a new, *federal* constitution. I will return to its structure in a moment; more important was their recognition that *popular* ratification in each state separately was necessary to assure the legitimacy of the new institutions. As in the debates leading from protests in 1763 to the demand for independence in 1776, anticipation of the weight of the choice and a relatively large literate public encouraged the circulation of a vast number of pamphlets, often reprinted in local newspapers and commented on in others. The opposition accepted (unwisely) the label of "Anti-Federalists;" their criticisms turned largely around the purported anti-democratic features of the new institutions. The major arguments of the federalist supporters were presented in a series of 85 essays published under the classical-republican pseudonym of "Publius" by Alexander Hamilton, James Madison and John Jay. Tactically adept, the articles had first appeared in newspapers published in different states before being collected as a unitary argument in *The Federalist Papers*. As a result of this public process of deliberation, the ratification debate was already a national national concern before the vote in the individual states; the legitimacy of the new, federal republic was based on this deliberative democratic expression of popular sovereignty. The pseudonymous identity of the author, *Publius*, strategically chosen, incited political debate with the inward-directed Anti-Federalists, who claimed to support democratic immediacy against the republican constitutionalism.

The institutional structure of the new constitution could be called "defensive," reflecting the struggles for independence at the birth of the new republic. The members of the Convention were well versed in classical political theories and Roman history; they were also products of the scientific age of

Enlightenment, which offered the political ideal of government as a dynamic balance of forces able to produce what the historian Michael Kammen called "a machine that would go forever" without the arbitrary power of a ruler. They sought compromises that would satisfy the norms of political theory and local interests that could not be ignored. Their goal was to create a "government of laws, not of men." At the same time, the vision of a continental future that had arisen during the struggle for independence remained a latent presence.[3] In effect, the newly independent nation was being transformed from "these united states" into "the United States." This fact would take on a growing importance, particularly as the powers of the presidency grew to form a so-called "imperial presidency" after the mid-twentieth century[4].

The constitution proposes a delicate series of institutional "checks and balances" that can be used and strengthened by each of the countervailing and separate powers that are joined together in the unitary federal sovereign republic. Although this structure of unity-in-difference was clearly marked out, one practical feature in the constitution marked a significant innovation: the provision for amendment proved to be an essential feature of the democratic governance of the "republic of laws."[5] This provision played a significant role in the first years of the constitution. Madison came to accept one of the major Anti-Federalist critiques; he proposed a series of amendments to the constitution known as the "Bill of Rights."[6]

Another apparently anti-democratic feature of the new institutions was the existence of a senate, which had classically been the aristocratic branch of government in the classical vision of the Roman republic. What place did a senate

[3] It had been reaffirmed a year earlier by the outgoing acts of the Congress of the Confederation, the "Northwest Ordinance" that outlined political principles for the incorporation of territories as yet only thinly settled.

[4] During the ratification process, it was assumed that the executive would not dominate over the other powers; the fact that it was widely assumed that George Washington – who, like Cincinnatus, had returned to his farm (sic: plantation) once the emergency had ended – would become president. But already with the presidency of Thomas Jefferson, the institution showed a surprising capacity for initiative, nearly doubling the American landmass with the Louisiana Purchase in 1803.

As the century wore on, both republics took on imperial ambitions; and both retained them into the 20th century. Was this ambition connected to the universalism of the republican vision which had no place for the messy compromises that came with the recognition of other powers? As both have entered the 21st century, they have been faced with the need to recognise the rights of others, which has posed problems for the legitimacy of domestic political choices.

[5] These ideals of a "machine" and of a "republic of laws" must have shocked classical political theorists, whose credo had been renewed as recently as Montesquieu's *Spirit of the Laws,* which insisted that a republic must be based on the *virtue* of its citizens.

[6] It should be noted that this Bill of Rights defines *political rights*; it is not a Declaration of the Rights of Man that are taken as pre-existing the constitution (as defined by the preamble of the Declaration of Independence. As a result, these rights appeared to be rights belonging to the states; only after the Civil War had resolved the question of the "property rights" of slave-owners under the 14th amendment to the constitution (1868) did the rights pertain explicitly to individuals.

have in a democracy, asked the Anti-Federalists. The traditional answer is that the senate is needed to restrain impetuous action by the popular House; it was to act like a saucer, cooling the heated brew contained in the cup. That reply only seemed to confirm the anti-democratic character of the constitution. The Federalist Papers' explanation turns on a *distinction between direct and representative democracy*. Writing as Publius in *Federalist* #63, Madison pointed out that in the classical constitutions the represented classes were assumed to be wholly present (i.e., not just represented) in 'their' specific institutions, whereas the sovereign people had no place or presence. The American constitution, Publius argued, is different: the people are represented in all institutions;[7] they have no unique (institutional or physical) representative; this omnipresence of a non-localisable *demos* is the motor that constantly renews the democratic dynamic. In this way, the republican democracy makes use of the idea of *political representation*, which, like the constitution itself, is never an exact reproduction of the process it represents; its nature is subject to debate and, eventually, to amendment. As a form of government, political representation does not pretend to *incarnate* the sovereign people but to be a reflection of – and on – not only the present state of affairs but also of a desirable future that is arguably part of its potential reality.[8] Two hundred fifty years of republican democracy in the U.S. can be interpreted as a series of dynamic conflicts among the separate and distinct powers of government and the diverse forces that animate them.

A final illustration of the working of the American form of a republican democracy will help illustrate the actual functioning of the republican democracy at its origins. The unanimity supporting the presidency of George Washington began to fracture with the choice of his successor. The election of 1796 was contested by two inchoate parties, which would congeal in 1800 to form a bipartite *system*, a unity in its division. The Federalists (led by vice-president John Adams) and the Democratic-Republicans (led by Secretary of State, Thomas Jefferson. The development of political parties had not been anticipated in the constitution; the bitter rivalry of their partisans appeared to contemporaries as a threat to the republic. The election of 1796 reflected the danger; Adams became president, but his rival, Jefferson, who had received more votes than Adams' co-candidate, was awarded the vice-presidency.[9] As vice-president, Jefferson had little power; but his partisans, led by James Madison in the House of representatives, played a role in blocking many of President Adams' proposals. The election of 1800 was therefore decisive, bitterly contested, overlaid by ideological venom reflecting the

[7] Among these institutions are included the individual states, as well as other constituted civic institutions. This aspect explains frequent appeals to state governments as "laboratories of democracy."

[8] This feature of representation, which is denied by radical proponents of direct democracy, can be said to be the *utopian moment* in the institutions of republican democracy.

[9] This constitutional anomaly was repaired by the XII amendment to the constitution, ratified in 1804. It would be the last amendment agreed to before the end of the Civil War in 1865.

continental conflict between "Jacobins" and "Monarchists." The Jeffersonians' victory appeared to polemicists as the "Revolution of 1800."

The application of those French political categories to American institutions should not obscure the fact that power passed *peacefully* from the Federalists to the Democratic-Republicans; the vanquished did not disappear from the political stage in a violent *coup*. This was an innovation in political history; it reflects the way in which a unitary republic can make room for the democratic activity of the citizenry. The novelty of this republican-democratic dynamic was not clear to the actors at the time—for example, Jefferson's partisans still called themselves "Democratic-Republicans"—but it would become explicit in a decisive decision in which the Supreme Court affirmed *its* role as a distinct institution whose *power* derived from its guardianship of the *principles* of the constitution. The occasion was provided by the case of *Marbury v. Madison,* in 1803. In the waning hours before Jefferson took the oath of office, Adams made several "midnight" patronage appointments; the incoming secretary of state, James Madison, refused to certify these nominations, including that of Marbury. The conflict came before the high Court, whose Chief Justice, John Marshall, had been a staunch Federalist politician before his nomination by Adams in early 1801. In his new judicial role, Marshall could not be seen to act as a partisan; he had to defend the constitution, which was the basis of the court's own power.

Speaking for the Court, Marshall argued first that Madison had been wrong to refuse the certification because it is the constitution, *not the temporary majority*, that expresses sovereignty in a republic. Indeed, according to Anglo-American common law, "where there is a right there is a remedy." However, the ruling continued, the Supreme Court was not the proper agency to *execute* that remedy; the role of the court is *limited* to the defence and protection of the constitution. And, concluded Marshall, because the law to which Marbury appealed for remedy (the Judiciary Act of 1790) itself violates the constitution by giving excess power to the Congress that voted its passage, there is no judicial remedy available to Marbury. Marshall's reasoning has come to be accepted by jurists; the constitution itself, *not* its constituent powers *nor* a temporary electoral majority is the guarantor of the republic.

In effect, there seems to be no explicit constitutional protection for democracy as real or realizable in itself, as was the effect of the Court's refusal to deliver his lawful commission to Marbury; on the other hand, the citizenry can fall victim to the temptation to equate a *temporary* majority opinion with the will of the *demos* which is never in reality a single unified whole. Both of these options become forms of *antipolitics*. Constitutional structures and juridical reasoning cannot stand on their own; their *legitimacy* ultimately depends on political choices and citizen action. In a word: the symmetrical political institutions seen in the French attempt to realise a *democratic republic* and present in America's republican democracy hold up a mirror that illustrates the ways in which each of these states could suffer a *loss of legitimacy*. I conclude with a well-known anecdote from the time of the American Founding. Benjamin Franklin was a

delegate to the constitutional convention, whose proceedings had taken place behind closed doors. As the delegates emerged from the final session, a woman approached Franklin with a question: "What kind of government are we to have?" The elderly sage replied simply: "A republic, if you can keep it."

III.

Benjamin Franklin's political imperative may have been coined in the late 18th century; but it remains a , and not only for today's Americans—whose institutions were maintained by the (perhaps antipolitical) intervention of the Supreme Court in the contested election of 2000 but were threatened only two decades later by the antipolitical demagogy of former President Donald Trump and his MAGA partisans in 2020, who remain an antipolitical threat.. It is not only U.S. citizens who face the challenge but also all those nations that have become democracies in the intervening years and centuries, particularly those formerly under colonial or totalitarian domination. The choice is easy to portray in theory, as I have tried here to show; and even harder to put into practice! As doubts spring up and authority is contested in an increasingly complex and interconnected nation, itself a participant in an increasingly global world of nations, it is the task that must be mastered, and at times reconquered by *politics*; recognition of this political imperative is necessary if the always present *antipolitical* temptation that is inherent in modern democracy is to be avoided. Neither institutional arrangements nor the immediate participation of the citizenry; faced with unexpected conditions, neither a republican constitution nor a democratic citizenry can ensure that what I have called a *republican democracy* can perdure.

Statehood 3.0: Temptations and Restraints

Leif Kalev

Introduction

States are once again undergoing a major transformation, this time catalysed by digitalisation, the ongoing integration of digital technologies and digitised data across the economy and society (Eurofound, 2024) but also including automation and other aspects. Digital transformation can be characterised as increasingly capable systems, increasingly integrated technology and increasingly quantified society (Susskind, 2020).

There are diverse optimistic and pessimistic accounts on digitalisation and its implications but what can be learned by linking digitalisation and statehood more specifically? What are the key aspects to keep an eye on in the currently unfolding transformation of statehood from a political and governance studies perspective?

In this article, I first discuss the concept and key aspects of the state and elaborate the concept of statehood 3.0 as related to the earlier types. Then I discuss the opportunities opened by digital transformation and develop the idea of temptations and restraints created by it. The temptations and restraints are then more closely studied in two key areas of state operation: transforming sovereignty and neoliberal governance. This builds the basis for a concluding discussion of the key aspects relevant in developing a human-centred statehood 3.0.

Discussing the relationship between digitalisation and statehood, we need to keep in mind that while the technological aspects of digitalisation create the basis for transformation(s) it will nevertheless most likely be shaped by human and contextual factors, at least based on historical experience. Thus, to discuss the transformations in statehood, politics and governance we should contextualise it historically with human and relational aspects in mind.

Transformations in the operation of the state

There are many and diverse ways to understand and define the state (see, for example, Nelson, 2006; Marinetto, 2007; Bevir and Rhodes, 2010; Pierson, 2011; Jessop, 2015; Vesting, 2022). To first develop a broad understanding, I build on two sources that outline the key features of the state. The Montevideo Convention (1933), a major legal source, defines the state as having a permanent population, a defined territory, a government and the capacity to enter into relations with other states.

Offering a more detailed account along these lines, Pierson (2011, p. 6) identifies nine key features of the modern state: (monopoly) control of the means of violence, territoriality, sovereignty, constitutionality (including also the state aims and purposes), impersonal power (also including the rule of law), public bureaucracy, authority/legitimacy, citizenship, and taxation (also including welfare).

Statehood can be defined as the condition of being an independent state or nation (e.g., Collins Dictionary, 2024). In this concept, the focus is on the capacity to operate as a state, a quality that may be more or less advanced and runs in parallel with the more formal aspects. Here, the key issue is how the power centre and the citizenry relate and interact in their territory and towards other states. In this process, the political and governance arrangements, citizenry and territory are constantly (re-)constituted, as are all the features of the state (see, for example, Finer, 1999a; Finer, 1999b; Finer, 1999c; Rae, 2002; Pierson, 2011; Hameiri 2010; Jessop, 2015).

One can have more pessimistic and optimistic, more cynical and hopeful views on the state and statehood. This is a partial answer to the overarching question of whether the state is a monster, as the answer to this will very much depend on the perspective. But whatever the level of optimism or cynicism, the key issue is the evolution of the state as a way to dominate, to generate a certain level of social order and organisation, and manage human communities, not only top-down, but also collaboratively, and to an extent, bottom up.

The idea for the concept of statehood 3.0 came from the development of the Internet. There are three clear-cut generations of Internet as for now: we likely remember the one-sided flow of information in Web 1.0, the original Web; then we experienced Web 2.0, which is mostly related to social media and bottom-up content production. Now, for some time already, we are in the environment of Web 3.0; it continues the previous generation, but also includes algorithm-based steering and control. What you see from Web 3.0 is based on algorithms. There is a huge amount of information, but only some of it reaches you. This is not entirely based on your choice, although it's based on calculations of your preferences. (For some time, the concept of Web 4.0 based on artificial intelligence has also been around, but here I discuss it as part of 3.0.)

How to apply this to statehood? Building on works on the development of the state (e.g. Jellinek, 1914; Schmitt, 1963; Poggi, 1990; Finer, 1999a; Finer, 1999b; Finer, 1999c; Mann, 1986, 1993, 2012, 2013), we can identify two major generations of state organisation so far: the traditional state and the modern state. A modern state is clearly demarcated, well organised, relatively centralised and purposefully governed and came to fruition in the 19th century Western world, having evolved since the 15th century. The traditional state, in this analysis, refers to a wide range of various territorial power arrangements that preceded the

modern state and were looser in terms of organisation, but nevertheless had some of it.

We can denote the traditional state statehood as 1.0. Statehood 1.0 was relatively weak in its organisational capacity and in terms of infrastructure and outreach towards every citizen and every location. Statehood 2.0 is the main reference for modern states, based on the idea of cohesion, in terms of politics, identity, administration, clear borders, and so on.

Building on this, we could characterise statehood 3.0 as the information and technology-rich state of contemporary times and the (near) future, which is based on the organisation of the modern state but in many ways functions differently from that. I'm mostly referring to the new developments of recent decades, especially, but not only, those of information and communication technology, automation, development of all kinds of new devices, artificial intelligence and other related aspects. With a view to the main elements of the state (e.g., Jessop, 2015) a selection of the main differences between statehood 1.0, 2.0 and 3.0 is presented in the following table.

Table 1.
***Statehood 1.0, 2.0 and 3.0*.**

Characteristic	**Statehood 1.0**	**Statehood 2.0**	**Statehood 3.0**
Territory	Internally diverse within the frontiers	Relatively homogenous within clearly demarcated borders	Area within and beyond national borders that is governable with technological support
Population	Subjects to the ruler	Citizens of a nation state	Citizens who are empowered, steered and controlled
Organising power	Ruler and his court	State apparatus	Digitally amplified ensemble of state institutions
State idea	Glory of ruler (and often god(s))	National state project	Some hegemonic but contested state project

Source: author

For this article, the key difference between statehood 2.0 and statehood 3.0 is how cohesion, organisation and control are reached. In the modern state, it is based on human control of and over the political leaders, citizens, political party leaders, policemen, military, teachers—whoever. Technology is used, of course, but those who control and who are controlled are human beings. In statehood 3.0,

it is much more manifold, diverse and impersonal as technology has a significant role, both as the instrument and object of cohesion, organisation and control—and maybe even more.

Originally, there was much discussion, especially in optimistic globalisation literature, of the state somehow fading away and dissolving into a social fabric, being replaced by markets, networks, global flows and movements and so on (see, for example, Ohmae, 1991; Kuper, 2004). A soberer view, focusing on the transformation of the state instead of its dissolution, regained prevalence relatively quickly (e.g., Sørensen, 2004).

But what I argue here is that in recent decades rather a contrary process has taken place. Instead of the state weakening, it has been strengthened by the new technologies. While 30 years ago the Internet was heralded as an extra-state space beyond control, it is now developing into a controllable environment and, moreover, a vehicle for control The new technologies enable a new level of cohesion, control and organisation, and in a much more impersonal way. There are possibilities and limits in this—temptations and restraints—and this is what we discuss next.

Opportunities, temptations and restraints in statehood 3.0

Digitalisation has opened up new opportunities for the state in the development of information- and communication-based technologies, automation, and development of artificial intelligence. This is something that is ongoing, but we can sketch out some main features.

We need to analytically separate the different aspects of this technological change. The aspect we are more familiar with is probably all kinds of communication systems—internet, Zoom, whatever—that enable us to have more information, discussions etc. But information and communication technologies also have different uses.

From another point of view, digitalisation has resulted in various monitoring solutions. It can also lead to huge databases containing information about human beings that can be accessed only by a few people, probably officials, and utilised for a purpose. Here, analytics and access are of key importance.

In the past decade or so, we have also seen the development of autonomous devices. This can be better seen from the illustrations here. We already have drones that fly and can deliver post or kill someone. We have autonomous weapons, weapon systems and so on.

The effects of both monitoring and autonomous devices are amplified by artificial intelligence: this is the machine’s ability to perform some cognitive functions we usually associate with human minds, such as perceiving, reasoning, learning, interacting with the environment, problem-solving, and even exercising creativity (McKinsey & Company, 2024). We can speak of intelligent systems

developing a course of action, implementing it via digital solutions and adjusting it based on monitoring the environment and learning from this.

As we see, the contemporary technological revolution has many aspects, but, at least nowadays, it must eventually come down to human beings whose capacities for organising and control are greatly enhanced. While both the companies and state bodies can use these opportunities, we can easily conclude that states as central authorities seem to win more from having the capacity-enhancing devices, databases, resources, and so on (see, for example, Bigo et al., 2019; Susskind, 2020).

The winners include both the small states, who can function as normal states, and the very large states, who can expand their power and influence across borders much more easily. But it is easy to see that the larger states win disproportionately, and in any case the opportunities of organisation and control for the central public authorities expand more than for the rest of society, especially the regular citizens.

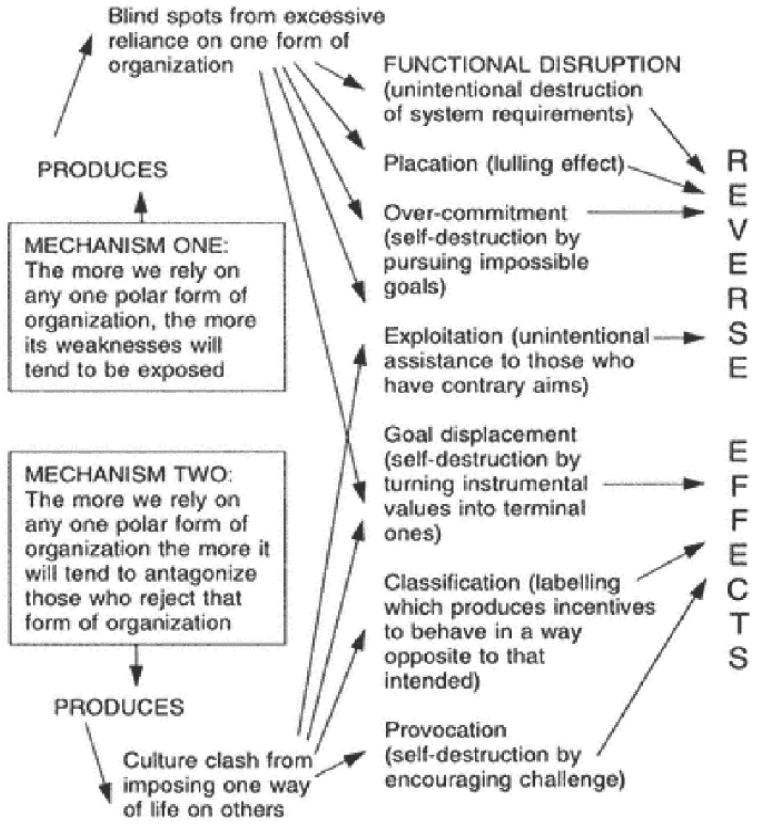
But maybe human beings can also win out. Ordinary citizens will also have more information and tools, more comfortable homes, equipment and so on. It's not only a one-way development, so the future power relations are, to an extent, open. But we cannot forget that in comparison to devices human beings tend to be more emotional and can often be manipulated, thus a good awareness, education and restraint are needed to be sufficiently autonomous in this new situation. And the trend, at least for now, is towards greater central organisation and control possibilities.

What are the digitalisation-related temptations and restraints in statehood 3.0? With regard to temptations my thinking is based on the idea that if one has new capacities at his or her disposal, one will be interested in making use of these new capacities and will test their limits. We have a tendency towards technological optimism, and much can be done with the new capabilities opened up by digitalisation. Consequently, there is a temptation to try, use and, possibly over-use these new opportunities.

My understanding of restraints and their mechanisms is much based on Christopher Hood (1998), who has demonstrated that all the ways of governing, emphasising different aspects of human nature and different ways to steer human beings, can be over-exploited. All of them are partly perfect and partly internally flawed; that is why if you adopt just one political and governing strategy you will eventually run into difficulties, as has been seen various times in history.

Hood himself developed this perception in the context of public management. Over-reliance on one strategy leads you to its overuse, with reverse effects and resulting problems: with the hierarchical strategy, over-reliance on dominance leads to failures in too loftily launched grand projects; the egalitarian could result in endless discussions; the individualist strategy is prone to cynical overuse; and the fatalist one to endless passivity. The general logic is presented in the following figure.

Figure 1.
Reverse effects of overuse of governance strategies.



Source: Hood (1998, p. 218).

We can also use a similar perspective for broader political and governance processes and again seek restraints for digitalisation-based temptations. I see such restraints emerging in two ways. One way is related to automatic restraints. If you focus only on one strategy, there will come a point when you will not get forward anymore in most situations: you need to develop a new perspective and adjust the strategy. This is what I see as an automatic restraint; something that is, in a way, built into the system.

The other restraints do not emerge automatically but need to be set up, and this requires much more work and elaboration, and—which is probably the harder part—much willpower. Here, I will mostly discuss the automatic restraints of new technology-rich states. But of course, I will also give some thoughts about those restraints that likely do not emerge automatically and need to be consciously developed.

To study the temptations and restraints in greater depth, I now focus on two areas where issues arise in state operation. The first area is the transformation of sovereignty related to digitalisation, with a focus on the new forms of dominance and inequality in the international arena, although there are consequences as well. The second area is more domestic: it is the relationship of neoliberal governance to democracy and citizenship—but of course, this also has some international implications.

Temptations and restraints in transforming sovereignty

Sovereignty is a manifold concept (see, among others, Laski, 1921; Bartelson, 1995, 2011; Krasner, 1999, 2009, 2012; MacCormick, 1999; Kalmo & Skinner, 2010; Cohen, 2012; Inocencio, 2014). Concisely put, it can be understood as the supreme authority in the polity (e.g., Bartelson, 2011), be it legally or politically based (e.g., MacCormick, 1999), exclusive or meta-governance style (Bodinian vs. Althusian tradition, e.g., Inocencio, 2014; Bell & Hindmoor, 2009), etc. Krasner (2012, p. 6) outlines seven classical elements of sovereignty: territory, population, effective domestic hierarchy of control, *de jure* constitutional independence, *de facto* absence of external authority, international recognition, and the ability to regulate trans-border flows.

The conventional concept of sovereignty that superseded the earlier prince-based understanding developed up to the 19th century through the four sequential steps of territorialisation, depersonalisation, absolutisation and popularisation (Bartelson 1995, 2011). Nowadays we can speak of a new game of sovereignty that is based on much more interaction among the states and regulated intervention. The legal core of sovereignty is intact, but the operational mechanisms have started to change, both internationally and in the domestic arena (Sorensen, 2004).

The distinction of three aspects of sovereignty – internal, external and popular – is well known. Internal sovereignty denotes the ability of state authorities to control the territory and the people. External sovereignty signifies the international recognition of independence and the government's ability to freely operate in the international arena (see, for example, Inocencio, 2014). Popular sovereignty has a different reference ground: the ability of people (citizens) to define collective priorities and make decisions, which is the basis of democratic statehood (see, for example, Bourke and Skinner, 2016). In more ambitious approaches, popular sovereignty can be seen as a precondition for the external (recognition) and even internal (legitimacy) sovereignty. These aspects are presented in the following table.

Table 2.
Aspects of sovereignty.

Aspect of sovereignty	**General characterisation**
Internal	The ability of state authorities to control the territory and the people. Systematic organisation of public authority, finance and force, clearly defined population, territorial integrity.
External	International recognition of independence and the government's ability to freely operate in the international arena, diplomatic contacts with other states, membership in international organisations.
Popular	The ability of people (citizens) to define collective priorities and make (and change) binding decisions. Constitution founded on

	the rule of the people, decision-making according to a set of rules, reasonable expectation that fellow citizens comply with decisions and share outcomes, regular possibility to change decision-makers.

Source: Kalev, Jakobson 2022.

These aspects have developed historically at different speeds and in different ways, and are thus only compatible to a limited extent, even if they are relatively reconciled in a modernist setting. In the contemporary international system, we see new dynamics partly due precisely to the new opportunities for state governments. Using their new opportunities, the state governments can expand their outreach and influence transnationally. This leads to an increase of internal-type sovereignty at the relative expense of the external type (Kalev & Jakobson, 2022).

Bartelson (2011) discusses this as the governmentalisation of sovereignty, as it will become more homogeneously constructed, assessed, and also performed across the globe. Hameiri (2010) outlines how such a governmentalised sovereignty runs into another set of difficulties because of human agency. For example, studying state-building interventions in the world, he demonstrates that even if you go in with a clear-cut plan, you will become embedded in local contexts. These will also shape those who intervene, not only those who are inside.

The development towards more internal-type sovereignty opportunities also leads to more hegemonic ambitions and related strategies, a fuzzier process of international politics, and increased asymmetry of power among the states and in the international system. It also fosters the resurgence of realism in the international arena, although this need not be limited to that development.

Thus, we can conclude that the new technological opportunities create temptations for attempting more power and dominance of the (larger) state governments, but at least as long as these are steered by humans the results will likely not be uniform and the international power balance is still constantly evolving, albeit more or less along realist or some other lines. Such a dynamic can be seen as an automatic restraint, at least to the point that we have more than one capable state in the international arena.

Another aspect of this process is more domestically oriented and creates a bridge to studying neoliberal technocratic governance. Capable and interested states operating across borders, of course, utilise the new resources available. Just to give a couple examples, they utilise cyberattacks against strategic targets; one might remember the problems of Iranian nuclear power due to cyberattacks, or how general Qasim Solaimani was killed by a remotely operated drone.

This creates new insecurity and a resulting process of securitisation (Buzan et al., 1998; Nyers, 2009; Omand, 2010; Guillaume & Huysmans, 2013). This is the idea, I would say, of hyper politicising some aspects of life. When you politicise, you have several viewpoints and you have arguments in between different viewpoints. When you hyper-politicise, you try to depict something as so

huge a threat that there is just one answer, no others, and you are able to deliver. So, over-securitisation is something that can be built up as a feeling, and this is largely based on media – social media, mass media, whatever. This builds a justification for more top-down strategies that claim to be on good intentions.

We have had new EU databases on people justified by Schengen free movement. We have seen other databases, several other measures and a new layer of documentation of people based on COVID prevention. But these nice, securitising initiatives also build up a new layer of top-down governance in the Western states. It is largely anonymous. Most people just have glimpses of it, and it is quite extensive, relatively precise, and could be backed up by quite small forces; when you know where to go, you don't need police everywhere, just as one example. We see state capacities extending to new domains, and this concerns both international and domestic arenas.

Temptations and restraints in digitalising neoliberal governance

In recent decades we can speak of a process of technocratisation and the divergence of vote-seeking frontstage politics and backstage policy-making in the Western world, especially Europe (e.g., Papadopoulos, 2013). It is often characterised as the new public management doctrine (e.g., Christensen & Laegreid, 2002; Pollitt & Bouckert, 2017; Sootla & Kalev, 2020) or neoliberalism (Crouch, 2011; Davies, 2014). For us, both are relevant, as the doctrine highlights the strategies and tools, and neoliberalism the justifications for a new style of governing.

Although new public management has evolved through many generations (e.g., Hay, 2007) and is quite diverse in practice, its managerial-technocratic focus is well handled by its main tools, which are presented in the following table. More broadly, its core purpose is to manage inputs and outputs in a way that ensures economy and responsiveness to consumers through managers operating based on performance targets, borrowing many methods and tools from private sector management. Thus, efficiency is achieved by considerable top-down, if sometimes interactive, technocratisation.

Table 3.

The new public management toolkit.

Market-inspired reforms	**Governance reforms**
• *Privatisation* of state assets and certain services • *Internal markets* – separating purchasers from providers within the public sector to create new markets, e.g. care for elderly • *Performance budgeting* – results-oriented, target-driven budgeting	• *Decentralisation* – moving responsibility for programme delivery and delegating budgetary authority from central government to provincial or local governments or neighbourhoods • *Open government* – freedom of information, e-government and public engagement mechanisms – e.g.

• *Performance contracts* and *pay-for-performance* – establishing performance targets for departments and individualised pay scales for public employees • *Programme review* – systematic analysis of costs and benefits of individual programmes • *Compulsory competitive tendering* – services delivered by the private or voluntary sector • *One-stop-shops* – coordination of programmes through one delivery system to eliminate duplication • *Invest to save budgets* – venture capital for oiling the wheels of government • *Quality standards* – applying principles of quality management, e.g., Citizens' Charters, 'Best Value' or 'Comprehensive Performance Assessments', public service agreements	citizens' juries and other deliberative forums • *Standards in public life* – constituting effective public administration frameworks (e.g. executive machinery, departments, planning and coordination mechanisms) • Development of *codes of ethical practice* (e.g., codes of conduct, transparency, accountability, effective audit, monitoring and evaluation) • *Collaborative government* with *stakeholders* • *Co-production* with citizens
Deregulatory/regulatory reform • *Personnel deregulation* – open competition in recruitment, performance-related pay and elimination of civil service controls over hiring, firing, promotion, etc. • *Purchasing deregulation* – permits individual organisations to make decisions about procurement, rather than using centralised purchasing organisations • Creation of *new regulatory bodies* to supervise privatisation and collaborative governance	**Competence reforms – increasing the capacity of public servants to act** • *Staff audits* to determine what personnel is on hand • *Getting the right people into the administration*, partly by stronger incentives to attract and retain them, partly by changing objectives and procedures in an effort to make the work situation more challenging and rewarding, and • *Establishing integrated training programmes* through the establishment of a civil service college/schools of government and professional skills for government/occupational skills/professional accreditation • Coaching and mentoring • Capability review

Source: Evans and Stoker (2022, pp. 148-149)

The reason I discuss neoliberal governance is not only based on its prevalence. The key issue is that it has liberty as its core claim. The manifold techniques of neoliberal governing are, to a large extent, based on the idea of liberating people—at least in a way (see, for example, Davies, 2014). The idea is to make individuals freer, more capable of acting in certain ways, and the governance tools should support this. In addition to the toolbox, there are also several other techniques, such as monitoring, securitisation, communication, and so on. The main focus is similar, nudging people towards some desired ways of behaviour and away from the undesired.

The problem in contemporary neoliberal governance is that there is a relatively narrow understanding of freedom and its enhancement. If people are not egoistic and individualistic in their private and public activities, they are seen as deviating and in need of some indoctrination and stronger measures: this element of a clear-cut truth is actually alien to most of the liberal tradition. Another problem is that there have already been for some time very divergent views and recipes within neoliberalism (e.g. Crouch, 2011; Davies 2014). But the managerial public administrators can nevertheless use their toolkit to steer people to act along the lines of whatever neoliberal rationality currently prevails.

The traditional ideas on which representative government, liberal democracy and citizen agency were founded are currently considerably eroded in contemporary neoliberal governance, and mostly in the guise of doing good. We have different emancipatory activities, surveillance, documentation, post-democratic trends and so on that erode the separation of public and private sphere, immunity, citizens' basic status, functioning representative government, and so on. We need new kinds of restraints here, for example, for immunity or privacy in the contemporary age of exposure.

It is easy to see how digitalisation amplifies the possibilities of neoliberal governance, as its mainly unit-based approach to accounting and management is easily reconcilable with digital logic, and digitalisation vastly increases the amount of data and capacity for calculation. This could easily lead to over-exploitation of logic, seeking ever more ambitious strategies to steer society. Digitalisation strengthens the temptation towards more managerialism and (semi-)authoritarianism.

This (semi-)authoritarianism is not something that is a clear-cut dictatorship. It is more about managing people in rational ways and carrying them along into co-governance initiatives. In this logic, we have people participating in governing activities, but not as democratic decision-makers. The compounding of such governance and digitalisation could create very dangerous combinations in terms of democracy.

So far, there has also been an automatic restraint on the temptation of comprehensive technocratic steering, even if it sometimes emerges slowly. The experience so far has always been that the ambitious systems of data-based

steering (e.g., PPBS) and planned economy (e.g., the Soviet system) have failed over time due to unintended side-effects (see also Sootla & Kalev, 2020). Even the less ambitious particular solutions of neoliberal governance run into difficulties and paradoxes, as in many real-life situations efficiency is turned upside down, etc. (e.g., Hibou, 2015).

This restraint is based on human nature. When you seek to steer people towards a very specific way of life, they become very talented at finding sideways directions to undermine both the operation and legitimacy of the system, as exemplified under several ideology-based authoritarian regimes. And of course for any more seriously liberal perspective you become uneasy as the requirements grow and become too heavy for people. Instead of liberating them, they could act as some kind of excessive steering mechanism, resulting in neurosis and its therapeutic governance. This is very much against the ideas in early neoliberalism of empowering people to achieve more.

This may change with the rise of artificial intelligence and further automation. If you have more capable, autonomous and agile systems of steering and control, ambitious top-down governance could be more sustainable. In this case, we need something different from the existing balances. There is some chance that new-style automatic restraints will emerge, but it is more likely here that new restraints need to be purposefully created.

Conclusion: a human-centred statehood 3.0

We have now seen that while digitalisation clearly leads to transformations in statehood, these can unfold in many ways and forms, and there is a considerable, continuous human role in the outcomes that will emerge. We already see how the modern international system somehow reemerges in a new shape. Most likely, we will also see some resurgence of representative government in the Western states, but we need to transform the old balances into the new, technology-rich context.

We have discussed the temptations towards more top down, technocratic and even autocratic governance based on new digital capacities. But we have also seen the restraints on these temptations, some of which likely emerge automatically while others need to be set up. In order to support human-centred and democratic development of statehood 3.0 we need to pay attention that the system functions as it should. For this, we can find many insights from the studies of statehood, citizenship, democracy, politics, policy and governance.

A crucial aspect to bear in mind is that adapting and steering digitalisation needs to be done with a human-centred view. The political needs to be defined around human beings, as it has so far always been. All the three aspects of the political – politics as contestation over power and aims, policy as the concrete governance strategy and polity as its environment – are based on the idea that human-induced change in the environment is possible. In this way, the political is

also the centrepiece of innovation, including political renewal. At the heart of it are different approaches, rationalities, human debates and choices based on them.

The political starts when there are a number of relatively sensible options, opportunities for progress that can be discussed and debated and then put into practice. It is built on human (im)perfection and creativity and thus there is no one truth, nor a single rationality. This differs from the natural inevitability of the unconscious or dogmatic reliance on one incontestable truth (hegemonic, monopoly-seeking religion or ideology). When a dogma or inevitability is contested, the political unfolds. Thus, politics, policy and polity are a profoundly human phenomenon: unlike technocratic phenomena, political debates and choices cannot be instrumentalised and automated.

We need to observe and ensure the representative democratic system functions as it is expected, or if we want to change the system or some of its elements, we do it thoughtfully and address the side-effects if necessary. A democratic state is expected to operate based on the following general logic: people articulate their views, the more active ones coalesce to promote these views, run for elections, and, if successful, make decisions and shape policies. In this process, experts and parliamentary support structures also play a role. The government then implements policies with the help of various governance strategies, institutions and tools. Key institutions balance and control each other to prevent power from concentrating in one place and becoming absolute. The functioning of a democratic state also needs a shared vision of a common future that can be collaboratively improved.

There are several studies highlighting challenges to the contemporary democratic system (e.g., Papadopoulos, 2013; Blüdhorn, 2013) but several lines of improvement have also been suggested (e.g., Kalev, 2017; Evans & Stoker, 2022). We need to re-strengthen the existing democratic political and governance institutions, facilitate education in democratic citizenship and develop a broader civility. A selection of such measures needs to be implemented, with specific attention to the effects of digitalisation (e.g. Susskind, 2020), designing and developing balancing mechanisms and, more broadly, the underlying principles of digital solutions in the advancement of organisational models and social technologies.

To return to the overarching question, we cannot say that the state is a cold monster nowadays. Despite ongoing digitalisation, it is still largely human-based and, consequently, uncold to a considerable extent. For human-centred development, we need to keep it this way. We need to overcome the temptations of digitalisation for politics and governance by further developing the restraints, building on the experiences of the previous periods. This will be a hard task but, in all likelihood, a doable one.

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Constitutional Review in Estonia – a Model for 30 Years?[10]

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Constitutional adjudication in Estonia: brief historical and theoretical overview

Although constitutional review in a sense similar to Kelsen's did not exist before the 1992 Constitution of the Republic of Estonia[12] came into force, some elements of a right to a judicial review similar to the US judicial review model existed during the interwar period. The first, extremely democratic, constitution of 1920[13] did not contain any explicit provision of constitutional adjudication.

[10] Most of the following topics are at least to some extent covered by earlier publications of the author. The corresponding publications are indicated in the beginning of each topic. However, the very precise individual references have been omitted for reasons of space and time.

All links in this article were accessed 31 August 2024.

[11] The author is grateful to Andra Laurand for valuable help in preparation of the article.

[12] Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia) (PS) of 28 June 1992 [RT (Riigi Teataja = State Gazette) 1992, 26, 349; I, 15.05.2015, 2] <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530122020003/consolide>. Estonian Constitution consists of three acts. PS, as the main act was adopted via a referendum on 28 June 1992 and came into force on the following day, as follows from §1(1) of the Eesti Vabariigi põhiseaduse rakendamise seadus (The Constitution of the Republic of Estonia Implementation Act) (PSRS), (RT I 1992, 26, 350) <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530102013012/consolide>. PSRS was adopted together with the PS by a referendum on the same day. On 1 May 2004, Estonia, together with nine other European countries, joined the European Union. Before accession, the PS was amended via a referendum on 14 September 2003. The Eesti Vabariigi põhiseaduse täiendamise seadus (The Constitution of the Republic of Estonia Amendment Act) (PSTS) was added to the Constitution (RT I 2003, 64, 429; 2007, 43, 313) <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530102013005/consolide>. This act provides that Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected and that when Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty.

[13] Eesti Vabariigi Põhiseadus (The Constitution of the Republic of Estonia) (PS 1920) of 15 June 1920 (RT 1920, 113/114, 243).

Instead, it contained a rather vague provision,[14] which then was interpreted by the Riigikohus (the Supreme Court)[15] as the basis for judicial review.[16]

The difficulty in providing an adequate overview of the historical development of constitutional adjudication can be traced back to the two fundamental theoretical counterpositions regarding the definition of constitutional adjudication, i.e., whether the Estonian system corresponds to a diffuse (i.e. decentralised or dispersed) or rather a concentrated (i.e., centralised) model.[17]

According to a recent approach,[18] the judicial review in Estonia can be dated back to the 11th of May 1926. The case in question concerned a decision of the Minister of the Interior concerning the law on the election of the county councils. With this decision, the minister annulled the electoral list of a certain voters' association in the county council elections of 1923 and, consequently, terminated the mandates in the county council members obtained by the candidates on that list. Kaarel Baars was an attorney, a member of the voters' association in question and a member of one of the county councils. Together with several other members of county councils who had faced similar fate, he challenged this decision in court. One of their central arguments was that the change made in the composition of the county councils was unconstitutional. The case reached the Riigikohus, who declared inter alia:

> The Estonian courts must act in accordance with §86 PS 1920, and according to this, every court in which the question is raised that a certain piece of legislation does not comply with the Constitution is entitled and obliged to give an answer to this question. In deciding the question whether

[14] §86 PS 1920 reads: "The Constitution is a steadfast guide to the activities of the Parliament, the courts and the government."

[15] Riigikohus (Supreme Court or, translated literally, State Court) was from1919–1940, and is again since 1992, the highest court instance. Riigikohus was foreseen in §9(2) and (3) of the Eesti Vabariigi valitsemise ajutine kord (Provisional Rules of Government of the Republic of Estonia) of 4 June 1919 (RT 1919, 44, 91) (which were later replaced by PS 1920) and then established by the Riigikohtu seadus (Act of the Supreme Court) of 20 October 1919 (RT 1919, 82/83, 164). The Soviet occupation regime liquidated the Riigikohus with point No. 4 of the Eesti NSV ajutise Ülemnõukogu Presiidiumi seadlus kohtute süsteemi ümberkujundamise kohta (Decree of the Provisional Presidium of the Supreme Soviet of the Estonian SSR on the reorganisation of the court system) of 16 November 1940 [ENSV Teataja (= State Gazette of the Estonian SSR) 1940, 45, 523]. The decree was enforced in December 1940 and the activities of the Riigikohus were discontinued at the end of the year. Some of the judges were arrested, deported to Russia and later perished during their captivity.

[16] Cf. Uno Lõhmus, Hannes Vallikivi, Lisandusi põhiseaduslikkuse järelevalve sünniloole Eestis, Juridica 2020, pp. 451–464 (462). Unfortunately, Uno Lõhmus and Hannes Vallikivi confuse the constitutional review and judicial review.

[17] Vello Pettai, Estonia's Constitutional Review Mechanisms: A Guarantor of Democratic Consolidation? in *The Road to the European Union*, Vello Pettai, Jan Zielonka (eds.), vol. 2: Estonia, Latvia and Lithuania (Manchester, New York 2003) p. 79 and 101 fn. 13 with further references to these concepts. Cf. Allan R. Brewer-Carias, Judicial Review in Comparative Law (Cambridge 1989) pp. 131–135, 185–194. In the present article, the term 'judicial review' is used when we speak of the diffuse model, the term 'constitutional review' when we speak of the concentrated model, and the term 'constitutional adjudication' when both are covered.

[18] Marelle Leppik, Esimesi märke põhiseaduslikkuse kohtulikust järelevalvest: Riigikohtu praktika 1920. aasta põhiseaduse kehtimisajal, Juridica 2012, pp. 185–192; Uno Lõhmus, Hannes Vallikivi, Lisandusi põhiseaduslikkuse järelevalve sünniloole Eestis, Juridica 2020, pp. 451-464 (451 fn. 7).

an ordinary piece of legislation is in accordance with the Constitution, the court must act in the same manner as in deciding whether a mandatory regulation is in accordance with the legislation. If the court finds that the mandatory regulation is contrary to the legislation, it must disapply it, and the court must also disapply the piece of legislation if the court finds that it is contrary to the Constitution.[19]

According to the current state of research, this judgment can be considered the beginning of judicial review in Estonia. More precisely, this early development forms the historical background for the partially represented opinion in the legal literature, according to which the Estonian constitutional adjudication mechanism is even today similar to that of the pre-war system.[20]

The practice of judicial review described above did not last long. From 1934 onwards, the Estonian constitution became authoritarian[21] and democratic elements, including the judicial review, were either abolished or, little by little, vanished on their own.[22] In 1940–1941 and 1944–1991, Estonia, like Latvia and Lithuania, was occupied by the Soviet Union, and 1941–1944 by National Socialist Germany. During this period of more than 50 years, constitutional review did not exist.

The present court system stems from a pre-constitutional law that was adopted in the transitional period.[23] The new Courts Act was drawn up at the end of the 1980s and passed by the Supreme Council in 1991 after the formal restoration of independence, but before the adoption of the new constitution in 1992.[24] The model of this newly invented court system was based on the pre-war

[19] Judgment of the Administrative Law Chamber of the Riigikohus, 11 May 1926, Estonian National Archive, ERA.1356.2.1004 (the file is unpaginated); cf. judgment of the Administrative Law Chamber of the Riigikohus, 1 and 8 February 1927, Estonian National Archive, ERA.1356.2.1005 (the file is unpaginated).

[20] Märt Rask, Tänu põhiseadusele, Riigikogu Toimetised 15 (2007), p. 21. Märt Rask was 2004–2013 the Chief Justice of the Riigikohus.

[21] E.g. Rait Maruste, Heinrich Schneider, Constitutional Review in Estonia – Its Principal Scheme, Practice and Evaluation, in *Constitutional Reform and International Law in Central and Eastern Europe*, Rein Müllerson, Malgosia Fitzmaurice, Mads Andenas (eds.) (The Hague, London, Boston: Kluwer Law International, 1998) pp. 91–104 (93 ff.).

[22] In the *travaux préparatoires* of Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia) (PS 1938) (RT 1937, 71, 590) which entered into force on 1 January 1938, the different modi of constitutional adjudication were debated, cf. Uno Lõhmus, Põhiseaduslikkuse järelevalve küsimus 1937. aasta põhiseaduse koostamisel: võitlus põhiseaduskohtu loomise eest, Riigiõiguse aastaraamat 2 (2021), pp. 105–138. However, PS 1938 merely modified the authoritarian regime and constitutional adjudication had no place in the new power architecture.

[23] Priit Pikamäe, Ääremärkusi Eesti põhiseaduslikkuse järelevalve korralduse ja menetluse kujunemisele ja võimalikule edasisele arengule, Riigiõiguse aastaraamat 2021, pp. 139-170. Cf. the reform of the court system in general Katre Luhamaa, Merike Ristikivi, Rebuilding the Court System of Estonia after the Communist Regime, Juridica International 31 (2022), pp. 81–89 <https://doi.org/10.12697/JI.2022.31.05>.

[24] Kohtute seadus (Courts Act) of 23 October 1991 (RT 1991, 38, 472). The Courts Act of 1991 was replaced by the Kohtute seadus (Courts Act) (KS) of 19 June 2002 (RT I 2002, 64, 390; 04.01.2024, 4) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/527022024006/consolide>.

model, influenced strongly by the Courts Code of 1938.[25] The constitutional review part has been simply added to that. At the Constitutional Assembly neither the court system nor the constitutional adjudication model was profoundly debated. However, Klaus Berchtold, the Austrian expert invited to the Constitutional Assembly, commented on the draft constitution and pointed out some issues connected to the originally planned system of judicial review: "And if I am correct […] all these courts have the competence to decide whether there has been an infringement of human rights or not. If that is correct, […] this is the point that should probably be discussed. If this is correct, you may face difficulties if there are a great number of courts which may decide on human rights. […] It might be asked whether the Riigikohus [will] be in a position to guarantee, so to say, a certain unity of jurisprudence. This is the point which should be reconsidered and I have not found clear indication in your draft whether these courts could be competent in human rights cases which arise out of activities of administrative authorities."[26] In this way, Klaus Berchtold touched upon the central problem of the judicial review model put forward by the 1926 judgment of Riigikohus and addressed the main issue that is inherent to the Estonian constitutional review model: the incompatible dichotomy of diffuse and concentrated elements of review.

The Constitution of 1992 re-established the Riigikohus in §148(1) No. 3[27] and §149(3)[28]. In particular §149(3), second sentence, and §152(2)[29] can be seen as clear expressions of a concentrated constitutional review model because they constitute monopolised competence of the Riigikohus to invalidate a piece of legislation. This is the central characteristic of the concentrated review model. However, the prevailing theoretical understanding of the constitutional adjudication and constitutional interpretation have so far, at least partly, remained on the level of the pre-war case law of the Riigikohus.

Constitutional procedural law is provided for in more detail by the Constitutional Review Court Procedure Act (PSJKS). The first PSJKS of 1993 was rather brief and simply structured, having only 27 articles.[30] The first hearing of the Riigikohus in a constitutional review case took place on 27 May 1993.

[25] Priit Pikamäe, Ääremärkusi Eesti põhiseaduslikkuse järelevalve korralduse ja menetluse kujunemisele ja võimalikule edasisele arengule, Riigiõiguse aastaraamat 2021, p. 141 f.

[26] Klaus Berchtold, 29 October 1991 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 323.

[27] "The court system shall consist of: […] 3) the Supreme Court."

[28] "The Supreme Court shall be the highest court in the state and shall review court decisions by way of cassation proceedings. The Supreme Court shall also be the court of constitutional review."

[29] "The Supreme Court shall declare invalid any law or other legal act that is in conflict with the letter and spirit of the Constitution."

[30] Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Court Procedure Act) (PSJKS 1993) of 5 May 1993 (RT I 1993, 25, 435).

Riigikohus rendered its first constitutional review judgement on 22 June 1993. The PSJKS 1993 was replaced by the new PSJKS[31] in 2002, which is far more detailed.

Institutional framework, composition and appointment of judges of the Riigikohus

Riigikohus is the highest court in Estonia and unifies the functions of the final instance of civil, criminal, and administrative jurisdictions. But Riigikohus is a constitutional court, too. Constitutional provision,[32] which places the highest ordinary and administrative jurisdiction above constitutional jurisdiction, seems to express the secondary nature of the latter.[33] Such a combination of different functions has been described with good reasons as unique,[34] as one of a kind,[35] as exceptional,[36] as peculiar[37] or as an entirely unknown and untested institutional configuration.[38]

In line with the fact that Estonia is a small state, Riigikohus consists of only 19 judges.[39] The Administrative, Criminal and Civil Chambers are permanent chambers and 18 of the 19 judges are assigned to these chambers. Only the Chief Justice[40] of the Riigikohus is not assigned to any of these chambers.

The key elements of the appointment proceedings of the judges are provided for in the Constitution. Pursuant to the Constitution, the Chief Justice of the Riigikohus is appointed to office by the Parliament on a proposal of the

[31] Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Court Procedure Act) (PSJKS) of 13 March 2002 (RT I 2002, 29, 174; 07.03.2019, 4) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/512122019006/consolide>.

[32] §149(3) PS reads: "The Supreme Court is the highest court of Estonia which reviews rulings of other courts pursuant to a quashing procedure. The Supreme Court is also the court of constitutional review."

[33] This has been pointed out by Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 467.

[34] Rait Maruste, The Role of the Constitutional Court in Democratic Society, Juridica International 13 (2007), p. 12; Rait Maruste, Põhiseaduslikkuse kohtuliku järelevalve süsteem Eestis, in *Konstitutsioonikohtute organisatsioon ja tegevus*, H. Schneider (ed.) (Tartu 1995) p. 76; Priit Pikamäe, Äärемärkusi Eesti põhiseaduslikkuse järelevalve korralduse ja menetluse kujunemisele ja võimalikule edasisele arengule, Riigiõiguse aastaraamat 2 (2021), p. 167.

[35] Rait Maruste, in *Kohtute seadus*, Kommenteeritud väljaanne, Priit Pikamäe (ed.) (Tallinn 2018) §26 rec. 18; Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 467.

[36] Märt Rask, Tänu põhiseadusele, Riigikogu Toimetised 15 (2007), p. 21.

[37] Sergio Bartole, Konstitutsioonikohtu reform Eestis, 1997, p. 3 f. <https://www.just.ee/media/1095/download>; Märt Rask, Opening speech at the International Research Conference on the 15th Anniversary of the Constitution, Juridica International 13 (2007), p 2.

[38] Vello Pettai, Estonia's Constitutional Review Mechanisms: A Guarantor of Democratic Consolidation? in *The Road to the European Union*, Vello Pettai, Jan Zielonka (eds.), vol. 2: Estonia, Latvia and Lithuania (Manchester, New York 2003), p. 83.

[39] §25(3) KS.

[40] "Chief Justice" is the term used in the official translation of the Constitution <https://www.riigiteataja.ee/en/eli/ee/rhvv/act/530122020003/consolide>. An alternative and perhaps more precise translation would be "President of the Supreme Court".

President of the Republic.[41] His term, according to the Courts Act, is nine years,[42] but as an appointed judge and having not yet reached the maximum age of office for judges, he has the right to remain a member of the Riigikohus after the end of his term of office as the Chief Justice until he resigns or reaches the general maximum age of office for judges.[43]

The other 18 judges of the Riigikohus are appointed to office by the Parliament on a proposal of the Chief Justice of the Riigikohus.[44] In the selection process, the opinion of the Council for the Administration of the Courts must be heard[45] but the Chief Justice is not bound by the opinion. Although Parliament makes the final decision, it can only accept or reject the candidate put forward by the Chief Justice. Recruitment is therefore primarily the responsibility of the Chief Justice, who increasingly involves presiding judges of the permanent chambers and even all judges of the Supreme Court in the decision-making process.

The power of constitutional review is exercised either by the Constitutional Review Chamber or, alternatively, by the Riigikohus *en banc*. The Riigikohus *en banc* is composed of all judges of the Riigikohus, i.e., of 19 judges,[46] and is chaired by the Chief Justice.[47] The Constitutional Review Chamber of the Riigikohus comprises of nine judges of the Riigikohus.[48] The Chief Justice of the Riigikohus shall chair the Constitutional Review Chamber[49] and is its only permanent member. Other members of the Constitutional Review Chamber shall be appointed by the Riigikohus *en banc* for four years, taking into consideration the opinion of the Administrative, Criminal and Civil Chambers, and having regard to the most equal possible representation of the permanent chambers in the Constitutional Review Chamber. Specialisation in constitutional law is not necessary. Thus, the Constitutional Review Chamber, unlike other chambers, is an *ad hoc* chamber on the basis of voluntary membership and with a regular term of four years. In a sense, it somewhat resembles a task force rather than a chamber in the proper sense.

Since there is no legal obligation for any judge of the Riigikohus to join the Constitutional Review Chamber and the work performed there is in addition to the main task of working in one of the permanent chambers, membership of the Constitutional Review Chamber must not necessarily rotate among all the judges

[41] §150(1), §65 No. 7 and §78 No. 11 PS.

[42] §27(1) KS.

[43] §27(8) KS.

[44] §150(2) and §65 No. 8 of the Constitution.

[45] §41(3) No. 1 KS.

[46] §30(1) and §25(3) KS.

[47] §30(3)1 KS.

[48] §29(1) and (2) KS.

[49] The last sentence of point 32 of the Internal Rules of the Riigikohus <https://www.riigikohus.ee/sites/default/files/elfinder/dokumendid/kodukord/Riigikohtu_kodukord_08-02-2022.pdf>. The internal rules of the Riigikohus are passed by the Riigikohus *en banc*, cf. §33(1) KS.

of the Riigikohus. Therefore, presupposing that after the ending of the four-year term no other member of the home chamber is interested, the appointment to the Constitutional Review Chamber may be renewed.

To sum up, in Estonia, the sole difference between the highest ordinary and administrative judges and the constitutional judges is that the former have just volunteered for the Constitutional Review Chamber and were accepted for this task by their colleagues. This institutional framework reflects the secondary nature of constitutional review function in the Constitution. Although most cases of constitutional review will be decided by the Constitutional Review Chamber, the case is occasionally referred to the Riigikohus *en banc*. In these individual cases, all highest ordinary and administrative judges become constitutional judges on an *ad hoc* basis. Again, this clearly expresses the secondary nature of constitutional adjudication.

Where does the competence for constitutional review lie?

Powers of the Riigikohus

The key norms that define the constitutional review powers of the Riigikohus are §149(3)2 of the Constitution, according to which the Riigikohus shall "also" be the court of constitutional review, and §152(2), which states that the Riigikohus shall declare invalid any law or other legal act that is in conflict with the letter and spirit of the Constitution.[50] According to the Constitution, the invalidation competence, that is constituted by the latter provision, lies exclusively with the Riigikohus. This is a clear constitutional indication in favour of the concentrated constitutional review model (please see above).

Inside the Riigikohus, the power of constitutional review is exercised either by the Constitutional Review Chamber or, alternatively, by the Riigikohus *en*

[50] A few other constitutional articles give the Riigikohus a competence that is by nature a competence of the constitutional court. §64(2) No. 4 PS: "The mandate of a member of the Riigikogu shall terminate prematurely: […] 4) if the Riigikohus decides that he or she is permanently incapable of performing his or her duties […]"; §83(1) PS: "If the President of the Republic is permanently incapable of performing his or her duties as decided by the Riigikohus, or if he or she is temporarily unable to perform them in the cases specified by a law, or if his or her mandate has terminated prematurely, his or her duties shall temporarily transfer to the President of the Parliament."; §83(3) PS: "The President of the Parliament, acting as President of the Republic, shall not have the right, without the consent of the Riigikohus, to declare extraordinary elections to the Parliament or to refuse to promulgate laws."; §107(2) PS: "The President of the Republic may refrain from promulgating a law adopted by the Parliament and, within fourteen days after its receipt, return the law, together with his or her reasoned decision, to the Parliament for a new debate and decision. If the Parliament adopts the law which is returned to it by the President of the Republic again, unamended, the President of the Republic shall promulgate the law or shall propose to the Riigikohus to declare the law unconstitutional. If the Riigikohus declares the law to be in conformity with the Constitution, the President of the Republic shall promulgate the law." The meaning of the concept 'permanent capability' that occurs regarding members of Parliament and the President of the Republic is a bit unclear, especially with regard to the question of whether it can also refer to impeachment proceedings or whether it merely refers to the physical and mental abilities of the person concerned. The biggest legal riddle, however, is §83(3) PS, because it is not clear either from the wording or from the legislative history whether, as the wording seems to suggest, this also gives the Riigikohus the power of advisability examination or whether, which would be preferable, the review is merely to be limited to questions of law and, if so, to which ones.

banc.[51] As a rule, the proceedings are conducted before the Constitutional Review Chamber, which usually sits as a five-member panel.[52] The Constitutional Review Chamber decides by far the most constitutional review cases.

The Riigikohus *en banc* has two different kinds of competencies: jurisdiction-related and those not related to the jurisdiction. The latter catalogue consists of competencies such as making a proposal to the President to appoint a judge to office or release a judge from office.[53] These cases are administrative activities to which administrative procedural law, not procedural law, is applicable. As far as jurisdiction-related powers are concerned, a case can come before the Riigikohus *en banc* in three different ways. First, there are special exclusive constitutional review competencies of the Riigikohus *en banc* that involve proceedings in order to declare a member of Parliament, the President of the Republic, the Chancellor of Justice or the Auditor General permanently incapable of performing their duties, to terminate the mandate of a member of the Parliament or to terminate the activities of a political party.[54] Second, a matter of constitutional review that was initially supposed to be heard by the Constitutional Review Chamber may be referred by the latter to the Riigikohus *en banc* because the chamber deems it necessary that the case be disposed of by the Riigikohus *en banc*.[55] The third possibility is that a permanent chamber, which actually has jurisdiction over the case, deems it necessary to refer the case to the Riigikohus *en banc*. In this case, there are again two options.

First, the permanent chamber may refer a question of constitutional review, i.e., a question of the constitutionality of a legislative act, to the Riigikohus *en banc*.[56] The precondition of such a reference is that the permanent chamber (or a special panel) holds a legislative act or omission to adopt such an act, which is relevant to the adjudication of the concrete case, for the status of being contrary to the Constitution. The second option is that the majority of the permanent chamber adopts a position that differs from a legal principle or opinion concerning the application of a law that the Riigikohus *en banc* has hitherto recognised, or in the view of the majority of the permanent chamber, disposition of the case by the Riigikohus *en banc* is important from the point of view of uniform application of

[51] §3(1) PSJKS.

[52] §3(2) and (2[1]) PSJKS. Electoral complaints are heard by a panel of three judges; in exceptional cases, the chamber may sit in a larger composition.

[53] §30(2) No. 2, 5 and 6 KS.

[54] §3(4) and §25 to §36 PSJKS.

[55] §3(3)1 PSJKS.

[56] §3(3)2 PSJKS, cf. §228(1) No. 3 of the halduskohtumenetluse seadustik (Code of Administrative Court Procedure) (HKMS) of 27 January 2011 (RT I, 23.02.2011, 3; 06.07.2023, 30) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/520122023003/consolide>, §19(4) No. 3 of the tsiviilkohtumenetluse seadustik (Code of Civil Procedure) (TsMS) of 20 April 2005 (RT I 2005, 26, 197; 22.03.2024, 8) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/529052024002/consolide>, §356 No. 3 of the kriminaalmenetluse seadustik (Code of Criminal Procedure) (KrMS) of 12 February 2003 (RT I 2003, 27, 166; 21.06.2024, 34) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504072024003/consolide> and §169(2) of the väärteomenetluse seadustik (Code of Misdemeanour Procedure) (VTMS) of 22 May 2002 (RT I 2002, 50, 313; 22.03.2024, 11) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/515042024001/consolide>.

the law,[57] and the question of constitutional review arises during the proceedings of the Riigikohus *en banc*.

Constitutional review proceedings

There is a debate on how many types of proceedings the PSJKS of 2002 contains.[58] There is a catalogue of proceedings in §2 PSJKS which is not exhaustive and does not match the systematicity of the rest of the law. At this point, it is assumed that different procedures should not be combined with each other and all different constitutional review proceedings will be considered as separate proceedings. Accordingly, 14 different proceedings following from the Constitution and from the text of the PSJKS can be identified:

1) Proactive abstract norm control initiated by the President of the Republic;[59]
2) Reactive abstract norm control initiated by the Chancellor of Justice;[60]
3) Autonomy complaint of local governments;[61]
4) The concrete norm control;[62]
5) Complaint about a resolution of the Parliament;[63]
6) Complaint of a member of Parliament or of a faction about a decision of the Board of the Parliament;[64]
7) Complaint about a resolution of the President of the Republic;[65]

[57] §228(1) No. 1 and 2 HKMS, §19(4) No. 1 and 2 TsMS, §356 No. 1 and 2 KrMS, §169(1) VTMS.

[58] E.g., according to the Constitutional Justice: Functions and relationship with the other public authorities. Answers by the Supreme Court of Estonia (p. 4) there are five different types of proceedings, cf. <https://www.riigikohus.ee/sites/default/files/elfinder/dokumendid/1_answers_by_the_estonian_supreme_court_bucharest_en.pdf>.

[59] §107(2) PS, §4(2)2, §5 PSJKS. E.g. under the PSJKS 1993: RKPJKo (Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi otsus = judgment of the Constitutional Review Chamber of the Riigikohus) 14.04.1998, 3-4-1-3-98, and under the PSJKS: RKÜKo 20.10.2020, 5-20-3.

[60] §142(2) PS, §4(2), §6 PSJKS, §17, §18 ÕKS. E.g. under the PSJKS of 1993: RKPJKo 12.01.1994, III-4/1-1/94 (cf. Madis Ernits, Constitution as a System (Tartu 2019) p. 105 ff.), and under the PSJKS of 2002: RKÜKo 12.07.2012, 3-4-1-6-12, cf. Garri Ginter, Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty, European Constitutional Law Review 9 (2013), p. 335-354. Cf. to the Chancellor of Justice in general Madis Ernits, The Use of Foreign Law by Estonian Supreme Court, in *Judicial Cosmopolitanism*, Giuseppe Franco Ferrari (ed.) (Leiden, Boston 2019) p. 501–527 (514 fn. 59) <https://doi.org/10.1163/9789004297593_021>.

[61] §4(2), §7 PSJKS. E.g. RKÜKo 16.03.2010, 3-4-1-8-09.

[62] §15(1)2 PS, §4(3), §9, §11(3), §14(2) PSJKS. E.g. under the PSJKS 1993: RKPJKo 30.09.1994, III-4/1-5/94; cf. Madis Ernits, The Use of Foreign Law by Estonian Supreme Court, in *Judicial Cosmopolitanism*, Giuseppe Franco Ferrari (ed.) (Leiden, Boston 2019) p. 501–527 (506 ff.). E.g. under the PSJKS: RKÜKo 07.06.2011, 3-4-1-12-10; cf. Madis Ernits, The Principle of Equality in the Estonian Constitution: A Systematic Perspective, European Constitutional Law Review 10 (2014), p. 444–480 (451 ff.).

[63] §16 PSJKS.

[64] §17 PSJKS. Cf. RKPJKo 02.05.2005, 3-4-1-3-05; 30.10.2009, 3-4-1-20-09.

[65] §18 PSJKS.

8) Request to declare the President of the Republic, a member of the Parliament, the Chancellor of Justice or the Auditor General permanently incapable of performing his or her duties;[66]
9) Request to terminate the mandate of a member of the Parliament;[67]
10) Request to grant consent to the President of the Parliament acting as the President of the Republic to declare extraordinary elections of the Parliament or to refuse to promulgate an Act of the Parliament;[68]
11) Request to terminate the activities of a political party;[69]
12) Complaint against the actions of a body organising elections or a decision or actions of an electoral committee;[70]
13) Protest by the National Electoral Committee;[71]
14) Petition by the Parliament[72].

Not all of the listed proceedings are equally important. Proceedings of significant importance are the abstract norm control proceedings initiated by the President of the Republic or by the Chancellor of Justice and the right of local government councils to challenge a legislative act or regulation if it is contrary to the constitutional guarantees of local governments. The most important type of proceedings of the present review architecture is the concrete norm control, which may be initiated by any court that concludes that a piece of legislation, the validity of which its decision depends on, is unconstitutional.[73]

This procedure seems to be similar to Austrian, Belgian, French, German, Greek, Italian and Spanish concrete norm control proceedings. In all these jurisdictions, judges have the right to ask the Constitutional Court for an opinion on the constitutionality of the relevant legislative act if they deem it necessary before a final decision in the case is made. Thus, the review model is incidental and proactive. In Estonia, however, according to the prevailing interpretation of the Constitution (and similarly, for example, to Portugal) the constitutional review proceedings start when a court has made a decision in the case, i.e., as a rule, has delivered the judgement or – in procedural matters – the ruling. It is thus (not being principal), *ex post facto* and reactive. Thus, the main difference of the Estonian concrete norm control system is that in Estonia the start of constitutional

[66] §25 PSJKS.

[67] §26 PSJKS. E.g. RKÜKo 13/04/2007, 3-4-1-10-07.

[68] §83(3) PS, §27 PSJKS.

[69] §48(3) and (4) PS, §32–§36 PSJKS.

[70] §37–§40, §42(1) and (2), §43–§46 PSJKS.

[71] §41, §42(3), §43–§46 PSJKS.

[72] §7[1] PSJKS. This procedure was introduced to the PSJKS in 2005 in order to help to overcome the possible constitutional obstacles by adoption of the Euro. Ever since, pursuant to this provision, there was only one procedure, cf. RKPJKa (Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi arvamus = opinion of the Constitutional Review Chamber of the Riigikohus) 11.05.2006, 3-4-1-3-06. Two judges submitted their dissenting opinions questioning the constitutionality of the amendment of the PSJKS.

[73] Cf. Madis Ernits, The Courts and the Supreme Court in Concrete Norm Control, in *15 Years of Constitutional Review in the Supreme Court of Estonia*, Gea Suumann (ed.) (Tallinn 2009) p. 26–38.

review proceedings depends on the prevailing opinion on the prior final decision in the case.

The most important question related to the concrete norm control proceedings concerns the debate whether the Riigikohus' interpretation of the Constitution, according to which the lower-level court should always deliver a final decision prior to initiating the constitutional review,[74] is correct. This interpretation is the clearest expression of the diffuse theory of constitutional review (see above). As a supporting argument, a shorter duration of the proceedings could be put forward. Nevertheless, the present understanding of the initiation of the concrete norm control has been criticised in the literature.[75] The main argument of the critics is the possibility that when the Riigikohus does not follow the opinion of the lower-level court on the unconstitutionality of the legislative act left unapplied, the judgment of the lower-level court might stay in force if none of the parties appeals the decision. A court decision that leaves a valid legislative act unapplied is itself unconstitutional. This problem would not occur in a system of constitutional review that follows the concentrated theory, e.g., when the lower-level courts obtain a preliminary ruling from the Riigikohus and only after that render their final decision.

A constitutional review judgment shall be adopted by a simple majority vote under the principle of confidentiality of deliberations.[76] Judges shall resolve any differences that arise in the process of deciding the case by a vote. No judge has the right to abstain from voting or remain undecided. The presiding judge shall vote last. In the case of an equal division of votes, the vote of the presiding judge shall be decisive.

The publication of dissenting opinions to final judgments is permitted. The possibility of dissenting opinions is foreseen by the PSJKS, pursuant to which a judge, or several judges, who disagree with the judgment or the reasons, may append a (joint) dissenting opinion to the judgment.[77] This opinion shall be submitted by the time of pronouncement of the judgment and signed by all the judges concerned. Dissenting opinions will be published together with the judgment, both in the Official Journal and on the website of the Riigikohus.[78]

Diffuseness of and access to the constitutional adjudication

[74] Since the first CNC judgment: RKPJKo 30.09.1994, III-4/1-5/94.

[75] Madis Ernits, The Courts and the Supreme Court in Concrete Norm Control, in *15 Years of Constitutional Review in the Supreme Court of Estonia*, Gea Suumann (ed.) (Tallinn 2009) p. 26–38; Julia Vahing Laffranque, Põhiseaduse kohtu ja normikontrolli võimalikkusest Eestis Saksamaa näitel, Juridica 1999, p. 307 f.

[76] §57(2) PSJKS.

[77] §57(5) PSJKS.

[78] Cf. Christoph Grabenwarter, Monika Hermanns, Kateřina Šimáčková, Report on Separate Opinions of Constitutional Courts, Venice Commission Opinion No. 932/2018, p. 21 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)030rev-e>.

In the light of the above discussion, the fundamental question of sufficient access to the constitutional adjudication arises. The Riigikohus has recently explained:

> If a person considers that his or her rights have been infringed by a provision of a legislative act, he or she may request a review of the constitutionality of the provision, in particular in the case in which the provision is to be applied (§15(1)2 PS[79]). The constitutionality of a restriction on access to the courts may be challenged by the person in court proceedings, in which the disputed provision should be applied.[80]

Thus, the Riigikohus considers the right to concrete norm control as the primary right to constitutional review and the arguments regarding the alleged unconstitutionality of a legislative act must be presented before the ordinary courts. In another case, the Riigikohus has recently stated: "Pursuant to §15 and §152 PS[81], every court must, in deciding a case, assess the constitutionality of the applicable law."[82] This is an expression of the diffuseness of the system – not only the Riigikohus, but, according to the Riigikohus, all courts are competent to perform judicial review. While this in itself can be considered somewhat ineffective, it is not necessarily constitutionally problematic as long as the Riigikohus fulfils its function as a constitutional court. However, one would expect that courts or – as the court of last instance – the Riigikohus at least has the obligation to respond to the arguments put forward in the complaint regarding the constitutionality of the piece of legislation in its decision. Instead, however, the Riigikohus has repeated several times: "The mere fact that the Riigikohus does not state reasons in its ruling as to the constitutionality of the contested provisions does not mean that courts failed to assess all the pleas in law raised in the complaint."[83] This fiction applies regardless of whether a court has even explicitly considered the constitutionality of the legislative act in question. And this is where it becomes problematic.

In light of this, the claim to an effective legal remedy with regard to the review of constitutionality is reduced to a mere fiction and an irrefutable presumption that at least some judge in the court system has given some thought to the constitutional question. However, this does not fulfil the minimum

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[79] "Everyone has the right, while his or her case is before a court, to request for any relevant law, other legal act or action to be declared unconstitutional."

[80] RKPJKm (Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi määrus = ruling of the Constitutional Review Chamber of the Riigikohus) 13.12.2023, 5-23-36, para. 19.

[81] §15 PS: "[1] Everyone whose rights and freedoms are violated has the right of recourse to the courts. […] [2] The courts shall observe the Constitution and shall declare unconstitutional any law, other legal act or action that violates the rights and freedoms provided for in the Constitution or is otherwise in conflict with the Constitution." §152 PS: "[1] When adjudicating a matter, a court shall not apply any law or other legal act that is in conflict with the Constitution." [For §152(2), see fn. 19 above.]

[82] RKPJKm 22.12.2020, 5-20-9, para. 12; 07.11.2022, 5-22-7, para. 30; 11.06.2024, 5-24-6, para. 24.

[83] RKPJKm 27.01.2017, 3-4-1-14-16, para. 26; cf. RKPJKm 01.11.2011, 3-4-1-21-11, para. 13; 15.05.2013, 3-4-1-4-13, para. 27.

constitutional requirements of a democratic constitutional state. Whether and how such an examination has been carried out must be evident and comprehensible. The complainant and the legal public must be informed of the reasons for rejecting the complaint. Moreover, the Riigikohus has the clear constitutional obligation to perform constitutional review, which means the duty to perform it explicitly. Not obeying this obligation comes close to the denial of justice.

As an interim conclusion, it should be noted that the diffuseness of the constitutional adjudication leads to a dispersion of responsibility. If several instances are simultaneously responsible for constitutional adjudication, it may end up that the question of constitutionality is passed on between the instances as a hot potato. Therefore, it ultimately comes down to the fact that it may happen that not one court really examines the most important question – the question of constitutionality. Historical experience teaches us that in case of a legal system that does not guarantee full legal protection of the constitutional rights, it is only a matter of time before the democratic system of government suffers serious damage.

The main institutional issues

Appointment procedure of judges

The different appointment proceedings for the Chief Justice and for the rest of the judges raises the problem of whether the Riigikohus is a fully-fledged collegial body. This has already been addressed elsewhere.[84] A further problem lies in the modus of how the judges of the Riigikohus are appointed. Although the Parliament has the final decision-making competence, the recruitment of judges is the constitutional responsibility of the Chief Justice, who may or may not involve all judges of the Riigikohus in his decision-making. Although the Parliament ultimately formalises the nomination, in reality the Chief Justice personally determines the composition of the Riigikohus.

The legitimisation procedure for judges of the Riigikohus corresponds to the indirect cooptation[85] model. In his influential work on cooptation, Karl Loewenstein based his analysis on the preliminary understanding of cooptation as the filling of vacant positions in a collegial body by the votes of the existing members of the body, as opposed to an election by an outside constituency.[86] If the actual election

[84] Madis Ernits, Jolita Miliuvienė, Jānis Pleps, Vytautas Sinkevičius, Models of constitutional adjudication in the Baltic States, International Social Science Journal, Special Issue 2022, p. 1–19 (10 f.) <https://doi.org/10.1111/issj.12384>.

[85] Cf. to the cooptation in general Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 14 ff. and to the indirect cooptation p. 87.

[86] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 18. It must be admitted that there is no commonly recognised definition of cooptation. For example, Michael G. Lacy distinguishes between the traditional elite recruitment model, the formal organisation model, the power-protest model and the political socialisation model of cooptation, cf. Michael G. Lacy, Cooptation: Analysis of a neglected social process (University of Kansas 1973) p. 10 <https://hdl.handle.net/1808/30584>. According to Lacy, Loewensteins approach corresponds to the traditional elite recruitment model.

or nomination is not carried out by the body itself but just controlled by it, one could name it indirect cooptation.[87] The function of cooptation is frequently, according to Loewenstein, as a means "to protect the existence and future of a group in its present form".[88] Thus, in this model, it is more likely that the views of newly recruited members are in line with those of existing members, although the process can also be used to change the organisational profile.[89] This means that the cooptation process also becomes a venue for power struggles between those who favour the change and those who would prefer to leave everything as it is.[90] But there is another dimension causing the most concern. To describe the essence of the problem, the words of Karl Loewenstein express it best:

> It [i.e. the cooptation] may be superior to popular election in terms of expediency, but it offers no guarantee that only the most capable will actually reach the top positions. Patronage and nepotism can creep in with every appointment to office, but are easier to detect and, if necessary, correct with all other investiture techniques than with cooptation.[91]

Karl Loewenstein's thorough analysis of cooptation thus points to its fundamental systemic risk.

It must be emphasised that the cooptation procedure for the composition of the Riigikohus was not entirely wrong, at least for the transition period, because it probably accelerated the reform of the court system and its necessary personal renewal, and with that the transformation of the whole legal system. The first composition of the Riigikohus selected by the first Chief Justice Rait Maruste turned many fundamental principles of the democratic constitutional state into constitutional reality. For this, they deserve sincere recognition.

However, the cooptation model might not appear equally successful in the long run. Even if cooptation might not have been a bad choice for a short period of time, over a longer period human imperfection, accumulating error rate and deficit of democracy may sooner or later lead to a creeping downfall. This insight could motivate a forward-thinking constitutional legislator to address this issue sooner rather than later. Historically, under the democratic Constitution of 1920,[92] all judges of the Riigikohus were equally appointed (or elected) by the Parliament and this historical model could serve as the model for a possible future legitimisation procedure for judges of the court that carries out the constitutional review function. A qualified majority, e.g., a two-thirds majority of all members of

[87] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 87.

[88] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 191.

[89] Cf. Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 192.

[90] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 192 ff.

[91] Karl Loewenstein, Kooptation und Zuwahl (Frankfurt a. M. 1973) p. 212. Although Loewenstein explicitly addresses this to the cooptation procedures associated with multinational corporations, these insights are nevertheless transferable to other cooptation models as well.

[92] §69 PS 1920.

Parliament, could be used as a possible amendment in order to minimise the risk of politicisation.[93]

Lifelong term of office of the judges of the Riigikohus

The reason for the limited term of office is the need to find a reasonable balance between the democratic legitimacy of constitutional judges and their independence.[94] The Government Commission for Legal Expertise of the Constitution argued in its final report: "A fixed term of office and a periodic change of the membership will avoid the "petrification" of the Court and ensure the continuous renewal of its legitimacy."[95] On the other hand, opponents of the time-limited term of office for constitutional judges insist on the absoluteness of the principle of lifelong tenure.[96]

Currently, the judges of the Riigikohus are, equally to all other judges, appointed to office for life[97] which means in practice that they will be released as a rule at 68 years of age, but their term of office can theoretically be prolonged by the Riigikohus *en banc* up to 72 years.[98] Combined with the cooptation model, the lifelong tenure of judges of the Riigikohus reinforces both good and incorrect personnel decisions. If someone is appointed to the Riigikohus in his or her early 30s, as it has happened, the effective term of office may theoretically last even 40 years. In a democratic constitutional state, which derives its ongoing power from the change of personalities and their views at the top of the decision-making chain, this is simply too long.

The term of office of constitutional judges varies internationally. Other than in Estonia, the undetermined duration of the term of office of constitutional judges applies in the following member states of the European Union: Austria, Belgium, Cyprus, Denmark, Finland, Ireland, Malta and Sweden.[99] However, the tendency

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[93] §151(1) of the final report of the Government Commission for Legal Expertise of the Constitution of 16 March 1998 "Muudatusettepanekud" <https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus> proposed a the two-thirds majority of the members of the Parliament for the appointment of the judges of a future Constitutional Court.

[94] Cf. Dian Schefold, Zur Problematik der beschränkten Amtszeit von Verfassungsrichtern, Juristenzeitung 43 (1988), pp. 291–296 (292 ff.).

[95] Explanatory memorandum to §151 of the final report of the Government Commission for Legal Expertise of the Constitution of 16 March 1998 "Muudatusettepanekud" <https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus>.

[96] Tõnu Anton, Kas kohtu asemele kvaasikohus on samm edasi või tagasi? in *Konstitutsioonikohtute probleemid ja arengukavad*, Heinrich Schneider, Peeter Roosma (eds.) (Tartu 1999) pp. 82–84. Tõnu Anton who was the President of the Constitutional Assembly and at that time judge of the Riigikohus mocked constitutional judges appointed to office for a fixed term as 'non-judges' because of their lack of lifelong tenure and a constitutional court correspondingly as a 'non-court'.

[97] §147(1) PS.

[98] §48 and §99[1] KS.

[99] The information quoted here is from the Report of the Venice Commission, "The Composition of Constitutional Courts", No. CDL-STD(1997)020, December 1997, p. 13 ff., 65 ff. <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e>.

seems to point towards a non-renewable term of 9 to 12 years, which would meet both requirements: the independence of the judges and the necessary change of personnel and views. In Latvia and Lithuania, as the closest neighbours, the not (directly) renewable term of office of constitutional judges is, respectively, 10 and 9 years. In other member states of the European Union, for example, a not (directly) renewable 9-year term of office applies for constitutional judges in Bulgaria, France, Italy, Poland, Portugal, Romania, Slovenia and Spain and a 12-year non-renewable term in Germany. Furthermore, a non-renewable 9-year term of office also applies for constitutional judges in Ukraine. Thus, Estonia is the only member state of the European Union which, in its relatively new Constitution, made the decision for a lifelong term of office of constitutional judges. Perhaps, in order to minimise the risk of negative effects on the democratic constitutional state, it could be advisable to consider limiting the term of office of constitutional judges *de lege ferenda* to a non-renewable term of office of between 9 and 12 years.[100]

Secondary nature of the constitutional review

§149(3) of the Constitution reads: "The Riigikohus is the highest court of Estonia and reviews rulings of other courts pursuant to a quashing procedure. The Riigikohus is also the court of constitutional review." The systematicity of the two sentences of this paragraph forms the basis of the critique, mainly expressed by the first Chief Justice after the regaining of independence Rait Maruste, according to whose interpretation this constitutional provision means that the Riigikohus is in the first place the highest court of Estonia and only secondarily the court of constitutional review.[101] Indeed, since the Riigikohus deals with administrative, civil, criminal and misdemeanour cases – apart from constitutional review cases – and above that with cases concerning court administration, it has to apply case by case a total of five different codes of procedure, plus rules for court administration matters. With such a complex structure of competences and procedures, it is crucial that the judges carrying out constitutional review tasks stay on track and do not lose sight of their main objective – to carry out an effective substantive constitutional review. Constitutional guardianship, as Hans Kelsen has put it, in the style of Carl Schmitt,[102] is a fundamental function of democratic

[100] §151(3) of the final report of the Government Commission for Legal Expertise of the Constitution of 16 March 1998 "Muudatusettepanekud" <https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus> and §151(5) of the Eesti Vabariigi põhiseaduse muutmise seadus (Amendment Law of the Constitution of the Republic of Estonia), 864 SE of 08 October 2001 <https://www.riigikogu.ee/download/07ee86bd-3ac6-3969-a2d7-3d5176b74ccf>, presented to the Parliament by the President Lennart Meri, proposed a non-renewable 12-year term of office for the judges of a future Constitutional Court.

[101] Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 467; Rait Maruste, in *Kohtute seadus*, Kommenteeritud väljaanne, Priit Pikamäe (ed.) (Tallinn 2018) §26 rec. 18.1.

[102] Hans Kelsen, Who Ought to Be the Guardian of the Constitution? in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Lars Vinx (transl.) (Cambridge 2015) pp. 174–221; cf. Carl Schmitt, The Guardian of the Constitution in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Lars Vinx (transl.) (Cambridge 2015) pp. 79–124, 125–173; Lars Vinx, Introduction in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Lars Vinx (transl.) (Cambridge 2015) p. 5; Lars Vinx, Democratic Constitutionalism –

constitutionalism, separate from ordinary jurisdiction, and deserves corresponding treatment by the Constitution. The cited constitutional article does not meet this requirement.

Reform efforts

There are numerous issues that could be raised.[103] In the following, the article focuses on the two most important critical aspects: the lack of a separate constitutional court and the debate about the individual constitutional complaint.

Constitutional Court

It was only a matter of time before a debate would break out about the justification of the configuration of the institutional framework for constitutional review. There are four important issues of the present system that need to be addressed: incomplete access to constitutional adjudication for the protection of constitutional rights; the cooptation model of appointing the judges; the lifelong term of office of the constitutional judges; and the secondary nature of the constitutional review. All of these could be solved, or at least significantly mitigated, if a standalone constitutional court were established consisting of judges who are all appointed to office through an equal procedure for a non-renewable fixed term of reasonable duration.

The debate about a separate constitutional court started as early as in the *travaux preparatoires* of the Constitution, although none of the draft versions contained an explicit provision for this. Austrian expert Klaus Berchtold was – as far as can be seen – the first to propose a constitutional court for Estonia under the Constitution of 1992. He argued in his speech to the Constitutional Assembly:

> But you may consider establishing a constitutional court which is a specialised court and has the advantage of concentrating the competence concerning protection of human rights to one court for the whole of Estonia. I may say that our [i.e. Austrian] experiences has shown that such a concentration of competence in this field before a constitutional court has a lot of advantages. Especially the advantage that there is no differing jurisprudence between several courts.[104]

The constitutional review questions were discussed in the Constitutional Assembly,[105] but according to the transcript, either the idea was not properly

Kelsen's Theory of Constitutional Review in Lars Vinx, *Hans Kelsen's Pure Theory of Law* (Oxford 2007) p. 163.

[103] For example, Rait Maruste points out the lack of the following necessary aspects of constitutional review: a separate constitutional court; an individual constitutional complaint dispute settlement between public authorities; a right of a parliamentary minority to challenge a decision of the majority; and impeachment proceedings, cf. Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 472 f.

[104] Klaus Berchtold, 29 October 1991 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 328 f.

[105] Peet Kask, 1 November 1991 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 385; Liia Hänni, 22 November 1991 and 10 April 1992 *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.)

discussed, or it was left aside for reasons not disclosed. Thus, the idea of a separate constitutional court was set aside without transparent reasoning and, instead, the present configuration was introduced.

The debate about establishing a separate constitutional court continued among the public in the second half of the nineties with the work and the final report of the Government Commission for Legal Expertise of the Constitution, which was established in 1996. First, foreign experts Robert Alexy[106] and Sergio Bartole[107] recommended a constitutional court for Estonia. Subsequently, in its final report, the commission presented a well elaborated proposal to amend the Constitution and to establish a constitutional court.[108] The essential arguments presented by the commission were: (1) an individual constitutional complaint leads to the establishment of a separate specialised court; (2) the constitutional court better ensures the development of constitutional law; (3) the constitutional court more effectively keeps state bodies within the limits of the powers assigned to them by the Constitution; (4) the constitutional court better ensures the protection of constitutional rights; and (5) the constitutional court helps to prevent Estonia being defeated in the European Court of Human Rights. The Minister of Justice at that time, Paul Varul, was of the opinion that the establishment of the constitutional court was, although not strictly necessary for the development of the state, important and recommendable.[109] Subsequently, several authors – some of them involved in the work of the government commission themselves as staff of the commission – supported a constitutional reform and the establishment of a separate constitutional court.[110]

(Tallinn 1997) p. 531, 1044, 1046; Kaido Kama, 16 January 1992 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 726; Jüri Rätsep, 10 April 1992 in *Põhiseadus ja Põhiseaduse Assamblee*, Viljar Peep (ed.) (Tallinn 1997) p. 1045.

[106] Robert Alexy, Põhiõigused Eesti põhiseaduses, Juridica special issue 2001, p. 94. The manuscript of the monograph was essentially ready and presented to the members of the Government Commission for Legal Expertise of the Constitution already in 1997.

[107] Sergio Bartole, Konstitutsioonikohtu reform Eestis, 1997, p. 5; cf. Sergio Bartole, Helmut Steinberger, Opinion on the Reform of Constitutional Justice in Estonia, Venice Commission Opinion No. CDL(1998)059-e, p. 7 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1998)059-e>.

[108] Cf. the final report of the commission of 16 March 1998 "Muudatusettepanekud" <https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus>. Cf. Paul Varul, Põhiseaduse juriidiline ekspertiis: eesmärgid, töökorraldus ja tulemused, Riigikogu Toimetised 1 (2000), pp. 65–76 (74 f.) <https://rito.riigikogu.ee/eelmised-numbrid/nr-1/pohiseaduse-juriidiline-ekspertiis-eesmargid-tookorraldus-ja-tulemused/>; Maige Prööm, Intervjuu justiitsminister Paul Varuliga, Juridica 1998, p. 110 f.

[109] Paul Varul, Põhiseaduse juriidiline ekspertiis: eesmärgid, töökorraldus ja tulemused, Riigikogu Toimetised 1 (2000), p. 75 <https://rito.riigikogu.ee/eelmised-numbrid/nr-1/pohiseaduse-juriidiline-ekspertiis-eesmargid-tookorraldus-ja-tulemused/>; Maige Prööm, Intervjuu justiitsminister Paul Varuliga, Juridica 1998, p. 110 f.

[110] Julia Vahing Laffranque, Põhiseaduse kohtu ja normikontrolli võimalikkusest Eestis Saksamaa näitel. Juridica 1999, p. 304 f.; Madis Ernits, Põhiseaduse Riigikogu peatüki probleemid, Juridica 1999, p. 478; Virgo Saarmets, Konstitutsioonikohus ja individuaalne konstitutsiooniline kaebus, Üldiseloomustus ja Eesti perspektiivid (Tartu Ülikool 2000) p. 25 f., 70 f. Rather ambiguous Rait Maruste, Põhiseadus ja justiitsorganite süsteem, Juridica 1998, p. 327; Thilo Marauhn, Supreme Court or Separate Constitutional Court: The Case of Estonia, European Public Law 5 (1999), pp. 301–314 <https://doi.org/10.54648/euro1999023>.

In 2001, the departing President of the Republic Lennart Meri initiated constitutional amendment proceedings in order to establish a separate constitutional court.[111] President Meri formulated reasons for the reform of the constitutional court in the explanatory memorandum to the draft and in his speech to the Parliament on 7 October 2001.[112] The explanatory memorandum was essentially based on a critique of the present system. The further arguments raised by President Meri were: (1) Estonia needs a body that has the right to the final interpretation of the Constitution in order to be able to settle disputes between constitutional bodies; (2) such an institution would prevent the risk that some powerful prime minister, parliamentary leader or president will usurp the powers of the other institutions; (3) the constitutional court in this way would create the balance that the state needs to function. The proposed constitutional amendment did not find the necessary political majority and with the next election the draft dropped out of the proceedings of the Parliament. In the following period, several authors here and there supported the idea of establishing a separate constitutional court.[113]

On the other hand, several authors have opposed the idea of the separate constitutional court. The most prominent opponents have been the former Presidents of the Riigikohus Märt Rask[114] and Priit Pikamäe,[115] judges or former

[111] Draft of 7 October 2002 "Eesti Vabariigi põhiseaduse muutmise seadus Vabariigi Presidendi pädevuse ja tema valimiskorra muutmiseks 1182 SE" <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/8aa6f95d-a36c-38ab-abb4-e26248735110/Eesti%20Vabariigi%20p%C3%B5hiseaduse%20muutmise%20seadus%20%20Vabariigi%20Presidendi%20p%C3%A4devuse%20ja%20tema%20valimiskorra%20muutmiseks>.

[112] Lennart Meri, Vabariigi Presidendi Lennart Meri kõne, Verbatim record, IX Riigikogu, VI Istungjärk, Täiskogu korraline istung, Monday, 08.10.2001, 15:00 <http://stenogrammid.riigikogu.ee/en/200110081500>.

[113] Particularly Rait Maruste, former President of the Riigikohus and justice of the European Court of Human Rights, endorsed in several newspaper articles a separate Constitutional Court: Rait Maruste, Eesti vajaks uut põhiseadust, Eesti Päevaleht, 26 March 2004 <https://epl.delfi.ee/artikkel/50980005/rait-maruste-eesti-vajaks-uut-pohiseadust>; Rait Maruste, Käes on aeg uue põhiseaduse teksti koostamiseks, Postimees, 21 April 2005 <https://www.postimees.ee/1471661/kaes-on-aeg-uue-pohiseaduse-teksti-koostamiseks>; Rait Maruste, Eesti vajab veel üht kohut, Postimees, 14 September 2010 <https://www.postimees.ee/312719/maruste-eesti-vajab-veel-uht-kohut>; Rait Maruste, Kaubamaja on kaubamaja ja laev on laev, Postimees, 13 September 2017 <https://arvamus.postimees.ee/4242121/rait-maruste-kaubamaja-on-kaubamaja-ja-laev-on-laev>; Rait Maruste, Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves, Juridica 2020, p. 472. Cf. Anne Raiste, Maruste sõnul tuleks asutada konstitutsioonikohus, Reinsalu seda vajalikuks ei pea, ERR, 11 October 2016 <https://www.err.ee/575364/maruste-sonul-tuleks-asutada-konstitutsioonikohus-reinsalu-seda-vajalikuks-ei-pea> and Rait Maruste's proposals to the Constitutional Experts' Commission <https://www.just.ee/media/903/download>. As for other endorsing opinions, see Allar Jõks, Austatud lugeja! Juridica 2007, p. 1; Lauri Mälksoo, Eesti suveräänsus 1988–2008 in *Iganenud või igavene?* Tekste kaasaegsest suveräänsusest, Hent Kalmo, Marju Luts-Sootak (eds.) (Tartu 2010) p. 156.

[114] Märt Rask, Põhiseaduse kohus suurendab presidendi võimu, Eesti Päevaleht, 30 October 2001 <https://epl.delfi.ee/artikkel/50899906/rask-pohiseaduse-kohus-suurendab-presidendi-voimu>.

[115] Priit Pikamäe, Kui kohtuotsus ei meeldi, ei sobi mistahes selgitus, Postimees 17 November 2017 <https://arvamus.postimees.ee/4312991/priit-pikamae-kui-kohtuotsus-ei-meeldi-ei-sobi-mistahes-selgitus>; Priit Pikamäe, Tants põhiseaduskohtu ümber, Sirp, 31 May 2019 <https://www.sirp.ee/s1-artiklid/c9-sotsiaalia/tants-pohiseaduskohtu-umber/>; Priit Pikamäe, Ülevaade kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kotha, Verbatim record, XIII Riigikogu, V Istungjärk, Täiskogu korraline istung, Thursday, 08.06.2017, 10:00 <http://stenogrammid.riigikogu.ee/en/201706081000>.

judges of the Riigikohus Tõnu Anton,[116] Jüri Põld,[117] Indrek Koolmeister[118] and Ivo Pilving,[119] one of the leading authors of the draft of the Constitution of 1992 Jüri Adams,[120] and Chancellor of Justice Ülle Madise.[121] In summary, they have brought up the following main arguments: (1) there is no need for a separate constitutional court because there are no separate civil, criminal and administrative high courts that would cause the need for harmonising differing case laws but only a single integrated Riigikohus; (2) the cost factor would be too high and the anticipated workload would be too low in a small country like Estonia; (3) the position of the Riigikohus would be damaged and the role of the Chancellor of Justice would be marginalised; (4) since the appointment of the judges of a separate Riigikohus and their term of office would differ from the appointment procedure of other judges and their lifetime term of office, they would not be real judges and thus, the constitutional court would not be a real court; (5) as a consequence, a separate constitutional court would jeopardise the balance of powers and democracy; (6) last but not least, the present system guarantees a sufficient level of protection of constitutional rights and stability is a value in itself.

This debate reveals that any proposal for a reasonable constitutional reform cannot succeed without a broad political consensus, which is extremely difficult to reach. The recurring argument of too high costs has been brought up without any closer analysis and simply anticipating the high salaries of judges. However, if one included the advantages offered by a better protection of constitutional rights, which protection in certain respects does not currently meet the constitutional standard (see above), and the increase of legal certainty, the calculation might not be so simple. These wins could be translated into a better economic climate and increased foreign investments and thus into real money. Furthermore, the institutional arguments illustrate the general reluctance of institutions towards reforms, with the institutions concerned tending to protect their powers and to ignore the broader picture. Therefore, it is now extremely difficult to correct institutional shortcomings created during the drafting of the Constitution, more than 30 years later.

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[116] Tõnu Anton, Kas kohtu asemele kvaasikohus on samm edasi või tagasi? *Konstitutsioonikohtute probleemid ja arengukavad*, Heinrich Schneider, Peeter Roosma (eds.) (Tartu 1999) pp. 82–84.

[117] Jüri Põld, Kas Eestis on vaja eraldiseisvat konstitutsioonikohut? in *Kohtute sõltumatus ja kohtusüsteemi toimimise efektiivsus Eestis* (Tartu 2002) pp. 73–84.

[118] Indrek Koolmeister, Poliitika ja õigus, Juridica 2020, p. 161.

[119] Ivo Pilving, Kas Eestis on vaja individuaalkaebust? Kohtute aastaraamat 2016, pp. 85, 89.

[120] Jüri Adams, Kuidas ja kuhu oleks võimalik põhiseadusega edasi minna, Riigikogu Toimetised 22 (2010), p. 35.

[121] Ülle Madise, Koalitsioonipresidenti meil tarvis pole, Eesti Päevaleht, 2 November 2016 <https://epl.delfi.ee/artikkel/76089649/ulle-madise-koalitsioonipresidenti-meil-tarvis-pole>; Ülle Madise, Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem, Postimees 16 March 2017 <https://arvamus.postimees.ee/4048205/ulle-madise-otsekaebuse-petukaup-ehk-kuidas-rohkem-on-tegelikult-vahem>. Ülle Madise is the daughter of Tõnu Anton.

Individual constitutional complaint

The main shortcoming of the constitutional review proceedings is the lack of a procedure for an individual constitutional complaint or, to be more precise, the lack of sufficiently clear and predictable criteria for the admissibility of an individual constitutional complaint. In Estonian constitutional law theory, the dispute is still ongoing as to whether the Constitution establishes a right to an individual constitutional complaint to the Riigikohus or if all courts have a direct constitutional obligation to enforce constitutional rights and to perform constitutional review.[122] The author of this paper is of the opinion that there are far better arguments that support the necessity of the individual constitutional complaint.[123] It is indispensable in order to meet the requirements of the constitutional guarantee of access to justice.[124] Without the right of individual complaint, the constitutional review system cannot be considered to be exhaustive and the bearers of constitutional rights would still lack the ultimate remedy to enforce such rights.

Foundation and development of the individual constitutional complaint

The right of individual complaint was discussed but rejected in the legislative process of the new PSJKS.[125] However, it was recognised approximately a year later in the case law of the Riigikohus.[126] In 2003 the Riigikohus heard an appeal brought by S.B.[127] who had been sentenced to six years' imprisonment under the old Criminal Code, which had its roots in Soviet law. The new Penal Code, which entered into force on 1 September 2002, laid down a maximum term of imprisonment of five years for Brusilov's sentence for criminalised acts. After having completed five years, Brusilov brought an appeal before the Riigikohus for

[122] Cf., e.g., the materials of the 2013 conference on the Brusilov case (RKÜKo 17.03.2003, 3-1-3-10-02), <http://www.oigus-selts.ee/konverentsid/kumme-aastat-brusiloviga-kuidas-edasi>. Cf. Madis Ernits, The Use of Foreign Law by Estonian Supreme Court in *Judicial Cosmopolitanism*, Giuseppe Franco Ferrari (ed.) (Leiden, Boston 2019) p. 504 fn. 25 with further references.

[123] Madis Ernits, Põhiõigused, demokraatia, õigusriik (Tartu 2011) p. 259;

[124] §15(1) PS.

[125] Märt Rask, the acting Minister of Justice opposed from the lectern in Parliament an amendment proposal to add an explicit regulation of the individual constitutional complaint into the new PSJKS:

> Providing for so-called individual complaints will only seem to guarantee better protection of people's rights. In practice, individual complaints only reach constitutional review after they have passed through other instances of litigation. However, in the practice of other countries, high courts have begun to review political decisions of parliaments under the guise of protecting constitutional rights. Is this what we want? Probably not. Today's governing coalition does not consider such a constitutional change to be right, as it would shift the balance of power between the branches. Therefore, the initiator cannot support the aforementioned amendments.

Märt Rask, Põhiseaduslikkuse järelevalve kohtumenetluse seaduse eelnõu (895 SE) kolmas lugemine, Verbatim Record, IX Riigikogu, VII Istungjärk, Infotund, Wednesday, 13.03.2002, 13:00 <https://stenogrammid.riigikogu.ee/en/200203131300>.

[126] RKÜKo 17.03.2003, 3-1-3-10-02.

[127] Only a few years ago, this case was subsequently anonymised on the Supreme Court's website without any further explanation. The Estonian legal community generally refers to this case as "the Brusilov case". For this reason, this name will also be used hereafter.

the correction of judicial errors and requested that he be exempted from continuing to serve his sentence. The Riigikohus *en banc* upheld the appeal and declared the Implementation Act of the Penal Code unconstitutional in so far as it did not provide for any reduction of the sentence of imprisonment imposed pursuant to the Criminal Code up to the maximum limit on deprivation of liberty laid down in the corresponding paragraph of the Penal Code. The main argument for the admissibility of these proceedings was the requirement under §15(1) PS that the protection of constitutional rights must be free from gaps.[128]

The Riigikohus has stressed several times subsequently that: "The aim of the constitutional right enshrined in the first sentence of §15 PS[129] is to effectively ensure access to courts without any gaps through appropriate court procedure."[130] A gap arises, in particular, when there is no procedural possibility of enforcing a substantive claim. This interpretation must be upheld, since the cited provision, taken in isolation and in conjunction with certain other constitutional provisions,[131] implies the existence of the right to an individual constitutional complaint.[132]

In the subsequent period, the Riigikohus further developed its reasoning, implicitly recognising the individual constitutional complaint and stressing repeatedly:

> The Constitutional Review Court Procedure Act does not contain an *expressis verbis* provision enabling the filing of individual complaints for review of the constitutionality of legislation of general application. At the same time, the Riigikohus *en banc* has repeatedly pointed out, on the basis of §13, §14 and §15 PS and the application practice of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the Riigikohus may refuse to hear a complaint of a person on its merits only if the person has other effective possibilities for exercising the right of recourse to the courts, guaranteed by §15 PS.[133]

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[128] RKÜKo 17.03.2003, 3-1-3-10-02, para. 17 and 26; cf. also former RKÜKo 22.12.2000 3-3-1-38-00, para. 15 (Divec) and subsequently RKÜKo 29.11.2011, 3-3-1-22-11, para. 23; 06.03.2012, 3-2-1-67-11, para. 21; 21.01.2014, 3-4-1-17-13, para. 27; RKÜKm (Riigikohtu üldkogu määrus = ruling of the Riigikohus *en banc*) 21.04.2015, 3-2-1-75-14, para. 58; RKPJKo 09.04.2008, 3-4-1-20-07, para. 18; 17.07.2009, 3-4-1-6-09, para. 15; 15.12.2009, 3-4-1-25-09, para. 20; 01.11.2011, 3-4-1-19-11, para. 22; 11.12.2012, 3-4-1-11-12, para. 38; 11.12.2012, 3-4-1-20-12, para. 29; 10.12.2013, 3-4-1-20-13, para. 48; 21.01.2014, 3-4-1-17-13, para. 27; 20.03.2014, 3-4-1-42-13, para. 48.

[129] §15(1) PS reads: "Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before a court, to request for any relevant law, other legal act or action to be declared unconstitutional."

[130] RKÜKo 12.04.2016, 3-3-1-35-15, p 25; RKÜKm 05.06.2017, 3-1-1-62-16, p 31.

[131] In particular in conjunction with §14, §146 and §149(3)2 PS.

[132] Cf. Robert Alexy, Põhiõigused Eesti põhiseaduses, Juridica Special Issue 2001, p. 13 f., 94.

[133] RKPJKm 23.03.2005, 3-4-1-6-05, para. 4; 09.05.2006, 3-4-1-4-06, para. 8; 17.01.2007, 3-4-1-17-06, para. 4; 04.04.2007, 3-4-1-8-07, para. 5 f.; 17.05.2007, 3-4-1-11-07, para. 3 f.; 05.02.2008, 3-4-1-1-08, para. 4 f.; 03.04.2008, 3-4-1-3-08, para. 3 f.; 17.09.2008, 3-4-1-13-08, para. 2 f.; 30.12.2008, 3-4-1-12-08, para. 17 f.; 11.03.2009, 3-4-1-19-08, para. 10 f.; 20.05.2009, 3-4-1-11-09, para. 5 f.; 27.11.2009, 3-4-1-26-09, para. 7 f. Cf. already RKÜKo 17.03.2003, 3-1-3-10-02, para. 17: "On the basis of §15 of the Constitution the Riigikohus may

Moreover, the Riigikohus has explicitly recognised the right of every person if direct recourse to the Riigikohus: "If a person is of the opinion that he has no other effective possibility to exercise the right of judicial protection, guaranteed by §15 PS, the person himself can have recourse to the Riigikohus."[134] Simultaneously, the Riigikohus has always highlighted the subsidiary nature of the individual complaint: where there is another effective remedy, an individual complaint is inadmissible.[135]

On the other hand, the Riigikohus has partly limited the possibility of filing an individual complaint in a way that would make it practically impossible:

> Even if a person has no other effective means of exercising the right to access to courts guaranteed by §15 of the Constitution, he or she can only appeal directly to the Riigikohus in defence of his or her constitutional rights if his or her rights have been violated by the application of certain provisions to him or her. The question of the constitutionality of these norms must arise from their specific application to the person, not from their unspecified application in the past or their possible application in the future. There must be a genuine dispute as to whether constitutional rights and freedoms have been infringed.[136]

This extremely restrictive view cannot be accepted. The function of an individual complaint is to fill a gap in legal protection in cases where, for factual or legal reasons, a person cannot be required to await the specific application of the rule or cannot reasonably be expected to be subject to the rule in advance. Since an infringement of a constitutional right may also consist of a failure on the part of the legislature to act, it is legally impossible, at least in those cases, to require the prior specific application of a rule. A similar structure existed, for example, in the Brusilov case, in which the person had no procedural opportunity to challenge the non-reduction of his sentence and the infringement consisted quite simply in the absence of the necessary rule.[137] However, even if there is a rule, it may be impossible to have to wait for the specific application of the rule. For example, in the case of challenging an international treaty or a rule of an international treaty that modifies the rights or duties of persons, the requirement of a specific application of the rule would render the legal remedy practically meaningless, since it is very difficult for a state to get rid of an unconstitutional

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refuse to hear S. Brusilov's complaint only if S. Brusilov has other effective ways to obtain judicial protection of the right established in this provision."

Although the Riigikohus also cited, in that context, §13 PS, it is important to mention it and this can systematically mark the triangular effect of constitutional procedural rights (*Drittwirkung*), since the protection of constitutional rights within the meaning of §13 PS is to be understood as protection by the State against attacks by a third party and not as protection against the State or against another addressee of constitutional rights. As regards the ECHR, it would be even more precise to refer to the case law under Articles 6 and 13.

[134] RKPJKo 09.06.2009, 3-4-1-2-09, para. 36.

[135] Cf. RKPJKm 20.06.2024, 5-24-4, para. 11.

[136] RKPJKm 10.06.2010, 3-4-1-3-10, para. 14; similarly: RKPJKm 23.01.2014, 3-4-1-43-13, para. 10. Riigikohus has later relativised this extremely restrictive view, cf. RKPJKm 03.03.2015, 3-4-1-60-14, para. 17, 18.

[137] RKÜKo 17.03.2003, 3-1-3-10-02.

treaty in force and the treaty cannot logically be applied before it is enforced. Moreover, the function of the individual complaint is to help secure rights where a person may not even be aware that a norm has been applied to him. This is the case, for example, with provision of surveillance measures. If a person does not know, it is impossible to require him or her to wait for the specific application of the rule. It is also doubtful whether a person can reasonably be expected to wait for the sanction to apply. If the legislature were to reintroduce, for example, the death penalty, a person could not reasonably be expected to wait until the sanction norm would apply to him. The same is obviously true for sanctions that would constitute torture, cruel or degrading treatment. Where exactly the line is drawn is a matter of interpretation.[138] So, the Riigikohus later retracted this extremely restrictive view:

> A person may file a complaint to the Riigikohus for review of constitutionality against a legislative act prohibiting certain conduct in order to protect his or her fundamental rights even before the imposition of the sentence or the alleged violation of subjective rights, if the person refers to the possibility of an actual violation of his or her rights. Such an individual complaint is admissible if the violation of the person's rights is probable, serious and irreversible and the person has no other effective means of exercising the right to judicial protection guaranteed by §15 of the Constitution.[139]

It is to be hoped that the extremely restrictive view on the admissibility is merely an unfortunate isolated case.

Possibility of a constitutional complaint against a court decision (judicial constitutional complaint)

The aforementioned, however, only concerns the norm control complaint. Interestingly, in the period subsequent to the Brusilov judgment, the Riigikohus also initially appeared to be willing to recognise the judicial constitutional complaint, i.e., the constitutional complaint against the decision of the court of the last instance. This has been vaguely pointed out in particular in two judgments delivered by the Riigikohus *en banc*.

In a so-called special appeal brought by Ronald Tsoi, the Riigikohus *en banc* heard an administrative case. The two main issues in the case were, first, whether the law which precluded the revocation of withdrawal of the right to drive imposed before the entry into force of the new Penal Code, even though the new law did not know the corresponding additional punishment was constitutional and, secondly, whether the failure to waive the penalty had to be challenged before the

[138] It is advisable to allow an individual complaint against all sanctioning norms for which a person cannot reasonably be expected to wait for the norm to apply in a specific case. In such cases, where the person has no difficulty in challenging the application of the rule when it is applied, an individual complaint will not be admissible merely because there is another effective remedy available.

[139] Cf. RKPJKm 03.03.2015, 3-4-1-60-14, para. 18.

administrative or ordinary courts.[140] In the first place, the Riigikohus allocated the jurisdiction of the administrative court because it was a public-law dispute for which no special regime had been provided for. Secondly, the Riigikohus found that the law at issue was in line with the Constitution. This was a constitutional dispute which arose in the context of a dispute concerning the jurisdiction of a court.

In another so-called special appeal, brought by Peeter Ludvig, the Riigikohus *en banc* also examined a case transferred to it by the Administrative Chamber. The main issue in this case was, like the previous case, the question of the jurisdiction, i.e., whether the administrative court or the ordinary court had jurisdiction to hear an appeal against a decision establishing the intoxication status of a person who had been brought to a health care institution.[141] The Riigikohus held that the jurisdiction in this case belonged to the ordinary courts.

The link between the two cases was that the Riigikohus gave a broad interpretation to the right of individuals to bring a so-called special appeal before the Riigikohus in order to ensure that the general constitutional right to address a court was not unprotected. These decisions have been interpreted as a step towards the recognition of judicial constitutional complaint.

In the following period, however, the Riigikohus expressly ruled out the judicial constitutional complaint in the case of Murat Kilic. A Turkish sea captain for long-distance ferries was married to an Estonian national and held a long-term residence permit for Estonia. He applied for Estonian citizenship. This was refused on the grounds that the applicant had not stayed in Estonia for at least 183 days per year in the last five years. The administrative courts dismissed the appeals and did not initiate constitutional review proceedings, despite repeated explicit requests.[142] The applicant lodged an individual complaint against the judgment of the Administrative Chamber of the Riigikohus before the Riigikohus, which was dismissed by the Constitutional Review Chamber. The latter stated succinctly: "Pursuant to the Constitutional Review Court Procedure Act, the Constitutional Review Chamber is not a higher court than the other chambers of the Riigikohus, to which appeals can be lodged against decisions of the Administrative, Civil or Criminal Chamber."[143]

This precedent has been followed by a number of unsuccessful attempts to directly or indirectly challenge a Riigikohus's decision before the Riigikohus with a constitutional reasoning.[144] As a consequence, according to the unequivocal case

[140] RKHKm (Riigikohtu halduskolleegiumi määrus = ruling of the Administrative Chamber of the Riigikohus) 10.11.2003, 3-3-1-69-03 and RKÜKm 28.04.2004, 3-3-1-69-03

[141] RKHKm 22.12.2003, 3-3-1-77-03 and RKÜKo 30.04.2004, 3-3-1-77-03.

[142] RKHKo (Riigikohtu halduskolleegiumi otsus = judgment of the Administrative Chamber of the Riigikohus) 20.10.2008, 3-3-1-42-08.

[143] RKPJKm 11.03.2009, 3-4-1-19-08, para. 14.

[144] See RKPJKm 11.04.2013, 3-4-1-8-13; 07.07.2015, 3-4-1-24-15; 19.04.2016, 3-4-1-34-15; 27.01.2017, 3-4-1-14-16; 11.05.2017, 3-4-1-4-17. More recently: RKPJKm 22.12.2020, 5-20-9, para. 11-12; 07.11.2022, 5-22-7, para. 29-30; 13.12.2023, 5-23-36, para. 18-19; 11.06.2024, 5-24-6, para. 24; 20.06.2024, 5-24-4, para. 12, 14.

law of the Riigikohus, there is *de lege lata* no judicial constitutional complaint in Estonia. Such a solution may not sufficiently guarantee the constitutional right to loophole-free access to justice.

Amendment attempt

The fundamental importance of the individual complaint for legal protection and the legal uncertainty described above prompted the Minister of Justice in 2017 to present a plan to add provisions on individual constitutional complaint to the PSJKS.[145] The subsequent debate about this plan was mainly conducted in the press.

The plan was endorsed by the Chief Justice of the Riigikohus at the time, Priit Pikamäe, and by some of the judges[146], who found that the problem of introducing an individual complaint in the PSJKS was appropriate and that regardless of the specific solution, the issue must be dealt with through legislation.[147] Eerik Kergandberg also expressed cautious support for the institution of the individual complaint in the literature.[148] In the press, Rait Maruste[149] and, slightly more cautiously, Uno Lõhmus[150] also expressed clear support for the idea of introducing individual complaints in the PSJKS.

[145] Põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise seadus, Väljatöötamiskavatsus, compiled by Katri Jaanimägi, Ulrika Paavle, Mirjam Rannula, Justiitsministeerium, 1 March 2017, 17-0304; Põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise seadus, Seaduseelnõu, Justiitsministeerium, 21 May 2018, 17-0304, both available at: <http://eelnoud.valitsus.ee>.

[146] Judges Henn Jõks, Eerik Kergandberg, Ants Kull, Villu Kõve and Peeter Roosma.

[147] Riigikohtunike P. Pikamäe, H. Jõksi, E. Kergandbergi, A. Kulli, V. Kõve ja P. Roosma täiendav arvamus põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise väljatöötamise kavatsuse kotha, 29 March 2017, nr 6-6/17-15, available at: <http://eelnoud.valitsus.ee>.

[148] Eerik Kergandberg, Individuaalkaebus kui riigisaladus, Kohtute aastaraamat 2016, pp. 91–97.

[149] Rait Maruste, Õiguskantsler püüab eksitada seadusandjat ja avalikkust, Postimees, 14 March 2017 <https://arvamus.postimees.ee/4045813/rait-maruste-oiguskantsler-puuab-eksitada-seadusandjat-ja-avalikkust>.

[150] Uno Lõhmus was in 1998–2004 the Chief Justice of the Riigikohus, before that 1994–1998 judge of the European Court of Human Rights and after that 2004–2013 judge at the Court of Justice of the European Union. Cf. Uno Lõhmus, Võimalus pöörduda otse riigikohtusse väärib arutelu, ERR, 16 March 2017 <https://www.err.ee/584528/uno-lohmus-voimalus-poorduda-otse-riigikohtusse-vaarib-rutelu>.

However, on the other side, the plan triggered exceptionally harsh critique.[151] In particular, the draft was attacked as dangerous for democracy,[152] as an act of deception[153] and as an attempt to silence the Chancellor of Justice.[154] Even the majority of the Riigikohus did not support the draft law "as proposed".[155] Furthermore, judge Ivo Pilving publicly criticised the plan.[156] Other prominent opponents were the Chancellor of Justice Ülle Madise[157] and former Minister of Justice and former Chief Justice of the Supreme Court Märt Rask.[158] The main argument of the opponents was the assumption that there is no gap in the judicial protection, the assertion that the introduction of individual complaints would lead to an unnecessary increase in the workload of the Riigikohus, that it would create

[151] Ivo Pilving, Kas Eestis on vaja individuaalkaebust? Kohtute aastaraamat 2016, pp. 81–89 <https://www.riigikohus.ee/sites/default/files/elfinder/%C3%B5igusalased%20materjalid/Riigikohtu%20tr%C3%BCkised/Kohtute_raamat_2016.pdf>; Liis Velsker, Reinsalu plaanitav seaduseelnõu on õiguskantsleri hinnangul arusaamatu ja ohustab demokraatiat, Postimees, 10 March 2017 <https://www.postimees.ee/4041463/reinsalu-plaanitav-seaduseelnou-on-oiguskantsleri-hinnangul-arusaamatu-ja-ohustab-demokraatiat>; Karin Kangro, Rask näeb otsekaebuste lubamise plaanis katset õiguskantsler tasalülitada, Postimees, 15 March 2017 <https://www.postimees.ee/4046031/rask-naeb-otsekaebuste-lubamise-plaanis-katset-oiguskantsler-tasalulitada>; Ülle Madise, Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem, Postimees, 16 March 2017 <https://arvamus.postimees.ee/4048205/ulle-madise-otsekaebuse-petukaup-ehk-kuidas-rohkem-on-tegelikult-vahem>; Helen Mihelson, Riigikohus ei toeta otsekaebuste lubamise plaani, kuid soovib arutelu jätkata, Postimees, 29 March 2017 <https://www.postimees.ee/4062357/riigikohus-ei-toeta-otsekaebuste-lubamise-plaani-kuid-soovib-arutelu-jatkata>; Ivo Pilving, Põhiõiguste kaitset tuleb alustada õigest otsast, Postimees, 2 April 2017 <https://arvamus.postimees.ee/4066569/ivo-pilving-pohioiguste-kaitset-tuleb-alustada-oigest-otsast>.

[152] Liis Velsker, Reinsalu plaanitav seaduseelnõu on õiguskantsleri hinnangul arusaamatu ja ohustab demokraatiat, Postimees, 10 March 2017 <https://www.postimees.ee/4041463/reinsalu-plaanitav-seaduseelnou-on-oiguskantsleri-hinnangul-arusaamatu-ja-ohustab-demokraatiat>.

[153] Ülle Madise, Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem, Postimees, 16 March 2017 <https://arvamus.postimees.ee/4048205/ulle-madise-otsekaebuse-petukaup-ehk-kuidas-rohkem-on-tegelikult-vahem>.

[154] Karin Kangro, Rask näeb otsekaebuste lubamise plaanis katset õiguskantsler tasalülitada, Postimees, 15 March 2017 <https://www.postimees.ee/4046031/rask-naeb-otsekaebuste-lubamise-plaanis-katset-oiguskantsler-tasalulitada>.

[155] Riigikohtu arvamus põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise väljatöötamise kavatsuse kotha, 29 March 2017, 6-6/17-15, available at: <http://eelnoud.valitsus.ee>.

[156] Ivo Pilving is the current President of the Administrative Chamber of the Riigikohus. Cf. Ivo Pilving, Riigikohtu halduskolleegiumi arvamus PSJKS muutmise seaduse eelnõu VTK-le, 28 March 2017, 6-6/17-15, available at: <http://eelnoud.valitsus.ee>; Ivo Pilving, Põhiõiguste kaitset tuleb alustada õigest otsast, Postimees 2 April 2017 <https://arvamus.postimees.ee/4066569/ivo-pilving-pohioiguste-kaitset-tuleb-alustada-oigest-otsast>; Ivo Pilving, Kas Eestis on vaja individuaalkaebust? Kohtute aastaraamat 2016, p. 81 ff.

[157] Ülle Madise is the Chancellor of Justice since March 2015. Cf. Ülle Madise, Arvamus põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise seaduse eelnõu väljatöötamise kavatsusele, 10 March 2017, 9-2/170305/1701102, available at: <https://www.oiguskantsler.ee/et/seisukohad>; Ülle Madise, Otsekaebuse petukaup ehk kuidas rohkem on tegelikult vähem, Postimees, 16 March 2017 <https://arvamus.postimees.ee/4048205/ulle-madise-otsekaebuse-petukaup-ehk-kuidas-rohkem-on-tegelikult-vahem>; Liis Velsker, Reinsalu plaanitav seaduseelnõu on õiguskantsleri hinnangul arusaamatu ja ohustab demokraatiat, Postimees, 10 March 2017 <https://www.postimees.ee/4041463/reinsalu-plaanitav-seaduseelnou-on-oiguskantsleri-hinnangul-arusaamatu-ja-ohustab-demokraatiat>. Since the principal function of the Chancellor of Justice is to help to guarantee constitutional rights, it would only be consistent if she or he were the first proponent of the individual complaint.

[158] Cf. Karin Kangro, Rask näeb otsekaebuste lubamise plaanis katset õiguskantsler tasalülitada, Postimees, 15 March 2017 <https://www.postimees.ee/4046031/rask-naeb-otsekaebuste-lubamise-plaanis-katset-oiguskantsler-tasalulitada>.

a risk of politicisation of the Riigikohus and the apprehension that it would undermine the competences of the Chancellor of Justice.

The strong negative reaction was somewhat surprising and regrettable. The Riigikohus, in its case law, has already accepted the right of individual complaint. Despite this, no excessive increase of the workload or politicisation of the Riigikohus has so far been observed. However, if the individual constitutional complaint were removed from the legal order, there would appear an unconstitutional gap in the right to access to courts.

In the following, the Minister of Justice withdrew his plan and the individual constitutional complaint continues its shadowy existence based on the case law of the Riigikohus, which itself did not have a majority in support of the idea.

A case study on the case law of the Supreme Court

One of the most famous cases of the Riigikohus, the Brusilov case,[159] has already been touched upon above. Another judgement that is undoubtedly one of the landmark judgements of the Riigikohus is called "Operative technical measures I".[160] The Parliament adopted the Police Act of the Republic of Estonia Amendment Act,[161] which provided, among other things, for the following:

> To establish that until the adoption of an act laying down operative surveillance activity, the security police officers may temporarily use operative technical measures to perform their duties only at the written consent of a member of the Riigikohus appointed by the Chief Justice of the Riigikohus.

The Chancellor of Justice challenged this article in the Riigikohus. The Riigikohus repealed the article in question as of the entry into force of the judgment.[162]

The reasoning of this early judgement was rather brief and simply structured. The following parts are of importance:

> The law establishes the possibility to employ special operative surveillance measures, and the general grounds for the restriction of fundamental rights and freedoms. […] Nevertheless, the Court is of the opinion that the valid normative framework for the implementation of special operative

[159] RKÜKo 17.03.2003, 3-1-3-10-02.

[160] RKPJKo 12.01.1994, III-4/1-1/94. Cf. Madis Ernits, An Early Decision with Far-reaching Consequences, Juridica International 12 (2007), pp. 23–35 (24–28, 32–35); Madis Ernits, §3. [Põhiseaduse ülimuslikkus ja reservatsioon ning seaduslikkus ja üldine seadusereservatsioon; rahvusvahelise õiguse üldtunnustatud normid; avaldamiskohustus ja salajase õiguse keeld] in *Eesti Vabariigi põhiseaduse kommentaarid*, Uno Lõhmus (ed.), 2023, rec. 101 ff. <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon>.

[161] Eesti Vabariigi politseiseaduse muutmise ja täiendamise seadus (Act amending and supplementing the Police Act of the Republic of Estonia) of 21 March 1993 (RT I 1993, 20, 355).

[162] RKPJKo 12.01.1994, III-4/1-1/94, resolutive part of the judgment.

> surveillance measures is insufficient from the aspect of universal protection of fundamental rights and freedoms, and hides in itself the danger of arbitrariness, distortions and unconstitutional restrictions of the exercise of fundamental rights and freedoms. It has not been provided what exactly is to be understood under these special operative surveillance measures. […] The circle of subjects entitled to apply special operative measures, the cases, conditions, procedures, guarantees, control and supervision, and responsibility pertaining to the use of special measures have not been specified. […] Thus, upon passing […] the Police Act Amendment Act, the Riigikogu has ignored §3 of the Constitution, according to which the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith, and has violated §14, which obliges the executive to guarantee the rights and freedoms of every person. […] The Riigikogu itself ought to have established the concrete cases and a detailed procedure for the use of special operative surveillance measures, as well as possible restrictions of rights related to the use of such measures, instead of delegating all this to the officers of the Security Police and a judge of the Riigikohus. What the legislator is justified or obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and under the condition of court supervision. Thus, […] the Police Act Amendment Act is also in conflict with §13(2) of the Constitution, as insufficient regulation upon establishing restrictions on fundamental rights and freedoms does not protect everyone from the arbitrary treatment of state power.

The significance of this judgment arises from three aspects: first, the Riigikohus recognises the general principle of the reservation of the law; second, it introduces the general right to organisation and procedure, and third, it accepts that the legislature can not only violate the Constitution by going too far but also by doing not enough, i.e. by omission.[163] Only the first aspect, which is the most important one, is of a closer interest here. The general principle of the reservation of the law has its roots in the Enlightenment and in the idea that, since everyone is equally entitled to human rights, everyone must also be entitled to have a say, at least indirectly through a vote in elections, in the limitation of these rights.[164] The Riigikohus has repeated the idea of the general principle of the reservation of the law several times after its first recognition, in a different wording but always in a very clear manner, e.g.: "The Parliament may not delegate to the Government

[163] Madis Ernits, An Early Decision with Far-reaching Consequences, Juridica International 12 (2007), pp. 23–35 (24–28, 32–35).

[164] Cf. Madis Ernits, §3. [Põhiseaduse ülimuslikkus ja reservatsioon ning seaduslikkus ja üldine seadusereservatsioon; rahvusvahelise õiguse üldtunnustatud normid; avaldamiskohustus ja salajase õiguse keeld] in *Eesti Vabariigi põhiseaduse kommentaarid*, Uno Lõhmus (ed.), 2023, rec. 103 <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon>.

of the Republic the resolution of a matter which, according to the Constitution, must be resolved by legislation."[165]

The principle of general reservation of the law has two elements: first, the requirement of a legal base or legislative authorisation for every infringement of rights which specifically concerns constitutional rights, and second, a slightly broader materiality principle or parliamentary reservation which requires that material, or most important, questions must be decided by the Parliament itself and cannot be delegated to the executive power.[166] The most prominent formulation of the first principle by the Riigikohus is the following:

> The delegation of a matter that falls within the competence of the legislature to the executive and the interference of the executive in constitutional rights is permitted only on the basis of an authority-delegating provision that is provided for by legislation and in accordance with the Constitution.[167]

The materiality principle has been repeated in a similar wording several times by the Riigikohus:

> The requirement of parliamentary reservation derives from the principles of the rule of law and democracy, and it means that in regard to issues concerning constitutional rights all material decisions from the point of view of exercise of constitutional rights must be taken by the legislator.[168]

The following requirement is a particularly important addition to this principle:

> The executive may only specify the restrictions on constitutional rights and freedoms laid down by legislation, but is not allowed to impose additional restrictions to those provided for by legislation.[169]

When it comes to infringements of constitutional rights, both requirements, i.e. the requirement of a legal base or legislative authorisation and the materiality principle or parliamentary reservation must be met.

The most interesting question in this context is what is material. Unfortunately, there is neither a simple nor an exhaustive answer to that question. In subsequent case law, the Riigikohus has ruled in particular that a detailed

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[165] RKPJKo 23.03.1998, 3-4-1-2-98, para. VIII. Cf. RKPJKo 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32; 20.03.2014, 3-4-1-42-13, para. 41; RKÜKo 26.04.2016, 3-2-1-40-15, para. 53.

[166] Madis Ernits, §3. [Põhiseaduse ülimuslikkus ja reservatsioon ning seaduslikkus ja üldine seadusereservatsioon; rahvusvahelise õiguse üldtunnustatud normid; avaldamiskohustus ja salajase õiguse keeld] in *Eesti Vabariigi põhiseaduse kommentaarid*, Uno Lõhmus (ed.), 2023, rec. 101 ff. <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon>.

[167] RKPJKo 18.05.2015, 3-4-1-55-14, para. 46.

[168] RKÜKo 03.12.2007, 3-3-1-41-06, para. 21; 02.06.2008, 3-4-1-19-07, para. 25. Cf. RKÜKo 21.02.2017, 3-3-1-48-16, para. 38; RKPJKo 24.12.2002, 3-4-1-10-02, para. 24; 06.01.2015, 3-4-1-34-14, para. 44; 18.05.2015, 3-4-1-55-14, para. 46.

[169] RKPJKo 24.12.2002, 3-4-1-10-02, para. 24; RKTKm (Riigikohtu tsiviilkolleegiumi määrus = ruling of the Civil Chamber of the Riigikohus) 26.02.2014, 3-2-1-153-13, para. 17.

procedure for limitation of rights[170] and the designation of the competent administrative body[171] are material from the perspective of constitutional rights and thus objects of legislation. What is more, e.g., disciplinary sanctions against civil servants,[172] the object and amount of a customs duty,[173] interest duty on a tax payment in arrears,[174] a participation fee of an auction for privatisation of land,[175] fees for bailiffs[176] and a limit on the reimbursement of the costs of a contractual representation fee[177] must be provided for by legislation and are, thus, material. However, this list is not exhaustive and is therefore only indicative.

At this point, it is important to note that the judgment "Operative technical measures I" laid the foundation for a long chain of case law, some of which continues to this day. Unfortunately, in a more recent case law, the Riigikohus seems to have partially abandoned the materiality principle in declaring that "some material matters can be decided by the government".[178] This statement has also found expression in some judgements.[179]

The Riigikohus *en banc* had to assess the constitutionality of a set of provisions providing for the qualification requirements for construction engineers.[180] The obligation to prove the existence of qualifications for a certain profession is an intense infringement of the constitutional freedom of choice of profession. Since without proof of qualification, a person cannot work in the chosen profession, this is a restriction on access to the profession. This, in turn, means that a person who does not have a professional certificate cannot freely earn a living in his chosen profession. As the Riigikohus pointed out: "The law precludes the exercise of certain activities without a certificate of professional qualification or competence."[181]

The legislature had delegated the setting of those qualification requirements in their entirety to the regulatory power of the Minister for Enterprise and

[170] RKPJKo 12.01.1994, III-4/1-1/94. In case of an intensive limitation, which undoubtedly includes wire-tapping and covert surveillance under operative technical special measures, the Riigikohus considers the order or procedure so important that it must be established by law and not by an act subordinate to a law.

[171] RKHKm 22.12.2003, 3-3-1-77-03, para. 24.

[172] RKPJKo 11.06.1997, 3-4-1-1-97.

[173] RKPJKo 23.03.98, 3-4-1-2-98.

[174] RKPJKo 05.11.2002, 3-4-1-8-02.

[175] RKÜKo 22.12.2000, 3-4-1-10-00.

[176] RKPJKo 19.12.2003, 3-4-1-22-03.

[177] RKÜKm 26.06.2014, 3-2-1-153-13, para. 73.

[178] RKPJKo 31.10.2022, 5-22-4, para. 71.

[179] Cf. M. Ernits, §3. [Põhiseaduse ülimuslikkus ja reservatsioon ning seaduslikkus ja üldine seadusereservatsioon; rahvusvahelise õiguse üldtunnustatud normid; avaldamiskohustus ja salajase õiguse keeld] in *Eesti Vabariigi põhiseaduse kommentaarid*, Uno Lõhmus (ed.), 2023, rec. 159 f. <https://pohiseadus.riigioigus.ee/v1/eesti-vabariigi-pohiseadus/i-uldsatted-ss-1-7/ss-3-pohiseaduse-ulimuslikkus-ja-reservatsioon>.

[180] RKÜKo 17.05.2021, 3-18-1432. Cf. RKHKo 28.12.2021, 3-17-1994, p 14–17.

[181] RKÜKo 17.05.2021, 3-18-1432, p 31.

Information Technology, without any limitations or substantive requirements. The Riigikohus held, in breach of its earlier case law, that this legislation constitutes the authorisation "under which the minister will establish, among other things, as qualification requirements, the education and work experience requirements that a person must meet in order to qualify [as a construction engineer]"[182]. In short, the Riigikohus accepted in this case a mere allocation of competence as the basis for authorisation to issue the regulation establishing the qualification requirements. The Riigikohus did not examine whether, in accordance with the principle of materiality, at least the most important qualification requirements should not be laid down in the legislation itself. However, from the earlier case law of the Riigikohus, it can be clearly concluded that the legislator cannot, in the case of an intensive infringement of a constitutional right, expressly delegate the power to enact all important conditions to the executive.

A further problematic development has emerged in the assessment of the lawfulness of vaccination orders. The Commander of the Defence Forces imposed on all employees of the Defence Forces the obligation to undergo vaccination against coronavirus. The consequence of non-compliance to this order was dismissal from service. The Riigikohus was of the opinion that a general provision of the labour law was a sufficient legal basis for this order. According to this general provision, every employer shall have the right to impose on the undertaking stricter occupational health and safety requirements than those provided for by legislation. This provision has a double meaning. In so far as the employer is a private person and the relationship between the parties is governed by a labour contract, this power must be exercised in accordance with the principles of private law. However, when it is relied upon by the State itself or by a subordinate public legal person in relation to a private individual, the rule is subject to constitutional principles, including the principle of materiality. According to the principle of materiality, however, the important questions, i.e., in particular, the restrictions of constitutional rights, must be laid down in the legislation itself. This condition was clearly not met by the provision in question. It is therefore highly doubtful whether the provision in question can be applied at all in public law. However, the Riigikohus stated, without seeing any problem: "[The particular provision] expressly permits the imposition of stricter requirements than those provided for in the legislation, and neither the Military Service Act[183] nor its implementing acts provide for an exception to the right to impose stricter requirements."[184]

In a more recent similar case concerning the compulsory vaccination of police officers, which was imposed by a general order of the Director General of Police based on the same legal basis, the Riigikohus reaffirmed the latter

[182] RKÜKo 17.05.2021, 3-18-1432, p 23.

[183] Kaitseväeteenistuse seadus (Military Service Act) of 13 June 2012 (RT I, 10.07.2012, 1) <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/505082024006/consolide>.

[184] RKHKm 25.11.2021, 3-21-2241, para. 24.

position.[185] Hereby, the Riigikohus simply stated that the general labour law basis was constitutional.[186] In short, the Riigikohus suddenly allows, despite its earlier strict case law, the imposition of further obligations by the executive on the basis of a legal basis devoid of any substance. This opens the floodgates to the arbitrariness of the executive.

It remains to be seen whether these decisions are going to be corrected in later case law or whether a larger and more serious problem has occurred for the rule of law and the basic democratic order.

Constitutional Review in Estonia – a Model for 30 Years?

Speaking of the overall trends, the rapid development of the Riigikohus' case law in the initial period seems to have been slowed down over time. In some cases, tendencies have appeared to roll back some of the central achievements of the democratic constitutional state already achieved in the early case law, and in some recent important cases the case law has not taken the best path from the perspective of the constitutional principles. Some key judgments bring out important points. However, the reasoning tends too often to be fragmentary or methodologically poorly comprehensible and at times the consistency of the case law is somewhat lacking. Nevertheless, the withdrawn control over the decision-making powers of the executive is a cause for concern from the point of view of constitutional rights because the rule of constitution is not always guaranteed by the case law of the Riigikohus in this respect. Furthermore, the difficult or in some cases even impossible access to justice in the matters of constitutional review causes serious concerns from the constitutional point of view.

The Estonian constitutional review system appears only at the first glance as simple. Although performed by a single court, in reality, it is quite complex and does not constitute a good model. The incompatible dichotomy of diffuse and concentrated elements of review and the misleading constitutional article which stipulates the secondary nature of constitutional review blur competences and accountabilities. Furthermore, the formation of the Constitutional Review Chamber also raises questions related to the rule of law. Insofar as the institutional aspect is concerned, an improvement is not in sight because it would require far-reaching institutional reforms for which there is no consensus, and which cannot be achieved in the foreseeable future by democratic means. In particular, the reluctance of Riigikohus itself for any change will block every reform effort of the Riigikohus. And to go against a powerful unified highest, and at the same time constitutional, court would be a tricky task in every democratic constitutional state, which no mainstream political party would agree to because of suspicion of undemocratic ulterior motives.

[185] RKHKo 21.06.2024, 3-22-157.

[186] RKHKo 21.06.2024, 3-22-157, para. 12.1.

As regards the appointment procedure for judges, which corresponds to the indirect cooptation model, it seems that the solution that has proven to be successful in the transformation period might not be the best solution for a stable democratic society in the long run.[187] The lifelong term of office is an amplifier of the consequences of a possible unlucky appointment and an accumulation of unsuccessful personnel decisions combined with poor substantive decisions can even, in an extreme case, jeopardise the existence of the democratic constitutional state. In an ideal world, a stand-alone constitutional court would indeed, if configured without major errors, very likely be a far better solution in the long term.[188]

[187] To prevent these risks, it might be recommendable to appoint all justices of the Riigikohus to office in an equal way, e.g. by the Parliament on a proposal of the President, and to let them elect the Chief Justice by and from among the justices themselves. This solution would respect the principle collegiality and in this case the Chief Justice would rather be a *primus inter pares*.

[188] Realistically, there are neither economic reasons nor sufficient political support for the plan to establish an additional stand-alone constitutional court. Theoretically, there are essentially two strategies to establish a constitutional court. The first is to transform the current Riigikohus into a genuine constitutional court eliminating its competences as the highest court of appeal. At the moment, there is a three-tier court system in which a single judge regularly decides at the first level and a three-judge panel decides at the second level – at the level of the appeal courts. A decision by a Court of Appeal may then be appealed again to the Riigikohus. This could prove to be too cost-intensive for a small state in the long term. The strategy would include a reorganisation of the two existing courts of appeal into an ordinary appeal court of last instance and an administrative appeal court of last instance. Although this would eliminate the problem of the secondary nature of constitutional adjudication, it would retain particularly the problems caused by the cooptation model and by the lifelong term of office. Furthermore, in this case the constitutional court would have too much influence to the legitimisation of the rest of the court system as provided for in §78 No. 13 and §150(3) PS according to which all other judges shall be appointed to office by the President of the Republic on the proposal of the Riigikohus.

The second, more radical strategy, would essentially be to abolish the Riigikohus and establish a new, stand-alone constitutional court, free from all the problems listed above. The reorganisation of the two courts of appeal would then follow the path already described and the current judges of the Riigikohus should become the opportunity to become judges at the two courts of appeal due to their lifelong term of office.

Gustav Radbruch's Notion of State

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Radbruch, a critical legal philosopher

Gustav Radbruch is commonly regarded by legal theorists and historians of philosophical thought as a legal positivist who, after witnessing the upheaval of Nazi violence, returned to the classical doctrine of natural law. This portrayal does not, in our opinion, account for either the complexity of Radbruch's philosophy during the Weimar years or for his post-1945 theoretical approach.

From the very beginning of his academic and biographical career, Radbruch was an unconventional legal positivist. Because of his originality, it would be more correct to describe him from the outset as a *critical* legal positivist. With deep adherence to this theoretical position, after the fall of Hitler's criminal regime, he did not become a traditional natural law jurist, anchored again to metaphysical principles. The new appeal to a non-positivistic concept of law is, in short, only a partial revolution of his theoretical perspective. There are elements that do not change and that, in their persistence, complicate the concept of law.[189]

Moreover, the internal reworking that he gave himself was both a necessity and a moral duty; a moral duty that, for Radbruch, the German jurists of the past should also have taken upon themselves. They should have had the courage to condemn the perversion of law carried out by the Nazis, the inner strength and the deontological consistency to refuse their own collaboration, even their own complicity with the regime. They would have had the duty to confront themselves and their own theories with the twelve years of National Socialist totalitarian domination, drawing all the consequences, on a civil and theoretical level. Unfortunately, this was not the case, as Radbruch regretfully recognised.

In the draft of the postface conceived by Radbruch for a new edition of *Rechtsphilosophie* (draft found in the *Nachlaß*), we find a very eloquent passage on this matter:

[189] See more widely, Marina Lalatta Costerbosa, *Il diritto in una formula. Saggio su Gustav Radbruch*, DeriveApprodi, Bologna 2024. <https://cris.unibo.it/item/preview.htm?uuid=3d2c88bc-e010-4820-a3be-b08539674020>; and, from a historico-philosophical perspective, Gaetano Rametta, *Giurisprudenza e crisi della normatività nel neokantismo: Rickert e Radbruch* (in print).

> In the face of such documents, the Nuremberg judgement speaks of a 'cynical and open disregard for all law'. The word 'cynical' does not suffice; the National Socialist rulers did not just cynically, i.e., shamelessly, show vice in pure nakedness; what is worse, they transformed vice, e.g., fanaticism, brutality and harshness, into virtues. In the field of law, the perversion of vice into law is forever characterised by three names: Frank, Freisler and Thierack. The many individual judges who resisted such judicial dishonour must unfortunately remain unrecognised" [190].

They were certainly a minority, but they were there: cowardice, cynicism and perversion of the profession were rampant; and Radbruch would like to give voice to the silence of the dissenters.

Whether or not there is continuity or a caesura in Radbruch's philosophical reflection concerning the concept of law is, indeed, still an open question, even for recent historiography.[191] It is indisputable that after the Second World War he expressed the conviction that legal positivism could only remain the last word for a definition of law, and that his normative intention could not be resolved in a posthumous return to an outdated notion of natural law.[192] However, it should be noted that in the last paragraph of *Vorschule der Rechtsphilosophie*, he concludes by stating that "[t]he collapse of the National Socialist state of injustice repeatedly poses questions for German jurisprudence that traditional positivism is unable to answer."[193] In the face of this latter conviction, the philosophy of law takes on a new task, rediscovering its old vocation: a normative vocation that Radbruch had never denied:

> General legal theory, universal history and the sociology of law were therefore addressed as substitutes for philosophy or even as philosophy. In view of the shake-up of our value system, however, we are particularly inclined today to see philosophy as the science of values, as the science of 'ought'. As such, it teaches us how to think correctly in logic, how to act correctly in ethics and how to feel correctly in aesthetics. Correspondingly, the philosophy of law is the science of just law (Rudolf Stammler). It

[190]Gustav Radbruch, 'Nachwort-Entwurf zur "Rechtsphilosophie"', in *Rechtsphilosophie.* Studienausgabe, ed. by Ralf Dreier, Stanley L. Paulson, C.F. Müller, Heidelberg 1999, p. 193-208: 199: "Angesischts solcher Dokumente redet das Nürnberger Urteil von einer 'zynischen und offenen Missachtung allen Rechts'. Das Wort 'zynisch' genügt nicht; die nationalsozialistischen Machthaber haben nicht etwa nur zynisch, d.h. schamlos das Laster in reiner Blösse gezeigt, sie haben, was schlimmer ist, das Laster, z.B. Fanatismus, Brutalität und Härte, zu Tugenden umgeprägt. Auf dem Gebiete des Rechts ist di Perversion des Unrtechts zum Recht für immer durch drei Namen gekennzeichnet: Frank, Freisler und Thierack. Die vielen einzelnen Richter, die solcher Justizschmach Widerstand geleistet haben, müssen leider ungeknannt bleiben".

[191] Giuliano Vassalli, *Formula di Radbruch e diritto penale. Note sulla punizione dei "delitti di Stato" nella Germania postnazista e nella Germania postcomunista*, Giuffrè, Milan 2001, p. 29 ff. Furthermore, Thomas Mertens, Radbruch and Hart on the Grudge Informer. A Reconsideration, in "Ratio Juris", vol. 15, n. 2, 2002, p. 186-205.

[192] Vassalli, *Formula di Radbruch e diritto penale*, p. 22.

[193] Gustav Radbruch, Vorschule der Rechtsphilosophie (1948), in Id., *Gesamtausgabe*, *Vol. 3: Rechtsphilosophie III*, ed. by Winfried Hassemer, C.F. Müller Juristischer Verlag, Heidelberg 1990, p. 121-228: 226: "[d]er Zusammenbruch des nationalsozialistichen Unrechtsstaates stellt die deutsche Rechtsprechung immer wieder vor Fragen, die der überkommene Positivismus nicht zu beantworten vermag".

> therefore deals with the values and goals of law, with the idea of law and ideal law, and finds its continuation in legal politics, which has the realisability of ideal law as its object.[194]

The cultural nature and historical character inherent in law is thus confirmed.

In the historiographical debate on Radbruch's thought, there are scholars who, in spite of this evidence, downgrade the value and stability of the theoretical outcome of the so-called "second phase" of his reflection, relegating it to mere judicial praxis, to advice of prudence at the disposal of the judge.[195] And there are interpreters who grasp its theoretical depth but contest its legitimacy, given the conditioning that this normative twist suffered in the face of the tragic events linked to Nazi-fascist domination in Europe.[196]

In our view, the accusations levelled against Radbruch, according to which he is even guilty of betraying the legal positivist doctrine, as if the legal positivist doctrine were a faith to be dogmatically endorsed, are frankly inadmissible. It is not the case; first of all because Radbruch has always been a legal positivist *sui generis*. But above all, it is not about a betrayal, but about a change in his own view of law. He would have in the event—though in our opinion this did not happen—changed his own conviction, which would have attested, if there was any need, his complete distance from (here ideological) fanaticism (in tune with Amos Oz's lectures on fanaticism). He has been accused of internal incoherence of the theory, of excessive exposure to historical contingency of ideas that should—it is argued—exist in full abstraction.

All of these criticisms are burdened with prejudice and a kind of scientific-disciplinary moralism, as if criticism and the progress of knowledge did not also depend on the willingness to recognise errors and revise theoretical approaches that had hitherto been considered safe.[197]

Furthermore, it should not be forgotten that Radbruchian legal positivism never resolved itself, and never presented itself, even in its germinal phase, as a purely formalistic and therefore legalistic positivism. Rather, it was always a

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[194] Ibidem, § 6, I, p. 137: "Allgemeine Rechtslehere, Universalgeschichte und Rechtssoziologie wurden deshalb als Ersatz der Philosophie oder gar als Philosophie angesprochen. Angesichts der Erschütterung unseres Wertsystems wird man heute dagegen besonders geneigt sein, die Philosophie als Wissenschaft von den Werten, als Wissenschaft vom Sollen aufzufassen. Als solche lehrt sie uns in der Logik das richtige Denken, in der Ethik das richtige Handeln, in der Ästhetik das richtige Fühlen. Entsprechend ist die Rechtsphilosphie die *Lehre vom richtigen Recht* (Rudolf Stammler). Sie handelt also von den Werten und Zielen des Rechts, von der Idee des Rechts und vom idealen Recht, und findet ihre Fortsetzung in der Rechtspolitik, welche die Verwirklichungsmöglcihkeiten des idealen Rechts zu ihrem Gegenstand hat".

[195] Brian H. Bix, 'Radbruch's Formula and Conceptual Analysis', in *The American Journal of Jurisprudence*, vol. 56, 2011, p. 45-57.

[196] Bernd Schünemann, 'Per una critica della cosiddetta Formula di Radbruch. Note su un concetto di diritto culturalmente e comunicativamente orientato', in *i-lex. Scienze Giuridiche, Scienze Cognitive e Intelligenza artificiale*, n. 13-14, 2011, p. 109-120; Douglas G. Morris, 'Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch After the War', in *Law and History Review*, vol. 34, n. 3, 2016, p. 649-688.

[197] Thomas Mertens, 'But Was it Law?' in *German Law Journal*, vol. 7, n. 2, 2006, p. 191-197, but also, for example, Zong Uk Tjong, 'Über die Wendung zum Naturrecht bei Gustav Radbruch', in *ARSP: Archiv für Rechts- und Sozialphilosophie*, vol. 56, n. 2, 1970, p. 245-264.

theory of positive law anchored to minimum standards of morality, including Kantian references to a deontological morality referable to respect for the law.[198] The form of the law in its pure formality never represented, for Radbruch, the necessary and sufficient requirement to affirm the legal status of a provision or an order. This conviction found further confirmation and inevitably drew new strength in the post-World War II period, once the impotence of the law-form in resisting its fiercest instrumentalisation had been tragically revealed.[199]

What "natural law"?

How then to interpret his explicit revival of natural law in the second half of the 1940s?

For Radbruch, at stake was a clear assumption of responsibility, which could not but refer back to the theoretical and epistemological status of the category of natural law. At that time and in that cultural context, natural law in some form represented for him the only source of universalistic normativity. It is therefore understandable and inevitable that, as a critical-normative instance, a reformulation of the ancient category of natural law resurfaced from the ashes.[200]

As we have already pointed out, it is not a re-proposition of the identical—of a nostalgic or reactionary reiteration of natural law. That would be a gesture out of time, no longer justifiable metaphysically or rationalistically. On the contrary, in his inaugural address *Der Mensch im Recht* (1927), he had shown with unquestionable clarity his sense of history and historical change. In that lecture, read in front of colleagues at the University of Heidelberg, he had emphasised how indispensable it always was for him that a reflection on law and its concept should take into consideration the evolution of institutions over time, an evolution closely linked to changes in the idea of man that occur in various historical epochs.[201] There are therefore many variables that necessarily make the ideal of justice changeable, which then corresponds, for Radbruch, to the ideal of fairness, of the universal principle of equality commensurate with the diversity among people, in their individuality:

> Justice contains within itself an insurmountable tension: equality is its essence, generality is therefore its form – and yet the endeavour to do

[198] On this point, we refer mainly to Dreier and Paulson in 'Einführung in die Rechtsphilosphie Radbruchs', in *Radbruch, Rechtsphilosophie. Studienasugabe*, p. 235-250: 247-250; and Erik Wolf, 'Umbruch oder Entwicklung in Gustav Radbruchs Rechtsphilosophie?' in *ARSP: Archiv für Rechts- und Sozialphilosophie*, vol. 45, n. 4, 1959, p. 481-503.

[199] Radbruch, *Die Erneuerung des Rechts*, in Id., *Gesamtausgabe*. Vol. 3: "Rechtsphilosophie III", ed. by Winfried Hassemer, p. 108.

[200] Cfr. Gustav Radbruch, *Neue Probleme in der Rechtswissenschaft*, in *Gesamtausgabe*. Vol. 4: "Kulturphilosophie und Kulturhistorische Schriften", ed. by Günter Spendel, C.F. Müller Verlag, Heidelberg 2002, p. 232-235.

[201] Radbruch, *Vorschule der Rechtsphilosophie* (1948), in Id., *Gesamtausgabe*. Vol. 3: "Rechtsphilosophie III", ed. by Hassemer, § 6, IV, pp. 139-140.

justice to the individual case and the individual person in their uniqueness is inherent in it. This desired justice for the individual case and the individual human being is called *equity.*[202]

What idea of 'state', what relationship with law?

Against this general backdrop, Gustav Radbruch's notion of the state must be reconstructed by taking into consideration his entire work.

This is what we shall attempt to do, starting therefore with his writings from the first decades of the 20th century, where a critical-normative concept of the state was already surfacing, up to his latest production, that of the post-World War II period, a phase that had an understandable and undeniable evolution. Yet precisely in light of these changes, the unitary study of his essays, handbooks and contributions of a different nature (literary papers, parliamentary interventions, book reviews, etc.) allows us to confirm a reading of Radbruch's thought as a dynamic but ultimately cohesive whole.

Let us note at the outset that the question of the nature of the state – of what the state is – never attained a central position in Radbruch's thought. It is explicitly and specifically addressed both in *Rechtsphilosophie*, in paragraph 26 of the third edition of 1932 (a significantly expanded version of the two previous editions), and in *Vorschule der Rechtsphilosophie* (1948), specifically in paragraph 11 of the third chapter.

The answer to the question of the state must therefore be traced by referring both to texts from the Weimar era, in which the complexity of the Radbruchian version of legal positivism is evident, and to those at the origins of the quasi-naturalistic outlook of the post-World War II period, essentially represented by the three writings from 1945-1948: *Fünf Minuten der Rechtsphilosophie*, *Gesetzliches Unrecht und übergesetzliches Recht* and *Vorschule der Rechtsphilosophie*.

In order to define his idea of the state, in *Rechtsphilosophie* our Lübeckian philosopher initially advances from a fundamental distinction between the concept of the "real" state (*Wirklichkeitsbegriff*) and the concept of the "legal" state (*Rechtsbegriff*).[203] Ronald Dworkin, more than a century later, would perhaps have called the former a "criterial" concept of the state and the latter an "interpretative" concept of the state, a cultural concept (*Kulturbegriff*), a concept that belongs to the sphere of "value-related concepts" (*wertbezogene Begriffe*)—as Radbruch

[202] *Ibidem*, § 7, V, p. 143: "Die Gerechtigkeit enthält in sich eine unüberwindliche Spannung: Gleichheit ist ihr Wesen, Allgemeinheit ist deshalb ihre Form – und dennoch wohnt ihr das Bestreben inne, dem Einzelfall und dem Einzelmenschen in ihrer Einzigartigkeit gerecht zu werden. Man nennt diese erstrebte Gerechtigkeit für den Einzelfall und den Einzelmenschen *Billigkeit*".

[203] Gustav Radbruch, 'Rechtsphilosophie', in Id., *Gesamtausgabe*. *Vol. 2: Rechtsphilosophie II,* ed. by Arthur Kaufmann, C.F. Müller Juristischer Verlag, Heidelberg 1993, p. 206-450: § 26, p. 420.

would put it in Paragraph 11 of *Vorschule*—hence neither "value concepts" (*Wertbegriffe*) nor "being concepts" (*Seinsbegriffe*).[204]

The difference between the two concepts (the real and the legal) is of primary importance and Radbruch attempts to explain their meaning and relevance by proposing a first analogy with the aesthetic world and a second analogy with the universe of science.

The difference between the "legal" and the "real" concept of the state corresponds to the difference expressed, for example, in the concept of "Kunst" (art): "both an ideal concept and a yardstick by which the inartistic is expelled from the realm of art, like a concept of reality that encompasses all artistic achievements of a time, both artistic and kitschy."[205] It is useful to understand that the *ratio* of the distinction is the reference to the notion of "science" (*Wissenschaft*), which "on the one hand means the standard of truth of cognitive activity, by which one measures unsuccessful cognition as unscientific,"[206] therefore, a valuable concept to expunge superstition, pseudoscience, erroneous beliefs from the sphere of science, and "on the other hand, the historical concept of culture. The scientific truth and scientific error are value-neutral in themselves."[207]

Or finally, the concept of "Kultur" is eloquent, which "itself can be understood both as an ideal for the historical-social cultural facts and as the essence of these cultural facts themselves."[208]

Returning to our reflection on the idea of the state as a legal concept, the term "state" is valid as an authentic concept, corresponding to the legal institution as such, e.g. the German Reich as expressed in the Weimar Constitution. Or it may be valid as a legally relevant concept, i.e., factual, representative of the rights and duties of the state, established in the Weimar Constitution, a text in which the term frequently recurs.

This preliminary clarification is due to the semantic complexity of the concept of the state, which can be understood first and foremost—as we have seen—as a real concept and as a legal concept, and the latter in turn can be interpreted in a dual meaning: as an "authentic" legal concept, whereby the content of the norm is also taken into consideration, or, more externally, in a socio-historical sense, as a "legally relevant" concept. Against this background, a further question arises, which is also valuable in providing an answer to the

[204] Radbruch, *Vorschule der Rechtsphilosophie*, § 11, II, p. 150.
[205] Radbruch, *Rechtsphilosophie*, § 26, p. 420: "zugleich ein Idealbegriff und Maßstab ist, mittels dessen man das Unkünstlerische aus dem Reiche der Kunst verweist, wie ein Wirklichkeitsbegriff, der alle Kunstleistungen einer Zeit, künstlerische wie kitschige, umfaßt".
[206] Ibidem: "einerseits den Wahrheitsmaßstab der Erkenntnistätigkeit bedeutet, an dem man mißglückte Erkenntnis als unwissenschaftlich mißt".
[207] Ibidem: "[A]nderseits den historischen Kulturbegriff. Der wissenschaftliche Wahrheit und wissenschaftlichen Irrtum wertneutral in sich schließt".
[208] Ibidem: "selbst sowohl als Ideal für die geschichtlich-gesellschaftlichen Kulturtatsachen wie als der Inbegriff dieser Kulturtatsachen selbst verstanden werden kann".

fundamental problem concerning the concept of the state: what relationship exists between the state (understood as an "echter" legal concept[209]) and the law?

According to Radbruch, law and power, or rather, the idea of law and the idea of the state, do not identify with each other. The purpose of the state, *raison d'État*, can conflict with the principle of legal certainty and the idea of justice. This is what was unfortunately made blatantly obvious during the years of the Nazi regime. It was revealed in all its crude brutality by the violent and criminal denial of any possible notion of credible justice; the complete overturning of it and its transformation into its opposite: the upside-down world imagined by Orwell and affirmed in reality, with the help of a pervasive practice of political lies, a racist logic cloaked in pseudo-science, a deep-rooted authoritarian culture, and the unscrupulous exploitation of resentment, the need for community, and the identity crisis, which were widespread in German civil society.

The very foundations of law were thus destabilised: not only its justice, but its very correctness.[210] Legal certainty is, after all, an essential part of the idea of justice although it does not exhaust it: it counteracts arbitrariness and privilege by providing for separation of powers, transparency and stability of legislative procedures.

In *Rechtsphilosophie*, Radbruch reformulates and correctly applies to the conception of the state, the traditional Hume's law, where he asserts that "'normativity of the factual' is a paradox; an ought can never arise from a being alone, a fact such as the view of a certain epoch can only become normative if a norm has assigned this normativity to it."[211] And in *Vorschule*, Radbruch explicitly refers to Kantian philosophy precisely to reinforce the thesis of impossibility "deriving values from reality, basing an ought on facts of being, transforming natural laws into norms,"[212] and at the same time not disqualifying the realm of morality; rather, attributing to it an independent value and a nature justly not derivable from material existence in the world.

By this route, the doctrine of the "normativity of the factual" that Radbruch traces in Georg Jellinek's theory of law, but which, generalising, belongs to the widespread imperativist and decisionist legal positivist theses, takes on a paradoxical aspect in its own right. Radbruch emphasises the independence of the normative sphere, whose justification therefore cannot derive from factual reality or scientific evidence, but from the goodness of its own moral foundation. One is inevitably pushed beyond mere positive law and the mere effectivity of the actual occurrence of the state, because, "It is precisely state and legal positivism taken

[209] Ibidem.

[210] Radbruch, *Vorschule der Rechtsphilosophie*, § 9, II, p. 147-148.

[211] Radbruch, *Rechtsphilosophie*, § 26, p. 422: "'Normativität des Faktischen' ist ein Paradoxon, aus einem Sein allein kann nie ein Sollen entspringen, ein Faktum wie die Anschauung einer betimmten Zeitepoche kann nur normativ warden, wenn eine Norm ihm diese Normativität beigelegt hat".

[212] Radbruch, *Vorschule der Rechtsphilosophie*, § 6, II, p. 137: "Werte aus der Wirklichkeit abzuleiten, ein Sollen auf Seinstatsachen zu gründen, Naturgesetze in Normen umzuprägen".

to its logical conclusion that presupposes a principle of natural law,"[213] Radbruch admits already in *Rechtsphilosophie*.

Confirming the clarity of the Radbruchian analysis, recent interpretations of the so-called "Hume's principle" come to mind on this point. For example, Ronald Dworkin and, before him, Hans Jonas, reject any reading that aims to disqualify the field of morality on account of its factual non-demonstrability.[214] At the core lies a correct observation: from the descriptive sphere, the dimension of what is, one cannot deduce what should be, the sphere of prescriptiveness. But from this evidence it would not be correct to derive the unfoundedness of the normative or prescriptive dimension, but rather its independence from that of mere factuality. The prescriptive therefore emerges strengthened and not challenged. It is in this way defended and not questioned, because its self-sufficiency is claimed from the realm of brute facts.

From this perspective, the step separating us from a certain interpretation of natural law and the associated interpretative concept of the state is very short.

An interpretative concept of state

In 1932 Radbruch wrote: "If there is a supreme ruler in a community, what he orders should be obeyed."[215] The principle of legal certainty, which only political authority can guarantee and which explains this obedience, at the same time represents, on the other hand, a constraint, or rather, a limitation on the exercise of sovereign power. The intention behind the demand for recognition of the principle of legal certainty implies that the state must also be subject to the laws. "The same idea of legal certainty that calls upon the state to legislate also demands that it be bound by its own laws. The state is only called upon to legislate on the condition that it considers itself bound by its laws."[216]

The concept of state implies a claim of correctness towards the law from which can be inferred that it can never be considered *legibus solutus*. Against Hobbes, the state in its essence is a rule-of-law state, a state subject to the constraint of law.

Legal positivism and the concept of state in Radbruch's thought presuppose in this specific procedural sense a principle of natural law. "The state is thus bound

[213] Radbruch, *Rechtsphilosophie*, § 26, p. 422: "gerade der ganz zu Ende gedachte staatliche und rechtliche Positivismus einen naturrechtlichen Rechtssatz voraus".
[214] See Hans Jonas, *Das Prinzip Verantwortung. Versuch einer Ethik für die technologische Zivilisation*, Suhrkamp, Frankfurt am Main 1979, II, IV, § 6 and Ronald Dworkin, *Justice for Hedgehogs*, Harvard University Press, Cambridge, MA 2011, chap. 1.
[215] Radbruch, *Rechtsphilosophie*, § 26, p. 422: "Wenn in einer Gemeinschaft ein höchster Gewalthaber vorhanden ist, soll, was er anordnet, befolgt warden".
[216] Ibidem: "Derselbe Gedanke der Rechtsicherheit, der den Staat zur Gesetzgebung beruft, verlangt auch seine eigene Bindung an die Gesetze. Der Staat ist zur Gesetzgebung berufen nur unter der Bedigung, daß er sich durch seine Gesetze selbst für gebunde halte".

to its positive law by super-positive law, by natural law, by the same principle of natural law on which alone the validity of positive law itself can be founded."[217]

There is also a further limitation that cannot be overlooked. It corresponds to the recognition of the principle of equality, also understood as the principle of impartiality; the same principle that between 1945 and 1946 Radbruch would have defined as the fundamental principle of every democratic ideal of justice. Impartiality as a general normative principle allows the total conceptual extraneousness between a constitutional state (*Rechtsstaat*) and an unconstitutional state (*Unrechtsstaat*) to emerge clearly. "A state order that wanted to apply to individual people and individual cases as such would not be law, but arbitrariness,"[218] writes Radbruch in paragraph 26 of *Rechtsphilosophie*. And he concludes that the interest of the ruling class does not emerge in its nakedness, but rather "in the guise of law" (*im Gewande des Rechts*)*;* and "the content of the law is whatever it wants, the legal form always serves the oppressed."[219] The law has to be in favour of the dominated, the less advantaged and the weak, for whom it is always better to depend on the state and the law, rather than a coexistence without them, i.e., exposed to anomie.

With the coherence that would accompany him to the end of his days, following up on his ideas in his political and governmental activities, Radbruch tried for as long as possible, and as much as possible, to make fairer the constitutional legal system in force in Germany before the advent of Nazism.

He attempted to pursue this project of justice, in particular through personal civic and institutional commitment. And it is precisely in this context that we find a concise but limpid essay from the Weimar period entitled *Volk im Staat*, in which Radbruch succeeds in just a few pages in exhibiting the critical potential of his ideal conception of state and the centrality of the principle of equality as its criterion of legitimacy.

Particularly noteworthy are the harsh words of denunciation when he switches from the ideal plane to the desolate description of reality. The world of facts, the German society before him shows "[n]ot equality, but inequality of individuals, inequality of property, of education, in the best case still inequality of dispositions and, as a result, the difference between rulers and ruled, often rulers and dominated. Not individuals who choose and vote of their own free will and subsequently add up to majorities and minorities, but beings socialised to the core of their souls, social groups that impose certain decisions on their members externally or internally, with group-forming powers behind them: class

[217] Ibidem, p. 422: "Der Staat wird also an sein positives Recht gebunden durch überpositives, durch natürliches Recht, durch denselben naturrechtlichen Grundsatz, auf den die Geltung des positive Rechts selber allein gegründet warden kann".

[218] Ibidem, p. 423: "Eine staatliche Anordnung, die einzelnen Menschen und einzelnen Fällen als solchen gelten wollte, ware nicht Recht, sondern Willkür".

[219] Ibidem: "der Inhalt des Rechtes sei welcher er wolle, die Rechtsform immer gerade den Unterdrückten dient".

consciousness and leader suggestion, public opinion: street and press, behind this possibly the power of money majorities are potentiated minorities!"[220].

Conclusions

It seems clear that Radbruch was not only never a "traitor", never underwent a "conversion", but rather, in the face of devastating historical events, after witnessing the historical failure of an uncritical positive law, he had the honesty and courage to revise his ideas, to modify them, in search of a concept of law more suited to express his constitutive and basic demand for correctness.

In this sense, what gave strength to his determination was the same conviction that Arendt theorised a decade later, denying the Hitler regime, the Nazi law, and the power of the *Führer* the possibility of continuing to be called law and sovereign power. They originated on foundations of abuse and violence, of a "criminal legality", an oxymoron behind which lies a formalistic idea of law that Radbruch never fully accepted. As is well known, Arendt, in the epilogue to her *Eichmann in Jerusalem*, posed a question: "what sovereignty does a State like the Nazi State have? […] Can we apply the principles that apply to regimes in which crime and violence are exceptions and borderline cases to a regime in which crime is legal and indeed the rule?"[221]. The question becomes whether one can still speak of sovereignty, whether that form of domination can still be called a state, in a sense not only rhetorical, but conceptually relevant.

Thus, through this path, the question of the definition of the concept of state is transformed into the more radical issue of the distinction between an unjust state and a non-state. The semantic space of the concept of state, if properly understood, lies between the ideal of a well-ordered society (impartial and capable of honouring the value of equality) and a criminal regime. This middle position is not uniform, being capable of sustaining its own internal modulation: between a state not too far from acceptable standards of justice and an unjust state, the nuances are many, as are the possible variants of law, in its ranging from a law with a constitutional high-profile to an unjust law. The point is that

[220] Gustav Radbruch, 'Volk im Staat', in *Gesamtausgabe*. *Vol. 12: Politische Schriften aus der Weimarer Zeit - I. Demokratie, Sozialdemokratie, Justiz*, ed. by Alessandro Baratta, C.F. Müller, Heidelberg 1992, p. 26-32: 26-27: "[n]icht Gleichheit, sondern Ungleichheit der Einzelnen, Ungleichheit des Besitzes, der Bildung, im besten Falle noch immer Ungleichheit der Anlagen und, dadurch bedingt, der Unterschied von Führern und Geführten, oft Führern und Angeführten. Nicht Einzelne, die aus freien Eigenentschluß wählen und stimmen und sich nachträglich zu Mehrheiten und Minderheiten summieren, sondern bis in den Kern ihrer Seele vergesellschaftete Wesen, soziale Gruppen, die ihren Mitgliedern bestimmte Entscheidungen äußerlich oder innerlich aufnötigen, unter hinter ihnen gruppenbildende Mächte: Klassenbewußtsein und Führersuggestion, öffentliche Meinung: Straße und Presse, hinter dieser möglicherweise die Macht des Geldes Mehrheiten sind potenzierte Minderheiten!"

[221] Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil*, The Viking Press, New York 1963, Postscript, p. 290.

even with such variability, even with a more or less intense rate of injustice, one can still speak in the former case of state and in the latter of law.

In the concluding remarks of paragraph 13 of *Rechtsphilosophie*, Radbruch observes: "that the law is in the midst of polar tensions in an unstable equilibrium that is always under threat and has to be constantly re-established."[222] But it is above all in *Vorschule* that this idea fully blossoms.

When, then, is the state no longer a state?

In the third chapter, after reaffirming that law is constituted of positive laws and customs, that it does not record facts but regulates reality through the norms of collective life, of living in society, he states that where the recognition of these norms is lacking, it is the state itself that disappears, and mere domination remains. The difference between the state (legally or conceptually understood) and domination lies in the presence or absence of certain essential characteristics. "Even expressions of the will of the state, if they lack one of these characteristics, are only pronouncements of power without the nature of law. Where, for example, the general nature of law is deliberately denied and justice is not even sought, the orders thus created can only be decrees of power, never legal principles."[223]

Not every form of dominion can be called a state, not every centralised power can be called sovereign. Neither the state nor the sovereign are brute instances of force capable of obtaining obedience: both must fulfil the minimum requirements of lawfulness. "Thus the state that legalises only one party and excludes other associations of the same character, the 'one-party state', is not a legal entity; thus the law that denies human rights to certain people is not a legal principle. There is therefore a sharp boundary here between law and non-law."[224]

Ultimately, a clear indication of what Radbruch's position is may already be obtained from the exergue chosen for paragraph 26 of *Rechtsphilosophie*, the one—as we have seen—entirely dedicated to the concept of the state as a constitutional state.

It is a passage by Friedrich Schiller, the poet and writer, and a fraternal friend of the late 18th century German democrat, Wilhelm von Humboldt. It reads: "Mistrust yourselves, noble lord, lest the benefit of the state appear to you as justice!"[225]

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[222] Radbruch, *Rechtsphilosophie*, § 13, p. 338: "daß das Recht im labilen, stets bedrohten und immer neu wiederherzustellenden Gleichgewicht inmitten polarer Spannungen steht".

[223] Radbruch, *Vorschule der Rechtsphilosophie*, § 11, II, p. 151: "Auch Willensäußerungen des Staates sind, wenn sie eines dieser Merkmale entbehren, nur Machtsprüche ohne Rechtsnatur. Wo also z.B. die generelle Natur des Rechts bewußt verleugnet, Gerechtigkeit nicht einmal erstrebt wird, können die so geschaffenen Anordnungen nur Machtsprüche sein, niemals Rechtssätze".

[224] Ibidem: "So ist der Staat, der nur *eine* Partei legalisiert und andere Verbände gleichen Charakters ausschließt, der 'Einparteinstaat', kein Rechtsgebilde; so ist das Gestez, das gewissen Menschen die Menschenrechte verweigert, kein Rechtssatz. Hier ist also eine scharfe Grenze zwischen Recht und Nicht-Recht gegeben.

[225] Radbruch, *Rechtsphilosophie*, § 26, p. 418: "Mißtraut Euch, edler Lord, daß nicht der Nutzen Des Staats Euch als Gerechtigkeit erscheine!"

Still a Cold Monster?
On the Dual Nature of the State[226]

Massimo La Torre

The Question of the State

The question of the state is central for legal and political theory, since the state is the form that modern political communities and their legal order have assumed. It is also the central question for philosophical and pollical anarchism. This is so because the state is an entity that claims to have an overwhelming right to our obedience, a right that is mostly shaped as absolute. Its commands should be obeyed without exception, and with not too much delay. Thus, a state is the form of social organisation that most conflicts with anarchist values and ideas.

A state, as a structured and institutionalised organisation, is in tension with a form of life that projects itself as constantly changing and changeable. This is a basic tenet of anarchism, which is projected along at least two different lines of elaboration. In the first, a political community is the outcome of the mutual recognition of individuals and of agreement about a common scheme of cooperation. Subjective autonomy here is the bedrock of political order, so this is permanently exposed to autonomous arrangements of individuals to cope with evolving circumstances and revision of their needs and views. A different elaboration of this autonomy motive conceives institutions as only legitimate if not detached from their instituting moment, from their original, societal source. This is the seat of autonomy and can never be pre-empted by the established institution. In this way, what is institutional is constantly exposed to the emergence of the ”novel”, a new project and concept of a good life, the vicissitude of social imagination, that is collective autonomy.

Contrary to this second model, the state seems to embody a quite rigid form of institutionalisation that does not allow for adjustment and modifications according to the needs and will of individuals. It is based, it would seem, on domination, violence and hierarchy, such that freedom is permanently denied to its citizens. It claims a value in itself that is superior to the dignity and autonomy of the individual. Individuals’ basic goods, life, property, honour, respect, liberty, might all be sacrificed on the altar of the state. It is a ‘person’ in itself that is more than the association of its members and even of its officials or rulers. It can demand everything from its ‘subjects’, including their own death, be it in war or on a scaffold. As Nietzsche once characterised it, it is a ‘cold monster’.

However, the question of the state – of its legitimacy and form – is not just a concern for anarchism, but might be plausibly considered as nearly the whole business of political and legal philosophy. Our entire life is developed and experienced within the confines of the state. We are born and are immediately

[226] I base this on ideas and materials from chapter three of S. Newman & M. La Torre, *The Anarchist Before the Law*: *Law Without Authority*, Edinburgh University Press, Edinburgh 2024.

registered as members, nationals of a state. Our minute affairs and vicissitudes are determined by state rules and instructions. We live within state borders, we are brought up to sing a national anthem, or salute a national flag. We are under state supervision and control from birth to death. If we infringe the state's rules and instructions, we are sent to state jails or we have to pay state fines. A substantial part of our income is taken every year by the state in the form of taxes, which is spent in ways over which we have little or no control.

Many Europeans were possibly not aware that they lived under a state until 1914. But suddenly, in August of that fatal year, they were conscripted, sent first to barracks, given a uniform and a weapon, carried by trains to the front, and forced to kill others indiscriminately, without a clear understanding of the reasons. The militarised state – first and foremost a European form of political rule – was fundamentally based on four key institutions: the army, the post, the railway, and the police. In several European states, military training began in the school, a place where children and teenagers were confined and subjected to strict discipline and indoctrination. The schoolmaster anticipated the figure of the sergeant.

This story is well narrated by Erich Remarque's pacifist novel *All Quiet on the Western Front* (1929),[227] or by Józef Wittlin, in his *Salt of the Earth* (1935).[228] The latter novel is especially suggestive in understanding how the state in the twentieth century was experienced by ordinary people. A Polish peasant is mobilised, stripped of his social attachments, forcefully put into a train wagon, and sent to military training in Austrian army barracks. Here he is confronted by a new world, where his individuality counts for nothing. He is one naked body among many, dressed in a uniform, but this does not really cover his nakedness: his social world, his relationships, all that gives him an identity and dignity, has been reduced to nothing.[229] This nothingness is already visible during the medical examination, when his body is inspected to ascertain whether he is fit to serve as a soldier and fight. Recruits appear naked before the army doctors – they are simple, sheer bodies, filled with shame, and their prevailing experience is one of destitution.

National identity was a product of the exigency of states. A state was a gigantic enterprise for constructing a homogeneous national identity out of plural communities and local affiliations. Until late in the twentieth century, for instance, Italian peasants could not generally understand each other, since they did not share a common national language. They spoke their respective dialects: Sicilian peasants could barely grasp what a working-class girl from Piedmont had to say. We cannot but agree with Michael Oakeshott's observations:

[227] English translation by E.W. Wheen, 1928, Available at https://www.gutenberg.org/ebooks/75011

[228] First English translation from the original Polish: J. Wittlin, *Salt of the Earth*. *A Novel*, Methuen & Co., London 1939.

[229] This might confirm what Giorgio Agamben says about "naked life" being an intended product of the modern state (cf. G. Agamben, *Homo sacer. Il potere sovrano e la nuda vita*, II ed., Einaudi, Torino 2005, p. 9). In a somewhat similar vein, David Graeber relates the formation of States to the destruction of the "context", the communal relations, that are constitutive of subjective individuality (cf. D. Graeber, *Debts*, Melville House, Brooklyn, New York 2011, *passim*).

> Each of the states which emerged in early modern Europe was composed of a variety of ancient communities with undying memories of other allegiances, of independence, or of mutual hostility, or made up of fragments of such communities severed by a frontier from their fellows, without a common language, law, or coinage, divided from one another ethnically, in custom, and often in religious beliefs.[230]

Those plural and diverse communities shared only the same experience of being subject to an overwhelming force that intended to shape their lives in a uniform way. The state thus forcibly simplified the internal structures of political orders, while at the same time bringing about a new dimension of plurality, and indeed paradoxically producing "anarchy," within the international domain. In Europe, the birthplace of the modern state, "to the degree that state formation progressed, the universal Christian world order made room—as noted by Dieter Grimm, a former German federal constitutional judge—for particularistic states existing side by side."[231] The state, that is, marks the decline and fall of the idea of an Empire that, based on Christianity, was able to rule the entire Christian world. A state should sadly give up the universal ambition of global rule and only establish itself within the space of well entrenched, and specific borders. The state thus implicitly accepts the validity of other states, something an Empire would never possibly acknowledge. This is particularly relevant to the political configuration of Europe, where once the form "state" was introduced, it would be confronted with a plurality of equal, sovereign formations.

The Nature of the State

What is the state? What is its nature? How could we define it? There are at least two traditional definitions. There is one focusing on the exercise of violence within a distinct territory; the state would essentially be qualified by a monopoly of violence. This is the definition we find in one the most famous papers by Max Weber, the great German sociologist, *Politik als Beruf* (1922), where we read that the State is "that human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory."[232] This does not mean that violence is the ordinary means for the state to act and exist; however, adds Weber, it is what gives the state its specificity, what ultimately defines it in the last instance; it is what defines its nature.[233] Max Weber's idea is further developed by Carl Schmitt, according to whom a state is rather the monopoly of decision,

[230] M. Oakeshott, *On Human Conduct*, Clarendon, Oxford 1975, pp. 186-187.
[231] D. Grimm, *Sovereignty. The Origin and Future of a Political and Legal Concept*, Columbia University Press, New York 2015, p. 5.
[232] M. Weber, *Gesammelte Politische Schriften*, ed. by J. Winckelmann, Mohr, Tubingen 1980, p. 506. Italics in the text.
[233] "Gewaltsamkeit ist natürlich nicht etwas das normale oder einzige Mittel des Staates: -- davon ist keine Rede --, wohl das ihm spezifische" (*ibid*.).

meaning by this an exception to the 'normality' of the rule of law.[234] This monopoly of decision refers to the sovereign's capacity to violate the law, a capacity that would potentially imply an exceptional use of force. The state, then, is that institution that is allowed to infringe, by force, its own law.

How should we understand this notion of a monopoly of force? We could think of it as a device to minimise violence. Indeed, there is a line of interpretation that sees the state as the engine of a process of civilisation within societies, whereby people have to learn to relate the one to the other without violence. Feuds and vendettas are no longer tolerated, as the state assumes the sole authority to decide disputes through legal means.[235] The state rules out the private use of force; the violence or potential violence of the sovereign thus enforces a peaceful social order.

On the other hand, the monopoly of violence might be interpreted in a different way. What the State in this second approach can undertake is a superior use of violence such as to alter the use of violence elsewhere in the society. In its first version a monopoly of violence means a general prohibition of the use of force for citizens, and somehow for state agencies, too. In this second version, the monopoly is not an attempt to reduce the use of force in the society, but to make it possibly so radical that attempts at individual use of force would immediately be reciprocated with a disproportionate application of violence. There is no pacificatory ideal involved here. In a sense, the state, by asserting its own supremacy and sovereignty, means it is able to be the most violent possible actor within the society. In order to do that, means should be used that are the strongest and the most effective for deploying force. Force is concentrated not so much to deactivate it, but rather to make possible an extreme use of it. This logic is then duplicated in the arena of international relations, where a search for equilibrium of powers among states is constantly disrupted by each state striving to have military supremacy over its rivals. According to this picture, states do not seem to be instrumental in civilising social and political relations; on the contrary, it may seem that they render the social world increasingly dependent on, and exposed to, extreme violence—indeed, after the development of weapons of mass destruction, to total annihilation.

But the question remains: What is a state? Legal philosophy and legal theory have usually given two main answers to this question, once again testifying to the dual nature of the state, and the ambiguity of its grip on our society and imagination. The key to the understanding of the state here is seen in its connection to law. What is law for the state, or vice versa: what is the state for the law? Here, two opposing visions are confronted. First, we have an approach

[234] See C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, Duncker und Humblot, Leipzig 1922.

[235] This is, for instance, Goethe's view: "Der Character der Roheit ist es, nur nach eigenen Gesetzen leben, in fremde Kreise willkürlich übergreifen zu wollen. Darum haben wir den Staats-Verein geschlossen, solcher Roheit und Willkür abzuhelfen, und alles Recht und alle positive Gesetze sind wiederum nur ein ewiger Versuch, die Selbsthilfe der Individuen gegeneinander abzuwehren." (*Letter to Weimar Chancellor Friedrich von Müller*, 18th April 1818).

according to which the state is an extra-legal entity, a body able to act collectively, which is hierarchically structured with a commander-in-chief at its highest rank. A state, according to this account, is either a sovereign power that can impose obedience on others, a 'political superior' in John Austin's words, or else a kind of community, a historical society that is an expression of a specific national, cultural, or temporal context, an embodiment of an 'objective mind'. This is the account of Hegel and German Historicism. In both cases, the state is prior to the law; it is the 'source' of law, and the efficacy of law is indeed limited in shaping the essentials of the state. The state operates legally by an act of self-limitation—this is an influential idea by George Jellinek, one of the founding fathers of European continental public law. This conception has relevant implications in the way we should then understand constitutionalism and the nature of a constitutional state. In this essentialist approach, the State is not the product of a constitution: the latter can only give some form to it; it offers formalisms of various kinds to its operation, but such formalisms, however, can be dismissed when necessary. There is a continuity of the state that constitutions cannot alter – such is also the public view of international law. The basic nature of what a state is remains the same whichever constitution is then adopted. Fundamental rights do not have a constitutive validity, but serve rather as a kind of regulative rule. Fundamental rights here can never be rooted in original natural freedoms of citizens or in their basic moral dignity. This is explicitly thematised, for instance, by Georg Jellinek, who understands public rights as being founded upon an individual's position of absolute subjection to authority, *status passivus.*[236] Fundamental rights are then negative rights, entitlements against state intervention. They operate vertically between authority and autonomy. In this view, however, a constitution could hardly claim *Drittwirkung*, "efficacy towards third parties;" it could not claim validity in impinging upon private relationships and transactions. Private law is of the same essence as the state; that is, endowed with a stronger ontological dignity than constitutionalism. Law here is instrumental to the state, not the other way around.

However, there is an alternative doctrine. This is explicitly vindicated by Immanuel Kant: the state is a collective entity that is structured through legal rules ("Ein Staat […] ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen"[237]): "A state is (…) an association of a mas of people through rules of law." Kant's view is then radicalised by Hans Kelsen: a state, he claims, cannot be understood, nor can it act, without referring to rules. And within the state, rules are equivalent to legal rules. There is no possibility of conceiving of a state from any other perspective, once we assume the internal point of view of its agents. This is the legal point of view. The consequence of such an approach is that every state is seen as a *Rechtsstaat*, a rule of law: "Er muss zu der Erkenntnis führen, daß *jeder Staat Rechtsstaat ist,*"[238] which should lead to the conclusion

[236] See G. Jellinek, *System der subjektiven öffentlichen Rechte*, Mohr, Tübingen 1905.
[237] I. Kant, *Metaphysik der Sitten*, ed. by H. Ebeling, Reclam, Stuttgart 1990, p. 169.
[238] H. Kelsen, *Der soziologische und juristische Staatsbegriff*, II ed., Mohr, Tubingen 1929, p. 191. Underlined in the text.

that every state is a legal state, that every rule is a rule of law. The authority of the law and the authority of the state are one and the same thing. This thesis, however, does not have *prima facie* strong legal philosophical or political implications. Kelsen is not justifying or recommending a dictatorship as the rule of law: a state here seems to be considered as a kind of a mask, behind which one might perceive the disquieting presence of the Gorgon of naked power. The ontology of the state is based on force, not really on law. This is somehow a sort of device to make sense of the juristic operations that are, however, instrumental to state functions. This is why there is a possible interpretation of Kelsen's doctrine as a sort of political realism.[239] Nonetheless, the substantive emptiness, the radical formalism, of this approach contrasts with any attempt to offer an essentialist or naturalist picture of the State. This explains why Kelsen's picture of the state was so strongly opposed by nationalists and communitarians, both of the right and the left.

On the other hand, the Austrian scholar's approach allows for the idea that sovereignty is simply another name for a valid legal order, and that law can be perfectly impersonated through supranational institutions. In the end, Kelsen's message is that law is independent of the state as a specific sociological formation, or alternatively that a state is just another name for any valid legal order. Here the duality of the state—on the one hand, a historical community, a special sort of society, and on the other a formal, hierarchical structure defined by rules and procedures—is solved, as noted by Gustav Radbruch, the German legal philosopher, by simply denying that this is a problem. There is no solution to the dilemma of the dual nature of the state, only a denial of the problem, which is seen as arising from an unclear or mistaken epistemological strategy. The only cognitive point of view concerning a state is the internal, legal perspective. Beyond this, or without this, there is confusion and inappropriate essentialism or even mysticism, as happens, for instance, whenever the state is interpreted with reference to an impersonal soul or a collective destiny, and is filtered through a demanding philosophy of history or a too thick social ontology.

But is Kelsen's thesis sufficient for understanding what a state really is? We have reason to doubt it. The Austrian scholar does not ignore the coercive side of the state practice, and, indeed, according to him, a legal order is a coercive system, and legal norms are ultimately about sanction and coercion. But the nature of the law cannot be reduced to coercion, nor can it explain the state and its operations and validity. Otherwise, a bandits' order, a rule by desperados or gangsters or mafia, would be indistinguishable from law. Or we could envisage Auschwitz as an institution of law. Incidentally, according to Kelsen, validity, *Geltung*, is the specific form of the existence of both law and the state. The state is more than just a monopoly of violence; there is a drive to order and structured processing of conducts. The state is thus a *legal* monopoly of violence, where the

[239] See, for instance, the recent book by Robert Schuett, *Hans Kelsen's Political Realism*, Edinburgh University Press, Edinburgh 2021.

legal attribute is what gives the state its specific nature and ontological justification.

However, is this reference to legality a sufficient guarantee to constrain the violence of state sovereignty? This is debatable. In the end here, the factual prevails; this is somehow explicit in Kelsen's admission that the basic ground rule of the legal order is the principle of efficacy, one that is recurrent in public international law. Such admission tells us to consider as a state—that is, a legitimate legal subject of international law, one that deserves recognition by the international community—all those powers that are under fully effective control within a specific territory. In this way, we are driven back to Georg Jellinek's idea of the 'normative force of the factual', *normative Kraft des Faktischen,*[240] so that the fact of authority is a sufficient condition for the claim to produce law. This idea, we might remember, is quite close to Pascal's recommendation that, since we cannot make justice powerful, we should aim to make the powerful just: "Ne pouvant fortifier la justice, on a justifié la force."[241] Violence that is effective and monopolised by a powerful subject can legitimately raise a claim to legality. Is this consistent with the notion of the state as a civilising actor in society? Is the state a gentle civiliser of nations, once it is shaped according to the facticity of an irresistible power?

This is not the view of the great legal historian Hermann Kantorowicz. According to the German scholar, to presuppose the state as prior to law would not necessarily allow us to give legal character, for instance, to the rules of international law or customary law. Constitutional law would also be impaired by such priority given to the state as the primordial source of law. As Kantorowicz says:

> We must not, as many do, consider the law a creation of the state – a theory which would be incompatible with the existence of customary law, of canon law, and of international law. On the contrary, the state presupposes the law – international or national law – and this idea is borne out by the history of jurisprudence, which shows that no concept of the state has ever been formed that did not imply some legal elements."[242]

This also seems to be the view developed by Gustav Radbruch, a good friend and a colleague of Kantorowicz at the University of Kiel.

A Self-Limited Power?

Radbruch was a legal positivist, and a strong legalist. He used Georg Jellinek's doctrine of the self-limitation of the state as starting point: law is the outcome of a self-limiting act, but the efficacy of the law is conditional on its

[240] See G. Jellinek, *Allgemeine Staatslehre*, III ed., Wissenschaftliche Buchgesellschaft, Darmstadt 1960, p. 337. Jellinek's thesis however is presented as a psychological finding, rather than as a normative argument (see ibid., pp. 339 ff.).
[241] Pascal, *Pensées*, ed. by M. Le Guern, Gallimard, Paris 1977, p. 94.
[242] H. Kantorowicz, 'The Concept of the State', *Economica*, No. 35, February 1932, pp. 5-6.

application of being universally undertaken. Self-limitation by law means that the law is applicable to the state itself. Of course, from this perspective, there is a state before the law. But the state's claim to make law – and this is a necessary evolutionary move for the state to develop its grip on society – is only possible on condition that the law is generally applicable; that is, applied to the state itself. The law does not provide an exception for the state. A state without a law is illegal and thus illegitimate, but this opens the possibility of a full deployment of the dual nature of the state, in so far as the law's sense is envisaged in its pretension to justice. A legal state, a *Rechtsstaat*, is, according to Radbruch, a state that lays claim to justice. However, the question is intricate, and the legal positivism maintained as a general doctrine of law makes things less clear and promising. Radbruch maintains the idea of a sovereign power that imposes its rules, possibly by coercion, and its justification is essentially its capability of being a supreme authority, understood in factual terms as violence and the monopoly of force.

Legal positivism – the doctrine according to which the law's validity is not necessarily connected with justice, or morality – is a theory especially designed to justify the rise of the modern state. As a matter of fact, in the philosophy of law, legal positivism has been identified in three distinct forms. We have first a doctrine that claims the state to be the only source of the law. This is sometimes also called the "source thesis;" the law is to be known just by looking at what an authority, actually a state, says the law is. This thesis, that of legal positivism as a doctrine of the state as the only producer of law, is made plausible through the adoption of two more basic versions of positivism. The first is the so-called "methodological positivism:" it is possible—according to this version—to know what valid law is in a descriptive, purely cognitive mood. This is a kind of epistemological rehearsing of the "source theory": "there is somewhere a source of law. I approach it, I see it, I record it, and this all I need to know what law is. I do not need to assume a normative attitude. I can be—I should be—neutral. I should only repeat the law."

An Italian positivist legal philosopher used to say that legal rules are a reiteration of the sovereign's prescriptions.[243] A lawyer should only learn them, possibly by heart, indeed to "sing" them ("cantar", as is required, for instance, in Spain to pass the exam for judges), and repeat such rules time and again. But why should the law be experienced in this way? In a society, there is a permanent conflict over what the rules of society should be. Such conflict cannot be resolved from the point of view of a substantive morality. This is so, especially, because the right and the wrong are relative and cannot be cognitively approached; there is no right answer in an absolute moral sense. What is "right," then, cannot but be the outcome of a decisionist action, undertaken by a figure that has the authority, the force, that can use the necessary violence, to impose the one solution that ends the controversy. And we need this authority if we want to live in peace and coordinate our conduct effectively.

[243] See U. Scarpelli, 'Le "proposizioni giuridich"' come precetti reiterati', in *Rivista internazionale di filosofia del diritto*, Vol. 44., 1967, pp. 465-482.

A somehow oblique version of this normative positivism is offered by the "service conception" of authority,[244] whereby authority is justified in so far as it is of service to individuals' preferences and plans of life. Here, the argument is presented as a logical or an ontological one. Since the law is something that claims authority, it does presuppose such authority; that is, a coercive power capable of imposing its prescriptions. This is the nature of law. It is a kind of ontological proof of the authoritarian nature of law. It reminds us of the medieval ontological proof of the existence of God: since God is claimed to hold all properties, He should also have the property of existence. "Existence" is considered an adjectival quality, like "goodness". Now, in the same way as we assume that God is good, we should then also acknowledge that He owns "existence," once we start from the basic idea that God possesses all possible positive qualities. The authoritarian nature of law is deduced in a similar way. Behind such ontological proof of authority as the nature of law, there is a theory of the reason we have for action. In this case, the argument runs more or less as follows: authority, issuing pre-emptive, second-order reasons for action, is able to give first-order reasons for action, individual preferences, and basic interests, greater satisfaction or more effective realisation. First-order reasons are more capable of realisation if they are assisted by second-order reasons.[245]

But—and this is the gist of the argument—such assistance is equivalent to replacement. Assisting individual preferences means, for authority, replacing them through the authority's prescriptions. Second-order reasons replace first-order reasons, and it is good that this is so. To do that, however, there should be an authority issuing those second order reasons; that is, an intervention that pre-empts first-order reasons, individual substantive desires and preferences, and make them irrelevant in citizens' practical reasoning. This, in a sense, is what also constitutes the state as such—its primordial *Coup d'État*; that is, the State's "official" reasons supplanting citizens' "private" reasons.[246] Authority—which is, moreover, the basic justification for such an operation—makes people better off, and this is only possible if, in following authority's rules, people forget the relevance and even the content of their first-order reasons; that is, their interests, needs and preferences. When presented with rules as second-order reasons—that is, as authority commands—we are asked to remember the underlying good these reasons, such commands, are supposed to assist and better realise.

That a contemporary natural lawyer shares an analogous view of authority is evidence of the deep influence enjoyed by positivism over the whole of legal culture. Indeed, such a view seems more radical than the thesis defending natural law as being based on sheer force. According to the natural law thinker, legal

[244] See J. Raz, *The Morality of Freedom*, Oxford University Press, Oxford 1986.
[245] See J. Raz, *The Authority of Law*, Oxford University Press, Oxford 1979.

[246] Cf. P. Bourdieu, *Sur l'État. Cours au Collège de France 1989-1992*, "Raisons d'agir/Seuil", Paris 2012, p. 123. "Le coup d'État d'où est né l'État […] témoigne d'un coup de force symbolique extraordinaire qui consiste à faire accepter universellement, dans les limites d'un certain ressort territorial qui se construit à travers la construction de ce point de vue dominant, l'idée que tous les points de vues ne se valent pas et qu'il y a un point de vue qui est la mesure de tous les points de vues, qui est dominant et légitime".

validity at the end of the day is built upon the "perhaps too stark principle" (the natural lawyer's words[247]) of effective force. Once again, normativity is related here to the supreme capacity of a fact, *normative Kraft des Faktischen*. The state is a rule that is opaque to people's desires and motives. This core thesis of positivism is also reflected and re-elaborated from different intellectual perspectives. Such is the case, for instance, of system theory, which thematises legal norms as expectations that are not open to disappointment.[248] A state legal rule would therefore be valid, even if it were not repeatedly followed. The rule not being assisted and applied with reference to people's wishes, and its being actually opposed to people's desires, breach the conditions for such a rule to be given the dignity of law.

Not surprisingly, Gustav Radbruch, being a legal positivist, defends something of a similar tenor. His first move is the recognition that legal positivism bases itself on a natural law assumption: "Wenn in einer Gemeinschaft ein Höchster Gewalthaber vorhanden ist, soll, was er anordnet, befolgt werden,"[249] ("If in a state there is a supreme holder of force, whatever this prescribes ought to be followed.") But why? The answer here is given through an appeal to the highest value of legal security. It is only by obeying the supreme holder of violence and force that we can reach certainty about a common rule for society to follow. However, the same legal security principles oblige the state, the supreme force holder, to abide by that same law it has issued. "Der selbe Gedanke der Rechtsicherheit, der den Staat zur Gesetzgebung beruft, verlangt auch seine Bindung an die Gesetze:"[250] the same intuition that connects legal certainty and State legislation, leads to the idea of the rule of law binding the state. Should the supreme legislator not be bound to its own commands and rules, its power would cease to be legitimate and it would not be able to claim obedience. The use of force and law is inextricably considered connected to the claim to be legitimate and binding on citizens. But law here is not just a general rule; law is more than just a rule or statute or command, and a rule can only be a law if it can claim to be just: "Denn Recht ist nur, was den Sinn hat, Gerechtigkeit zu sein:"[251] "Law is only that whose meaning is justice." Justice, on the other hand, implies equality and a strong connection to the common good, to the *res publica*. A state is legitimate, and indeed a proper public institution, only if it can be considered a guarantor of the public good.

[247] J. Finnis, *Natural Law and Natural Rights*, Clarendon, Oxford 1980, p. 250.

[248] See N. Luhmann, *Rechtssoziologie*, II ed., Westdeutscher Verlag, Opladen 1983, p. 43: "Normen sind demnach *kontrafaktisch stabilisierte Verhaltenserwrtungen*. Ihr Sinn impliziert Unbedingtheit der Geltung insofern, als die Geltung als unabhängig von der faktischen Erfüllung oder Nichterfüllung der Norm erlebt und auch so institutionalisiert wird" (italics in the text).

[249] G. Radbruch, *Rechtsphilosphie*, ed by R. R. Dreier ad S.L. Paulson, Heidelberg 1999, p. 172.

[250] Ibid., p. 173.

[251] Ibid.

The State as Caring for the Common Good: An Alternative View

Legal positivism tends to obscure the dual nature of law and the state. From this perspective, authority is the core of the law and the state, and behind authority lurks the experience of the monopoly of violence, meant as the greatest possible deployable force. However, Gustav Radbruch—as we have seen—proposes a richer concept of law and legality, connected as this is to justice. He makes positivist reductionism less plausible, and opens up an alternative theory. This alternative, surprisingly enough, has been openly thematised by the anarchist thinker, Pierre-Joseph Proudhon.

We are used to believing that anarchism is a doctrine that radically opposes the state. Indeed, for most anarchist thinkers, the state is irremediably considered as a form of violence and domination. This is also so in the work of contemporary anarchists, such as David Graeber. In his work on the history of debt, Graeber refers to the state not as a specific political form related to modernity, but rather as a notion to explain and name all forms of centralised power and authority in human history.[252] This approach is later confirmed in his general political anthropology of human societies, *The Dawn of Everything.*[253] In this perspective, there were states in Ancient Mesopotamia and Egypt, as well as in the Inca and Aztec societies in pre-Columbian America. The Roman city is here held to be a State, and so on. The qualifying character of a state is assumed to be its use of violence and the reduction of people, in principle, to slaves—to subjects that are fully disposable by power holders. This is also the anarchist Kropotkin's view, whose book on *The State* centres around the hypothesis of this political form as an outcome of sheer violence and oppression.[254]

Kropotkin's view is that the roots of the state are to be found in war, and in the surrender and humiliation of the vanquished and conquered. Max Stirner declared that whoever has the power, he will also have the right: "Wer die Gewalt hat, der hat das Recht:"[255] "Law is thus an accessory, a tool, of the state for enforcing its power." Karl Marx, though dismissive of 'Saint Max', would agree: "Einfache Herrschaft von Säbel"—"the simple rule of the sword," the German communist says, "is the state's oldest way."[256]

More recently, Michel Foucault, the French post-structuralist philosopher, has presented us a picture that is not too different from the stark view held by Kropotkin or Stirner. In most of his work, the state is a force of domination, violence and codified warfare; law is stained with the blood of the oppressed. From such a perspective, no alternative vision of the state would seem to be possible: nor might a state with dual nature be even conceivable. This is still Nietzsche's

[252] See D. Graeber, *Debts*, Melville House, Brooklyn, New York 2011.
[253] Graeber, D., Wengrow, D., *The Dawn of Everything,* Penguin, UK, 2021
[254] See P. A. Kropotkin, *The State. Its Historic Role*, Freedom Press, London 1943.
[255] M. Stirner, *Der Einzige und sein Eigentum*, ed. by A. Meyer, Reclam, Stuttgart 1981, p. 110.
[256] K. Marx, *Der achzehnte Brumaire des Louis Bonaparte*, ed. by H. Brunkhorst, Suhrkamp, Frankfurt am Main 2007, p. 13.

'cold monster': "Staat heisst das kälteste aller kalten Ungeheuer."[257] Nietzsche also later adds that the state is a sort of 'hypocritical dog', *Heuchelhunde*[258]; that is, while its speech is given through the shouting of orders and the smoke of firing, it would have us believe that those words it speaks imperatively would express the nature of things. It offers us a philosophy whose real essence is violence. In short, the state is an ideological machine that disciplines not only our conducts, but also and above all our thought and imagination. It claims to be 'the most important animal on this earth', and more often than not it bravely succeeds in convincing us that it is so.

However, there is an anarchist thinker who has a more nuanced and sophisticated understanding of the state. Pierre-Joseph Proudhon considers the state from two alternative perspectives. We can see the state simply in terms of the monopoly of violence, where any claim to justice is nearly null, or if it exists, it plays the role of mere ideological fiction. Here, force and violence are the definitional properties of a state. However, there is another sense of the state which is both less formal and less sheerly empirical, and that is a state as the dimension of public affairs, of common good, "res publica":

> Il existe en toute société, par cela seul qu'il y a société, une chose positive, réelle, qu'il est permis de nommer *l'État*. Elle consiste, cette chose : 1. Dans une certaine force essentielle au groupe, et que nous appellerons force de collectivité ; 2. dans la solidarité que cette force crée entre les membres du corps social ; dans les propriétés et d'autres avantages communs qui la représentent et qui en résultent.[259]

The common good is another name for the justice of political life, of the public morality of collective institutions. In this sense, a State is a sphere where individuals are no longer considered isolated subjects, stripped of their social context, of their intersubjective attachments, of the reciprocity of commitments that makes their identity. In this area, the public is equivalent to reciprocity and solidarity. The State's *locus* is public morality, or the common good; in Hegel's jargon: "Der Staat an und für sich ist das sittliche Ganze."[260]

Michael Oakeshott seems to follow Proudhon's suggestion when he proposes two possible delineations of the idea of State: one that he calls *societas*, and another labelled *universitas*. The main character of *Universitas* is its purposiveness, its instrumental strategic determination, whenever associates are driven by a uniform external target. *Societas* is rather a mode of internal discursive recognition and conversation. Oakeshott then adds that modern states are a conjunction of both models: they are mixed up, but such mixing is never

[257] F. Nietzsche, *Also sprach Zarathustra*, in Id., *Sämtliche Werke*, Vol. 4, ed. by G. Colli and M. Montanari, Walter de Gruyter, Berlin 1980, p. 61.
[258] Ibid., p. 170.
[259] P.-J. Proudhon, *De la Justice dans la Révolution et dans l'Église*, Vol. 2, Fayard, Paris 1988, p. 769 .
[260] G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*, Suhrkamp, Frankfurt am Main 1986, p. 403.

fully achieved; the two basic ideas cannot fully converge in a coherent, frictionless scheme.[261]

We could nonetheless hope that one model, and the more civilised one, that of the state as public sphere and discourse, might eventually prevail. The state is reshaped in terms of an institution of social solidarity and civil conversation, if—as Proudhon claims—by state we should mean the public sphere and the institutionalised common good through citizens' participation: "si par l'État on entend la chose publique, la force collective, à la production et au benefice de la quelle participent tous les citoyens."[262] Here, justice moreover assumes a strong redistributive turn by at the same time referring it to the citizen's sovereignty. As Proudhon says: "The peculiar feature of the concept of justice—as John Rawls says—is that it treats each person as an equal sovereign."[263] In this second view of the state, as an institution of public discourse and solidarity, there are no commands and subjection as original positions, and they do not have a definitional character; what is essential in such a case is engaging with commitments and agreements. Authority is here prompted by citizenship and participation. First-order reasons take the upper hand over the second-order state precepts. Law is given back to considerations of justice, and this to the collective solidarity of people that acknowledge each other's basic needs, rights, and virtues.

Now, what is the conception of the state that is most conducive to democracy and to social justice? It is obvious that we are in need of a richer notion of the state that might keep open and operative the question of its possible dual nature and the meeting of requirements that such duality mobilises. The Covid-19 pandemic has shown us how much the common good is a question of care, and how effective care can only be provided by a public institution. We might thus refer to the State as *the public institution of care*. We would then expect a concept of law, accompanying this civilised form of the state, that does not forcefully and starkly pre-empt citizens' first-order reasons, and will be permanently accountable to them.[264]

In this way, eventually, we get a state that anarchists could claim as their own. This is the dimension of the common good, a public sphere that is instrumental for individuals to make effective their personal projects of good life and where they act in concert to experience the pleasure of participation in a common scheme and project. The good life would remain the business of each person. There is no other way to have a good life if not from the internal perspective of the person whose good life is in question. No one except him or her can know what is really good for a person beyond a certain threshold that

[261] M. Oakeshott, *On Human Conduct*.

[262] P.-J. Proudhon, *De la Justice dans la Révolution et dans l'Église*, Vol. 2, p. 772. Cf. J. L. Villacañas Berlanga, "Föderalismus als Gegenbewgung", in *Zukunft des Staates—Staat der Zukunft*, ed. by H. U. Gumbrecht and R. Scheu, Reclam, Stuttgart 2021, pp. 24 ff.

[263] J. Rawls, 'Constitutional Liberty and the Concept of justice', in *Rights*, ed. by D. Lyons, Wadsworth, Belmont, Cal. 1979, p. 45.

[264] For a philosophical proposal pointing in such direction, see the recent book by Robert Alexy, *Law's Ideal Dimension*, Oxford University Press, Oxford 2021.

guarantees that conditions are offered for developing one's own plan of life. A good life is a life in which one has the capacity and the means to project and conduct oneself. Pursuing a good life also means that one is ethically responsible for it. A public sphere cannot pre-empt this basic reference to the individual plans of life. However, it should protect and make it possible in a dignified way. In this sense a state could be reshaped as such a guarantee and eventually be considered as an institution that anarchism could reasonably and legitimately claim without denying its normative core. This is maintained by the refusal of hierarchy, inequality and domination. An anarchist state would thus be a public sphere comprising persons endowed with equal dignity, each given the capacity to pursue their project of life, without submitting to any other rule than the one commonly and freely agreed.

Sovereignty Civilised

A general criticism and rejection of the state, indeed, seems to be the core of the anarchist theory of politics.[265] This—as we have tried to argue—might be doubted. However, Proudhon's political philosophy attempts a more nuanced analysis of the state whereby its monopoly of violence and its obsession with coercion are disconnected from its more basic public functions and its role for the maintenance of a public sphere and a collective good.

In his lectures on the birth of biopolitics and neoliberal governance at the end of the 1970s, Michel Foucault astutely outlined how unsatisfactory was a general criticism of the state. This, he intelligently remarked, was based on several argumentative fallacies. One of these was arguing by generalising an assumed historical state capacity for evil and expanding it to the whole scope of state action: since there was Auschwitz, and a state was responsible for Auschwitz, whatever a state performs keeps as its inner logic the potential for Auschwitz. However, a national health system is also a state performance, but it cannot be equated with a practice of domination or with one of sheer coercion: this would only be possible if one had to approach states with a poor analytical methodology. Institutions are complex collective entities which obey distinct functional motives. In order to understand them, we should be able to differentiate distinct institutional functions and modes of action. A general, unnuanced criticism of the state would not give us the best key for such an understanding. It would also oversimplify the anti-authoritarian sense and good reason of the traditional anarchist rejection of the state. Now, Proudhon's more nuanced care approach is indeed what could, on the one hand, maintain the anarchist criticism against dominion and self-defining institutions, and at the same time satisfy the need not to scarify the collective good and the public functions that are instrumental to the flourishing of the public good to a preconceived, and not thoroughly reflexively self-examined ideological position.

[265] D. Loick, *Anarchismus zur Einfuehrung*, Junius Verlag, Hamburg 2017, p. 119.

But here, a more fundamental question is implied. Anarchism traditionally does not seem capable of avoiding a paradigm of politics rooted in the notion of sovereignty. What anarchism does is to radically universalise such a paradigm, both in its intensity and in its extension. The sovereign is not only one person or a few people, but all. Sovereignty is here linked to equal concern, a universal notion of individual dignity. Dignity requires autonomy, and thus sovereignty, or at least a fragment of it. On the other hand, sovereignty is here permanently exercised: there is no end to its use and movement. Rules are given by all and then by all they can be changed—in fact, they ought to be changed, if institutions are not to be fully crystallised in a socially unreflective and coercive form. Rejection of coercion means a permanent activation of sovereignty, but this has a cost, and this, among others, is a recurrent claim of individual merits and rights, a growing focus on the self, to the detriment of the respect and attention due to others. This attitude can only be controlled from a different existential perspective. Self-reflexivity would here only increase the self-centred world of an egocentric self, obsessed in the end with his own will to power. To counteract this likely outcome of a radicalised individualism, we need to give others a voice, and the chance to stop the self-righteous activation of autonomy. This is exactly what care intends to do. Sovereignty in this way is, so to speak, tamed and reshaped in a more humble way by attention to the needs and the words of the other person. The voluntarist romanticism inherent in the self-empowering individual and collective self (people driven in this way imagine themselves to be a pre-political homogeneous entity) is corrected by a different form of romantic culture; one that is rooted in respect for the small, poor and humble. It is not strength here that is the defining virtue, but just its opposite, vulnerability.

Beyond *Staatswissenschaft*: The Conception of the State and Rights in Kelsen and Weber

Peter Langford

Introduction

The tradition of *Staatswissenschaft*—a general theory of the character and organisation of the state—is a distinctive phenomenon, both in its concern with a method of theory construction which founds itself on its scientificity (the assertion of a comparable degree of objectivity in its theoretical framework to that of the natural sciences), and in its emergence as an almost exclusive concern within German-speaking lands. Its emergence and formal recognition as an academic discipline within the Universities of German-speaking lands, in the nineteenth century, is to be understood as a theoretical response to the enduringly negative conception of the French Revolution and to the particular trajectory of state formation or transformation. The process of German Unification, undertaken by Prussia, during the later nineteenth century, eventually resulted in the constitutional monarchy of the German Reich (1871). The Austro-Hungarian Empire, defeated as part of this process of German Unification, had, in the earlier 1860s, transformed itself into a constitutional monarchy.[266]

The theoretical framework of *Staatswissenschaft* is one predominantly orientated to integrating a monarch, within a juridical and parliamentary legislative framework, in a manner in which the monarch remains the principal source and origin of sovereign power and authority. The monarch, while no longer a source of absolute, unconditioned sovereignty or authority, is related to non-monarchical institutions by according them a lesser position.

Within this tradition, the specific conceptualisation of law—*Staatsrechtlehre* or *Staatsrechtswissenschaft*[267]—is exemplified in the work of Paul Laband (1838-1918) and Georg Jellinek (1851-1911).[268] A central difference between Laband and Jellinek, beyond their distinct, initial intellectual formation, is that Jellinek develops his theoretical position through the theoretical difficulties arising from

[266] The transformation of the Habsburg Emperor into a constitutional monarch in the early 1860s, is one which remains founded, through recourse to Laband's theory, on the Emperor as the sole legislator. See Schmetterer (2010, 2012). For Jellinek's early attempt to formulate this theoretically, see Jellinek (1887).

[267] See (Pauly, 1993).

[268] The central work of Laband, in five editions, is the three-volume, *Das Staatsrecht des Deutschen Reichs (1876-1914)*. See also the broader reflections in the lectures at the University of Strasbourg (1872-1918) collected in Laband (2004), in which Laband furnishes broader reflections on the history of state thought, on state theory and constitutional history and on German constitutional law of the 19th century. For interconnections between Laband's theory and the distinct intellectual environment at the University of Strasburg, see Schlüter (2004). See, also for the broader intellectual context, Friedrich (1986) and Pauly (1993). For the theoretical and methodological construction of Laband's theory, see Herberger (1984) and Montella (2019). For the origins of Laband's methodology of the state in the preceding nineteenth-century German legal science of civil or private law, see Wilhelm (1958); and, for Laband's relationship to preceding nineteenth-century German *Staatsrechtslehre* and its notions of constitutionalism, see Pauly (1993a, pp. 168-209). The central work of Jellinek, in three editions, is *Allgemeine Staatslehre* (1900, 1907, 1914). The origin of this work is now held to arise from a lecture course of 1896: see Jellinek (2016).

within Laband's theoretical framework.[269] This process is also contributed to by an academic career trajectory commencing in Vienna and concluding in Heidelberg, and the accompanying movement (Vienna-Basel-Heidelberg) away from the Austro-Hungarian Empire to the comparatively freer intellectual environment of Heidelberg.[270]

The differing position of Jellinek is evident from the development in his thought of the origin and character of rights in relation to the state. This is exemplified through a comparison of Jellinek's works of 1892 and 1895 (the latter republished in 2016), in which public rights are initially thematised[271] and then, their historical origin is traced, prior to their reintegration within the conceptual framework of the *Staatsrechtlehre*. This process of reintegration is then subsumed within Jellinek's later conceptual framework of the *Allgemeine Staatslehre*.

The importance of Jellinek's short work of 1895,[272] as the preliminary preparation for the subsequent reintegration, is, as explicitly recognised in the critical exchange between Boutmy and Jellinek on this text,[273] to adopt a juridical approach to the text of the *Declaration of the Rights of Man and the Citizen* 1789, and to seek the origin of the *Declaration* in a detailed textual examination of its historical precursors.[274] In this manner, Jellinek seeks to effect a double displacement: to displace the origin of the *Declaration* and to then re-centre that origin upon a particular fundamental freedom. The origin is displaced from Rousseau's *Social Contract*—the purportedly contemporaneous French origin—by situating it as the further development of an origin in the American *Declaration*. From this historical origin, the development is held to reside in the freedom of religion, and, from the perspective of this trajectory, the *Declaration of the Rights of Man and the Citizen* ceases to have a distinct, exceptional position.

This internal development,[275] by Jellinek, within the *Staatsrechtslehre* tradition, indicates an increased recognition of rights,[276] whilst continuing to conceive them from the perspective of a state-centred positivism: the self-limitation of the state.

A subterranean critique of the *Staatslehre* tradition is formulated from the initially privately printed first part of Nietzsche's *Thus Spoke Zarathustra* in

[269] For the development of Jellinek's methodological position, see Schönberger (2000), but qualified by Ghosh (2008, pp. 90, 320-1) and La Torre (2000). See also Anter (2020), Beaud (2021), Boldt (2020), Jouanjan (2005) and Kersten (2000).
[270] On this, see Lagi (2015, 2016a, 2016b), and for Jellinek in Heidelberg, see Graf (2018).
[271] On Jellinek (1892), see Pauly (2000).
[272] All references are to the English translation, Georg Jellinek, *The Declaration Of The Rights Of Man And Of Citizens: A Contribution to Modern Constitutional History*, New York: Henry Holt, 1901.
[273] Boutmy (1902), Jellinek (1902). See, on this exchange, Klippel (1995).
[274] For Jellinek, "The achievement of this task is of great importance both in explaining the development of the modern state and in understanding the position which this state assures to the individual" (Jellinek, 1901, p. 6).
[275] For Kersten (2021), this is part of the wider reflective character of Jellinek's legal positivism.
[276] This recognition is, however, based upon a conception of a spectrum of statuses. See Jouanjan (2004) and Pauly and Siebinger (2004). See, also, the later, short work on the law of minorities (Jellinek, 1898), and the introduction to the German reedition by Pauly (1996) and the wider analysis by Kersten (2001).

1883.[277] In 'The New Idol' section, Zarathustra inveighs against the state—the "coldest of cold monsters" (Nietzsche, 2006, p. 34)—which has substituted itself for the people, and in this mendacious substitution is the historical origin of the phenomenon of the state's generalised lying and stealing. Zarathustra's emphatic rejection of the state—an idol which creates its worshipers (Nietzsche, 2006, p. 35)—is the prelude to the conclusion of the section, in which the "end of the state" (Nietzsche, 2006, p. 36), namely, that place or position beyond the state, prefigures or gestures towards a different image of the political.[278]

The condensed Nietzschean critique, delivered through the figure of Zarathustra, within the distinctive textual form of *Thus Spoke Zarathustra*, is articulated outside the methodological concerns and parameters of the *Staatslehre* and the *Staatsrechtslehre*. The place or position of the "end of the state" is, however, reached in a different manner, with the defeat of Germany and the Austro-Hungarian Empire in World War I, and the installation of the Weimar Republic and the First Austrian Republic with their respective democratic constitutional states. This defeat is also the end of the nineteenth-century tradition of the *Staatsrechtlehre* and, in its later nineteenth-century formulation, the end of a theory of the state as a constitutional monarchy.

Hans Kelsen and Max Weber, who, however, died in 1920, were directly situated in this transition, contributing, respectively to the elaboration of the Constitution of the First Austrian Republic and the Constitution of the Weimar Republic.[279] The transition, which is also a methodological critique of the preceding tradition of both the *Staatswissenschaft* and the *Staatsrechtlehre*, is then the attempt to combine the state and the people within a democratic constitution. Kelsen and Weber are, however, distinguished by the manner in which this critique is developed and articulated in what will become the contrast between a Kelsenian legal science of positive law and theory of democracy and a Weberian sociology and sociological theory of law.[280]

[277] This critique expresses an increasingly negative reaction of Nietzsche to the establishment of the German Reich and Bismark. See, for this transformation and the wider character of Nietzsche's position, Hofmann (1971) and Steinbach (2006).

[278] The analysis leaves aside the question of the further determination of the political in *Thus Spoke Zarathustra*, and its relationship to the political in the final works of *Ecce Homo* and *The Antichrist*. On this, see Meier (2021, 2024)

[279] The analysis will concentrate upon the interwar work of Hans Kelsen.

[280] The analysis acknowledges, but leaves aside, the wider academic discussion of the relationship between Nietzsche and Weber but follows Treiber (2016) in the difficult task of delimitating the influence of Nietzsche on Weber. In relation to Kelsen, there is, in the second edition of the Essence and Value of Democracy (1929), a quotation of this passage from Nietzsche's Zarathustra, but it is utilised and methodologically delimited as the exemplary preliminary critique of the fusion of state and people. From which Kelsen proceeds to indicate the necessity of a distinction between two notions of the People: a unity of human individuals based upon participation "in the creation of the state order" and a unity of human individuals based upon their common subjection to normative regulation by the legal order (Kelsen, 2013, pp.36-37).

Hans Kelsen: State and Rights in a Legal Science of Positive Law

State

For Kelsen, the legal science of positive law is developed from a direct critique of this preceding tradition. It centres upon displacing the primacy of the state with the primacy of law, and, in this displacement to juridify the notion of the state. In this displacement, the notion of the state, is transformed from one which designates a substantive entity to one which, as a juridical notion, designates a formal entity. The initial critique is elaborated in Kelsen's *Hauptprobleme Der Staatsrechtslehre* 1911 (Kelsen, 2008), which provides a comprehensive critique of the methodological presuppositions and approach of the *Staatsrechtslehre* tradition. This is the preparatory or preliminary methodological critique which is then further modified and extended during the interwar years,[281] concluding with the first pure theory of law (*Reine Rechtslehre*) in 1934.

The methodological purpose of juridification is to be understood as the methodological dissolution of any continued adherence to a conception of the state as an entity which exists prior to law. Juridification is the counterpart of the demonstration that all attempts to situate the origin of the state prior to law or to accord primacy to the state in relation to law are characteristic of a hypostatisation: the presentation of a category of thought—the state—as a distinct substance or physical entity. The methodological dissolution retains the notion of the state, but as one which is now entirely juridical in character and, therefore, part of, rather than prior to, the hierarchical normative order of positive law. Positive law is itself understood as a normative order of coercion—*Zwangsordnung*—which exists autonomously and externally to the individuals whose behaviour is guided or shaped by it.

The dualism of state and law is, thereby, overcome, and the notion of the state is conferred with an entirely heuristic purpose of designating a certain level within the hierarchical normative order of positive law. It is from this position that Kelsen then considers that the further dualism between national and international law is to be dissolved[282] in an analogous manner with a theory of legal monism: the state, as a legal category designating a level within the hierarchical normative order of positive law, is an *internal* component of a normative hierarchy in which international law is situated above the level encompassed by the state.

The methodological effect of the development of the Kelsenian legal science of positive law extends to the notion of a *Rechtstaat*. The dissolution of the dualism of state and law results in the generalisation of the notion of a *Rechtstaat*: it becomes, in itself, an entirely descriptive, rather than, prescriptive or evaluative notion. This is initially expounded in the final section of the first part of the

[281] Kelsen, in the preface to the second edition of the *Hauptprobleme* in 1923 (Kelsen, 1998), designates the critical analysis in the *Hauptprobleme,* as the first, preliminary articulation which his subsequent work has further extended and developed.

[282] See, (Kelsen, 1920; Kelsen, 1922; Kelsen, 2019 (1925)). See, also, Jestaedt's introduction of the *Allgemeine Staatslehre*, (Jestaedt, 2019).

Allgemeine Staatslehre (1925) (Kelsen, 2019, pp. 230-31), and finds its most concise and radical formulation in the Pure Theory (*Reine Rechtslehre*) of 1934:

> The attempt to legitimise the state as a *Rechtstaat* is exposed as completely inappropriate, since every state must be a *Rechtstaat*—if one understands by '*Rechtstaat*' a state which 'has' a legal system. There can be no state that does not have, or does not yet have, a legal system, since every state is only a legal system. (Kelsen, 1997, p.105).

This, in turn, introduces the distinction between the notion of a *Rechtstaat* as a legal *form* and the particular legal *content* of the specific legal system of a state. With the Pure Theory, the Kelsenian legal science of positive law has confined itself to legal *form* in which the *Rechtstaat* has become merely a generic, descriptive term. For neither the state nor the law, as notions within a legal science of positive law which has dissolved the dualism of state and law, has the purpose of justification of the other. The methodological coherence of the Pure Theory which, as "objective cognition" (Kelsen, 1997, p. 106), relinquishes a position of justification, as one of subjective evaluation: "a matter of ethics and politics" (Kelsen, 1997, p. 106).[283]

The methodological stringency of the Pure Theory is tempered by returning to Kelsen's work of the late 1920s, 'La garantie juridictionnelle de la Constitution (La justice constitutionnelle)'[284], and early 1930s—the exchange between Carl Schmitt and Kelsen over the 'guardian of the constitution'[285]. It is in these works of Kelsen, and, in particular, in the conception of a constitution, rather than that of a *Rechtstaat*, that a regulatory, rather than an entirely descriptive approach to positive law is articulated. The Kelsenian analysis situates the constitution and a constitutional court *within* the structure of the normative levels of a system of positive law. This, in turn, situates the question of regulation through the notion of an unconstitutional law—the possibility of the divergence between a statute and the constitution—and its institutional corollary, a constitutional court (an institution other than the state or a parliament) with the authority to declare a law unconstitutional.

The Kelsenian notion of 'constitutional justice', contained in the brackets of the title of the 1928 article, is, therefore, to be understood as *internal* to a hierarchical order of norms of positive law. However, as Kelsen emphasises, this is not necessarily confined to the mere determination of procedural conformity by establishing the process of formulation of the particular law:

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[283] See, also, the wider contrast which Kelsen draws between the objectivity of the natural sciences and the social sciences and the consequences of this for a legal science of positive law (Kelsen, 1997, p. 4). The objectivity of a legal science of positive law – its recognition as "an absolute value" (Kelsen, 1997, p. 4) – is also held to be affected by the degree of political stability "between states as well as within states" (Kelsen, 1997, p. 4).

[284] (Kelsen, 1928) ''La garantie juridictionnelle de la Constitution (La justice constitutionnelle)', *Revue du Droit public*, 1928, p. 197- 257

[285] The exchange is now collected in Vinx (2015a). On the exchange, see Beaud & Pasquino (2007), Paulson (2013), Vinx (2015b) and Grimm (2020).

> It also goes without saying that the control must cover both the procedure according to which the act was drawn up and its content, if the standards of the higher level contain provisions on this point as well. (Kelsen, 1928, p. 236)

The limits of Kelsenian constitutional justice are also determined by the overarching methodological framework of a legal science of positive law. The constitutional court, dependent upon its prior constitutional creation,[286] as an institution of the juridified notion of the state, is potentially open to draw upon the general principles of international law in its regulatory function. However, this openness, or recognition, is entirely determined by the prior recognition of these principles of international law by the constitution at the level of the particular domestic legal system (Kelsen, 1928, pp. 238-239). These limits are accompanied by the insistence upon the maintenance of the exclusion of ""super positive"" norms insofar as these norms remain untranslated into norms of positive law (Kelsen, 1928, p. 239). Insofar as these norms are explicitly contained in, and referred to, in a constitution,[287] Kelsen considers that these should not condition the determinations of the constitutional court. The conformity of the legislature, and, therefore, the statute, with the constitution should not be undertaken by recourse to these norms. The prohibition is corollary of the wider relationship, within a constitution, between a democratically elected Parliament, as the legislative body, and a constitutional court. The constitutional court, in relation to the content of the Parliamentary legislation, regulates, rather than substitutes, its position for that of provisions of the particular statute, through the prohibition of recourse to these norms. For Kelsen, in order prevent this potential institutional conflict, and

> [t]o avoid a similar shift of power – which it [the constitutional court] certainly does not want and which is politically completely contraindicated – from Parliament to an authority which is foreign to it and which can become the representative of political forces quite other than those who express themselves in Parliament, the Constitution must, especially if it creates a constitutional tribunal, refrain from this type of phraseology, and, if it wants to lay down principles relating to the content of the laws, to formulate them in a manner which is also as precise as possible. (Kelsen, 1928, pp. 241-242).

The delineation of the boundaries of the criteria for the determination of the compatibility of legislation with the constitution in a democratic republic is one in which regulation assumes a centrally important position. The boundaries which Kelsen determines for the constitutional court and which, thereby, determine its distinct judicial role, are also those which provide for the regulation of Parliamentary democracy.

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[286] The constitution, from the perspective of the legal science of positive law, is the first or primary concretization of the basic norm (*Grundnorm*) as the necessary presumption by legal consciousness of the underlying unity of the legal system.

[287] Here, Kelsen, considers these norms as exemplified by "the ideals of equity, of justice, of freedom, of equality of morality, etc…" (Kelsen, 1928, p. 238).

The importance of 'constitutional justice', as the capacity for a constitutional court to annul an unconstitutional law, is, for Kelsen, demonstrated by considering a constitutional framework in which there exists no capacity for annulment. Here, for Kelsen, the reduction of the possibility of juridical regulation—the effective disappearance of constitutional justice—is evident from its restriction to, and the difficulties of attribution of individual responsibility to, the relevant government minister (Kelsen, 1928, pp. 250-252). It is in a constitution with a constitutional court, in a democratic republic, that the sense of constitutional justice becomes apparent. For the regulation of legislation by the constitution, through the constitutional court, becomes the procedural regulation of political parties within a representative democracy: "it is an effective means of protection of the minority against the encroachments of the majority" (Kelsen, 1928, p. 253).

For Kelsen, this protection relates primarily to legislation, as any proposed revision or amendment of the constitution itself will normally require a reinforced, rather than a simple majority, thereby necessitating that the proposed revision includes the support of the minority (Kelsen, 1928, p.253). Thus, the primary locus of constitutional justice arises from within the sphere of Parliamentary legislation, which remains determined by simple majority and, therefore, by the government resulting from the election of the largest political party. This, in turn, creates the continued potential for the largest political party to pass legislation which "encroaches upon the freedom of the minority in the sphere of its constitutionally guaranteed interests" (Kelsen, 1928, p.253).

Thus, for Kelsen, "[e]very minority—of class, nationality, religion—whose interests are protected in any manner by the Constitution has, therefore, an eminent interest in the constitutionality of laws." Constitutional justice is an institutional means of reinforcement of the character of representative democracy—"the constant compromise between groups represented in Parliament by the majority and the minority" (Kelsen, 1928, p.253). The interest of the minority is furnished with institutional support, which, as "the simple threat of recourse to the constitutional tribunal" becomes the "correct instrument to prevent the majority from violating unconstitutionally its juridically protected interests" (Kelsen, 1928, p.253). The particular interest of the minority is simultaneously the interest in the prevention of the "dictatorship of the majority, which is no less dangerous to social peace than that of the minority" (Kelsen, 1928, p.253).288

The procedural guarantee of the constitutional conformity of legislation provided by the existence and operation of a constitutional court is also, for Kelsen, the procedural guarantee of the compromise essential to representative democracy.

Rights

The position accorded to rights in the Kelsenian legal science of positive law arises from the preceding juridification of the state and the critique of natural law

[288] Kelsen concludes by emphasising the centrality of 'constitutional justice' to a federal system (Kelsen, 1928,253-257).

of the later 1920s.[289] In the critique of natural law, Kelsen seeks, through the comparison with a legal science of positive law, to demonstrate that natural law confronts an insoluble, internal contradiction in its movement from an absolute, invariant material foundation to "its application to the concrete conditions of social life" (Kelsen, 2006, p. 397).

This application indicates that "the norms of natural law, which are ideally independent of human action and volition, ultimately do require the mediation of human acts in order to fulfil their purpose" (Kelsen, 2006, p. 398). The application, through human action and volition is, therefore "dependent upon the knowledge and will of men by whose doing more abstract natural law is transmuted into a concrete legal relationship" (Kelsen, 2006, p. 398).

Thus, the Kelsenian critique of natural law is an immanent critique of natural law: it must, to become law, posit itself in the form of legal norms of positive law, thereby creating a distinct, external form.[290] This external from is, then, positive law detached from the 'origin' of natural law, and the process through which natural law posits itself as law is the process of the positivisation of natural law. In the process of positivisation, natural law has become positive law, and the transformation in form entails that it is to be defined as positive law. The transformation is also its insertion within a system of positive law which, from the perspective of a legal science of positive law, is *both* static and dynamic: legal norms of positive law exist as a system which is perpetually open to modification and change solely as the result of human action.

The methodological demonstration of the inherent, internal contradiction of natural law, then affects the position and character of natural rights which may be held to derived from natural law. Natural rights require an analogous process of positivisation—to be posited in the legal form of norms of positive law—and exist, prior to or beyond positive law, only as the subjective values of ethics and politics.

The Pure Theory of Law (1934) proceeds beyond the critique of the later 1920s to engage in an extended critique, within the system of positive law, of the dualism of subjective rights and objective law. For Kelsen, this dualism, which is the residue of natural law theory in later nineteenth-century positivism, presupposes that there exists an objective law, composed of legal norms, and a subjective right, composed of the individual's interest or will.

This dualism is one in which logical and temporal priority is accorded to subjective rights in relation to objective law; subjective rights are held to exist "prior to and independently of, the objective law, which emerges only later as a state system protecting, recognising, and guaranteeing subjective rights" (Kelsen, 1997, p. 38). The dualism is to be overcome not by a simple reversal of the primacy between objective law and subjective law, but by demonstrating that subjective law is an integral part of objective law.

[289] See, (Kelsen, 1973; Kelsen, 2006). Both essays originally published in 1928.
[290] This is the emphasis of the critique of natural law in Kelsen (1973).

This requires, for Kelsen, that subjective right be "confronted [with] the concept of legal obligation", as the "sole essential function of the objective law" (Kelsen, 1997, p. 43). In this manner, subjective right and objective law become two aspects of the same law, for, "there is subjective right (*qua* legal right) only insofar as the objective law aims – with the consequence that it establishes an unlawful act—at a concrete subject" (Kelsen, 1997, p. 44). This reconceptualisation has the further consequence that it enables the expansion of legal rights, as subjective rights within an objective legal order, to proceed beyond the realm of civil law to encompass political rights: "granting participation in creating law" (Kelsen, 1997, p. 45).

From this, however, Kelsen then proceeds to reconfigure the understanding of the legal person as an entirely heuristic concept which indicates the "unity of a bundle of legal obligations and legal rights, that is, the unity of a complex of norms" (Kelsen, 1997, p. 47). The effect of this reconceptualisation is to reveal:

> legal connections between human beings, more precisely, between material facts of human behaviour, which are linked together by – that is, as the content of – the legal norm. The legal relation is the connection of two material facts, one of which consists in human behaviour established as a legal obligation, the other in human behaviour established as a legal right […]. In understanding so-called law in the subjective sense simply as a particular shaping or personification of the objective law, the Pure Theory renders ineffectual a subjectivist attitude toward the law, the attitude of so-called law in the subjective sense. (Kelsen, 1997, pp. 52-53)

Hence, the legal person is situated heuristically at a different level from the state *within* the hierarchical system of norms of positive law.

Max Weber: State and Rights in the development of Weberian Sociology

For Weber, the critique of the preceding tradition of *Staatswissenschaft* and *Staatsrechtlehre* develops more slowly, incrementally and indirectly as part of the development of a distinct Weberian sociology.[291] The early period of Weber's work, prior to the *Protestant Ethic* (1904), involves the first stage of his academic formation and of his conceptualisation of law. It is concerned with delimited historical investigations of medieval commercial partnerships in Italy (1889) and Roman agrarian history within roman civil and public law (1891) (Weber, 1986; Weber, 2008).[292] The principal orientation of Weber's work in this period is to the German historical school of law.[293] The emergence of a general methodological approach to the analysis of law arises through Weber's critical engagement, in

[291] On the broader question of the development of Weber's sociology, see Lichtblau (2015).
[292] On this period of Weber's work, see Marra (1992, 2014, 2022).
[293] See Dilcher (2008).

1907, with the work of Rudolf Stammler (Weber, 2012a, 2012b).[294] It is in this critique that Weber develops and distinguishes a set of concepts for the delineation of legal rules and the definition of legal norms. These concepts are drawn upon, and reinforced, in Weber's response, at the 1910 German Sociological Association General Meeting, to Hermann Kantorowicz's presentation on Legal Science and Sociology (Weber, 2012c). The Weberian conceptualisation of the state and of rights are comparatively later developments which find their most comprehensive articulation in the posthumously edited and published *Economy and Society* (*Wirtschaft und Gesellschaft*).[295]

The State

The Weberian conceptualisation of the state[296]—its sociological preconditions—commences from paragraph 17 of Part 1 (Basic Concepts of Sociology) in *Economy and Society*:

> A political institutional organisational enterprise (*Anstaltsbetrieb*) will be called a State to the extent that its administrative staff can exercise a monopoly of legitimate physical force in the execution of its orders. (Weber, 2013a, p. 54).[297]

This condensed definition is also to be understood as shaped by a wider interpretative methodology which orientates Part 1: the concept of a State is attributed to the combined or collective effect of reciprocal individual social action.

The further precision and delimitation of the categories with which to grasp this Weberian concept of the State, leads to the distinction between an organisation (*Verband*), an association (*Verein*) and an *Anstalt*. Thus, paragraph 17 is, for Treiber (2015, p. 69) necessarily linked to paragraph 15, in which it is the *Anstalt*, an organisation distinguished by an administrative staff implementing a statutory order in which membership is compulsory, which, for Weber, represents the sociological preconditions for the formation of a State.

It is with this category of *Anstalt* that Weber appropriates a category of the preceding *Staatsrechtslehre* tradition[298], and strips it of its limitation to "the Prussian-German constitutional monarchy" (Treiber, 2015, p. 71), by reconfiguring it as the description of a collective orientation of reciprocal individual

[294] Here, following the analyses of Coutu (2013, 2017). For the question of the wider effect of this critique on the development of Weber's sociology, see Treiber (2023).

[295] Its initial posthumous publication, presentation and understanding, in 1921, as a complete, unified work, has now been replaced by the division into six separate volumes in the German edition of the collected works of Max Weber, each reflecting its own distinct degree of completion.

[296] Here, following the analyses of Treiber (2015).

[297] Here, the translation follows that provided for this paragraph by Treiber (2015, p. 61) and the translator, Keith Tribe.

[298] For Treiber (2015, pp. 67-69), the sources of the *Staatsrechtslehre* tradition which Weber appropriates are Paul Laband and Otto Meyer. There is also an acknowledgement, beyond the *Staatsrechtslehre* tradition, of the ecclesiastical origin of the notion of *Anstalt* drawn from the particular interpretation of medieval Canon Law in Otto von Gierke's *Das deutsche Genossenschaftsrecht*. This is also explicitly acknowledged in the later Sociology of Law section (Weber, 2013b, p. 714).

social action: an apparatus of compulsion which combines obedience—conformity of external action—with "legitimacy-compliance"—inner conformity of individual belief.

Thus, the *Anstalt*, as a Weberian category, expresses the socio-historical transformation in the use of force in which the combination of 'the monopoly of force and the capacity to enact statutes' (Treiber, 2015, p. 73) demarcates the modern State as "the use of legitimate force" (Treiber, 2015). It is also, and equally, the expression of a process of legal rationalisation, and, thus, paragraph 17 is necessarily linked to paragraph 2 of the Sociology of Law, in Volume II of *Economy and Society* (Weber, 2013b, p. 644; Treiber, 2015, p. 67).

It is rule, through law, in the particular Weberian sense of the enactment of maxims for the orientation of human action (predicated upon the combination of external obedience and internal compliance), underpinned by the capacity for their enforcement, that the extent of Weber's recognition of "a State based on the rule of law (*Rechtstaat*)"is contained (Treiber, 2015).

The Weberian conception of the state based on the rule of law is accompanied, in paragraph 13, by the explicit appropriation, and reinterpretation, of Ferdinand Lassalle's notion of a constitution (Weber, 2013a, p. 51).[299] This appropriation is of a materialist theory of the constitution – the constitution is a form for the expression of the interests of social classes—which strips it of its Lassallean articulation within the emergent German workers movement—and generalises it, conferring on it a wider, non-legal form[300] and sociologically descriptive purpose:

> The only relevant question for sociological purposes is when, and for what purposes, and *within what limits*, or possibly under what special conditions (such as the approval of gods or priests or the consent of electors), the members of the organisation will submit to the leadership. Furthermore, under what circumstances the administrative staff and the organised actions of the group will be at the leadership's disposal when it issues orders, in particular, new rules. (Weber, 2013a, 51)

The effect of this understanding is particularly evident in Weber's Reich President proposals which, if lacking full realisation in the final text of the Weimar Constitution,[301] is indicated in his writings (Weber, 2002a, 2002b), the reintroduction of a figure or personification of authority who is directly elected – the plebiscitarian Reich President. The Reich President establishes a locus of authority which is distinct from the Parliament of representative democracy, and the party system; and is both directly elected and with distinct legal authority to dissolve parliament and to authorise referendums.

[299] (Lassalle, 1862).

[300] For Weber, (Weber, 2013, 51), the sociological conception of a constitution is not determined by, or confined to, the legal distinction between a written or unwritten constitution.

[301] On this, see Mommsen (1990, pp. 332ff) and Marra (2020). This Weberian conception of the constitution is also prefigured in the analyses of the Russian Revolution of 1905 (Weber, 1995, pp. 148-240).

The Reich President, as an individual, is to embody the Weberian vocation for politics, and this embodiment becomes the basis, beyond direct election, for the combination of external obedience and internal compliance which is the sociological condition for the maintenance and continued existence of the state within the Weimar Republic.

Rights

The Weberian conceptualisation of the State is accompanied by a conceptualisation of rights which develops and maintains a distinct position in relation to Jellinek's work of 1895.[302] This position, rather than seeking to adopt or repeat Jellinek's 'origin' of rights, in the right to religious freedom, and the consequent displacement of a historical origin from the French Revolution to the American Revolution, arises from a conception of rights which has already detached itself from a necessary inherence in a wider juridical or political theory of rights.

The Weberian position, which finds its expression, among other texts, in the analysis of the Russian Revolutions of 1905 and 1917 (Weber, 1995), and, within a broader framework, in Part 2 of Economy and Society, entitled 'Sociology of Law' (Weber, 2013b) is the reflection of a specifically Weberian 'liberalism'. This has relinquished a connection to the Enlightenment and seeks, instead, to comprehend rights within a socio-historical presentation of the distinction between state and economy.

This, in turn, arguably reflects a certain degree of continuity or affinity with Weber's initial formation in civil law, and his dissertation, 'The History of Commercial Partnerships in the Middle Ages' (*Zur Geschichte der Handelsgesellschaften im Mittelalter*), 1889 (Weber, 2008), in which an intertwining of 'rationality' and 'rationalisation' of law is given its first, preliminary articulation.

This Weberian approach is combined with a continued acknowledgement of a non-positivist source of rights and law as a socio-historical redescription of natural law.[303] In the Sociology of Law section of Volume II of *Economy and Society*, (Weber, 2013b, pp. 865-880), Weber presents a particular description of the emergence and disintegration of modern natural law, commencing from the French Civil Code of 1804.[304] This is itself situated within a broader sociological analysis of the formal and substantive rationalisation of law and the discussion of modern natural law – its emergence and disintegration – is orientated by this

[302] It is distinct, in the sense of its lack of direct influence or determination of Weber's *Protestant Ethic* (Ghosh, 2008a, 2008b), but also with regard to both the notion of rights (Ghosh, 2008b) and the French Revolution. For the French Revolution, this is evident from Weber's short statement comparing the Russian Revolution of 1905 with the French Revolution of 1789, where the basis for comparison is that of the notion of property, and right to property, not freedom of religion (Weber, 1995, p. 232).

[303] For Ghosh (2008b), this originates in the *Protestant Ethic*, and indicates a further divergence between Weber and Jellinek.

[304] This indicates a further divergence between Jellinek and Weber,

overarching framework. The emergence and disintegration is, therefore, also a description of a process of 'positivisation' of natural law which, having "advanced irresistibly", entails that

> [t]he disappearance of old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all to visibly, indeed, as the product or the technical means of a compromise between conflicting interests. (Weber, 2013b, p. 875).

This process of positivisation is also accompanied, for Weber, by the increased centrality of the legal profession and their "vocation" in regard to the orientation of the system of positive law (Ibid., 875-876); and, in relation to a system of modern, formal, positive law, the sociological analysis centres upon the further analysis of these formal qualities (Weber, 2013b, pp. 880-895).

Weber's 'sociological approach' retains the dualism of subjective rights and objective law but provides this with a sociological reinterpretation. This is particularly apparent in the Weberian responses to the Free Law Movement (Weber, 2012c, 2013b, pp. 886, 886 fn.20) in which Weber insists upon retaining the formalism of general legal norms of positive law. This is combined with the resistance to the expansion or alteration of these general legal norms to actively intervene in, and respond to, social and economic conditions. These, for Weber, indicate one of the anti-formal tendencies of modern law – the re-materialisation of formal law – which undermine its essential generality: re-materialisation is to render modern, positive law formally *irrational*.[305]

Weber, by designating these directions as possibilities or tendencies, leaves open the question of how they will affect the "form of law and legal practice" (Weber, 2013b, p. 895). The openness with regard to these possibilities is combined with the attribution of inevitability or "fate" (Weber, 2013b) of other aspects of modern, formal, positive law. These inevitable or invariant aspects relate to the continued development of the technical elements of this modern law, reinforcing its specialised character and a domain of specialists (Weber, 2013b). From this, for Weber, "the notion must expand that the law is a rational technical apparatus which is continually transformable in the light of expediential considerations [i.e., not these anti-formal directions] and devoid of all sacredness of content" (Weber, 2013b).

As Treiber concludes, in *Reading Max Weber's Sociology of Law*, "it is possible to connect the trend towards re-materialisation with Weber's fundamental

[305] For Weber, these "anti-formal directions" of modern, formal, positive law, which consider that "it be more than a mere means of pacifying conflict of interest" are: "the demand for substantive justice by certain social class interests and ideologies, they also include the tendencies inherent in certain forms of political authority of either authoritarian or democratic character concerning the ends of law which are respectively appropriate to them, and also the demand of the "laity" for a system of justice which would be intelligible to them; finally, as we have seen, anti-formal tendencies are being promoted by the ideologically rooted power aspirations of the legal profession itself" (Weber, 2013b, p. 894).

belief that modernisation and rationalisation also produce wholly negative side effects" (Treiber, 2020, p. 169).

Conclusion

Kelsen and Weber, in their critical engagement with, and transformation of, the preceding German language tradition of *Staatswissenschaft* and *Staatsrechtswissenschaft*, recognise the problematic conceptualisation of the character of the state in this tradition. In place of the subterranean Nietzschean denunciation of *Thus Spoke Zarathustra*, there is a concerted attempt to undertake a methodological comprehension and regulation of the state's importance and power. This is accompanied by an equally explicit presentation, within their respective methodological positions, of the essential fragility of political organisation maintained by a legal framework composed of norms of positive law.

It is their distinctive combination of methodological regulation and fragility against which post-World War II juridico-political thought has sought to define itself. In particular, there has been a sustained reconsideration of the continued pertinence of the dualism between values (inherently subjective) and validity (a methodological operation to establish a position of objectivity beyond all value) from which both Kelsen and Weber commence, and which determines the parameters of their respective methodological frameworks.

This reconsideration has then led to the reopening of the question of the relationship between morality and law, the existence and justification of fundamental or basic human rights and freedoms, themselves now further delineated as civil rights, political rights and socio-economic rights, and the reconception of the character and purpose of a constitution and the notion of a *Rechtstaat* or the rule of law.

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Taming Sovereignty

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The Overcoming of the Sovereign Monster

After the medieval communitas christiana dissolved and the biased and sometimes openly hypocritical project of a Christian universalism was dismissed, the notion of sovereignty became the beacon of the Westphalian setup of the Western world. In view of the overwhelming power of sovereignty, only a few voices were raised, in particular by the thinkers who are remembered as the drafters of the modern peace projects. Yet, although some of the projects—in particular those penned by William Penn[307] and Immanuel Kant[308]—by far preceded later developments and were destined to become, at least in Kant's case, a steady point of reference of political theory, their influence at the time of their drafting was rather limited, or it was promptly silenced by the nineteenth century's rise in nationalism. As a result, sovereignty has been one of the predominant factors—if not the most important element of all—on the Western political stage in the last two centuries. From there, it has increasingly expanded its influence on non-Western countries, too.

Sovereignty, however, is not only powerful but also dangerous. In fact, the state has often been perceived as a "cold monster" because of its claim to unconstrained sovereignty: if public power does not recognise any factual limitation, then it can easily transform its own citizens into passive subjects without rights or autonomy, oppress other political communities and deny any obligation towards their members. If we want to overcome the potential monster-like quality of public power, its traditional understanding has thus to be transmuted into a benign form of social, political and legal order, which implies what we can call the taming of sovereignty. On closer inspection, sovereign public power exerts its potentially freedom-threatening activity on two levels: the internal dimension, in which it can curtail the entitlements of the social community for whose political organisation it is responsible; and the external dimension, in which public power claims the right—precisely because of its unfettered sovereignty—to wage war, occupy and exploit foreign territories ex jure imperii, as well as to ignore the fate of foreign populations. As a result of the twofold menace that grows out of the historically established idea of sovereignty, the conversion of its usual understanding into a benign concept is also characterised

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[307] William Penn, 'An Essay towards the Present and Future Peace of Europe' (1693), in: William Penn, *The Political Writings*, Liberty Fund, Indianapolis 2002, 401–419, Section III, at 404 et seq.

[308] Immanuel Kant, 'Zum ewigen Frieden. Ein philosophischer Entwurf', in: Immanuel Kant, *Werkausgabe*, ed. By Wilhelm Weischedel, 1977, Vol. XI, 193–251 (English translation by H. B. Nisbet: 'Perpetual Peace: A Philosophical Sketch', in: Immanuel Kant, *Political Writings*, Cambridge University Press, Cambridge/New York 1991, 93–130).

by two stages: one focused on the democratisation of sovereignty in the internal domain of the state, and the other concerning its redefinition to make it compatible with international or cosmopolitan obligations.

Taming sovereignty amounts to no less than a profound change in the way in which the fundamental patterns of social order are understood. Furthermore, since this reconceptualisation impacts, at the same time, two dimensions of social and political life—one that is internal to the individual political community, and another that transcends it—we can reasonably assume from the outset that it must entail more than just one paradigmatic revolution. Yet, what is the conceptual pattern that lies at the basis of the idea of unconstrained sovereignty? In addition, what are the paradigmatic revolutions that are necessary to tame sovereign public power? To better understand the question, I introduce in my analysis the theory of the so-called *paradigms of order*,[309] whose conceptual framework is briefly described in Section 2. In a further step, I focus on the traditional concept of sovereignty and on the paradigm of order that supports it (Section 3.). The two following Sections are then dedicated to the paradigmatic revolutions that were—and to some extent still are—necessary to conceive a sovereignty which is, at the same time, democratic (Section 4) and open to cosmopolitanism (Section 5). Some final remarks about the conceptual conditions to meet for laying down a new idea of sovereignty will conclude the inquiry (Section 6).

The Paradigms of Order

Little doubt can be raised to the fact that no society can exist without some form of social order. Indeed, order is an essential component of social life. More specifically, we can maintain that a society is well-ordered when it is ruled by individually accepted, collectively shared and functionally effective norms. Those norms have three distinct tasks to fulfil. First, they make interactions among the members of the social community predictable. Second, conflicts are conveyed into procedures that make their peaceful settlement possible, thus preventing disruptive consequences for social cohesion. Third, rules guarantee a sufficient level of cooperation amongst the members of the social community. This claim does not imply that social order, to be accepted, always needs to take the form of a Pareto optimal solution; rather, it only requires that all members of the society—or, at least, a significant majority of them—subjectively consider the rules justified and substantially beneficial.

Though necessary in general, social order takes, in particular, quite different forms. In fact, we can identify a certain number of distinct understandings of how the society should be organised to be justifiably regarded as "well-ordered". Those understandings make up what we can define as the "paradigms of order". In a broad sense, a "paradigm" is a set of concepts that

[309] Sergio Dellavalle, *Paradigms of Social Order*, Palgrave Macmillan, London/New York 2021.

build the preconditions for the use of theoretical and practical reason in a certain time and related to a specific matter. Therefore, a paradigm of order is a set of fundamental concepts that specify the conditions for a society to be considered well-ordered. Every paradigm of order—and, thus, the set of concepts that make it up—entails three claims concerning essential elements of its constitutive structure. The first claim refers to the extent of the well-ordered society: is it inevitably limited in its range, so that every social, political, ethnic or religious community must have its own idea of order, which is incompatible with any other? Or could the well-ordered society comprise the whole of humankind? The second claim regards the ontological basis of order: according to the holistic interpretation, it is the community in its entirety that provides the ontological basis, while the individuals are placed second. Turning the priority upside down, in the individualistic understanding of order it is the individuals who freely create the rules and the society only exists to protect their rights and interests. The third claim is related to the question of whether the rules of a society, for it to be well-ordered, need to be strictly consistent with each other and hierarchically organised, or order can also be conceived as a plurality of normative systems that overlap and dialogically interact with one another.

All paradigms of order change over time to adapt to new social situations, so that each one of them has developed distinct variants. However, sometimes the conditions of social life go through processes of transformation which are so far-reaching that the concepts that characterise the established paradigms no longer fulfil the requirements for a justifiable idea of order. In those cases, a so-called *paradigmatic revolution* takes place. As a result, an innovative conception of order is developed, which is assumed to be better capable of understanding and justifying the new social condition, as well as of giving a more correct advice for action. An interesting feature distinguishes the paradigms of social order from those of natural sciences: while the latter tend to be completely replaced when a paradigmatic revolution occurs and to never reappear again—or, if they reemerge, they do so on the basis of a conceptual framework that barely has anything in common with its predecessor—the paradigms of social order never die. In other words, each new paradigm introduces an unprecedented view of social order, but the old one(s) is (are) still there and, after a more or less long period of decline, can be rediscovered with some adjustments to make it (them) suitable to meet the latest challenges.

The Traditional Concept of Sovereignty and Its Current Variants

If considered from the point of view of the theory of the paradigms of order, the traditional idea of sovereignty perfectly mirrors the most ancient Western pattern of order. According to the first paradigm of order, a society, to be well-ordered, must be *particularistic* (as opposed to universalistic), i.e., limited in its range, *holistic* (as opposed to individualistic), which means based on the supposedly organic community of its members, and *unitary*; namely, based on a self-reliant, self-consistent and hierarchical normative structure. This *holistic-*

particularistic paradigm of order dates back at least to ancient Greece, thus to well before the modern concept of sovereignty was formulated. Nonetheless, sovereignty's affinity to particularistic holism becomes clear if we consider how the concept was framed by Jean Bodin as the great architect of the modern idea of sovereign power. First, Bodin's sovereignty was particularistic because it centred public power on the individual will of the specific sovereign authority.[310] Accordingly, holders of "absolute and perpetual" sovereign power do not admit any horizontal interference by same-level authorities, nor do they accept the possibility of a cosmopolitan extension of order, which could also erode the absoluteness of their social and political control. Although Bodin made reference to the boundaries that natural or divine law may impose on the exercise of sovereignty, the limitations that derive from them are, in the end, quite modest.[311] In fact, holders of sovereign authority are granted the right to interpret the supra-positive norms in complete autonomy, i.e., without any secular or ecclesiastic control.

Second, the holistic or organic character of Bodin's sovereignty is sufficiently proved by his use of Aristotle's theory of the familistic origin of the political community—right at the beginning of his most influential work—in order to provide the sovereign polity with a robust ontological fundament.[312] According to this conception, the organisational structure of the family also serves as a model for the political community as a whole. As a consequence, the interests of the latter would deserve more consideration—from Bodin's standpoint—than those of its individual members, precisely as priority is traditionally given to the unity and destiny of the family as against the strive for individual independence. Third, the internal structure of the sovereign "commonwealth" (*république*) is unequivocally unitary and hierarchical, with the decision-making competence firmly put in the hands of the authority in charge. Although Bodin conceded that the sovereign may be limited by intermediate levels of power, as those embodied by the Estates, in the end these mid-level institutions are strictly submitted to the apex of the political pyramid.[313]

As one of the most distinctive formulations of the holistic-particularistic paradigm of order, sovereignty in its traditional meaning is still a constant presence in the political debate. We could say that it is even more so today than in previous decades, which clearly hints at a resurgence of the old view—a phenomenon that is not untypical of how the paradigms of social order evolve over time. More specifically, we can identify four main contemporary variants of the holistic-particularistic paradigm. Each of them points to one specific aspect of holistic-particularistic rationality and all still regard sovereignty as a crucial component of any well-ordered social, political and legal community. A first present-day variant of holistic particularism holds that the origin of public power

[310] Jean Bodin, *Six livres de la république*, Imprimerie de Jean de Tournes, Lyon 1579 (1st ed. 1576), Book I, Chapter VIII, at 85 (English transl. by M.J. Tooley, Blackwell, Oxford 1955).
[311] Ibid., Book I, Chapter VIII, at 91 et seq.
[312] Ibid., Book I, Chapter I, at 1.
[313] Ibid., Book I, Chapter VIII, at 98 et seq.

lies in the apodictic assertion of will made by a sovereign social actor firmly rooted in the real world.[314] Sovereignty is here viewed as essential to social, political, and legal order because it is assumed that the rationality that underpins order necessarily requires free and firm acts of political will on the part of an unconstrained power. As a result, a self-reliant entity constitutes itself precisely by performing the first and most fundamental political act, namely the creation of a sovereign constitutional framework for the polity.[315]

The second strand of contemporary holistic particularism—which has been particularly developed within the context of German constitutional theory—focuses on the national identity of the people (*Volk*) as the source of the legitimacy of public power. Some authors define this identity as being essentially based on elements like a common "geographic and geopolitical situation, historic origin and experience, cultural specificity, economic necessities of the people, natural and political conditions,"[316] which are all independent of individual decision or preference[317] and are assumed to forge the members of the community into a "community of destiny".[318] Others, like Dieter Grimm, rather point at linguistic unity as the glue that holds the community together and makes meaningful communication possible.[319] Yet, regardless of which factor is more stressed as the fundament of the community's identity, exponents of the ethno-nationalistic strand of holistic particularism always maintain that rationality is inevitably embedded in the unique characteristics of the *Volk*. As a result, defending the sovereignty of the nation is regarded as the most necessary condition to preserve the rational quality of the political and legal interaction and discourse—a quality that would be lost in the confusing turn to a cosmopolitan constitutionalism.[320]

According to a third approach of contemporary holistic particularism, the understanding of rationality is explicitly negative and defensive. In other words, social rationality would not basically be implemented through *positive* actions aiming to build up the institutions of society, but *negatively,* by finding the means for rejecting the threat coming from outside. The most rational endeavour consists, therefore, in organising the "friends" in order to prepare for the existential struggle against the external "enemies". Under these circumstances, unrestricted sovereign power vested in the political institutions of the community becomes a precious, even indispensable instrument to uphold its self-determination and very existence. This understanding of sovereignty as essentially

[314] Martin Loughlin, *Foundations of Public Law*, Oxford University Press, Oxford/New York 2010, at 216
[315] Ibid., at 208 et seq.
[316] Josef Isensee, 'Staat und Verfassung', in: Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band I: Grundlagen von Staat und Verfassung*, Müller, Heidelberg 1992, at 634.
[317] Paul Kirchhof, 'Der deutsche Staat im Prozess der europäischen Integration', in: Isensee/Kirchhof (note 315), at 869.
[318] Isensee (note 315), at 634.
[319] Dieter Grimm, 'Braucht Europa eine Verfasssung?', 50 JuristenZeitung (1995) 581–591.
[320] Dieter Grimm, 'The Constitution in the Process of Denationalization', 12 *Constellations* (2005) 447–463.

rooted in conflict was elaborated for the first time by Carl Schmitt.[321] However, some distinctive elements of his theory can also be detected, in a less radical and bellicose guise, in more recent works, like those of Samuel Huntington. In particular, Huntington first claims that the identity of a political community always implies distinctiveness. Thus, in order to know what it is, the community must put itself against an "other",[322] and Huntington goes so far as to say that the "other" has to be explicitly perceived as an "enemy".[323] Second, he states that the most relevant geopolitical division line in times of globalisation is not the traditional nation any longer, but a much larger entity, namely the "civilisation", which is grounded—quite like Schmitt's "large-range-order" hegemonic powers[324]—not on many unifying elements, as it was in the traditional concept of the nation, but just on a limited number of common features, or even on just one of them. The role that race played in Schmitt's thought is taken up, in Huntington's work, by culture and, in particular, religion.[325]

The fourth and last variant of holistic particularism, which still puts sovereignty at the centre of its idea of social, political and legal order, focuses primarily on the criticism of international law.[326] To strengthen scepticism concerning the normative quality of international law, Jack Goldsmith and Eric Posner applied the epistemological framework of rational choice to legal theory.[327] Following the rational choice assumption that selfishness is the inevitable outcome of rational behaviour, a political community would act rationally—i.e., it would increase its payoffs—by not binding itself to supra-state rules, or, in the case that it decides to accept, nonetheless, supra-state obligations, it does so on the condition that these rules are at the service of its immediate interests. From this perspective, selfish policies and the upholding of unrestrained sovereignty would be the most rational choice simply because we cannot precisely know what the preferences of other polities are or what their next actions are going to be.

The Democratisation of Sovereignty

The current variants of the idea of an undisputed sovereignty are clearly different from one another and each of them is characterised by its own weaknesses. Nevertheless, what is important here is that the main assumptions that distinguish the holistic-particularistic paradigm of order are central to all of them. However, holistic particularism did not remain unchallenged, and the

[321] Carl Schmitt, *Der Begriff des Politischen* (1932), Duncker & Humblot, Berlin 1963, pp. 20 ff. (English transl. by George Schwab, The University of Chicago Press, Chicago/London 2007, pp. 25 ff.)
[322] Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity*, Simon & Schuster, New York 2004, pp 24 ff.
[323] Ibid., pp. 258 ff., 357 ff.
[324] Carl Schmitt, Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte, Deutscher Rechtsverlag, Berlin/Wien 1939.
[325] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York 1996.
[326] Jeremy A. Rabkin, *Why Sovereignty Matters*, AEI Press, Washington, DC, 1998.
[327] Jack L. Goldsmith, Eric A. Posner, *The Limits of International Law*, Oxford University Press, Oxford/New York 2005.

paradigmatic revolutions, which brought about a temporary decline of the holistic-particularistic paradigm, also triggered the twofold taming of sovereignty. As for the first step of this taming, namely the transition to a bottom-up understanding of public power,[328] this can be led back to the paradigmatic revolution that affected the claim regarding the ontological basis of social order.[329] Following the holistic-particularistic paradigm, the community as a whole is assumed as the basis of the well-ordered society, so that it is considered to have more value—in its totality—not only than each one of the individual members of the community but also than their total sum. The turn to individualism was introduced by René Descartes with his theory of knowledge, which was based on two elements: the very *individual* capacity of questioning generally established theories and of creating new ones by means of the unprejudiced, purely rational thinking of the knowing subject, on the one hand, and the identification of a method for ensuring that those theories were *universally accepted as true* on the other.[330] Only a few years later, it was Thomas Hobbes who extended the *individualistic paradigm*, which was destined to become the distinctive pattern of modern philosophy, from the theory of knowledge to political philosophy.[331] More specifically, he put the centre of social order in the rights, interests and rational capacity of individuals, so that public power was only justified if it aimed at the protection of individual rights and interests. To underline the individualistic character of the foundation of public power, the establishment of political and legal institutions endowed with authority was regarded, in the strand of modern political philosophy that began with Hobbes, as the result of a *contract*—mostly of fictitious nature—among those who were willing to come together in order to form a "body politic".

Hobbes is generally regarded as the second founding father, along with Bodin, of the modern concept of sovereignty. However, there is a significant difference between their ideas of sovereignty, which can substantially be traced back to opposite approaches with reference to the question of the origin of public power. In Bodin's view, the political community is conceived as an enlarged family; therefore, as the head of the family exercises his power on the basis of an alleged

[328] This assertion does not imply that the current variants of the traditional idea of sovereignty reject any form of popular participation. The problem consists rather in the fact that they tend to interpret the "people" as something intrinsically unitary, so that the main task of the sovereign power is to be seen in its capacity to become the undisputed and immediate "voice of the people", while the real participation of the stakeholders is ultimately secondary. It is quite superfluous to say that democracy, on the contrary, is precisely centred on that participation. As a result, the danger of a populist or autocratic drift seems to be coessential not only to the old concept of sovereignty but also to its contemporary versions.

[329] Historically, as we will see in the next Section, this was not the first paradigmatic revolution. Nevertheless, it is the first one I refer to in my analysis for the simple reason that, when it appeared, sovereignty was the dominant form of the holistic-particularistic paradigm of order. Therefore, the transition to the individualistic paradigm was also the first challenge to which the idea of sovereignty was explicitly exposed.

[330] René Descartes*, Discours de la Méthode* (1637), Reclam, Stuttgart 2001 (English translation by John Veitch, Project Gutenberg, http://www.gutenberg.org/ebooks/59); René Descartes, *Meditationes de Prima Philosophia* (1641), Reclam, Stuttgart 1986 (English translation by John Cottingham: *Meditations on First Philosophy*, Cambridge University Press, Cambridge/New York 1996).

[331] Thomas Hobbes, *Elementa philosophica de Cive* (1642), Johan. Jac. Flick 1782 (English translation by Richard Tuck and Michael Silverthorne: *On the Citizen*, Cambridge University Press, Cambridge/New York 1998); Thomas Hobbes, *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (1651), Clarendon Press, Oxford 1929.

natural law according to the traditional patriarchal understanding of the family, it is the very same law of nature that legitimates the authority of the sovereign. In both cases, power—as well as authority, which can be defined as the implementation of power—*descends* from above, i.e., from a supposedly self-evident natural order, to the person who wields power, and from there to those who are expected to abide by his rules. A similar top-down approach also characterised, for a long time, Catholic political theology. As Francisco de Vitoria—one of the most significant exponents of Catholic political thought—specified in the first half of the sixteenth century, legitimate power is assumed to be transferred from God, its only original and supreme holder, to the mundane rulers.[332] Vitoria's interpretation may seem to be distant from our present-day sensibility; yet, a glimpse of the idea that sovereign authority is only legitimate when it respects the higher laws of God still reverberates in the contemporary notion of human dignity.[333] Indeed, if political power has to protect human dignity in order to obtain legitimacy, and the Catholic Church claims for itself the right to define what human dignity is, then the consequence cannot but be that the Church still maintains the pretension—albeit indirectly—that it possesses the key to sovereign power and that its interpretation of the law of God should still influence the secular political and legal order.

However, the currently most influential top-down interpretation of sovereign power has to be sought elsewhere, namely in what we can call the *technocratic* understanding of sovereignty. The idea that a specifically technocratic form of power can be identified was formulated for the first time by Max Weber, although he did not use the word "technocratic" to define it, but simply referred to it as the public power characterised by "rational" legitimacy.[334] The rationally legitimate power is typified, according to Weber, by an effective legal system in order to regulate social relations and to give predictability to interactions; by an efficient bureaucracy with a hierarchical structure; and, finally, by the presumption that the holders of power and, in general, the members of the bureaucratic apparatus are endowed with better skills and superior knowledge. Thus, identification of the citizens with the political community is only expressed through passive obedience to law and authority. As a result, insofar as the technocratic public power is vested with sovereignty, this latter is derived from a quality which is intrinsically possessed by the holders of power, thus falling from above on the submissive recipients of authoritative decisions, without the governed being actively involved in the decision-making process.

[332] Francisco de Vitoria, 'Relectio de potestate civili' (1528), Question 1, Article 7, § 10, Question 1, Article 7, § 10, p. 18, in: Francisco de Vitoria, *Political Writings*, Anthony Padgen and Jeremy Lawrance eds., Cambridge University Press, Cambridge/New York 2012, 1–44, p. 18.

[333] Christopher McCrudden (ed.), *Understanding Human Dignity*, The British Academy by Oxford University Press, Oxford 2013; Marta Cartabia, Andrea Simoncini (eds.), *Pope Benedict XVI's Legal Thought: A Dialogue on the Foundation of Law*, Cambridge University Press, Cambridge/New York 2015.

[334] Max Weber, *Wirtschaft und Gesellschaft*, Mohr, Tübingen 1922, pp. 122 ff. (English translation ed. by Guenther Roth and Claus Wittich: *Economy and Society*, University of California Press, Berkeley 1978, pp. 212 ff.).

Be sovereignty justified by natural or divine law, or be it based on the assumption of a superior competence with which the power holders are presumably endowed, in all these three variants sovereign power is always legitimated top-down. In this sense, it is still consistent with the holistic paradigm of order. Yet, because Hobbes led the paradigmatic revolution from holism to individualism, his notion of sovereignty also had to be made fit for the new conceptual framework. In his view, the Commonwealth is not the original and axiologically highest entity in the ethical world, but rather a tool that humans give to themselves in order to achieve social stability. Thus, legitimacy of sovereign power is *ascending* insofar as it arises from the original freedom and self-reliance of the individuals who create the institutions of public power through an autonomous act of will. Through the foundational contract, they transfer their original rights—or at least part of them—to the authority created hereby, with the purpose of guaranteeing an adequate protection of the subjective entitlements on the basis of a bottom-up legitimation process. Thus, according to modern contractualism, sovereignty is legitimate only if it aims at safeguarding fundamental rights and is grounded on a freely and explicitly expressed people's consent.

Hobbes's turn to an individualistic understanding of order set the conditions for a deep-seated redefinition of sovereignty. Nevertheless, the consequences of his revolutionary step did not become completely manifest in his work. In fact, from Hobbes's pessimistic perspective, social order can be safeguarded only if the individuals give up all their rights, excluding the right to protection of life and—very partially—the right to negative liberty as the freedom to pursue economic activities in order to achieve "happiness," yet only insofar as this does not jeopardise the guarantee of social peace and order.[335] Ultimately, Hobbes's bottom-up-legitimated sovereignty ended up denying its original rationale, while becoming an unnatural and ultimately self-deceiving instrument of absolutism. Yet, the seeds were sown and destined to germinate, while producing an offspring more coherent with the original purpose, for a period lasting from the end of the seventeenth century to the present days. Starting with John Locke's liberalism,[336] passing through Jean-Jacques Rousseau's passionate defence of democracy,[337] to temporarily end with the deliberative theories of the late twentieth century[338]—just to take some examples—the notion of sovereign power that puts the individuals at the centre of order always relies on ascending, or bottom-up, legitimation. Insofar as the community of those who were entitled to provide the

[335] Hobbes, De Cive (note 330), Part II, Chapter XIII, pp. 217 ff. (English: pp. 142 ff.); Hobbes, Leviathan (note 330), Chapter XVII, pp. 128 ff..

[336] John Locke, *Two Treatises on Government* (1690), Yale University Press, New Haven/London 2003.

[337] Jean-Jacques Rousseau, *Du contract social, ou principes du droit politique* (1762), Garnier-Flammarion, Paris 1966 (English translation: *The Social Contract*, in: Rousseau, *The Social Contract and the First and Second Discourses*, Susan Dunn ed., Yale University Press, New Haven/London 2002, 149–254).

[338] John Rawls, *A Theory of Justice* (1971), Harvard University Press, Cambridge (MA), 1999; John Rawls, *Political Liberalism* (1993), Columbia University Press, New York 1996); Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Suhrkamp, Frankfurt a. M. 1992 (English translation by William Rehg: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, The MIT Press, Cambridge (MA), 1996, 2nd ed.).

legitimation of public power was progressively extended to comprise all citizens, the idea of sovereign power was finally qualified as *people's* or *popular sovereignty*.

Sovereignty and Cosmopolitanism

Long before the transition from holism to individualism occurred, another paradigmatic revolution had changed the way in which social order was conceived. In this case, the claim affected did not regard the extension of order. According to the new approach, the well-ordered society was no longer assumed to be limited to the specific community, with each individual community having its idiosyncratic and incommensurable internal order, but was rather believed to be capable, in principle, of including the whole of humankind. By marking the transition from particularism to *universalism*, the first paradigmatic revolution sealed for the first time the birth of a new idea of order. Although the old paradigm managed to survive under different guises until the present day, the previous condition, according to which holistic particularism was the only way to conceive of the well-ordered society, was lost forever. However, while the first paradigmatic revolution reversed the claim regarding the extension of order, nothing changed with reference to the other contents of the paradigm: social order was still based on the assumption of an organic ontological fundament, and order had to be unitary. Therefore, due to its characteristics, the paradigm of order that emerged from the first paradigmatic revolution can be defined as *holistic universalism*.

The notion of a universal order was probably introduced for the first time in the history of thought by the Buddhist philosophy through the concept of *dharma* as the "natural order of the universe".[339] A couple of centuries later, the same turn towards universalism was taken in the Western world by the Stoic philosophy.[340] More specifically, Stoic universalism was based on three unprecedented assumptions. First, the whole world—both in its natural as well as in its social, political and legal dimension—is governed by a unique and, thus, universal *logos* as a principle of an all-encompassing rationality. Second, from this *logos,* a *nomos* (law) is derived, which is no less universal and is assumed to shape all worldwide interactions between human beings according to rational principles. Third, the universal *nomos* sets the framework for the *nomoi* (laws) of the individual polities, so that these are to be recognised as legitimate and valid only if they do not conflict with the superior *nomos* of the world.

Stoicism was, in general, rather alien to the world, and so also was its cosmopolitan proposal. Yet, many elements of its conception were passed on to the nascent Christian philosophy: significantly, both the cosmopolitan idea of order and the concept of a universal natural reason—as well as of a natural law which is assumed to be based on it—were among them. In fact, since the idea of the cosmopolitan human community was made dependent on the worldwide

[339] Rebecca Redwood French, Mark A. Nathan (eds.), *Buddhism and Law*, Cambridge University Press, Cambridge/New York 2014, p. 4.
[340] Johannes von Arnim, *Stoicorum veterum fragmenta*, Teubneri, Lipsiae 1905, Vol. I and Vol. III.

predominance of only one religion, Christian universalism was flawed from the very outset. As a result, starting from the seventeenth century, Western supporters of universalism progressively cut the ties with its religious component, while trying to ground cosmopolitanism on purely rational justifications. However, regardless of whether the arguments in favour of universalism were religious or not, the perspectives for the supporters of sovereignty under the dominance of the universalistic paradigm of order could not but be dire. Indeed, according to the Christian theology of the Middle Ages, even though it was acknowledged—in the most favourable cases—that "divine right … does not annul human right,"[341] state sovereignty was ultimately reduced to almost nothing under the unlimited dominance of the papacy, which was assumed to possess not only the highest spiritual power but also the highest temporal authority.[342] Catholic theology, which can be seen as the legitimate heir of its medieval predecessor, carried on largely the same view, albeit modernised through some adjustments. For instance, in the work of Francisco Suárez—arguably the most sophisticated and innovative product of early modern Catholic political theology—undisputed mundane authority was recognised to individual states, irrespective of them being Christian or not. Nevertheless, the holders of public power in all these states had to obey natural law, which—due to its tight connection to divine law—was subject to the binding interpretation delivered by the Church.[343] On that basis, the pope had the right to directly depose a Christian king who had violated natural law, as well as to legitimate military action against a non-Christian prince who had committed the same crime or had persecuted Christians, thereby hindering the spread of the Christian Gospel.[344] It is almost superfluous to underline the difference that separates, on this point, Suárez's view from Bodin's theory of sovereignty, in which no authority other than the mundane sovereign is in charge of the interpretation of natural law.

On the Protestant side of modern Christian thinking there was a well-grounded mistrust of political and religious universalism, which recalled, respectively, imperial oppression and papist persecution. The result was that more room was given to the sovereignty of individual states. This option implied, however, that the only foundation for a worldwide order was located in the assumption of the universal validity of human reason.[345] While the idea of a

[341] Thomas Aquinas, *Summa theologica* [1265–1273], W. Benton-Encyclopedia Britannica, Chicago 1980, Part II, Section II, Question 12, Article 2.

[342] Thomas Aquinas, *Political Writings*, R. W. Dyson ed., Cambridge University press, Cambridge/New York 2004, at 278; Sinibaldo Fieschi *Apparatus super quinque lib[ris] decr[etalium] et super decretalibus* (ca. 1245), Lugduni 1535 (1st ed. 1477), Book II, Chapter II, para. 2.

[343] Francisco Suarez, 'De legibus, ac Deo legislatore' (1612), in: Francisco Suarez, *Selections from three Works*, Clarendon Press, Oxford 1944, Book III, [Introduction], para. 2, at 361 et seq.; Book III, Chapter II, para. 6, at 376; Book III, Chapter IV, para. 7, p. 387.

[344] Francisco Suárez, 'Defensio fidei catholicae et apostolicae adversus Anglicanae sectae errores' (1613), in: Suarez, *Selections from three Works* (note 342), Book VI, Chapter IV, para. 15 ff., pp. 718 ff.

[345] Hugo Grotius, *De Jure Belli ac Pacis* (1625), English: *The Rights of War and Peace*, Richard Tuck ed., Liberty Fund, Indianapolis 2005; Samuel Pufendorf, *De jure naturae et gentium libri octo* (1672), complete English translation by Basil Kennet, Lichfield et al., Oxford 1703; partial English translation by Michael J. Seidler, in: Samuel Pufendorf, *The Political Writings*, Craig L. Carr ed., Oxford University Press, Oxford/New York 1994.

cosmopolitan order was thereby made independent of the intrinsically discriminatory pretension of a worldwide authority under Christian rule, the turn to purely natural law as the basis of universalism also marked a step backwards inasmuch as it gave up on the political and legal formulation of the *cosmopolis*. Being conceived only in terms of general principles of natural law, the idea of world order remained a matter for "comforters",[346] while world constitutionalism, if properly understood, necessarily needs a clearly identifiable legal framework. The step to the establishment of a cosmopolitan *legal* order—though rejecting, at the same time, any previous overlapping with divine law or religious authority—was taken by Kant. In particular, he introduced for the first time a tripartition of public law, in which the third part—going from the most specific to the most general and inclusive—is what he unequivocally defined as "cosmopolitan law" (*jus cosmopoliticum*).[347] Beside the law *of the state,* as the first part of his system of public law, and the law *between states,* or *international law,* as the second part of it, *cosmopolitan law* included principles and rules to govern the interactions between human beings as such, regardless of their respective national belonging and citizenship.

Slightly more than a century after Kant's writings and following a long period in which a renaissance of sovereignty under the aegis of nationalism had dominated the political stage, the apotheosis on the way to the legalisation of universalism was reached in the work of Hans Kelsen. His unquestionably courageous proposal aimed at creating a radically monist legal system, in which international law—not with reference to the part of it that involved inter-state law, but to the part considered supra-state law—was placed, for the first time in the history of legal theory, at the apex of the hierarchy of norms. As a result, state law—even constitutional law—was authorised to govern social interaction only within the framework established by international law.[348] In doing so, Kelsen prevented any kind of conflict between national and international norms, since supremacy was always associated with the latter. As he openly admitted, his construction of the legal system was designed to end any serious pretension to sovereignty by the single states.[349] Indeed, from the viewpoint of Kelsen's pacifism, sovereignty is essentially an ideological instrument for the justification of political selfishness and aggression, thus unequivocally at odds with any serious idea of cosmopolitan order.[350] On the other hand, a thoroughly legalised and centralised order like the one for which Kelsen pleaded also has its downsides. In fact, Kant had already admonished that public power can develop into a "soulless

[346] Kant, 'Zum ewigen Frieden' (note 307), p. 210 (English: p. 103).
[347] Ibid., at 203 (English: p. 98 ff.); Immanuel Kant, 'Die Metaphysik der Sitten' (1797), in: Kant, *Werkausgabe* (note 307), Vol. VIII, 309–634, Part I/II, § 62, pp. 475 ff. (English translation by Mary J. Gregor: *The Metaphysics of Morals*, Cambridge University Press, Cambridge/New York 1991, pp. 158 ff.).
[348] Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Deuticke, Leipzig/Wien 1934, pp. 147 ff. (English translation from the Second German Edition of 1960 by Max Knight, University of California Press, Berkeley/Los Angeles 1967, pp. 336 ff.); Hans Kelsen, *Peace through Law*, University of North Carolina Press, Chapel Hill 1944, p. 35.
[349] Kelsen, *Reine Rechtslehre* (note 347), at 142 and 153 (English: at 342 et seq.).
[350] Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts (1920), Scientia, Aalen 1981.

despotism", when located far away from those who have to abide by its rules.[351] Furthermore, the notion of sovereignty not only symbolises self-reliant defiance by an individual political community against any prospect of a well-ordered worldwide society but also stands—if understood as citizens' sovereignty—for democratic self-government and for the values of freedom and justice which are enshrined into national constitutions.

At this point, we seem to face an irresolvable dilemma: either we opt for the radical cosmopolitanism of a worldwide system of institutions and binding norms, with the consequence that we would nourish the hope—though distant—to foster universal justice and peace, but at the cost not only of pursuing an ideal that verges on a chimaera but also of putting at risk the principle of self-government and constitutional freedom. Or we prefer sovereignty, with the promise of political autonomy and the constitutional guarantee of fundamental rights, but also substantially indifferent to the responsibility that we bear towards those humans who are not members of our political community. Yet, this responsibility is unquestionable: first, because we all share the same planet and the problems that affect it ultimately touch us all; second, because we interact with fellow humans far beyond the borders of our nation, and all the more in times of globalised information and exchanges; and, third, decisions taken by a political community, in particular by the most powerful ones, may impact the quality of life of individuals far beyond its borders.[352] Decisive help to break the stalemate was offered by the third radical change regarding the way in which the well-ordered society is understood.

The *third paradigmatic revolution* in the theories of order occurred just a few decades ago and involved what has been described before as the third element that is always present in a paradigm of order; namely, the assertion concerning the unitary or non-unitary character of a well-ordered society. Regardless of whether they were particularistic or universalistic on the one hand, holistic or individualistic on the other, paradigms of order before the third paradigmatic revolution were all characterised by a *unitary* idea of order. In other words, in all these previous paradigms, the institutional structure and the system of norms are considered "well-ordered" only if they are organised as a coherent, vertical and hierarchical unity, or as a pyramid in which conflicts between different institutions and norms have to be resolved by defining which institution or norm, respectively, has priority over the conflicting one. Instead, the third paradigmatic revolution paved the way for an understanding of order in which the well-ordered society is conceived as a polyarchic, horizontal and interconnected structure that reminds us more of a network than of a pyramid. In this social, political and legal configuration of interrelated decision-makers, conflicts of institutions and norms are not considered a dangerous threat to order. Rather, they can be operationalised in discursive procedures aiming at reaching consent and not at

[351] Kant, 'Zum ewigen Frieden' (note 307), p. 225 (English: p. 113).

[352] Sergio Dellavalle, 'Opening the Forum to the "Others": Is There an Obligation to Take Non-National Interests into Account within National Political and Juridical Decision-Making-Processes?' 6 *Göttinger Journal of International Law* (2014) 217–257.

establishing—or re-establishing—hierarchy. In some implementations of the post-unitary conception of order, a kind of superiority of certain norms or institutions remains; yet, this priority is not grounded in the capability of displaying hard power, but in the disposal of superior legitimacy resources.[353] On the basis of a conception of order according to which the coexistence of interacting and overlapping systems of institutions and norms is considered acceptable, if not even desirable, what was barely imaginable before becomes finally possible. Concretely, sovereignty can be maintained as a fundamental expression of the self-government of the political community, while global responsibility is reaffirmed at the same time. Against this theoretical background, however, sovereignty can no longer be conceived as *absolute*, but only as *relative*, in the sense that the affirmation of self-determination has always to be compatible with obligations towards individuals who do not belong to the political community, but are nevertheless affected by its decisions.

Among the different patterns of order that emerged from the turn to a pluralist idea of the well-ordered society, the *communicative paradigm* provides the most useful organon for redefining the notion of sovereignty. According to the fundamental assumption of the communicative paradigm, society is made up of a *lifeworld of intersubjective relations*, which is characterised by *different forms of interaction*.[354] Put differently, social life has a variety of dimensions, corresponding to the diversity of our social needs, and each interaction has the task of developing one of those dimensions. In the broad context of society, many interactions (or forms of communication) unfold, which have not only different aims—each of them related to the specific social need that the interaction is apt to satisfy—but also distinct contents of the discourses that shape and characterise those very same communications.[355] A quite significant category of social interactions, for instance, is expressed by discourses focusing on clarifying the existential condition of the individuals involved, on their cultural identity or religious beliefs. Discourses of this kind cannot qualify as *political* because, even if all of us may be involved in some variant of them, the answers that are proposed in order to define the existential, cultural or religious identities of the individuals involved are not—and cannot be—shared by all members of the society. Indeed, common responses to the question of "who we are" cut across the social fabric, building communication communities which, even if utterly influential and important in enhancing our existential self-awareness, never overlap with the society in its entirety. As a result, the definition of sovereignty—which is essentially political in that it

[353] Sergio Dellavalle, 'Addressing Diversity in Post-unitary Theories of Order', 40 *Oxford Journal of Legal Studies* (2020) 347–376.

[354] Karl-Otto Apel, *Transformation der Philosophie*, Suhrkamp, Frankfurt a. M. 1973; Karl-Otto Apel, *Diskurs und Verantwortung*, Suhrkamp, Frankfurt a. M. 1990; Karl-Otto Apel, *Selected Essays*, Eduardo Mendieta ed., Humanities Press, Atlantic Highlands (NJ) 1996; Jürgen Habermas, *Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt a. M. 1981 (English translation by Thomas McCarthy: *The Theory of Communicative Action*, Beacon Press, Boston 1987, 3rd ed., Vol. II).

[355] Jürgen Habermas, *Erläuterungen zur Diskursethik*, Suhrkamp, Frankfurt a. M. 1991 (English translation by Ciaran Cronin: *Justification and Application*, MIT Press, Cambridge (MA)/London 2001, first published 1993).

necessarily involves all members of the *polis*—should not be mingled with questions concerning cultural or religious identity.

On the contrary, *political* interaction affects *all* individuals being part of the social fabric, regardless of how broad this fabric is, and therefore impacts the notion of sovereignty. Every kind of interaction needs rules in order to make communication well-ordered, i.e., peaceful, cooperative and effective. Yet, the rules that govern the political sphere—unlike those that lie at the basis of the communication about "who we are"—are positive and binding *laws*; furthermore, insofar as the norms regulate matters of common concern, the *corpus juris* that comprises them is referred to as *public law*. Two forms of political interaction can be identified, both of them focusing on the question of "how we should respond to the questions of common concern". The first refers to discourses addressing the organisation of public life within a limited territory and with reference to the community of individuals living in that territory or to those individuals who, despite not living there, maintain nevertheless a special relationship to the territory and to its community. This is what we can call a *national political community*, which is here understood as a "nation of citizens", thus being devoid—unlike the interpretation described in a former section[356]—of any ethnic connotation.[357] The questions addressed in the national political discourse should not touch on beliefs or the existential search for the meaning of individual life. Rather, in order to be included in the discourse all citizens of the national political community, the questions must have a rather practical content, being limited to issues like the distribution of resources, the organisation of the social subsystems and the form of government. Consequently, the identity forged by the common interaction concerning the question of "how to respond to questions of common concern within the borders of a limited political community" is not substantive, in the sense that it does not aim to touch on a deep existential dimension. Rather, it is formal inasmuch as it is centred around the interiorisation of the rules of political communication. Within the formal framework of political rules, each existential, cultural or religious community can find the proper space to thrive and cultivate its interests.

The second form of political interaction refers to the fact that individuals also meet and interact with each other outside the borders of single states, regardless of their belonging to a specific political community. This level of interaction is also governed by law; more precisely by the *corpus juris* of *cosmopolitan law*, consisting of those principles and rules that guarantee a peaceful and cooperative interaction between humans within the most general context of communication, namely beyond the condition of being citizens of an individual state. Embedded in these rules and principles is the fundamental recognition which we owe to every human being as the consequence of the universal capacity to communicate. The discourse of cosmopolitan interaction—

[356] See note 315 et seq.

[357] Jürgen Habermas, *Die postnationale Konstellation*, Suhrkamp, Frankfurt a. M. 1998 (English translation by Max Pensky: *The Postnational Constellation*, MIT Press, Cambridge (MA)/London 2001).

shaped by cosmopolitan law—addresses the question of "how to respond to questions of common concern to the whole humankind." In their systematics of public law, the exponents of the communicative paradigm of order—and most explicitly Jürgen Habermas—take up Kant's tripartition,[358] but reinterpret it from an intersubjective perspective.[359] Along the path of their groundbreaking predecessor, domestic public law regulates, at the first level, the interactions between citizens of each single political community, as well as between these citizens and the institutions of the same polity. The use of communicative reason and the application of its normative prerequisites guarantee, here, that decisions are taken through deliberative processes based on the reflexive involvement of the citizens. Thus, legitimate sovereignty, according to the communicative paradigm, necessarily takes a "bottom-up" form. At the second level, international public law addresses the relations between citizens of different states insofar as they are primarily regarded as citizens of the state; therefore, the interactions between individuals, which are here the object of regulation, are processed through the form of relations between states. Lastly, at the third level, cosmopolitan law is applied to the direct interactions between individuals from different states, as well as between individuals and the states of which they are not citizens.

As regards the legal system, the communicative paradigm of order paves the way to a conception in which the manifold articulations of the legal system are fully recognised, but in a way which is quite different from the analysis and vision of the exponents of radical legal pluralism.[360] In this latter approach, the affirmation of pluralism leads to the recognition of incommensurable legal systems—each of them with its own rationality and *raison d'être*—and to the rejection of any kind of overarching rational principle or institutional structure that should, to a certain extent, unite all of them. However, the way in which the legal system is understood by the supporters of radical legal pluralism risks bringing about both a weakening of the normativity of the law—due to the blurring of the distinction between "laws" and "norms"—and a substantial neglect towards the question of legitimacy. In contrast, the communicative paradigm embeds plurality into an all-encompassing structure, held together by the implementation of communicative reason in all dimensions of society and, therefore, also in all legal subsystems. As a post-unitary, non-hierarchical and non-pyramidal whole, the legal system of the communicative paradigm takes the form of a constitutionalism beyond the borders of the nation state, the cosmopolitan dimension of which, due

[358] See note 346.

[359] Jürgen Habermas, *Der gespaltene Westen*, Suhrkamp, Frankfurt a. M. 2001 (English translation by Ciaran Cronin: *The Divided West*, Polity Press, Cambridge 2006); Jürgen Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?', 38 *Kritische Justiz* (2005) 222–247; Jürgen Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik', in: Peter Niesen & Benjamin Herborth (eds.), *Anarchie der kommunikativen Freiheit*, Suhrkamp, Frankfurt a. M. 2007, pp. 439 ff.; Jürgen Habermas, 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft', in: Winfried Brugger, Ulfried Neumann & Stephan Kirste (eds.), *Rechtsphilosophie im 21. Jahrhundert*, Suhrkamp, Frankfurt a. M. 2008, pp. 368 ff.

[360] Nico Krisch, *Beyond Constitutionalism*, Oxford University Press, Oxford/New York 2010; Paul Schiff Berman, *Global Legal Pluralism*, Cambridge University Press, Cambridge/New York 2012.

to its acknowledgment of diversity, is quite different from the old ideas of the "world state" or of the *civitas maxima*. Within this framework, national sovereignty still plays a significant role, although only a *relative* and not an *absolute* one, in the sense that national sovereign powers have to recognise their obligation towards the worldwide community of humankind. Furthermore, the communicative paradigm of order deals thoroughly with the question of how the highest standards of democratic legitimacy can be maintained in a post-unitary and post-national constellation; for instance, by developing solutions based on the notion of "dual democracy".[361]

It has already been pointed out that the communicative idea of social order, with its specific merging of plurality with a non-hierarchical but all-encompassing normative and institutional structure, is heavily reliant on a distinctive concept of rationality. In fact, being no exception to the other patterns of order, the communicative paradigm is grounded on a solid epistemological foundation, which is applied in both its theoretical and practical domains. Yet, unlike the strand of holistic particularism that employs the rational choice theory to justify the allegedly superior rationality of egoistic behaviour,[362] communicative reason first regards a cooperative approach as the most suitable way to guarantee a long-term advantage and a Pareto optimal solution. Second, in contrast to another form of holistic particularism,[363] rationality is not embedded in national language or ethnicity. Third, it does not make ontological assumptions, like the non-falsifiable, natural-law-based presupposition of the factual existence—and not of the possibility—of a humanity with shared values and principles, which has exercised so much influence on the contemporary criticism of sovereignty and on the theory of the constitutionalisation of international law.[364] In a different vein, according to Habermas, the rationality of communication depends on three conditions. From an *objective* perspective, discursive communication can achieve its goal only if all those involved mutually presuppose that their assertions are *true* (in the sense that the propositions refer to real situations or facts). Furthermore, from a *subjective* perspective, the speakers mutually assume that they are acting *truthfully* (in the sense that they are committed to fair-minded purposes and are sincerely persuaded that their assertions meet the conditions for truth). Finally, from an *intersubjective* perspective, the speakers interact according to the principles of *rightness* (in the sense that they accept that their assertions have to meet the criteria for a general and mutual acknowledgement by all participants in the communication).[365]

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[361] Anne Peters, *Dual Democracy*, in: Jan Klabbers, Anne Peters & Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford University Press, Oxford/New York 2009, 263.

[362] See note 326.

[363] See note 315 ff.

[364] Christian Tomuschat. *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, in: "Collected Courses of The Hague Academy of International Law", vol. 281, Nijhoff, The Hague 1999; Mehrdad Payandeh, *Internationales Gemeinschaftsrecht*, Springer, Heidelberg/New York 2010.

[365] Jürgen Habermas, *Nachmetaphysisches Denken*, Suhrkamp, Frankfurt a. M. 1988 (English translation by William Mark Hohengarten: *Postmetaphysical Thinking*, Polity Press, Cambridge 1992); Jürgen Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt a. M. 1984 (English translation by Barbara Fultner: *On the Pragmatics of Social Interaction*, MIT Press, Cambridge

The concept of rationality of the communicative paradigm has five relevant consequences for a redefinition of sovereignty. First, because meaningful communication always depends on mutual recognition by the members of the communication community without interference from an outside authority, the communicative community itself is defined as self-determined and thus sovereign. Second, since decisions meant to have a truth content are to be taken on the basis of a democratic exchange of arguments and must be approved by the communication community, legitimacy is unquestionably ascending or bottom-up. Consequently, legitimate sovereignty has to be democratic. Third, being highly formal, the criteria of the rational discourse inherently strive for universalisation. Put differently, since the normative core of communication cannot be connected to any kind of selfish or ethnic-centred priority, the well-ordered society must have a worldwide range. As a result, sovereignty cannot be unlimited. Fourth, though essentially universalistic, the well-ordered society built around the communicative paradigm does not rule out the legitimacy and partial autonomy of the domestic dimension. Fifth, the tensions between domestic sovereignty and cosmopolitan responsibility are not resolved by referring to hierarchy, but through dialogue among the different dimensions of social life.[366]

Following the communicative paradigm, every one of us participates in a number of different interactions, while maintaining his or her personal and distinctive integrity. This implies significant novelty as regards the relationship between national and the cosmopolitan communities. Indeed, according to the previously analysed paradigms of order, the individual is always seen *either* as belonging to a limited and particularistic polity, *or* as being essentially part of the worldwide community of humankind. Instead, if we consider the issue from the viewpoint of the communicative paradigm, each individual is—at the same time and without irresolvable contradictions—a citizen of a specific national society *and* a member of the universal community of humankind. Therefore, as citizens of a national community, individuals take part in decision-making-processes that foster domestic interests. But, since they are also members of the global communication community, domestic decisions must be weighed against the obligations that we have towards our fellow humans on a global scale. Imbuing all dimensions of social life, communicative rationality provides the organon to deal with frictions that may arise from these twofold loyalties on the basis of mutual recognition and according to the principle of the best argument.

Towards a Democratic and Cosmopolitan Sovereignty

Although the modern concept of sovereignty was first developed in the sixteenth century, its conceptual framework goes much further back, to the first paradigm of social order, i.e., to holistic particularism. The same paradigmatic reference still characterises all current versions of the idea of unconstrained

(MA)/London 2001); Jürgen Habermas, *Wahrheit und Rechtfertigung*, Suhrkamp, Frankfurt a. M. 1999 (English translation by Barbara Fultner: *Truth and Justification*, Polity Press, Cambridge 2003).

[366] Sergio Dellavalle, 'Squaring the Circle: How the Right to Refuge Can Be Reconciled with the Right to Political Identity', 16 *International Journal of Constitutional Law* (2018) 776–805.

sovereignty, despite their differences in detail. Significantly, it is in the theoretical framework of holistic particularism that the threatening dimension of the sovereign monster takes shape and is justified. Since the whole of the community has more value than its individual parts, it seems to be reasonable to assume that the sovereign power embodies a rationale which goes beyond the defence of the rights and interests of the citizens. The superiority of the whole of the community if compared to individuals is always considered unquestionable, regardless of whether it is based on sheer power or on a specific and questionable interpretation of natural law. As for the understanding of external relations, then the claim that order is only possible within the single social and political community ends up disqualifying any attempt to create a rules-based cosmopolitan law. Once again, it does not matter much whether this attitude is justified through the reference to the cruel struggle for survival in the jungle of international relations, or through the assumption that selfish cautiousness is the most rational approach.

Given these premises, the taming of sovereignty towards both the inside and the outside required two different historical and intellectual processes, which were made possible by no less than three paradigmatic revolutions concerning the idea of social order. At first, the emergence of the individualistic paradigm transformed the internal dimension of sovereignty by claiming that sovereign power can only be regarded as legitimate if it has an ascending or bottom-up structure. In other words, sovereignty was limited, from then on, through the obligation to rely on the consent of those who have to abide by the rules. Although, as has been shown in a former Section, we still have influential political theories which, more or less openly, at least partially circumvent the idea that ascending consent is the only criterion for the legitimacy of the domestic public power, this first step in taming sovereignty can rely not only on a robust conceptual framework but also on a well-established constitutional tradition in the liberal democracies.

Far less developed is the second prong of the way to a tamed sovereignty, i.e., the improvement that should culminate in making it compatible with cosmopolitan obligations, which means with duties that we owe to the whole of humankind, regardless of citizenship and national belonging. This process needed two paradigmatic revolutions. The first opened the gate to conceiving all human beings as part of a cosmopolitan community. If taken to its extreme, however, the idea of an all-encompassing *cosmópolis* necessarily leads to the complete dismissal of the concept of sovereignty, including the perspective of people's self-determination. In this sense, it would also sideline or even cancel the well-founded understanding of legitimate sovereignty as the result of bottom-up participation, which was ushered in by the transition from the holistic to the individualistic paradigm of order. To avoid this undesirable consequence, a third paradigmatic revolution was indispensable, which redefined order as a post-unitary, pluralist and heterarchic condition. Under these circumstances, it is possible to conceive a multilayered system of public power and democratically legitimate sovereign states that are nonetheless committed to cosmopolitan obligations towards non-citizens. With reference to this conception, however, we have to admit that, while the theoretical background is arguably consistent enough, its realisation is still in

its early stages at best. Even worse, some events in the last years put more distance between us and the idea of a cosmopolitan sovereignty, making it a kind of remote regulative idea. Yet, regulative ideas are essential as incentives to make the world better on the basis of a reasonable project. Paraphrasing Hegel, I could conclude by saying that, even if we have to recognise that the reality is not as rational as it could and should be, there is no theoretical or practical necessity to give up on the hope that one day, and possibly soon, it will indeed become rational.

Õiguse piirist postmodernistlikus keeleparadigmas

The Limits of Law in a Post-Modern Linguistic paradigm

Ene Grauberg, Indrek Grauberg, Igor Gräzin

Abstract

Radical changes in modern society have also brought about changes in the paradigm of language – how we see and explain the world. Paradigms are important in society and culture, including in research, because they help to paint a picture of all possible or known ways of thinking, and thereby to develop a logic that helps to address the same facts, including legal facts, within different paradigms, and to see their differences and commonalities. At the same time, a paradigm is not an unchanging linguistic-cultural framework, but a model of thought and language that depends on the key principles, interests, and knowledge of the time, and which helps to better understand and interpret major changes in light of the generally accepted ideologies and values of the time. The linguistic paradigms of the time determine the possible questions and answers in argumentation, including legal argumentation. Kuhn then began referring to such thought structures as paradigms. By 'paradigm', Kuhn meant the set of values, principles, and beliefs adopted by a group of researchers. In his view, the linguistic paradigm is understood as linguistic-ideological structures of the world that help to better understand the linguistic relations between humans and the world in terms of the generally accepted principles and values of the time. The language paradigm is thus not a fixed linguistic-cultural framework, but a way of thinking that depends on the essential principles, values, and knowledge of the time, to better understand radical changes in the world.

Paradigms can therefore be found not only in the natural sciences, but also in the social sciences and humanities. In social sciences and humanities, language paradigms as linguistic-cultural frameworks differ from each other in what is called socio-cultural reality. Ultimately, they are 'determined by social and political ideologies'.

Paradigms, as sets of linguistically closely related assumptions about the surrounding world, are important in research because they help to paint a picture of all possible or known paradigms and thereby to develop a logic that helps to address the same facts, including legal facts, within the boundaries of different paradigms and see their differences and commonalities. The paradigm that shapes the theoretical framework of a study is closely related to a set of four types of philosophical assumptions or presuppositions – ontological, epistemological, methodological, and axiological – about the world around us. A language paradigm is not a fixed framework, but a model of thought and language that depends on the key principles, interests, and knowledge of the time, and which helps to better understand and interpret major changes in light of the generally accepted ideologies and values of the time. It also defines which problems cannot be raised and which answers are excluded. Let us take Bohr's principle of complementarity as an example here. In one sense, it can be discussed, but in another, it cannot.

Bearing in mind the dynamics of society and the aim of trying to explain and understand it through linguistic paradigms, we can distinguish between the three major linguistic paradigms already mentioned: semantic, syntactic, and pragmatic. In ancient and medieval times, the dominant linguistic framework was the semantic language paradigm. The syntactic language paradigm began to emerge with the development of theoretical physics and mathematics in 19th century modernist culture and society, where the essentialist approach to the world became more important in research, for example, in the creation of formalised language models of the world. This linguistic phenomenon also spills over into other fields, such as technology.

Radikaalsed muutused nüüdisühiskonnas on kaasa toonud muudatused ka keeleparadigmas ehk selles, kuidas me maailma näeme ja seletame. Paradigma on ühiskonnas ja kultuuris, sealhulgas teaduses, oluline, sest see aitab luua pilti kõigist võimalikest või tuntud mõtlemismudelitest ning kujundada seeläbi välja loogika, mis aitab käsitleda samu fakte, sealhulgas juriidilisi fakte, erisuguste paradigmade piires ning näha nende erinevusi ja ühisjooni. Samas pole paradigma mingi igaveseks ajaks ette antud muutumatu keelelis-kultuuriline raamistik, vaid ajastu olulistest põhimõtetest, huvidest ja teadmistest sõltuv mõtlemis- ja keelemudel, mis aitab olulisemaid muutusi ajastule omastest üldtunnustatud ideoloogiatest ja väärtustest lähtuvalt paremini mõista ja tõlgendada.[1] Ajastu poolt omaks võetud keeleparadigmad määravad argumenteerimisel, sealhulgas õiguslikul argumenteerimisel esitatavate küsimuste raamid ja võimalike vastuste skaala.[2]

Oluline on seejuures teadvustada, et maailm ei ole meile, sealhulgas teadusele, antud kunagi sellisena, nagu see tegelikult on, vaid sellisena, nagu see on paradigmasse haaratud. Oma jõudmisest sellise arusaamise ehk paradigma juurde kirjutab Thomas S. Kuhn nii: „...veetes aasta valdavalt ühiskonnateadlastest koosnevas kollektiivis, sattusin silmitsi ootamatute probleemidega ... Eriti rabas mind ühiskonnateadlaste seas valitsevate varjamatute lahkarvamuste hulk ja ulatus ehtsate teadusprobleemide ja õigete meetodite suhtes".[3] Püüd jõuda selle erinevuse mõistmise juurde, miks ühiskonnateadlastele on erinevalt loodusteadlastest nii olulised vaidlused põhialuste üle, viis Kuhni paradigma mõiste juurde. Kuhni enda sõnul tõi see teda äratundmisele, missugune roll on teaduslikus uurimuses struktuuridel.

Selliseid mõttestruktuure hakkas Kuhn sestpeale nimetama paradigmadeks. Paradigma all mõistis Kuhn uurijate rühmas omaksvõetud väärtushinnangute, põhimõtete ja uskumuste kogumit. Kuhni vaates mõistetakse keeleparadigma all keelelis-mõttelisi struktuure maailmast, mis aitavad paremini mõista inimese ja maailma keelelisi suhteid lähtuvalt ajastule omastest üldtunnustatud põhimõtetest ja väärtustest. Keeleparadigma pole seega igaveseks ajaks määratletud muutumatu keelelis-kultuuriline raamistik, vaid ajastu olulistest põhimõtetest, väärtustest ja teadmistest sõltuv mõtlemismudel, mis aitab radikaalseid muutusi maailmas paremini mõista.

[1] Vt Th. S. Kuhn. Teadusrevolutsioonide struktuur. Avatud Eesti Raamat. Ilmamaa. 2003.

[2] G. H. von Wright. Wittgenstein tõsikindlusest. – Filosoofia, loogika ja normid. Avatud Eesti Raamat. 2001, lk 567.

[3] Th. S. Kuhn. Teadusrevolutsioonide struktuur. Ilmamaa. 2003, lk 10.

Seega saab paradigmadest rääkida mitte ainult loodusteadustes[4], vaid ka sotsiaal- ja humanitaarteadustes. Sotsiaal- ja humanitaarteadustes erinevad keeleparadigmad kui keelelis-kultuurilised raamistikud üksteisest selle poolest, mida nimetatakse sotsiaal-kultuuriliseks reaalsuseks. Lõppkokkuvõttes on need „määratud sotsiaalsete ja poliitiliste ideoloogiatega"[5].

Erinevalt paljudest teistest sotsiaal-kultuurilistest nähtustest on õigusel olemas teatav n-ö viimane piir, kust õigus edasi minna ei saa. Seda põhjusel, et juriidiline teadmine ja tõde on loomult eksaktsed. Testament ja vanglakaristus ei saa olla ligikaudsed. Siit ka tõdemus, et juura ei saa minna kaugemale omaenese tinglikust reaalsusest. Argikeele kohale ehitub õiguskeel (lepingu eituse asemel „negatsioon"), õiguskeele kohale protsess (võla mittemaksja asemel „kostja"), protsessi kohale protsessi üldosa (asjast huvitatu asemel „iseseisva nõudeõigusega kolmas isik"), üldosa kohale tsiviilõiguse teooria (kostja ja hageja puhul poolte võrdsuse põhimõte) ja kõige kõrgemal kohal troonib tsiviil-filosoofia. Ning seal ongi õiguse viimane piir – õigus on seega lõppenud.

Pöördume tagasi keeleparadigma juurde.

Paradigma kui omavahel keeleliselt tihedalt seotud oletuste kogum ümbritseva maailma kohta on teaduses oluline, sest see aitab luua pildi kõigist võimalikest või tuntud paradigmadest ning kujundada seeläbi välja loogika, mis aitab käsitleda samu fakte, sealhulgas juriidilisi fakte, erisuguste paradigmade piires ning näha nende erinevusi ja ühisjooni. Paradigma, mis kujundab uurimuse teoreetilise raamistiku, on tihedalt seotud nelja liiki filosoofiliste eelduste ehk oletuste – ontoloogiliste, epistemoloogiliste, metodoloogiliste ja aksioloogiliste eelduste – kogumiga ümbritseva maailma kohta.[6]

Keeleparadigmaatiline lähenemisviis ühiskonnale ja kultuurile on oluline mitmel põhjusel.

Esiteks kasvõi sellepärast, et kui me ei taju maailmas toimuvaid radikaalseid muutusi keelefilosoofilisest aspektist, satume oma arutlustes ja uurimustes tihti juba vananenud mõtteskeemidesse, mis ei aita meil toimuvat mõista ega kirjeldada. Terrorirünnak New Yorgi kaubanduskeskusele 11. septembril 2001, maniaki massimõrv Norras, andmete massilevitamine Assange'i poolt, Araabia

[4] *Ibid*.

[5] G. H. von Wright. Wittgenstein tõsikindlusest. – Filosoofia, loogika ja normid. Avatud Eesti Raamat. 2001, lk 567–569.

[6] **Esiteks paradigma ontoloogiline funktsioon**: milline on see sotsiaalne, sealhulgas õiguslik tegelikkus, mida uuritakse ehk milline on uurimistöö tõlgendamise objekt; **teiseks paradigma epistemoloogiline funktsioon**: millisena me seda õiguslikku tegelikkust teame ja tunneme, milline on õigusallikate seoste kogum, mida uuritakse. Aarnio märgib seejuures, et „napp õigusallikate loetelu viitab üsnagi seadusetruudele (legitiimsetele) tendentsidele, kuna jälle väga vaba suhtumine õigusallikatesse räägib antilegitimismist, millel on küll erinevaid varjundeid"; **kolmandaks paradigma metodoloogiline funktsioon**: kuidas me seda õiguslikku tegelikkust uurime; millised on metoodilised põhimõtted ja juhised (viitavad sellele, kuidas saab neid kasutada otsuste tegemisel); **neljandaks paradigma aksoloogiline funktsioon**: mida väärtustatakse (millised on õigusliku arutelu ja otsustamisega kaasas käivad väärtushinnangud). Oluline on seejuures rõhutada, et õigusteadus erineb sotsiaalteadustest. Kui esimestega kaasnevad väärtusotsused, siis sotsiaalteadused uurivad väärtusi.

kevad, mis sai alguse Twitterist. Tegemist ei ole murrangulise variatiivsusega senise ühiskonna ja tehnoloogia teemadel, vaid muu, uue maailmaga.

Teiseks aitab keeleparadigma luua pildi kõigist võimalikest või tuntud mõtlemismudelitest ning mõista seeläbi ka ajastut ja ühiskonda.

Kolmandaks on oluline rõhutada, et kui räägime õigusest ja õiguslikust argumenteerimisest, räägime ühiskonna dünaamikast ja eesmärgist ning püüame neid seletada ja mõista keeleparadigma kaudu. Paradigmasid on palju ja erisuguseid – mehhaaniline paradigma füüsikas, füsioloogiline paradigma anatoomias, flogistoni paradigma keemias, taksonoomiline paradigma botaanikas jne. Ent on üks üldisem paradigma, n-ö paradigmade paradigma, mis määratleb keele, milles me räägime. Lääne ühiskondlik-kultuurilises mõtlemisruumis saab eristada kolme suurt keeleparadigmat: semantiline, süntaktiline ja pragmaatiline paradigma.[7] Keeleparadigma pole mingi igaveseks ajaks ette antud raamistik, vaid ajastu olulistest põhimõtetest, huvidest ja teadmistest sõltuv mõtlemis- ja keelemudel, mis aitab olulisemaid muutusi ajastule omastest üldtunnustatud ideoloogiatest ja väärtustest lähtuvalt paremini mõista ja tõlgendada.[8] Negatiivses mõttes määratletakse ka see, milliseid probleeme tõstatada ei saa ja millised vastused on välistatud. Olgu siinkohal näiteks toodud Bohri komplementaarsusprintsiip. Sellest ühtpidi saab rääkida, aga teisalt mitte. Pidades silmas ühiskonna dünaamikat ja eesmärki püüda selgitada ja mõista seda keeleparadigmade kaudu, saame eristada kolme juba eelnevalt nimetatud suurt keeleparadigmat: semantilist, süntaktilist ja pragmaatilist. Ajaliselt oli semantiline keeleparadigma domineeriv keeleraamistik antiik- ja keskajal. Süntaktiline keeleparadigma hakkas kujunema koos teoreetilise füüsika ja matemaatika arenguga 19. sajandi modernistlikus kultuuris ja ühiskonnas, kus essentsialistlikust lähenemisest maailmale sai näiteks teaduses olulisemaks formaliseeritud keelemudelite loomine maailma kohta. Tuleb mainida, et see keeleline nähtus kandub üle ka muudesse valdkondadesse, näiteks tehnikasse. Tavalise maismaatranspordi kõrvale tekkivad kosmoselennud muudavad oluliselt ka kunsti ja kultuuri valdkonda: S. H. Lemi teadusliku fantastika teosed (tuntud tautoloogiline probleem seoses sepuuliumitega), film „Avatar". Dramaatiline, kuid radikaalne uue paradigma näide on Stephen Hawkingi elu, millest on tehtud ka film „The Theory of Everything" („Kõiksuse teooria").

Koos uue maailmapildi kujunemisega alates 1940.–50. aastatest, mil uuritavast objektist muutub olulisemaks uurija ehk subjekti lähenemisviis maailmale ja selle konstrueerimine subjekti eesmärkidest ja huvidest lähtuvalt, kujuneb ka senisest pragmaatilisem maailmavaade, mis jõuab kvalitatiivselt uuele (ülipragmaatilisele) tasemele 1990. aastatel, mil virtuaalmaailm muudab kogu inimliku suhtumise

[7] Loogilise semiootika kui metaloogika eesmärk on luua tähistatava objekti ja seda tähistava märgi vahel ühtne teooria, mis koosneb semantikast, süntaktikast ja pragmaatikast. Semantika uurib formaliseeritud keeleväljendite suhet objekti ja sõnade tähendustesse. Loogiline semantika liigitatakse referentsi- ja tähenduse teooriaks. Referentsiteooriast on välja arenenud teooria, mis uurib märgi suhet märgitavasse.

[8] Vt Th. S. Kuhn. Teadusrevolutsioonide struktuur. Avatud Eesti Raamat. Ilmamaa. 2003.

maailma rangelt pragmaatiliseks: pole pragmaatilisemat keelenähtust kui arvutikäsklus.

1) Semantiline keeleparadigma

Antiik- ja keskaja kultuuri- ning keeleparadigma keskne fenomen oli *logos* kui mingi üldine, objektiivne printsiip, mis kandis antiikajal kosmilist, keskajal aga teistlikku iseloomu. Objektiivset *logos*'t käsitati kui igavest algust, mis lõi maailma üleüldise korra, harmoonia ja mõistuspärasuse. See oli ka sõna ja õpetus, mille algprintsiipidest saab tuletada teadmised kogu maailma kohta.

Ristiusu traditsioon alustab oma pühakirja mõttest „alguses oli Sõna". Subjektiivne *logos* oli arvamus, veendumus, sõna, mis juhib inimese mõtteid ja tegusid. Arutluse ja järelduse vormi aspektist on semantilise keeleparadigma raames kesksel kohal subjekti ja predikaadi vahelised suhted, kuid nad ise on teineteiseks üleminevad. Tähtis pole niivõrd üksiku termini positsioon ja funktsioon mingis lauses (nt „*S* on *P*", kus muutuja *S* tähistab subjekti ja *P* predikaati), vaid subjekti eristumine predikaadist ja vastupidi. Võtame näiteks kolm järgmist lauset:

Kõik poliitikud on inimesed.
Kodanik IG on poliitik.
Järelikult on kodanik IG inimene.

Esimesel juhul on poliitik subjekt, teisel juhul predikaat, mis nimetab kodanik IG.

Põhiküsimused on järgmised: kas tegelikkus ise on asi või lihtsalt mõiste sellest asjast ning millised on tegelikkuse ja keele vahelised suhted? Keelefilosoofiat ei huvita mitte niivõrd nimi ise, kuivõrd nimetamine. Kas nime andmine mingile asjale, näiteks inimesele või õigusnormile, on seotud konkreetse inimese või õigusnormi ja nende olemusega või on tegemist lihtsalt kokkuleppega tähistada asju mingite sõnadega?

Ajalooliselt on nimetamine välja kasvanud nime andmisest inimesele: *nomen est omen*. Sõltuvalt selle küsimuse lahendamiskäigust saab rääkida mõiste käsitluse kahest üldisemast voolust: realism ja nominalism. Realism, mis domineeris lääne kultuuriruumis kuni 17. sajandini pigem koolkonna kui suunana, kasvas välja mütoloogilisest ettekujutusest sõnade üleloomulike omaduste kohta ehk sõnamaagiast, leides hiljem väljenduse kristlikus teoloogilises ontoloogias „sõna" erilise käsitlusena. (Jahve üks varjatud nimesid on Logos.) Pikka aega arvati, et nime olemus on sellele seesmiselt omane, et see kandub imelisel kombel ka nime kandjale. Seetõttu suhtuti nime andmisesse väga tõsiselt, sest nimi osutab alati millelegi üldisemale ja kestvamale kui üks eraldi inimene või asi.

Filosoofiline traditsioon saab alguse Platonist, kes väitis, et üldnimed on olemas „asjadest sõltumata" (täpsemalt enne neid – *ante rem*), need ei teki ega hävi ning nende tähendus on nimedesse justkui seesmiselt peidetud ehk immanentselt nendes juba olemas. Näiteks mõiste „sõprus" viitab muutumatule ja igavesele sõpruse ideele teatavas ideede maailmas. Ajaloos on üsna olulist rolli män**g**inud antiikaja mõtleja Platoni üks tähtsamaid ideid selle kohta, et kusagil sealpoolsuses eksisteerib eriline ideaalsete substantside, ideede maailm, mida siinpoolne maailm peegeldab, kopeerib, kehastab vms. Varakristliku teoloogia seisukohalt – nagu märkis Püha Augustinus – ei väärinud see idee tema loojat. Aquino Thomas tõestas

Platoni ideede riigi võimatust juba sel alusel, et see muudab võimatuks loendamise ja mitmuse nii keeles kui ka arvutamisel. Kuid jah – Platoni üldmõiste või üldnimi, siin käsitletaval juhul „sõprus", nimetab mingit ideed. A. Thomase vastuväidet pole hiljem korrektselt tõlgendatud: Thomas loomulikult teadis, et võib loetleda ideede arvu ja ideid võib olla mitu.[9]

Asjad, mis Platoni arvates on pidevas tekkimises ja muutumises, on olulised ainult sedavõrd, kuivõrd need aitavad meil meenutada üldnimede tähendust. Näiteks sõbraks olemise erinevad ilmingud aitavad meil meenutada üldmõiste „sõprus" tõelist olemust. Konkreetsed inimesed või asjad aitavad aga meenutada üldmõiste olemust ehk tähendust.

Filosoofias tuntakse seda universaalide probleemina. Mõiste „universaal" viitab sellele, et jutt käib paljudele üksikjuhtumitele sobivast üldmõistest, samas jääb selle üldmõiste genees varjatuks. Kuidas mõista aga selliseid üldmõisteid, millel puudub nii ruum kui ka aeg, kuid mida kasutatakse erinevates kohtades ja eri aegadel? Kuidas rääkida näiteks „inimesega üldse". Mõistagi puututakse tegelikkuses kokku konkreetse inimesega. Tavaliselt ei teki ka erilisi raskusi ühe konkreetse asja eristamisel seda tähistavast üldmõistest. Paraku ei anna see oskus vastust küsimusele, mida sõna „üldse" tähendab. Näiteks mille poolest erineb „inimene üldse" mingist konkreetset inimesest? Kuid jah – Platoni üldmõiste või üldnimi (nt „sõprus", „inimene" jms) nimetab mingit ideed. Juba tavaliste abstraktsioonide, nagu „sõprus üldse", „inimene üldse" jms, kasutamine nõuab teadmisi selle kohta, kuidas neid mõisteid moodustada.

Platoni õpetust üldmõistetest, mida on nimetatud ka äärmuslikuks realismiks, on püütud hiljem mitmeti arendada. Aristotelese järgi koosneb maailm üksikasjadest. Näiteks Sokrates on olemas mitte seepärast, et ta on olemas filosoofi või inimese idees, vaid seetõttu, et ta on meelelise tegelikkuse eriline objekt. Aristotelese järgi pole universaalidel iseseisvat olemist. See tähendab, et universaalid ei eksisteeri asjadest sõltumata, vaid need eksisteerivad asjades (*in re).* Asja olemus ehk substants on Aristotelese järgi aga see, mis teeb asjast selle, mis see on ja mis jääb selle asja muutudes samaks (erinevalt aktsidentsist). Asja olemus pole aga lihtsalt aine (sisu), vaid aine ja vormi ühtsus. Samas on vorm Aristotelese arvates mateeriast siiski olulisem ja fundamentaalsem, sest vorm esindab seda universaalset, mis teeb võimalikuks teadmise. Teadmine on aga teadmine üldmõistest, mille olemus avatakse defineerimise teel. Näiteks kui tahetakse teada, mis on vabadus, tuleb see mõiste defineerida. Defineerimise kaudu tunnetatakse aine ja vormi ühtsust nii, et avatakse asja olemus.[10]

Aristotelese katse analüüsida oma loogikas mõtlemise formaalset struktuuri, sõltumata selle sisust, lõi aluse teaduskeele tekkimisele ja arusaamisele, et teaduste üldised alusmõisted peavad olema täpselt määratletud. See puudutab nii loodusteadusi, kus defineerimine on võimalik ainult matemaatilise abstraktsiooni kaudu, aga ka sotsiaal- ja humanitaarteadusi, kus täpsete määratluste jaoks piisab ka tavakeelest.[11] Tunnistades nn üldiste objektide eksisteerimist väljaspool mõistust konkreetsete üksikute esemete eksisteerimise kaudu, viljeles Aristoteles mõõdukat realismi.

[9] E. Grauberg, I. Grauberg. Tõe ja õiguse legitimeerimise modernistlikust piirist. Argo. 2017, lk 89–95.

[10] E. Grauberg, I. Grauberg, Tõe ja õiguse legitimeerimise modernistlikust piirist. Argo. 2017, lk 29–40.

[11] W. Heisenberg. Füüsika ja filosoofia. Ilmamaa. 2013, lk 160.

Vaatamata Platoni realismi kriitikale juba antiikaja kontekstis, on see õpetus üsna aktuaalne ka tänapäeval, mil kasutatakse selliseid üldmõisteid nagu „headus", „õiglus", „õigus" jms, teadmata võib-olla nende konkreetset tähendust asjade maailmas. Seetõttu võib kohati tunduda, et tegemist on justkui konkreetsest inimelust eraldi seisva ideede maailmaga, mis on igavene ja universaalne ning mille ilminguid võib tegelikkuses küll aeg-ajalt kohata, kuid oma täiuslikkuses on see maailm meile pigem eesmärk ehk üldmõiste kui tegelikkus ise. Platonist alguse saanud realismi järgi on „inimene üldse" – nii nagu iga teinegi üldmõiste – abstraktsioon, nii nagu on abstraktsioon „ideaalselt must keha" füüsikas või „punkt" matemaatikas. Järelikult on „üldobjekt" midagi sellist nagu Platoni ideedki, mis ei teki ega hävi, vaid on igavesed.

Sel moel edasi arutledes võiks küsida, mis on näiteks suveräänsus või kuritegu üldse? Kas on olemas universaalset suveräänsust või universaalset kuritegu? Kui antiikajal oldi seisukohal, et üldmõistete tähendust teavad ainult autoriteedid (filosoofid), ja keskajal leiti, et kõiketeadja on Jumal, siis tänapäeval on mõnes poliitilises režiimis autoriteetide-filosoofide ja Jumala asemele asunud kas absoluutset tõde omavad poliitilised diktaatorid (nt Põhja-Koreas) või nn valgustatud monarhid (nt Vladimir Putin).

Venemaa välispoliitilises retoorikas on juba pikka aega domineerinud seisukoht, et sarnaseid juhtumeid nagu Kosovo ja Krimm tuleb tõlgendada ühtsetest põhimõtetest lähtuvalt. „Me vajame ühiseid printsiipe, mille alusel leida neile probleemidele õiglane lahendus, mis oleks hüvanguks kõigile inimestele, kes elavad konfliktirohketel territooriumidel," sõnas Venemaa president V. Putin. „Kui anda täielik iseseisvus Kosovo elanikele, siis kuidas me saame seda keelata Abhaasia ja Lõuna-Osseetia elanikele?" Ta osutas siinkohal kahele Gruusiast lahku löönud alale, mida Venemaa toetab, ehkki ei ole seniajani neid ametlikult tunnustanud.[12] Eriti puudutavat see Putini sõnul postnõukogude ruumi konfliktide lahendamist. Kosovo lahendus peaks sellest lähtudes omama Putini arvates universaalset loomust, st kõnealust printsiipi peaks rahvusvaheline üldsus saama rakendada kõikidele samalaadsetele konfliktidele, näiteks ka Krimmi puhul.

Järelikult on nii Kosovo juhtumi kui ka Putini-Venemaa argumendid Krimmi küsimuse lahendamisel seotud pigem Platonist alguse saanud realistliku lähenemisega üldmõistele. „Enamgi veel, näib, et Putin püüab rahvusvahelistesse suhetesse sisse tuua Kanti kategoorilist imperatiivi, mille kohaselt peaksid osapooled käituma nii, et nende maksiimid (käitumisreeglid) võiksid samal ajal saada üleüldiseks seaduseks. Kahjuks ei saa samastada eraisikute ning riikide vahelisi käitumisnorme ning eetilisi printsiipe. Rahvusvahelises õiguses puudub selgelt ja üheselt määratletud separatistlike konfliktide lahendamise reeglistik või seaduspärasus."[13]

Samal ajal pole ükski teine riik peale Venemaa käsitanud ei Kosovo ega ka Krimmi juhtumit universaalina ehk üldmõistena. Vastupidiselt Putinile väidavad lääne poliitikud, et „Kosovo lahendus ei oma universaalset iseloomu, vaid on *sui generis*".[14] Kõnealusel juhul pole Putini kui nn valgustatud monarhi seisukohtades

[12] Vt T. Judah. Vene hunt ja Euroopa Liidu lambad. – Diplomaatia 2007, nr 52.

[13] K. Känd. Kosovo realismi, nominalismi ja putinismi vahel. – Diplomaatia 2008, nr 54.

[14] *Ibid*.

tegemist universalismi ega ka nominalismiga, vaid pigem kontseptualismi erivormiga. Universaalid ehk üldmõisted ei eksisteeri kontseptualismi järgi mitte niivõrd inimmõistuse vormina või Jumalas, kuivõrd ühe valgustatud monarhi peas. Mõistagi võiks seejuures küsida, kas sellisel ühe isiku deklaratiivsel universaalsusel on üldse mingit reaalset tähendust.

Kuidas reageerida kaasajal toime pandavatele etteheidetavatele tegudele – kui tegemist ei ole just vägivallakuriteoga, näiteks mõjuvõimuga kauplemisega – ja kas see on siis üldse kuritegu? Igatahes ei ole kohtunike arvates selliste kuritegude menetlemine viimasel ajal enam õnnestunud. Võiks küsida, kas selliste mõistete esitamine on tänapäeval kohane, on see paratamatu või isegi ohtlik?

Näiteks leidis kohtunikueksami komisjon, et üks noorkohtunik ei sobi jätkama kohtunikuna, sest ta ei tundunud „erapooletu" ja rikkus sellega kohtunike „ausameelsuse" ja „sõltumatuse" mainet. Järelikult võib selliste mõistete kasutamisel olla ka väga konkreetne eluline tagajärg. Pealegi kasutatakse „õigluse", „headuse" jne asemel teisi mõisteid, nagu „mõistlikkus" (mõistlik menetluse aeg), „head kombed", „eetikakoodeks" jms. Kas selliste mõistete esitamine on tänapäeval kohane? Millest need räägivad või millele need osutavad? Kas see on paratamatu või ehk isegi ohtlik?

Sellest tulenevalt võib tekkida küsimus, kas õiguse kontekstis saab üldse arutleda oluliste mõistete, näiteks tõe ja õiguse mõiste legitimeerimise üle. Võtame näiteks mõiste „menetlus". Õigus pole ju tegelikult midagi muud kui õigusnormide menetlemine konkreetsest olukorrast ehk juhtumist lähtuvalt. Semantilise paradigma järgi võiks oletada, et kohtuniku ülesanne on menetletava juhtumi (näiteks kuriteo) tegeliku olemuse (substantsi) avamine, kasutades selleks vastavaid menetlusreegleid ja -norme. Lõppotsustaja on siiski kohtunik, kes peab otsuseni jõudmiseks suhteliselt üldise normi täitma konkreetse sisuga. Eraldi küsimus on, kuidas see menetlusprotsess toimub.

Kuidas aga sellisel juhul, kui eksisteerib inimesest justkui eraldi seisev olemuste ehk substantside maailm, legitiimsust kontrollida? Tegemist on formaalse lähenemisega õigusnormile, kus legitiimsus langeb kokku legaalsusega. Siit tulenevalt kerkivad päevakorda ka kohtueelse menetluse küsimused.

Ajal, mil suurte narratiivide ehk lugude aeg on mööda saamas ning demokraatia on kujunemas pidevalt kestvaks dialoogiks erinevate poliitiliste rühmituste ehk väikeste lugude vahel, pole ka seadusandlik tegevus enam ainuüksi juristide ja poliitikute mängumaa. Mõtestatud argumenteerimine, mis vastab kindlatele reeglitele, on erapooletu ja keskendunud tõe väljaselgitamisele.

Probleem on mitmetahuline. Esiteks legitiimsus, mis on mitme õigusfilosoofia (näiteks Harti teooria) osa. Legitiimsus taandub vastavusele ja tuletatavusele mingist taga olevast süsteemist. Kriminaalkohtu otsus on õiguspärane ja seaduslik juhul, kui kohtunikud on määratud ametisse kooskõlas kehtiva seadusega ja kohtuasja arutelu on toimunud vastavalt menetlusnormidele (kohtualusele on antud viimane sõna, kaitsja on saanud esitada kõik tõendid, süüdistaja esitatud tõendid on kogutud vastavalt seadusele jne). Sel juhul võime öelda, et menetlus ja tehtud otsus on legaalsed. Ent on juhtumeid (ja nende arv kasvab), kus legaalsus puudub ja seda asendab legitiimsus. Erinevalt legaalsusest vastab

legitiimsus kas mingile väga üldisele õiguspõhimõttele või taustale väljaspool õigust, kõige sagedamini moraalile.

Näiteks võib siinkohal tuua Nürnbergi protsessi, mis oli legitiimne ehk õiguspärane, kuid ei olnud seaduslik. Nürnbergi protsess oli üks kõige ebaseaduslikum kohtuprotsess Euroopa ajaloos. Teatavasti on kriminaalõiguse üks olulisemaid põhimõtteid mitte-retroaktiivsus, aga Nürnbergi protsess oli retroaktiivne – selles inkrimineeritavad kuriteod kriminaliseeriti alles koos tribunali enda hartaga. Veelgi suurem ebaseaduslikkus iseloomustas protsessi Saddam Husseini üle, kus isegi kohus ise polnud erapooletu, vaid koosnes Husseini isiklikest vastastest.

Mõlemad protsessid olid legitiimsed üldise moraali mõttes, kuid ebaseaduslikud õigusliku legaalsuse seisukohalt. Husseini puhul oli olukord seda traagilisem, et tema üle peetava kohtu reeglistiku tõi sisse USA administratsioon, kes pidanuks valdama demokraatliku kriminaal-kohtupidamise reegleid. Aga ju me elame maailmas, kus nii öelda legitiimsust on nii et tapab, aga legaalsusest jääb puudu. Nähtavasti see ongi õiguse üleminek postmodernismi sellisel kujul, nagu seda ennustas Franz Kafka. Kui õigusele keelelisest aspektist läheneda, siis pole õigus ju midagi muud kui õigusnormide menetlemine konkreetsest olukorrast ehk juhtumist lähtuvalt. Tähtis on aru saada, et õigus ei tööta ega toimi tühjas ruumis.

Ajal, mil suurte narratiivide ehk lugude aeg on mööda saamas ning demokraatia on kujunemas pidevalt kestvaks dialoogiks erinevate poliitiliste rühmituste ehk väikeste lugude vahel, pole ka seadusandlik tegevus enam ainuüksi juristide ja poliitikute mängumaa. Mõtestatud argumenteerimine, mis vastab kindlatele reeglitele, on erapooletu ja keskendunud tõe väljaselgitamisele.

Semantilisest paradigmast lähtuvalt võiks oletada, et kohtuniku ülesanne oleks justkui menetletava juhtumi (näiteks kuriteo) tegeliku olemuse (substantsi) avamine, kasutades selleks menetlusreegleid ja -norme, mis on vale. Kohtunik peab otsuseni jõudmiseks rakendama suhteliselt üldist normi (mis on eeskiri paljudeks juhtudeks paljude subjektide suhtes) konkreetse faktikogumi suhtes, st teostama kvalifikatsiooni. Eraldi küsimus on, kuidas see menetlusprotsess toimub. Ja pealegi, kuidas kontrollida õiguse legitiimsust sellisel juhul, kui see on seotud inimesest justkui eraldi seisvate olemuste ehk substantside maailmaga? Tegemist on formaalse lähenemisega õigusnormile, mil legitiimsus langeb ühte selle legaalsusega.

2) Süntaktiline keeleparadigma

Süntaktiline murrang keelefilosoofias, mis saab alguse loogilisest positivismist, on tähtis keele ja maailma ning nende suhete seisukohast. „Maailm pole enam tühi ruum, nagu arvasid antiikfilosoofid, millesse asjad on justkui paigutatud ning mille igavesti muutumatuid olemusi saab avada nende määratlemise (realism) ja nime panemise ehk nimetamise kaudu (nominalism).[15] Nimeparadigma murdumine ning selle asendumine predikaatfilosoofiaga räägib sellest, et tõsise kahtluse alla seatakse kõik see, mis on vahetult seotud olemuse mõistega.

Süntaktilise lähenemisviisi puhul kaldub kaalukauss tugevalt juba normi formaalse käsituse poole. Bertrand Russell oli ilmselt üks esimesi, kes püüdis seda uut

[15]E. Grauberg, I. Grauberg. Tõe ja õiguse legitimeerimise modernistlikust piirist. Argo. 2017, lk 128.

keelepilti selgitada. Maailm koosneb Russelli arvates mitte asjadest, vaid faktidest või sündmustest. Sündmused on fakti erijuhtum. Fakte saab jaatada või eitada, kuid neid ei saa nimetada. Faktid on kõik see, mis maailmas aset leiab. Näiteks päike taevas on fakt; Caesar ületas Rubiconi jõe – fakt; kui mu hammas valutab, siis on minu hambavalu fakt. Kui ma midagi väidan, siis on ka minu väiteakt fakt. Kui üks väide on tõene, siis on tegemist faktiga, mille tulemusel see on tõene. Seda fakti ei ole aga siis, kui väide on väär. Faktid muudavad mingi väite tõeseks või vääraks.[16]

Sündmusi käsitatakse selles kontekstis kui fakti erijuhtumit. Nimi ei saa olla fakti keeleline vorm. Selleks on lause ja selle keskmes olev predikaat. Maailm koosneb faktidest ja sündmustest, mitte tühjas ruumis olevatest asjadest. Iga sündmust saab kirjeldada nn atomaarsete lausete abil. Kirjeldus on objektiivne, kui see on rääkija hoiakutest sõltumatu. Fakti kirjeldamiseks kasutatakse predikaati ja nimesid, millel on lauses predikaadi osutatud koht.

Predikaat on üks kõige antisemantilisemaid mõisteid üldse, sest predikaadid, vaatamata sellele, et neil on alati suhe väljaspool keelt asuvasse, ei nimeta seda kunagi. Näiteks on keeruline väita, et lauses „Ma olen siin" on sõna „siin" või siis predikaat tervikuna („olen siin") kohanimi. Ja seda vaatamata sellele, et predikaat on selles lauses kohapredikaat. Predikaate endid ei nimetata keele sõnadega. Toodud näite puhul on raske väita, et sõna „siin" nimetab predikaati kui mingit mõttelist olemust, millel on lauses kindel koht. Ühelt poolt võiks küll väita, et nimefilosoofiast tuntud semantiline kolmnurk asi – selle nimi (sõna) – mõiste on rakendatav ka predikaatfilosoofias. Teisalt tuleb aga rõhutada, et predikaatfilosoofias laguneb see kolmnurk, sest „asi" pole enam „asi", „nimi" pole enam „nimi" ja „mõiste" pole enam „mõiste".

Subjekti kohta midagi predikaadi kaudu väljendada tähendab kirjeldada seda mingi omaduse kandjana või mingis suhtes olevana. Seejuures on võimalik käsitada predikaati omaduse või universaali nimena. Selliselt saaksime aga lihtsalt rea nimesid või loendi nendest, mitte aga propositsiooni. Nende sisemiste suhete süsteemi, mis on ühine nii kujutatavale kui ka kujutisele, nimetab Ludwig Wittgenstein loogiliseks vormiks. Wittgensteini arvates võimaldab eelkõige asjaolu, et mõlema (kujutise ja kujutatava) loogiline vorm on sama – olla üksteise kujutis. Tänu sellele saame objekte märkivaid sõnu ühendada lauseteks, mille loogiline vorm vastab kirjeldatavale tegelikkusele. Seega võimaldab loogiline vorm meil kõneleda maailmast täpselt või ebatäpselt.

20. sajandi alguse loogilist positivismi iseloomustab püüd vabaneda kõigest, mis on justkui üleval- või allpool empiirilises kogemuses antut. Selleks on mitmesugused maailmavaatelised ja religioossed eeldused jms. Püütakse vabaneda essentsialismist, mis on siiani iseloomustanud filosoofiat alates Aristotelesest. Edasi toimub maailma deontologiseerimine. Enam ei räägita uuritava nähtuse igavese ja muutumatu olemuse avastamisest, vaid kogemuse kaudu fenomeni toimimisviisi fikseerimisest empiiriliselt kindlakstehtavate tingimuste juures. Kogemuses kajastuvad vaid fenomenid, mitte olemused. See tähendab, et reaalne maailm eksisteerib küll subjektist sõltumatult, kuid on subjektile esitatud fenomenidena tema käsitletaval viisil. Teaduse ülesanne on kirjeldada nähtusi erapooletult ja täpselt. Sellest, millest ei saa rääkida, tuleb

[16] B. Russell. Uurimus tähendusest ja tõest. Avatud Eesti Raamat. 1995, lk 193–341.

vaikida, märgib varajane Wittgenstein.[17] Järelikult tuleb sellest, millest saab rääkida, rääkida selgelt ja täpselt (mida see nõue iseenesest ka ei tähendaks).

Süntaktilise paradigma puhul on oluline, et fakt ja sündmus on olulised eelkõige tõenditeoorias. Sündmus on faktide kogum ja jada, mis kuulub rekonstrueerimisele (kas maja müüdi, kas isik tapeti, kas veksel võltsiti, kas autot nähti) ja vajaduse korral avarama sündmuse tõendamisele (kas tegemist on fikseeritava kuriteoga). Jurisprudentsis järgneb faktide kogumisele ja sündmuste rekonstrueerimisele eriline protseduur – kvalifikatsioon, st selle leidmine, kas esitatud tõendid vastavad neile tunnustele, mille fikseerib kuriteo koosseis. Kvalifikatsiooni neli elementi on järgmised: subjektiivne külg (tahtlus), objektiivne külg (mis toimus), subjekt (isik, kes tegi) ja objekt (mille vastu oli tegu suunatud). Kõik need elemendid kokku annavad legaalsuse, mitte aga legitiimsuse, mis on seotud üldisema normatiivse süsteemiga. See iseloomustab positivistlikku õigusemõistmist lahus väärtusmaailmast.

Tegemist on positivistliku, formaalse lähenemisega õigusnormile, kus legitiimsus langeb kokku legaalsuse ehk menetlusliku tõega. Siit tulenevalt tekib mitu legitiimsusega seotud küsimust. Näiteks kas ühise omaduse esinemist erinevatel asjadel saab analüüsida sarnasuse suhte alusel? Kui aga asjade sarnasus on vaid konventsionaalne, nagu arvavad paljud end nominalistiks pidavad kaasaja mõtlejad (nt hiline Wittgenstein), siis kuidas lahendada induktsiooni ehk üksikult üldisele liikumise küsimusi jms.[18]

Oluline on ka see, et õiguses saab eristada kahte süntaksi tüüpi, näiteks Franz Kafka ja Sherlock Holmesi oma. Mistahes keel peab selleks, et see oleks keel ehk suhtlemisvahend maailmaga, selle maailmaga mingil viisil suhestuma. Jättes kõrvale lingvistilised süntaksi-, st lausete konstrueerimise probleemid, võib täheldada, et iga süntaktiline element (sõna, täht, märk, väljend vms) on seotud õiguse süntaktika puhul mitme erineva maailmaga. Esiteks sama keele teiste osadega: parim näide on siinkohal õigussüsteemi karnevalielemendid Meletinski järgi – kohtunike parukad, vande andmine jne.

Kogu Kafka „Protsess" on näide puhtast juriidilisest süntaksist. Oma timukate kohta ütleb K: „Minu järele saadetakse vanad, alama astme näitlejad …" Kahvatud, mõlemad saterkuues, torukübar jäigalt peas – just selline kirjeldus väljendab õiguse süntaktikat, mille loojaks oli Kafka. See tähendab, et üks õiguse element omandab tähenduse seoses teise elemendiga – kohtuotsus eeluurimisega, testament omandisuhtega, kuritegu politseiga, kes osaleb karnevalis omas vormis ehk politseimundris. Kuivõrd iga keel on tegelikkuse suhtes formaalne ja õiguskeel veel eriti, toimib juriidiline süntaks olenemata reaalsest maailmast, mille kohta õigust rakendatakse. Sõltumata sellest, milline on kuritegu või kes on vannet andev protsessi osaline (tunnistaja, süüdistatav), on tunnistaja vandetekst ikkagi sama. Süntaksi nn õigusesisese aspekti olenevus postmodernistliku maailma olemisest ja kujunemisest on suhteliselt väike. Inglise kohtus on 21. sajandil parukad peas ka protsessis, mida peetakse interneti teel. Postmodernses ja sellele järgnevas maailmas saabub õiguse uus olemine täiesti uutes vormides (Tšaikovski, Kandinsky ja Kafka olid juristid). Küsimus on selles, kas õigus jääb hilises

[17] L. Wittgenstein. Loogikalis-filosoofiline traktaat. Ilmamaa. 1996.

[18] Selles kontekstis kerkivad teravalt esile menetlemise küsimused.

postmodernismis alles või muutub millekski, mis õigus enam ei ole. Ooper „Boris Godunov" on sisult juriidiline, aga selgelt mitte-õigus.

3) Pragmaatiline keeleparadigma

Erinevalt semantilisest ja süntaktilisest lähenemisest keelele, sealhulgas õiguskeelele, mis moodustavad dogmaatilise õigussüsteemi (kus õigusnormid on konkreetse riigi rohkem või vähem suletud õigussüsteemi osa), lähtub pragmaatiline keeleparadigma sellest, et asjadel ei ole mingit olemust ehk substantsi.

Võtame näiteks kasvõi Eesti põhiseaduse küsimuse. Viimastel aastatel on aeg-ajalt üles kerkinud küsimus, kas Eestil on vaja uut põhiseadust. Sellest lähtuvalt võiks küsida, kas kokkuleppel – nt põhiseadusel kui kokkuleppel – on substants? Kas pole küsimus pigem selles, kuidas normi sisustatakse? Riigi konstitutsioonilist iseseisvust saab pidada absoluutseks üksnes seni, kuni see puutub kokku kindlate formaalsete ning substantiivsete legitiimsuse tingimustega. Pealegi on mitmesugused rahvusvahelised kokkulepped ja organisatsioonid vähendanud tänapäeval riikide suveräänsust ja ka autonoomsust. Seetõttu on riigid, sealhulgas Eesti, sunnitud tegutsema teatud valdkondades selliselt, et see mõjutab nende ühtsust.

Kui positivistlik lähenemisviis eeldab internaalset perspektiivi ühiskonna ja õiguse legitimeerimise küsimustele, siis postpositivistlik, pragmaatiline keeleparadigma eeldab eksternaalset perspektiivi. Tegemist on põhimõttelise pöördega, sest väljumine käsitletavate küsimuste, sh õiguse ratsionaalsete aluste piiridest viib selleni, et teaduslikku lähenemist ei käsitata enam kui ainuvõimalikku tõe tunnetamise viisi ja inimkonna suurimat saavutust. Oluliseks peetakse ka filosoofilist refleksiooni, esteetilist kaemust jms. Eksternaalne perspektiiv on käsitletava küsimuse suhtes alati piiriülene. Sellest tulenevalt võimaldab see lõhkuda ja rikkuda ka kõikvõimalikke norme. Need kaks positsiooni – internaalne ja eksternaalne – on mitte üksteist välistavad, vaid täiendavad. Kui internaalne perspektiiv uurib tegevuse algoritme, siis eksternaalne perspektiiv keskendub orientiiride, väärtuste ja eesmärkide muutustele tänapäeva globaliseeruvas ühiskonnas ja õiguses.

Küsimuse käsitlemine mõlemast perspektiivist viib meid selleni, mida nimetatakse performatiivsuseks. J. L. Austin nimetab performatiivset lausungit kõneaktiks. Näiteks „Ma pärandan Teile oma maise vara!"[19]. Performatiivsete lausete eesmärk on midagi teha, mitte öelda, rakendades selleks teatud meetmeid. Neid lauseid iseloomustab esiteks see, et need ei ole tõesed ega väärad. Näiteks antakse ütluse „Ma vannun, et …" kaudu pigem mingi vanne kui teade. Ütlused võivad olla nii konstateerivad kui ka teostatavad. Näiteks „Määran teile viis aastat vangistust" on ütlus, mis nõuab teostamist. Järelikult pole performatiivsed laused seotud mitte niivõrd olukorra kirjeldamisega, kuivõrd olukorra loomisega, millel on tulemused. Performatiivsete lausete hulka kuuluvad ka kokkulepped, lepingud, lubadused, vanded jms. Nende lausete tõesusest saab rääkida ainult niipalju, kuipalju on tegemist pöördumisega teise poole.

[19] E. Grauberg, I. Grauberg, Tõe ja õiguse legitimeerimise modernistlikust piirist. Argo. 2017, lk 217–218.

Esimesed märgid murrangust teksti mõistmisel ja selle sidumisest performatiivsusega esinesid juba 20. sajandi alguskümnenditel. Tekstile ülekantuna võib performatiivsust käsitleda kui enese, sealhulgas Eesti eripära ja individuaalsuse esiletoomist kommunikatsiooni kaudu. J. L. Austini arvates on keele võimalusi maailma konstrueerimisel pikalt alahinnatud.

Tänapäeva demokraatliku ühiskonna eripära on selles, et legaalsed õigusnormid peavad olema ka legitiimsed. Niklas Luhmanni menetlusteooria järgi ainuüksi kohtuotsuses sisalduvast tõest ja õigusest tänapäeval ei piisa, et kohtuotsusega rahule jääda. Otsus peab olema ka legitiimne, et kanda endas tegelikku sotsiaalset väärtust. Luhmann rajab oma arutluskäigu sellele, et tõeni jõudmine kohtumenetluses ei ole võrreldav loodusteadustes kasutatavate meetoditega. Kui tõde on loodusteadustes iseenesestmõistetav, siis sotsiaalses läbikäimises põhineb tõde teistel kehtivusalustel – et tõde tõena ka tunnustataks. Luhmann väidab, et kohtuotsuse legitiimsust ei tagagi seetõttu mitte niivõrd selle tõe ja õiguse sisu ise, vaid selleni jõudmise protsess – teatud reegleid järgiv kommunikatsioon menetluse poolte vahel. Legitimeerimine on menetluse vahendusel toimuv õppimisprotsess. See on ootuste ümberkujundamine, mis toimub õiguslikult reguleeritud faktilise kommunikatsiooni kaudu.

Kuidas jõuda legitiimse lahendini, on küsimus, mida peavad esitama kõik menetlusosalised. Luhmanni jaoks on legitiimne menetlus segu sunnist ja konsensusest. Menetluse alg- ja lõpp-punkt peaksid olema ebamäärased ning menetlus peaks sisaldama alternatiivseid kulgemisvõimalusi.[20] M. Eerik märgib, et leppides menetluse mõiste säärase sisuga, tuleb tõdeda, et sellisel kujul on tegemist menetluse kui sotsiaalse nähtusega. See on omane kõigile kohtumenetlustele, sõltumata sellest, milliseid materiaalõiguse valdkondi need „teenindavad".[21]

Oluline on ka see, et tänapäeva globaliseeruvas ja postmoderniseeruvas läänе ühiskonnas on õiguse ja õigusliku argumenteerimise puhul täheldatud seda, et kõrgeima kohtuniku üks peaeesmärk on rakendada oma maailmavaatelisi seisukohti.[22] Maailmavaateliste seisukohtade tähtsuse suurenemine õiguses ja õiguslikus argumenteerimises on tihti viinud loogika ja argumenteerimise omavahelise kaugenemiseni. Sellist teed minnes on võimalik, et isegi valed faktiväited võivad mingis kontekstis tunduda kellegi jaoks tõeselt argumenteeritud. Järelikult on õiguse ja õigusliku argumenteerimise käsitamisel väga oluline osa ka sotsiaal-kultuurilisel ja maailmavaatelisel kontekstil[23].

Seega on kohtumenetluse – nagu igasuguse muu sotsiaalse menetluse – puhul oluline teada, et üht suurt tõde ei ole olemas. Tõde on alati intersubjektiivne ja sünnib dialoogi kaudu. Seetõttu puudutab sotsiaalne tegelikkus, sealhulgas õiguslik tegelikkus, ka uurijat ennast, tema isiksust ja hoiakuid ning arusaamu

[20] E. Kergandberg. Lepingu veli menetlus ehk Niklas Luhmanni lugedes. Akadeemia nr 3, lk 561–568.
[21] M. Eerik. Eesti kohtumenetluse ühtlustamise võimalikkusest. Akadeemia Nord. Tallinn. 2008, lk 42–53.
[22] L. Epstein, W. M. Landes, R. Posner. The Behaviour of Federal Judges. A Theoretical and Empirical Study of Rational Choice. Harvard University Press. 2013, lk 422.
[23] Ukraina konflikti osas on inimeste vaated erinevad olenevalt sellest, millises massiteabe väljas nad asuvad.

maailmast. Välismaailm on seda selgem, mida rohkem tunneb inimene iseennast kui isiksust. Sotsiaalne maailm avaneb inimesele mitte ainult iseenda kaudu, vaid ka kommunikatsioonis teiste inimestega, eri ajastute ja kultuuride kaudu.

See on Jürgen Habermasi sõnul arutlev demokraatia. Habermasi arvates on tänapäeval küsimus pigem selles, kuidas jõuda eri seisukohti omades kokkulepete ja üksmeeleni, mida tunnustavad kõik debatis osalejad.[24] Mõtestatud argumenteerimine, mis vastab kindlatele reeglitele, on erapooletu ja keskendunud tõe väljaselgitamisele. Seda nimetab Habermas diskursuseks. Lyotardi järgi on konsensus aga vaid horisont, mis pole kunagi saavutatav. Konsensus eeldab paratamatult erinevuste ületamist ning mingi ühe idee/seisukoha vastuvõtmist. Olgu selleks siis tehnoloogiline, majanduslik või kunstiline idee. Keelemängud on alati heterogeensed.[25] Järelikult on võimatu, et kõik argumenteerijad jõuaksid kokkuleppele selles, millised reeglid on keelemängude puhul universaalsed. Pealegi leidub alati keegi, kes püüab lõhkuda seda „mõistuslikku" korda. Seetõttu tuleks Lyotardi arvates jätta rohkem võimalusi nendele, kes püüavad olukorda destabiliseerida ja kellel on võimet pakkuda teadusliku keelemängu uusi reegleid, mis suudaksid kavandada ka uut uurimuslikku välja. Klassikalise mõiste- ja süllogismiõpetuse ning selle rakendamise olulist vähenemist ning asendumist hoopis praktilisema lähenemisega argumenteerimisele võib täheldada juba mõnda aega ka tänapäeva õigusliku argumenteerimise kontseptsioonides.[26]

Globaliseeruva ja postmoderniseeruva maailma eripära seisneb selles, et ka suveräänsust on hakatud riikide vahel jagama. Mitmesugused lõppotsustused näiteks majandus-, planeerimis- ja isegi sotsiaalpoliitikas on paljus koondunud niisuguste rahvusvaheliste organisatsioonide nagu WTO, ÜRO ja Euroopa Inimõiguste Kohus kätte. Suurenenud on regionaalne autonoomsus, mis on esitanud väljakutse traditsioonilistele kaasaja föderatiivsetele süsteemidele, pannes neid üha enam mõtlema konföderatiivsusest uues postmodernistlikus kontekstis või siis konsolideerumisest, kus konsensusel rajanev jagatud suveräänsus võiks kujuneda tänapäeva riikluse normiks. Eespool öeldu kehtib ka Euroopa Liidu kohta.

Riikliku suveräänsuse kõrval on tänapäeva postmoderniseeruvas maailmas üha tähtsamaks muutumas inimese suveräänsus. Näiteks on ÜRO endine peasekretär Kofi Annan oma esinemistes korduvalt rõhutanud, et traditsiooniline teadmine suveräänsusest ei suuda enam kaitsta inimeste põhivabadusi ning et „ÜRO on suveräänsete riikide ühendus, kuid inimeste, mitte riikide õiguste kaitsja (…) ma usun, et kindlalt on tekkimas uus rahvusvaheline norm, mis seab esikohale võitluse vähemuste represseerimise vastu ning lükkab riigi suveräänsuse tagaplaanile".[27] Ülerõhutatud aktsent erilisele ning ühiskonna ülepaisutatud fragmenteerumisele inimõiguste valdkonnas on viinud asjad tänapäeval nii kaugele, et kuulutatakse

[24] J. Habermas. Deliberative Politics: A Procedural Concept of Democracy. – Between Facts and Norms. Polity Press. 1997, lk 287–314.

[25] J-F. Lyotard. The Postmodern Condition: A Report on Knowledge. Manchester University Press. 1984.

[26] C. Perelman. The New Rhetoric. A Theory of practical reasoning. Badford Books. 1984.

[27] K. Annan. Towards a Culture of Prevention: Statements by the Secretary-General of the United Nations. Carnegie Comission on Preventing Deadly Conflict. Carnegie Corporation of New York. 1999, lk 24.

välja üha uusi põhiõigusi, millel on põhiseaduse või rahvusvaheliste lepingutega kaitstud pühaduse oreool. Nii kaob seaduste suhtes lõpuks igasugune neutraalsus.

1950. aastatel lähtuti keele analüüsimisel juba üldistest seostest. Kasutusele võeti ülddistributsiooni mõiste, mis peegeldab asjaolu, et keelt ning selle igat elementi püütakse käsitleda „keeleväliste suhete võrgus". Holistliku käsitluse järgi verifikatsioonist kujutab meie teadmiste kogum endast võrku. Selle ääred on kokkupuutes kogemusega. Iga punkt selles on suhete võrgustiku kaudu seotud teiste punktidega.[28] Võrgu keskel ehk südames olevate teadmiste ja uskumuste muudatused mõjutavad kogu võrku. Põhiline muutus ilmneb siis, kui esitatakse väljakutse meie tuum-uskumustele – näiteks püha Pauluse pööramine ristiusku. Sel juhul tuleb suurem osa võrgust ümber teha. Samas püütakse muuta pigem võrgu pehmeid kui tugevaid osi. (Märkus: niimoodi arutledes võiks küsida, millised on Eesti ühiskonna kui sotsiaalse võrgu tuum-ideed ja seisukohad, millest ei olda valmis mingil juhul loobuma. Ja mis juhtub siis, kui me nendest loobume?)

21. sajandil sai ilmseks seni vaid pigem intuitiivne tõdemus: virtuaalmaailm (arvutis) võib olla ontoloogiliselt tugevamgi kui reaalne maailm ise. Ehk Popperi kolmas maailm – subjektist sõltumatu teadus- ja kunstiideede maailm –[29] sai ilmseks tegelikkuseks – tarkvara suudab taastada hävinud kõvaketta, aga mitte vastupidi. Ja virtuaalreaalsuses eksisteerivad fenomenid, millel puudub vaste selle maailma välises tegelikkuses, mida on näiteks korduvalt rõhutanud James Cameron filmi „Avatar" ontoloogilise taustaga. Seega on näiteks teadmine nõrgem kui virtuaalmaailm, mida ta eeldatavasti peegeldab. Enamgi veel: ta võib üleüldse mitte midagi peegeldada.

Digitaalse revolutsiooni tulemusel on tekkinud olukord, kus esiteks suudab inimene üha vähem kontrollida ja mõista omaenese loodud keelelist (ja informatsioonilist) ruumi – on tunda, et ei Assange ega Snowden ole õieti aru saanud, millega nad hakkama said, kuigi mõlemad on virtuaalmaailma ja selle võimalustega kindlasti hästi tuttavad –, teiseks kaob piir tegeliku ja virtuaalmaailma vahel, st nii üks kui ka teine kuvatakse arvuti ekraanile. Tähenduslikult läheb olukord keeruliseks ka seetõttu, et paljud virtuaalmaailma ikoonid apelleerivad reaalmaailma nähtustele – „*file*" omab töölaual ka kujundina kaustapilti, samas jääb õhku küsimus, kus see nn kaust (koduleheküIg, e-kiri vms) füüsiliselt asub – arvutis, võrgus, serveris (koduses, NSA serveris?). Wikipedia märksõna „*icon*" toob esimeste tähendustena graafilised kujutised arvuti kodu-aadressitest ja kaubamärkidest (Google, @, Waze jne). Pühapildi tähendus on leitav, lisades tunnussõnadena „*church*", „*religious*" vms. Rangelt võttes pole selline olukord filosoofilisele tunnetusteooriale uus: uue aja filosoofia algusest on analüütiliselt küsitud, mis vahe on unenäol, fantaasial ja tegelikkuse, objektiivsuse peegeldusel meie teadvuses (Hume, Berkeley).

Seega on modernne, konkreetsete piiridega maailm asendunud postmodernse maailmaga, milles tavakeelelisi piire enam ei ole. Postmodernismi mõistet

[28] W. O. Quine. Tõe otsing. Akadeemia 1995, nr 4–7.

[29] K. R. Popper. Epistemology without a Knowing Subject – Logic, Methodology and Philosophy of Science III. Amsterdam. 1968, lk 333–373. Popper selgitab, et tema kolmanda maailma kontseptsioon on üldisem kui Platoni ideede (vormide) või Hegeli absoluutse vaimu kontseptsioon ning et see on pigem suguluses Gottlob Frege teooriaga. Popper püüdis näidata; et kolmas maailm on tunnetavast subjektist sõltumatu ja autonoomne samas tähenduses, nagu on teadmiste objektiivne sisu sõltumatu tunnetava subjekti teadvusest.

käsitletakse kõige enam kui vastandit modernismile[30]. Kui modernism lähtus eeldusest, et inimene võib jõuda absoluutse teadmiseni (millele on toetunud suur hulk lääne filosoofiast alates antiikajast), siis postmodernism seab selle eelduse kahtluse alla. Postmodernism eitab, et eksisteerib objektiivne (absoluutne) tõde, ja seob tõe küsimuse sotsiaalse kontekstiga. Kui modernistid leiavad, et inimene võib ületada sotsiaalse situatsiooni ning jõuda kõrgemate väärtusteni (tõeni), siis postmodernistid purustavad selle illusiooni. Postmodernistide jaoks konstrueerib sotsiaalne reaalsus tõe ning nagu märgib Derrida, midagi ei eksisteeri väljaspool konteksti[31]. Kui midagi on selles konkreetses sotsiaalses grupis tunnustatud väärtushinnangute kohaselt tõde, siis see ongi tõde. Mingit muud teadmist ei eksisteeri.

Postmodernism on seega juba mõnda aega küsimuse alla seadnud modernistlikud väärtused ning kahelnud suurtes narratiivides. Hulgaliselt võib tuua postmodernistlikke näiteid kirjandusest, kunstist ja arhitektuurist. Ka inimeste käitumises võib näha postmodernistlikke jooni. Infotehnoloogia arengust tulenevas igapäevaelu kiiruses muutuvad inimesed ühelt poolt küll kiiremaks, kuid samas pealiskaudsemaks – omadus, mida varem heideti ette[32]. Tekkinud on teatav multifunktsionaalsus – võime tegeleda mitme asjaga korraga.

Võime seda seost märgata ka väljaspool e-maailma, näiteks õiguses, mille taga on kaks reaalsust: esiteks tegelikkuses aset leidnud sündmuste reaalsus (kuritegu, tahe) ja teiseks reaalsus, mille moodustab õigus – kohtuprotsess ja selle reeglid (omalaadne grammatika). Kohtuotsuse ideaal on korrata iseennast uutes oludes juba olnud asjaolude suhtes ja juriidilises metakeeles, mis suhestub argioludega. See on õiguse omadus, mis teeb selle samaseks keelega, mis erineb küll argikeelest.

Õigus ei saa eksisteerida teisiti kui teatav keel ja keelena on õigus alati täielik ja lõpetatud, nagu mistahes lõplik virtuaalsüsteem. (Keele taha pürgivad õiguse ja arvutimaailma kriitikud – üldjuhul diletandid.) Õigustekstide puhul ilmneb just virtuaalmaailmas neile omane semantiline fleksibiilsus (st saab ilmseks, et nad tähendavad protsessi pooltele erinevaid asju) ja pragmaatiline tähendus – nad ei peegelda ega tähenda midagi, nad lihtsalt funktsioneerivad (kui keelud, lubadused, tõotused, ähvardused vms). Koos uue maailmapildi kujunemisega alates 1950.–60. aastatest, mil uuritavast objektist hakkas olulisemaks muutuma uurija-subjekti lähenemine maailmale ja selle konstrueerimine subjekti eesmärkidest ja huvidest lähtuvalt, kerkivad mitte ainult teaduses, vaid ka ühiskonnas üldiselt esiplaanile pragmaatilise maailmatunnetuse ja toimimise küsimused.

Maailm, mis on seotud erinevate diskursuste kõrvuti eksisteerimisega, paigutab inimesed justkui wittgensteinlikku keelemängu[33]. See on pluralistlik maailm, kus eksisteerivad paralleelsused ja kus ei ole kindlaid tõdesid ega õigusnormide

[30] E. Grauberg, I. Grauberg. Tõe ja õiguse legitimeerimise modernistlikust piirist. Argo. 2017, lk 190–330.

[31] Vt J. Derrida. Limited Inc. 1988. Northwestern University Press, lk 136.

[32] 1990. aastate modernistliku ühiskonna inimesed (postsovietlik ühiskond) pidasid lääne inimesi pealiskaudseteks. Ennast peeti aga tarkadeks ja põhjalikeks. Raske oli mõista, et lääne inimese küsimus „Kuidas läheb?“ tähendas pelgalt käibefraasi ega eeldanud eluloo tutvustamist ja murede kurtmist.

[33]

tõlgendusi. Maailmapilt killustub. Pragmaatiline murrang keelefilosoofias sunnib Wittgensteini loobuma oma varajasest kujutlusteooriast, mille järgi keel justkui pildistab seda, mis maailmas olemas on. Senine keelekäsitus on Wittgensteini arvates olnud liiga kitsas. Positivistlikke eesmärke ja ideaale taotlev keelekäsitus – kujundada eksaktseid mõisteid ja teooriaid – ähmastab tegelikkuse nägemist ja on seetõttu liialt kitsapiiriline. Keel mitte ainult ei peegelda maailma, vaid täidab mitut muud olulist funktsiooni.

Hilise Wittgensteini arvates on keel eelkõige tööriist, mida võib kasutada väga erinevatest eesmärkidest lähtuvalt. „Kõik tööriistad on selleks, et midagi muuta. Näiteks haamer muudab naela asendit, saag laua kuju jne. Ja mida muudavad mõõdupulk, liimipott, naelad? – Meie teadmist asja pikkuse kohta, liimi temperatuuri ja kasti tugevust." Kas selle väljendi niisugusest assimileerimisest oleks mingit kasu, küsib Wittgenstein.[34] Ta kutsus pöörama pilku nähtuste üksikasjadele. Selleks, et selgemini näha, peame vaatluse alla võtma eelkõige nähtuste üksikasjad.

Seega omandavad mõisted hilise Wittgensteini arvates tähenduse (eeldades, et ka norm on mõiste) konkreetsest kontekstist lähtuvalt.[35] Tegelikkuses oleme Wittgensteini järgi vastamisi väga erinevate keelemängudega, millest igaühes kehtib oma loogika ja mis väljendavad inimeste erinevaid huve. Pole olemas üleüldist ratsionaalsuse kontseptsiooni, sest kujutlus ratsionaalsusest tuleneb alati keelemängude seesmisest eripärast ja huvidest, mida üks või teine keelemäng kehastab. Tõde on see, mis on kasulik asja efektiivse lahendamise aspektist. See on utilitaarne ja pragmaatiline lähenemine, mis saab alguse juba 19. sajandi lõpu pragmatismist.

Nagu artiklis eespool juba öeldud, on tänapäeval küsimus pigem selles, kuidas jõuda eri seisukohti omades kokkulepete ja üksmeeleni, mida tunnustavad kõik debatis osalejad.[36] Konsensus eeldab paratamatult erinevuste ületamist ning mingi ühe idee/seisukoha vastuvõtmist. Keelemängud on alati heterogeensed.[37] Tänapäeva globaliseeruv maailm on eelkõige kokkulepete maailm. Ka normi sisustamine peaks sellises maailmas lähtuma peamiselt kokkulepetest.

Kuigi võib-olla pole filosoofilis-teaduslikult mõtet rääkida tänapäeval tõest nii, nagu seda tegi Aristoteles kaks tuhat ja Kant kakssada aastat tagasi, näitavad ka Eesti poliitika viimaste aastakümnete sündmused, et rahvas TAHAB sellest rääkida. Seejuures jättes varju küsimuse sellest, et rääkimine tõest eeldab ka selle teatavat subjekti. Näiteks kes on see rahvas, kes tahab rääkida. Jääkeldri vabakonna paradoksaalsus seisnes mitte niivõrd selle subjektsuse ebamäärasuses, kuivõrd selles, et see alustas oma subjektsust ametliku riigistruktuuri kõige ebaolulisema atribuudiga – nn kuluhüvitistega. (Veel enne, kui Rahvakogu kokku tuli, määrati selle esindajatele kindlaks sõidutasude kompenseerimise kord.)

[34] L. Wittgenstein. Filosoofilised uurimused. Ilmamaa. 2005, lk 24–25.

[35] L. Wittgenstein. Filosoofilised uurimused. Ilmamaa. 2005.

[36] J. Habermas. Deliberative Politics: A Procedural Concept of Democracy. – Between Facts and Norms. Polity Press. 2007, lk 287–314.

[37] J-F. Lyotard. The Postmodern Condition: A Report on Knowledge. Manchester University Press. 1984, lk 9–11.

Nn tõe otsing (mida see ka ei tähenda) võib toimuda efektiivselt juhul, kui antakse endale selgelt aru, millest käib jutt – kontseptuaalsest kompromissist. Tuleb arvestada sellega, et pragmaatilise lingvistika ajastul ei saa kompromisside aluseks olla pretensioonid „suurele legitiimsusele" – ajaloolised privileegid, ühiskonna traditsioonid, sotsiaalne austus vms, mis põhinevad suurtel narratiividel. „Tõde" (siinkohal on jutumärgid alati vajalikud!) on see, mis on kasulik asja tõhusa lahendamise aspektist (utilitaarne ja pragmaatiline lähenemine, mis sai alguse juba 19. sajandi lõpu pragmatismist – Pierce, James jt).

Kokkuvõte

Eespool esitatud kolm suurt keeleparadigmat – semantiline, süntaktiline ja pragmaatiline paradigma – on võib-olla uues virtuaalmaailmas minetanud paljus oma tähenduse. Kuid me kirjeldasime neid selleks, et see väide oleks ilmne. Keelefilosoofilise ajaloo sügavam mõte on tänapäeval selles, et see aitab mõista toimuvate muutuste põhjapanevat tähendust inimkonnale ja inimeste mõtlemisele. Kuna põhjuslikkus on siiski universaalne ja seda ka väliste mõjutuste puhul (siin käsitletud digitaalmaailma sünni mõju keelefilosoofiale, kusjuures mitte vastupidi), siis võime tõmmata punktiirjoone pragmaatilise keeleparadigma juurest (mis enam ei kehti) sellele järgneva paradigma juurde, mida võiks nimetada hüperpragmaatiliseks keelekontseptsiooniks. Ja nimelt: keeleajalugu on tundnud ja tunneb puhtpragmaatilist keelekasutust, mille puhul üksikud sõnad või keelestruktuurid omavad reaalset mõju või saavad keelevälise reaalsuse osaks.

Kui tuua näiteid vanemast ajast, siis olid sellised verbaalsed lepingud Rooma õiguses. Tuntuim ja lihtsaim neist on stipulatsioon – ühepoolne tingimusteta lubadus. Lubada ei saagi teistmoodi, kui öeldes „ma luban". Tunnistajat ei saa vande all üle kuulata muidu, kui ta ei ütle eelnevalt „ma vannun" (kõnelda tõtt ja ainult tõtt jne). Selline oli keelepragmaatika selle äärmuses veel paarkümmend aastat tagasi. Tänapäeval on aga keeleosiseks saanud otsesed käsundid arvutile, millel puudub igasugune keeleväline tähendus – failid, laikimised, allalaadimised on keeles kasutatavad arvutikäsud. See on jõudnud isegi poliitilise sõnavara tasandile – USA ja Venemaa vaheliste suhete parandamise poliitikat nimetas Hillary Clinton *reset*'iks, kusjuures mitte kujundi, vaid praktiliselt teostatava poliitilise mehhanismi tähenduses. Teisisõnu jõuab hüperpragmaatiline keelekasutus küll tavalise keelekasutuse maailma, kuid eksisteerib sellest sõltumatult ja on seotud vaid ühemõõtmelise digimaailma ehk arvutiekraaniga.

Murdepunkti saab määratleda üsna täpselt: aasta 1984, mil Apple varustas „hiirega" oma Macintoshi masskasutus-arvuti ja lõi esimesed ekraani-ikoonid. Kui selle ajani oli arvutipragmaatika eristatud muust keelest seeläbi, et suhtlus masinatega toimus spetsiaalse arvutikeele (mille tundmine eeldas eriharidust) abil, siis nüüd arvutid demokratiseerusid – võtsid omaks tavakeele ja üldmõistetavad ikoonilised märgid ja tõid need tavakeelde tagasi juba nende eneste poolt kujundatud (või moonutatud) tähenduses. Nõustugem, et tuhat sõpra Facebookis ei ole ikkagi sõbrad selles tähenduses, nagu me seni oleme mõelnud. Selles kogu probleem peitubki: kas me suudame edaspidi säilitada või tagasi võita need keeleparadigmad, mida oleme seni väärtustanud ja mis moodustavad tegelikult meie kui inimese elu.

Tsiviilkohtumenetlus versus alternatiivne kohtuväline tsiviilasja lahendamine Eesti Vabariigis

Civil proceedings versus alternative out-of-court civil matter resolutions in the Republic of Estonia

Mare Merimaa

Abstract

John Rawls, a social philosopher from the 20th century, has said, 'There are long periods in the history of any society during which certain basic questions lead to deep and sharp conflict and it seems difficult if not impossible to find any reasoned common ground for political agreement.' He gave the post-Reformation wars of religion that took place in the 16th and 17th centuries as an example. To this day, we still see armed conflicts where the participating states cannot be brought to the negotiating table for peace talks. International armed conflicts undoubtedly also threaten the security of other states and the sense of safety of their citizens. These situations lead us to question why international law is so ineffective in the modern world order. Throughout history, legal disagreements that needed resolving have also arisen in civil matters. Many different methods have been used to solve these conflicts, including vigilante justice. In contrast, the German legal historian Professor P. Oestmann has explained the main features of court and procedural law history as follows: 'Any person who wants to impose their presumed legal interests arbitrarily and takes justice into their own hands, or uses self-help, violates the boundaries set by law.' Nevertheless, what he described is permitted in certain situations of the German Civil Code (Bürgeliches Gesetzbuch), such as in BGB subsection 229. Disagreements may also arise between companies when it comes to the interpretation and fulfilment of contracts. In these situations, the most viable solution is not always obvious. Is it better to take the issue to court or seek an agreement out of court? Different legal relationships may also create disputes between natural persons. In short, conflicts (lat. conflictus) may occur between states, legal entities and natural persons. It is the subject of this sociological research paper. Tallinn University's doctoral student K. Palts defines conflict as a 'Disagreement or misunderstanding that creates tension, which prompts partners to act against each other's interests. Conflict requires at least two sides and areas where their interests collide. But what lies behind a misunderstanding? In short, it is resources, which are limited by nature, and differences in needs, values, stances, interests or goals.' Mediation theorists A. Trossen, R. Hofmann and D.B. Rothfischer are of the opinion that specialised literature lacks a unifying definition for conflict. The word stems from the Latin conflictus, which means to collide. 'The goal of targeted conflict management is to reach a situation where the conflict is no longer progressed by the conflict itself but by its participants.' This means that conflicts, regardless of the participating sides, need to be solved. One important solution for defending one's position is to

go to court. According to subsection 15 of The Constitution of the Republic of Estonia, 'Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before a court, to request for any relevant law, other legal act or action to be declared unconstitutional.' Societal changes have a direct impact on the development of law. After the Estonian restoration of independence and joining with the European Union, the country undertook a judicial reform, which also impacted its substantive law and procedural law. Nowadays, disagreements can be solved using a variety of alternative methods, such as negotiations, expert opinions, arbitration, mediation and conciliation. The goal of this article is to highlight the benefits of solving civil disputes outside of court compared to civil proceedings and what the possibilities are for speeding up civil disputes at court.

Sissejuhatus

20.sajandi tuntud ühiskonnafilosoof John Rawls on avaldanud, et „iga ühiskonna ajaloos leiame pikki perioode, mille vältel teatud põhiküsimused viivad välja tõsise ja terava konfliktini ning näib olevat keeruline, kui mitte võimatu, leida mingitki põhjendatud ühist alust poliitiliseks kokkuleppeks."[367] Eelnimetatud autor tõi näitena 16. ja 17. sajandi reformijärgseid ususõdu.[368]

Ka tänapäeval toimuvad relvastatud konfliktid, kus sõdivaid riike ei ole võimalik tuua ühise laua taha rahuläbirääkimisteks. Kahtlemata selline riikidevaheline relvastatud konflikt ohustab ka teiste riikide julgeolekut ning inimeste turvatunnet. Siin tekib küsimus kas rahvusvaheline õigus ei peaks nüüdisajal olema efektiivsem?

Poolte vahel on läbi ajaloo tekkinud erinevaid vaidlusi ka tsiviilasjades, mis vajasid lahendamist. Selleks kasutati erinevaid viise, sealjuures ka omakohut, et oma õigust maksma panna. Saksa õigusajaloolane prof. P. Oestmann, käsitledes kohtupidamise ja protsessiõiguse ajaloo põhijooni, on avaldanud, et „kes tahab oma eeldatavaid õigushuve omavoliliselt maksma panna ja asub enese õigust oma käel ellu viima ehk kasutab omaabi, ületab õiguslikult lubatud piire."[369] Samas teatud olukorras on see näiteks lubatud Saksa tsiviilseadustiku Bürgeliches Gesetzbuch BGB § 229 alusel. [370]

Äriühingute vahel võivad tekkida lahkhelid lepingute tõlgendamisel ja nende täitmisel. Seega tekib küsimus, millist teed ette võtta. Kas pöörduda kohtusse või üritada leida kohtuvälises korras mõistlik lahendus?

Füüsiliste isikute vahel võivad tekkida väga erinevatest õigussuhetest tulenevad erimeelsused, mis vajavad lahendamist.

[367] J. Rawls. Õiglus kui ausameelsus. Taasesitus. Kirjastus Valgus. 2015, lk.29.
[368] Samas, viide lk. 29.
[369] P. Oestmann, õigusajaloo radadel: kohus ja protsess.Tartu Ülikool, 2023, lk.11
[370] Bürgerliches Gesetzbuch. BGB § 249. www.gesetze-im-internet.de (12. 12.2024)

Seega konfliktid (lad.k. conflictus)[371] võivad tekkida nii riikide, juriidiliste isikute kui ka füüsiliste isikute vahel. Konflikt on sotsioloogilise uurimuse objektiks.[372]

TÜ doktorant K. Palts on defineerinud konflikti kui „lahkheli või arusaamatust, mille tulemusena tekib pinge, mis ajendab partnereid üksteise vastu tegutsema. Konfliktiks peab olema vähemalt kaks osapoolt ja valdkonnad, kus nende huvid kokku puutuvad. Mis on arusaamatuse taga? Lühidalt öeldes ressursid, millest kõigile ei piisa ning erinevused vajadustes, väärtustes, hoiakutes, huvides või eesmärkides"[373].

Mediatsioonimenetluse teoreetikud A.Trossen, R.Hofmann ning D.B. Rothfischer on seisukohal, et ühtne konflikti definitsioon erialakirjanduses puudub. Sõna „ konflikt" tuleb ladinakeelsest nimisõnast c*onflictus*, mis tähendab üksteise vastu põrkumist. „Teadliku konfliktikäsitluse eesmärk on jõuda olukorrani, kus konflikti kulgu ei määra enam konflikt ise, vaid selles osalevad inimesed"[374].

Siit tuleneb, et konflikt olenemata kelle vahel see aset leiab, vajab lahendamist.

Üheks oluliseks võimaluseks oma õiguste kaitseks on pöörduda kohtusse, mis on põhiõigus. Eesti Vabariigi põhiseaduse § 15 kohaselt „igaühel on õigus pöörduda oma õiguste ja vabaduste rikkumise korral kohtusse. Igaüks võib oma kohtuasja läbivaatamisel nõuda mis tahes asjassepuutuva seaduse, muu õigusakti või toimingu põhiseadusevastaseks tunnistamist.[375]"

Muutused ühiskonnas avaldavad otsest mõju õiguse kujunemisele Seoses Eesti Vabariigi taasiseseisvumisega ning Euroopa Liitu astumisega toimus kohtureform ning aset leidsid muutused nii materiaalõiguses kui ka menetlusõiguses.

Tänapäeval on vaidluse lahendamiseks erinevad alternatiivsed võimalused nagu läbirääkimised, eksperdi arvamused, vahekohus, vahendajad ja lepitajad.

Käesolevas artiklis on autor seadnud eesmärgiks välja tuua, millised eelised on kohtuvälises korras tsiviilvaidluse lahendamisel võrreldes tsiviilkohtumenetlusega ning millised võimalused on tsiviilvaidluse lahendamise kiirendamiseks kohtus.

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[371] : Konflikt (ladina keelest *conflictus*) onhuvide või väärtushinnangute kokkupõrge. [371] Arvutivõrgus: https://et.wikipedia.org/wiki/Konflikt (1.10.2024).

[372] ": Konfliktiteooria on sotsioloogilise uurimise vaatenurk, mis põhineb eeldusel, et ühiskond on keeruline süsteem, mida iseloomustab ebavõrdsus ja konflikt, mis põhjustab ühiskondlikku muutust. Konfliktiteoreetikutest on tuntumad: Max Gluckman ja John Rex (Suurbritannia); Lewis A. Coser ja Randall Collins (USA); Ralf Dahrendorf (Saksamaa, hiljem Suurbritannia); Ludwig Gumplovicz (Poola); Vilfredo Pareto (Itaalia); Karl Marx ja Georg Simmel (Saksamaa). Arvutivõrgus: https://et.wikipedia.org/wiki/Konfliktiteooria (1.10.2024).

[373] K..Palts. Konfliktist ja selle lahendamise viisidest. Arvutivõrgus: https://tnk.tartu.ee/Okonfliktist.html (25.09.2024.)

[374] A. Trossen, R.Hofmann. D.B. Rothfischer. Õppematerjal kohtunikele 2008. MEDIATSIOON Mediatsiooni teoreetilised ja praktilised alused. Tartu 2008. lk.16.

[375] Eesti Vabariigi põhiseadus. RT I, 15.05.2015, 2.

Kohtumenetlus tsiviilõiguslikes vaidlustes

Eesti Vabariigi põhiseaduse § 146 kohaselt mõistab õigust ainult kohus. Kohus on oma tegevuses sõltumatu ja mõistab õigust kooskõlas põhiseaduse ja seadustega.[376]

"Demokraatlikus riigis on oluline riigivõimu osade lahususe ja tasakaalustamise põhimõte. Traditsioonilise võimude lahususe teooria eristab alates Montesquieu`st ja Locke`st kolme iseseisvat riigivõimu osa: seadusandlikku, täidesaatvat ja kohtuvõimu"[377]

E. Kergandberg, kommenteerides kohtute seaduse (KS) § 2 lg 1, mis sätestab, et õigust mõistab ainult kohus, on seisukohal, et lõppkokkuvõttes otsustab riigis õigusliku vaidlusküsimuse õigusrahu tagavalt kohus.[378]

Tsiviilkohtumenetluse kiirendamise võimalused

Tsiviilkohtumenetluse seadustiku (TsMS) § 1 teise lause kohaselt tsiviilasi on eraõigussutest tulenev kohtuasi.[379] TsMS § 2 kohaselt on tsiviilkohtumenetluse ülesandeks tagada, et kohus lahendaks tsiviilasja õigesti, mõistliku aja jooksul ja võimalikult väikeste kuludega.**[380]** Selles sättes sisaldub menetlusökonoomia põhimõte, mida kohtud peavad järgima.

Riigikohtu esimees V. Kõve oma ettekandes "Ülevaade kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kohta" Riigikogule 2024.a. kevadistungjärgul tõi välja nii kohtusüsteemi toimimise positiivsed aspektid kui ka probleemid, mis vajavad lahendamist.[381]

V. Kõve rõhutas, et "viimases õigusemõistmise võrdlustabelis „Justice Scoreboard 2024" paigutatakse Eesti kohtusüsteem tõhususes ja menetluste kiiruses rahvusvahelises vaates jätkuvalt Euroopa Liidu riikide etteotsa. Eesti asub esimeses kohtuastmes tsiviil- ja haldusasjade lahendamiseks kuluva koguaja võrdluses endiselt Taani järel teisel kohal. Eesti kohtumenetluse kiirus kolmes kohtuastmes tsiviil- ja kaubandusasjades on võrreldes eelmise aastaga ühe koha võrra langenud, olles nüüd seitsmendal kohal. Haldusasjade menetlemise kiiruselt paikneme Euroopas kõikides kohtuastmetes kuuendal kohal (eelmisel aastal neljandal). Seejuures on meie riigi rahaline panus kohtusüsteemi ning kohtunike ja advokaatide arv 100 000 elaniku kohta pigem tabeli viimases kolmandikus. Paraku on asjade lahendamise menetlustähtajad võrreldes eelmise aastaga pikenenud. Ka on kohtusse jõudnud asjade arv 2023. aastal olnud valdkonniti väga erinev. Usaldus kohtusüsteemi vastu on kõrgel tasemel."[382].

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[376] Samas, viide 7.

[377] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. Juura, 2002, lk 608..§ 146 komm. (U. Lõhmus).

[378] Kohtute seadus. Kommenteeritud väljaanne Juura, 2008, komm.§ 2. lk.36-37 (E.Kergandberg)

[379] Tsiviilkohtumenetluse seadustik. RT I, 22.03.2024, 8.

[380] Samas, viide 11

[381] V. Kõve. Ülevaade kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kohta. RT III,19.06.2024,1.

[382] Samas, viide 15.

Esimese ja teise astme kohtute menetlusstatistika järgi saabus 2023.a. Eesti maakohtutesse kokku 35 116 tsiviilasja, sellest Harju Maakohtusse 17539 tsiviilasja ehk 49,9%, ning lahendati kokku 33517 tsiviilasja. Keskmiseks menetlusajaks oli 106 päeva.[383]

Kohtute menetlusstatistikast järeldub, et Eestis on tsiviilasjade menetlus tõhus, kuid tegemist on keskmise menetlusajaga, mis tähendab, et tsiviilvaidluses võib asja lahendamine kesta ka aastaid[384].

Eestis on kokku 261 kohtuniku ametikohta. Probleemina tõi V. Kõve esile, et kohtunike hulgas toimub põlvkonnavahetus. „Aastatel 2020-2023 on ametisse tulnud 56 uut kohtunikku ning viie aasta jooksul on õigus jääda pensionile veel 53 kohtunikul. Probleemiks on uute kohtunike ja kohtuametnike leidmine, kuna huvi seoses kohtunike suure töökoormusega ei ole ülemäära suur ning kohtuniku ametisse pürgijate õigusteadmiste tase on ebapiisav.“[385]

Autor võib oma kohtuniku töökogemuse põhjal kinnitada, et kohtuniku ametisse kinnitamisega ei olda veel valmis kohtunik. Selleks kulub aastaid, et töö käigus omandada kohtunikutööks vajalikud teadmised ja oskused. Seega on kohtunikutöös kogemuste omamine väärtus, mida tuleks arvesse võtta sotsiaaltagatiste kehtestamisel ning nende tühistamisel, et see amet oleks atraktiivne ning soovitakse kohtunikuks saada. Kahjuks kohtute seadust muudeti ning arvates 01.07.2013 kohtunike sotsiaaltagatised tühistati nii kohtuniku pensioni, puhkuse kestuse, töövõimekaotuspensioni osas. Leian, et see oli viga, mida on raske taastada. Kuni 01.07.2013 sätestas kohtute seaduse § 77 kohtuniku pensioni, milleks olid: kohtuniku pension, kohtuniku väljateenitud aastate pension; kohtuniku töövõimetuspension ning kohtuniku perekonnaliikme toitjakaotuspension.[386] 01.07 2013 jõustunud kohtute seaduse muudatusega paragrahv 77 tühistati.[387]

Euroopa Liidu liikmeriikides on loodud kohtunikele erinevad sotisaaltagatiste süsteemid. Meie naaberriikides Leedus, Lätis kehtib kohtunike sotsiaaltagatisena jätkuvalt ka kohtunike pension. Eesti Kohtunike Ühing on esitanud korduvalt taotlusi kohtute seaduse muutmiseks. Kui kohtunike ametikohtadele on raske leida sobivaid kandidaate, siis tuleks mõelda, kuidas seadusandlikult muuta antud ametikoht atraktiivsemaks.

Asjaolu, kui oluline on kohtunike ametialane iseseisvus oli aruteluobjektiks ka Eesti Vabariigis iseseisvusperioodil. Prof. J. Uluots võrdles Eesti Vabariigi iseseisvusperioodil kehtinud seadustikku ja tsiviilkohtupidamise seadustiku eelnõud ning tõstis esile kohtuvõimu eraldamist administratiiv- ja seadusandlikust

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[383] Maa-, haldus- ja ringkonnakohtute interaktiivne menetlusstatistika. Arvutisvõrgus: https://www.kohus.ee/eesti-kohtud/kohtute-menetlusstatistika (15.10.2024)

[384] Riigikohtu 17.04.2024 määrusega nr 2-17-124505 lahendati vaidlus menetluskulu suuruse kindlaksmääramise osas. Hagiavaldus esitati 21.12.2017. Seega tsiviilasja menetlus koos menetluskulu kindlaksmääramisega kestis kokku üle 6 aasta.

[385] Samas viide13.

[386] Kohtute seadus. RT I 04.03.2011,6.

[387] Kohtute seadus RT I 1,09.01.2024,4.

võimust ning kohtuniku ametialase iseseisvuse tagamist, võistlevuse põhimõtte arendamist, menetluseavalikkust, vahendituse ja suulisuse põhimõtet.[388]

V. Kõve ettekanne sisaldas mõtet kohtunike spetsialiseerumisest ning kohtupraktika ühtlustamisest. Autor toetab eeltoodud ettepanekut. Teatud valdkondades on Eesti maakohtutes juba toimunud spetsialiseerumine, s.o maakohtutes arutavad kriminaalasju ja tsiviilasju ainult teatud kohtunikud ning ka tsiviilasjades pankrotiasju teatud kohtunikud. Samuti on ringkonnakohtutes kohtunikud spetsialiseerunud kas tsiviilasjade, kriminaalasjade või haldusasjade arutamisele vastavates kolleegiumides.

Pankrotiseaduses (PankrS) muudeti kohtualluvust. Nimelt Pankr S § 4 lg 2 kohaselt füüsilisest isikust võlgniku maksejõuetusavaldus esitatakse kohtule füüsilise isiku maksejõuetuse seaduse §-s 5 sätestatu kohaselt. Kui juriidilisest isikust võlgniku asukoht on Harju maakonnas, esitatakse pankrotiavaldus Harju Maakohtule. Muul juhul esitatakse pankrotiavaldus juriidilisest isikust võlgniku osas pankroti väljakuulutamiseks Tartu Maakohtule. Nimetatud säte jõustus 01.07.2022.[389]

Pankrotiasjades spetsialiseerumine on autori arvates igati mõistlik. Pankrotiasjad nõuavad kohtunikult peale õigusalaste teadmiste ka teiste vajalike teadmiste omamist, sealhulgas raamatupidamisalaseid teadmisi ning kogemusi pankrotiasjade menetlemisel.

Autori arvates oleks mõistlik spetsialiseerumine ka töövaidlustes ning lapse õigusi puudutavates vaidlustes. Spetsialiseerumine võib probleemiks kujuneda kohtumajades, kus on suhteliselt vähe kohtunikke.

Kohtupraktika ühtlustamine on oluline mitte ainult kohtunike vaid ka menetlusosaliste jaoks, et kaaluda kas üldse on perspektiivikas esitada vastav hagiavaldus või avaldus, kui on teada, milline on analoogsetes asjades kohtupraktika. See hoiaks kokku nii riigi kui ka menetlusosaliste raha. Stabiilse kohtupraktika kujunemisele võib takistuseks olla õigusnormide sage muutmine, mida on aastaid erinevatel konverentsidel kritiseeritud. Autor eeldaks, et enne seaduse muutmist oleks toimunud asjakohane analüüs, kas seaduse muudatus on kooskõlas Eesti Vabariigi põhiseadusega ning milliseid tagajärgi seaduse muudatus kaasa toob nii majanduslikust kui sotsiaalsest aspektist. Kahjuks selliseid põhjalikke analüüse on autoril õnnestunud näha suhteliselt vähe. Autori arvates seaduse eelnõu seletuskirjast üksnes ei piisa, et põhjendada uue seaduse või selle muutmise vajalikkust.

Kohtusüsteemis on avardunud uute tehniliste vahendite kasutamine. Suhtlemine menetlusosalistega toimub elektrooniliselt ning suurenenud on audio ja videokonverentside kasutamine. Uued asjakohased tehnilised võimalused aitavad kaasa menetlust kiirendada, leida asjakohast kohtupraktikat ning õigusakte. See aitab kaasa kohtumenetluse tõhususele. Infotehnoloogilise arengu

[388] J. Uluots. " Tsiviilkohtupidamise seadustiku eelnõu": XII Õigusteadlaste päeva protokollid. Õigus. Tartu,1933. Lk. 44

[389] Pankrotiseadus. RT I, 20.06.2022, 1.

tempo toob jätkuvalt kaasa uusi tehnilisi võimalusi, näiteks arutletakse tehisintellekti kasutamise võimaluste üle kohtusüsteemis.

2023. a avaldati Euroopa Kohtunike Konsultatiivnõukogu (Consultative Council of European Judges, CCJE), kes on Euroopa Nõukogu nõuandev organ, arvamust õigusemõistmise tehniliste abivahendite kasutamise osas.390

Harju Maakohtu kohtunik M. Eerik on välja toonud, et tehisintellekti kasutuselevõtt tekitab küsimusi kohtusüsteemi sõltumatuse osas. "Maailmas arendab tehisintellekti mõni üksik suurearendaja, mis võib avaldada õigusemõistmisele ebakohast mõju. Lisaks nõuavad andmekaitse ja infoturve pidevat kontrolli, mida kohtuvõim üldjuhul teha ei suuda. Kui aga järelevalve ja arendus on antud täitevvõimu alluvuses olevale asutusele (Eestis näiteks Riigi Infosüsteemi Amet ning Registrite ja Infosüsteemide Keskus), võib see ohustada kohtute sõltumatust. Mõnes riigis on tekkinud juba esimesed probleemid. Näiteks Portugalis jagatakse kohtuasju kohtunike vahel algoritmi alusel, mille toimimist ei suudeta kohtunikele seletada. Tehisintellekti suurem kasutuselevõtt vähendab kohtumenetluse läbipaistvust veelgi, näiteks kui algoritmipõhine masin teeb vaidlusalustest asjaoludest ja nendega haakuvatest tõenditest vaid valiku. Võib juhtuda, et kuigi tehisintellekt on mõeldud kohtuniku abistamiseks, muutub ta de facto otsustajaks. Tehnikat pimesi usaldavat kohtusüsteemi ei saa pidada sõltumatuks."391

Autor nõustub eeltooduga, et kohtute ning kohtunike sõltumatus on oluline põhiseaduslik väärtus, mida tuleb silmas pidada ka uute tehniliste vahendite kasutusele võtmisel.

Ametisse nimetamisel annab kohtunik vande, mille tekst on KS § 56 lg 1 kohaselt järgmine: „Tõotan jääda ustavaks Eesti Vabariigile ja tema põhiseaduslikule korrale. Tõotan mõista õigust oma südametunnistuse järgi kooskõlas Eesti Vabariigi põhiseaduse ja seadusega ."392

Siit tuleneb, et kohtunik peab õigust mõistma oma südametunnistuse järgi, kuid kooskõlas Eesti Vabariigi põhiseaduse ja seadustega. 393

See säte sisaldab sügavat mõtet, et kohtunikul on kohustus kohaldada õiget materiaalõigusnormi ning järgida menetlusõigusnorme. Seejuures esimese ja teise astme kohtu kohtunikul on kohustus tuvastada asjaolusid, hinnata seaduse nõuete kohaselt tõendeid ning sellest tulenevalt langetada põhjendatud ja õige ning õiglane otsus.

A, Aarnio on tabavalt sõnastanud, et kohtuniku vastutus on vastutus põhjendamise eest.394

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390 CJE Opinion No. 26 (2023): Moving forward: the use of assistive technology in the judiciary. Arvutivõrgus: https://rm.coe.int/ccje-opinion-no-26-2023-final/1680adade7 (11.11.2024).

391 M.Eerik. Euroopa Kohtunike Konsultatiivnõukogu tegevus 2023. aastal.Arvutivõrgus: https://aastaraamat.riigikohus.ee/(11.11.2024).

392 Kohtute seadus. RT I, 04.01.2024,4.

393 Kohtute seadus. Kommenteeritud väljaanne. Juura 2008, lk 280 § 56 komm. (V. Saarmets).

394 J. Virolainen. P. Martikainen.Pro&contra Tuomion perustelemisen keskeisiä, Talentum, Helsinki 2003 lk.5 Moto1:

Kohtunike nõupidamistel on korduvalt rõhutatud, et otsus peab olema põhjendatud ning ei pea olema mitte ainult õige, vaid ka õiglane.

Tekib küsimus, kuidas saaks tehisintellekt kaaluda õiglase lahendi tegemist? Autori arvates on see praktiliselt võimatu.

Mis on õiglus ja milline on selle mõõdupuu on olnud filosoofide vaidlusobjektiks.395 E. Grauberg ja I. Grauberg on avaldanud, et „ seadusi võib olla erinevaid. Just mitteõiguspärase seaduse rakendamine on see, mis võib viia ebaõigluseni.“396. Kohtunikul, kes näeb, et seadus, muu õigusakt on vastuolus põhiseadusega, on kohustus sellist seadust mitte kohaldada ning teha Riigikohtule taotlus tunnistada seadus põhiseadusega vastuolus olevaks (PS § 15 lg 2). 397 Põhiseaduse tõhusa kaitse üheks mehhanismiks on U. Lõhmus pidanud üldist kohtusse pöördumise õigust ning õigust tunnistada põhiseadusvastaseks iga õigusakt või toiming, mis rikub põhiseaduses sätestatud õigusi ja vabadusi.398

Kohtunikul on otsust kirjutades põhjendamise kohustus, miks ta leiab, et antud vaidluses tuleb lähtuda mitte ainult õigusest vaid ka õiglusest. Näiteks kui kehtestatud riigilõivu määr on ebamõistlikult suur ning ebaõiglane ja võtab isikult võimaluse oma õiguste kaitseks kohtusse pöörduda. Selline olukord tekkis Eestis majanduskriisi perioodil, kui riik otsis võimalusi eelarvet täita. Ühe võimalusena nähti riigilõivumäärade tõstmist, mis kokkuvõttes tõi kohtule kaasa lisa töökoormuse ning Riigikohtule arvukaid taotlusi riigilõivumäärade põhiseadusega vastuolus olevaks tunnistamiseks.399

Riigikohtu esimees V. Kõve osales 9.-11.10.2024 Dublinis iga-aastasel Euroopa Õigusinstituudi konverentsil ja jagas ettekandes Eesti kohtusüsteemi digiteerimise kogemusi ja tõi esile kitsaskohad.”[400]

V. Kõve avaldatu kohaselt oldi seisukohal, et “peame hoiduma sisulise mõistmise üleandmisest masinale ehk süsteemi keskmesse peab jääma inimotsustus. Küll aga võimaldab uus tehnoloogia oluliselt kiiremini asju lahendada ja menetlusosaliste võrdset kohtlemist ning lahendite kvaliteeti parandada.“ [401]

“Tuomarin vastuu on perusteluvastuuta” Aulis Aarnio, professori (1985).

[395] R.Dworkin. Õiguse impeerium. Kõrvalepõige: õiglus. Kirjastus Valgus, 2015 lk.106-109.

[396] E. Grauberg. I. Grauberg. Tõe ja õiguse legitimeerimise modernistlikust piirist. Kirjastus Argo, 2017. lk..56.

[397] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. Juura, Õigusteabe AS. 2002. lk.136-146. §15 komm. (Prof.K.Merusk,LL.M M.Ernits,prof H.Lindpere,mag.jur. L.Madise).

[398] U.Lõhmus. Õigusriik ja inimese õigused. Tartu 2018,lk.70.

[399] Näiteks: Riigikohtu põhiseaduslikujärelevalve kolleegiumi 22.10.2013 kohtuotsusega nr 3-4-1-31-13 tunnistati põhiseadusega vastuolus olevaks riigilõivuseaduse (RT I 2006, 58, 439; RT I, 22.12.2010, 1) § 56 lõige 1 ja lisa 1, milles tsiviilasjas hinnaga üle 6 000 000 krooni kuni 7 000 000 krooni tuli hagiavalduselt tasuda riigilõivu 240 000 krooni.

[400] V.Kõve Lühikokkuvõte Dublini konverentsist. Arvutivõrgus: https://www.riigikohus.ee/et/uudiste-arhiiv/riigikohtu-esimees-jagas-dublinis-eesti-kogemusi-kohtususteemi-digiteerimisel(11.11.2024).

[401] Samas Viide 29.

Märkus: Euroopa Õigusinstituut (ELI) on üleeuroopaline organisatsioon, mis ühendab silmapaistvaid õigusspetsialiste erinevatest valdkondadest. Instituudi eesmärk on täiustada Euroopa õigust praktiliste projektide kaudu. ELI korraldab ka iga-aastaseid konverentse ja kohtumisi, tuues kokku juhtivad eksperdid erinevatest õigusvaldkondadest.

Tuleb nõustuda, et uute asjakohaste tehniliste võimaluste kasutamine saab menetlust kiirendada, kuid jällegi peab siin autori arvestama mitte ainult kohtu töö kergendamisega, vaid ka menetlusosaliste õigustega, et nad oleksid võimelised kasutama uuendatud tehnilisi vahendeid.

Eesti Vabariigis on kolmeastmeline kohtusüsteem. Tsiviilkohtumenetlus rajaneb õigusajaloolisel põhimõttel ***da mihi facta, dabo tibi ius*** (anna mulle faktid ja mina anna sulle õiguse). Siit tuleneb, et faktiliste asjaolude esitamise ülesanne on menetlusosalisel ning õiguse tundmise ülesanne kohtunikul ***iura novit curia*** (kohus tunneb õigust). Eelnimetatud põhimõte on sätestatud TsMS § 436 lg-s 7, mille kohaselt kohus ei ole seotud otsust tehes poolte esitatud õiguslike väidetega.

Tsiviilkohtumenetluse seadustiku (TsMS) kohaselt esimese ja teise astme kohtus ei pea menetlusosalisel olema lepingulist esindajat. Samas TsMS sätted on keerukad ning ilma õigusteadmisteta on kohtus üpris raske hakkama saada.[402] Seda eriti apellatsioonimenetluses, kus Eesti on valinud tsiviilasjades piiratud apellatsioonimenetluse. See tähendab, et apellatsioonikohus kontrollib esimese astme kohtu otsuse seaduslikkust ja põhjendatust üksnes ulatuses, mille osas on kaebus esitatud ning uute asjaolude ja tõendite esitamine on piiratud. TsMS § 633 lg 5 järgi kui apellatsioonkaebuse põhjendamiseks nimetatakse uusi asjaolusid ja tõendeid, tuleb apellatsioonkaebuses märkida uute asjaolude ja tõendite esimese astme kohtus esitamata jätmise põhjus. See eeldab, et menetlusosalised on teadlikud menetlusõiguse normidest ja esitavad maakohtus kõik vaidlust puudutavad asjaolud ja asjakohased tõendid õigeaegselt. Kohtupraktika näitab, et mitte kõikidel menetlusosalistel ei ole majanduslikel põhjustel võimalik võtta endale lepingulist esindajat.

Kui menetluskuluna riigilõivu suurus on ettenähtav tulenevalt riigilõivuseadusest, siis lepingulise esindaja kulu seda kahjuks ei ole.[403]

Vandeadvokaat A.Nõmper on välja toonud tööandjate vaates Eesti kohtusüsteemi plusse ja miinuseid ning võttis selle kokku lausesse: „Kriminaalmenetluses menetletakse osalejad surnuks ja tsiviilmenetluses vaeseks.”[404]“Tuleb nõustuda A. Nõmperiga, et tsiviilvaidluse lahendamine kohtus võib menetlusosalise jaoks kujuneda üpris kulukaks.

Christoph G. Paulus on avaldanud, et tsiviilprotsessiõiguse koht õigusvaldkonnas seondub vaidlusega ning vastutustundlikult tegutsev advokaat peab selgitama õiguslikku olukorda ning suunama vaidluse osapooled kohtuvälisele kokkuleppele.[405]

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[402] Tsiviilkohtumenetluse seadustik.RTI,22.03.2024,8.

[403] Harju Maakohtu 10.10.2024 tagaseljaotsusega asjas nr 2-24-12834 mõisteti parkimistrahv välja suuruses 55 eurot ja menetluskulu 230 eurot.
Riigikohtu 17.04.2024 kohtumäärusest nr 2-17-124505 ilmneb, et hageja nõue rahuldati 3000 euro osas, millele lisandus viivis 125,34 eurot ning edasiulatuv viivis. Menetluskuluna mõisteti välja Tallinna Ringkonnakohtu otsusega 10374,68 eurot, millises osas otsus jäi ka jõusse.

[404] A. Nõmper. Menetletakse surnuks või vaeseks. Juridica 2024/5 ,lk.389-396.

[405] Chisttoph G. Palulus. Tsiviilprotsessiõigus. Juura, Tallinn 2002, lk.3.

Riigikohus on ka apellatsioonimenetluse osas juhtinud tähelepanu selgitamiskohustuse täitmisele ringkonnakohtu poolt. Autor põhimõtteliselt nõustub sellega, kuid õiguslikuks küsimuseks on, kus on need piirid apellatsioonkaebuse läbivaatamisel, kui Eesti on valinud nimelt piiratud apellatsioonimenetluse mudeli. See tähendab, et hageja ei saa apellatsioonkaebuse menetluses ringkonnakohtus esitada uusi asjaolusid ega muuta hagi alust ja eset.[406]

Määruskaebuste puhul on tegemist hagita menetlusega, kus menetlus toimub uurimispõhimõttel ning kohtuniku roll menetluses on aktiivsem. Seetõttu TSMS § 662 lg 3 järgi võib määruskaebuse põhjendamiseks esitada ka ringkonnakohtule uusi asjaolusid ja tõendeid.[407]

Üheks võimaluseks tsiviilasjade lahendamise kiiremaks menetlemiseks on seadusandlikud võimalused eraõigussuhtest tuleneva võla ning alaealise lapse elatise nõuetes, milleks on maksekäsu kiirmenetlus. Maksekäsu kiirmenetluse eesmärgiks on menetluse lihtsustamine, kiirendamine ning menetluskulude vähendamine. Tegemist on formularipõhise elektroonilise menetlusega, mis on suunatud täitedokumendi saamisele. Pärnu Maakohtu Haapsalu kohtumaja kohtunikuabide pädevusse kuulub täitedokumentide väljastamine eelnimetatud menetluses (TsMS § 22¹ ja 108)[408] .

Tegemist peab olema selge rahalise nõudega, mis on muutunud sissenõutavaks ning lahendamine toimub lihtsustatud korras elektrooniliselt, kasutades välja töötatud menetlusdokumentide blankette.

TsMS § 481 lg 2² kohaselt maksekäsukiirmenetluse korral rahaline nõue ei tohi ületada 8000 eurot, mis hõlmab nii põhi-kui kõrvalnõudeid. Lapsele elatisenõue ei tohi ületada TsMS § 491 lg 2 kohaselt igakuist nõutavat elatist perekonnaseaduse § 101 lõikes 3 sätestatud elatise baassummat üle 1,5 korra. Menetlusstatistika näitab, et maksekäsu kiirmenetlus toimib ning maakohtusse laekus 2023.a. märkimisväärne arv maksekäsu kiirmenetluse avaldusi. Nimelt 51072 avaldust, kui samal perioodil tsiviilasju saabus maakohtusse kokku 35 116 asja[409].

Piiriüleste varaliste nõuete puhul kehtib Euroopa Liidus Euroopa Parlamendi ja nõukogu määrus (EÜ) nr 1896/2206, mille eesmärgiks on kiirendada ja lihtsustada rahaliste nõuete puhul lahendi tegemist. Erinevalt TsMS § 481 lg-st 2² Euroopa maksekäskude puhul ei ole rahalise nõude piirmäära ning teises Euroopa Liidu liikmesriigis täitmiseks ei ole vaja läbida eelnevat erimenetlust lahendi tunnustamiseks ja täidetavaks tunnistamiseks.[410] Seda on pidanud oluliseks

[406] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. Juura 2002, lk 622. § 149. komm. (U. Lõhmus).
[407] Tsiviilkohtumenetluse seadustik. RT I, 22.03.2024, 8.
[408] Tsiviilkohtumenetluse seadustik III. Juura 2018. lk.130 komm. (I. Järvekülg, V.Kõve, K.Vainola.).
[409] Maa-, haldus- ja ringkonnakohtute 2023. aasta menetlusstatistika kokkuvõte. Arvutivõrgus: https://aastaraamat.riigikohus.ee/maa-haldus-ja-ringkonnakohtute-2023-aasta-menetlusstatistika-kokkuvote/(11.11.2024)
[410] Euroopa Parlamendi ja nõukogu määrus (EÜ) nr1896/2006, 12.detsember 2006 , millega luuakse Euroopa maksekäsumenetlus *ELT L 399, 30.12.2006.*

määruse täitmise eesmärgiks M. Torgo, kes on seisukohal, et tänu *exequatori* kaotamisele on Euroopa maksekäsku võimalik lihtsamalt maksma panna.[411]

Euroopa Parlamendi ja nõukogu määruse (EÜ) nr 1896 /2006 preambula punktis 6 on rõhutatud, et „tõrgeteta ja tõhus maksmata võlgade sissenõudmine, mille puhul ei esine õiguslikke vastuolusid, on üliolulise tähtsusega Euroopa Liidu ettevõtjate jaoks, kuna maksete hilinemine on peamine maksejõuetuse põhjus, mis ohustab ettevõtjate, eelkõige väikeste ja keskmise suurusega ettevõtjate, püsimajäämist ja põhjustab suure hulga töökohtade kadumise."[412]

Kahtlemata äritegevuses on oluline sissenõutavaks muutunud rahaliste nõuete kiirem laekumine, mis vähendab ka võimalikke pankrotimenetlusi.

Samas on V.-P. Liin näinud õiguslikku probleemi maksekäsumenetluse osas, kui tegemist on tarbijakrediidilepinguga. „Maksekäsu kiirmenetlus on formaliseeritud menetlus kindla rahasumma nõudmiseks, mis hagimenetlusega võrreldes võimaldab kiiremalt, lihtsamalt ja odavamalt täitedokumendi saada. Kohus sisuliselt nõuet ei kontrolli. ning krediidiandja ei pea välja tooma, et on järginud vastustundliku laenamise põhimõtet." V.-P. Liin on seisukohal, tulenevalt Euroopa Liidu tarbijate kaitse lepingulistes suhetes direktiivist peaks kohus kontrollima vastutustundliku laenamise põhimõtte järgimist[413]. Käesoleva artikli autor nõustub antud seisukohaga.

Kokkuvõtvalt kohtusse pöördumisel tuleb menetlusdokumendi esitamisel arvestada alljärgnevaga:

1. tuleb järgida menetlusdokumentidele esitatud nõudeid ning esitada kõik asjakohased asjaolud ning tõendid maakohtus õigeaegselt;
2. asja menetlus võib kujuneda pikemaks, kui menetlusosaline eeldab;
3. menetlus võib kujuneda kulukaks;
4. menetlusosaline ei pruugi saada oodatud lõpplahendust;
5. kaaluda tuleks kas kompromissi sõlmimine ei oleks mõistlik lahendus vaidluse lõpetamiseks.

Kompromiss kui võimalik lahendus tsiviilkohtumenetluse

Üheks võimaluseks täita menetlusökonoomia põhimõtet on menetlusosaliste vahel kompromissi sõlmimine, mille osas on TsMS § 4 lg 4 pannud kohtule kohustuse olla menetluses aktiivne, et menetlusosalised jõuaksid kokkuleppele.

Nimelt TsMS § 4 lg 4 kohaselt „kohus peab tegema kõik endast sõltuva, et asi või selle osa lahendataks kompromissiga või muul viisil poolte kokkuleppel, kui

[411] M.Torgo Euroopa maksekäsumenetlus-lihtne viis rahvusvaheliste tsiviilnõuete maksmapanemiseks. Juridica V/2013, lk.329.

[412] Viide 40

[413] V.-P..Tarbijakrediit vs.tsiviilkohtumenetlus: Tarbijakrediit vs. tsiviilkohtumenetlus: aeg viia vastutustundliku laenamise põhimõtte järgimise kontroll Euroopa Liidu õigusega kooskõlla. Juridica 3/2023. lk.227-229.

see on kohtu hinnangul mõistlik. Kohus võib selleks muu hulgas esitada pooltele kompromissilepingu projekti või kutsuda pooled isiklikult kohtusse, samuti teha neile ettepaneku vaidluse kohtuväliseks lahendamiseks või lepitaja poole pöördumiseks. Kui kohtu hinnangul on see kohtuasja asjaolusid ning senist menetluskäiku arvestades asja lahendamise huvides vajalik, võib ta kohustada pooli osalema lepitusseaduses sätestatud lepitusmenetluses."[414]

Saksa õiguskirjanduses on erinevad teooriad kompromisside õigusliku olemuse kohta.

„Materiaalõiguslik teooria – kompromiss on suunatud materiaalõigusliku olukorra ümberkujundamisele ning kohtumenetluse lõpetamisele, mis ei ole aga omaette eesmärk.

Protsessuaalne teooria – käsitleb kompromisse eelkõige menetlustoiminguna**.**

Kompromissi topeltteooria – kompromiss on eri liiki tehing, mis sisaldab elemente menetlustoimingutest ja tsiviilõiguslikest tahteavaldusest ning toob kaasa nii menetlus- kui materiaalõiguslikke tagajärgi.

Eraldamisteooria – kompromiss kujutab endast kahte lepingut, üks on menetlusõiguslik ja on suunatud menetluse lõpetamisele ja teine materiaalõiguslik, mis on sunnatud vaidluse lahendamisele materiaalõigusliku olukorra muutmise teel. Viimased kaks teooriat on Saksa õiguses aktuaalsed"[415]. Menetlusõiguslikult on tegemist menetluse lõpetamisele suunatud menetlustoiminguga poolte vahel ning poolte ja kohtu vahel."[416]

Sõlmitud kokkulepe on materaalõiguslikus mõttes kompromissileping võlaõigusseaduse (VÕS) § 578 lg 1 tähenduses, mille kohaselt kompromissileping on leping õiguslikult vaieldava või ebaselge õigussuhte muutmise kohta vaieldamatuks poolte vastastikuste järeleandmiste teel. Ebaselguseks loetakse muu hulgas ka ebakindlust nõude sissenõutavuse suhtes.[417]

Pooled sõlmivad kokkuleppe ning kohus kinnitab selle. Seejuures peab kohus kontrollima, et kokkulepe ei oleks tühine ning vastab pooltevahelisele soovile vaidlus lõpetada. Autori arvates on kokkulepe sõlmimisel oluline, et selle sisust ja õiguslikust tagajärjest saavad pooled üheselt aru (TsMS § 431 lg 1). Kohtu selgitamiskohustus on eriti oluline siis, kui ühel menetlusosalisel on õigusteadmisi omav esindaja, teisel aga mitte.

Kompromisside sõlmimise soodustamiseks peavad kohtunikul olema lisaks õigusalastele teadmistele ka psühholoogiaalased teadmised, et suunata vaidlevad pooled üksteist ära kuulama ja ning kaaluma kompromissi sõlmimise

[414] Tsiviilkohtumenetluse seadustik.RTI,22.03.2024,8.

[415] Tsiviilkohtumenetluse seadustik II. Kommenteeritud väljaanne. Tallinn 2017. lk. 957-959, viide MüKoZPO/Wolfsteiner. änr 12. (2013) § 430 komm. (I. Järvekülg, V. Kõve).

[416] Samas, viide 44.

[417] Võlaõigusseadus. RT I, 04.07.2024, 18.

võimalikkust. Sellisele järeldusele jõudis autor juba 2008. a. oma uurimuses küsitledes kohtunikke kompromisside sõlmimise probleemide kohta.[418]

Kohtute menetlusstatistikas ei kajastu kahjuks kompromisside arv. Justiitsministeeriumist saadud andmetel on kompromisse sõlmitud tsiviilvaidlustes aastatel 2020–2023 alljärgnevatelt.[419]

Lahendi tegemise aasta	**2020.a**	**2021.a**	**2022.a**	**2023.a**
Lahendatud asjade koguarv	33286	33952	34460	35517
Tehtud kompromisside koguarv	2871	3214	2934	2954
Kompromisside osakaal lahendatud asjadest	8,6%	9,5%	8,5%	8,3%

Seejuures 2022.a. ja 2023 on enim kompromisse sõlmitud võlaõiguslikes vaidlustes: 2022.a -1708 ja 2023.a - 1815 ning perekonnaõigusalastes vaidlustes 2022.a - 781 ja 2023.a - 685.[420]

Eeltoodud kompromisside osakaal lahendatud tsiviilasjadest ei ole oluliselt muutunud ning ei nähtu ka tõusu trendi. Seega tuleks autori arvates tsiviilkohtumenetluses analüüsida, millised õiguslikud võimalused oleksid võimalikud kompromisside soodustamiseks. Näiteks töövaidluskomisjonis lõpetati menetlus kompromissi sõlmimisega 2023.a. sissetulnud asjadest kokku 23 %.[421] Eeltoodud andmed näitavad, et kohtuvälises menetluses on suudetud saavutada enam kompromisside sõlmimist.

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[418] :M.Merimaa. Menetluse põhimõtted ja tõendamine tsiviilkohtumenetluses. Tallinn 2008. Akadeemia Nord. lk.50-53.
Autor koostöös Justiitsministeeriumiga küsitles 2006.a. tsiviilasju menetlevaid kohtunikke kompromissi sõlmimist soodustavate ja takistavate asjaolude kohta, millest ilmnesid alljärgnevad kompromissi sõlmimise eeldused:

1. materiaalõigusnormi selgus, mis võimaldab menetlusosalistel ja esindajatel aru saada kompromissi sõlmimise mõttekusest ning mitte otsida kohtupraktikat materiaalõigusnormi tõlgendamiseks;
2. kohtunikul pooltega läbirääkimiste pidamise kogemuse olemasolu ning selleks täiendkoolituse vajalikkus;
3. kohtuniku töökoormus optimeerimine, mis võimaldaks kohtunikul eel- ja kohtuistungiks põhjalikumalt ette valmistada (see küsimus on ka nüüdisajal aktuaalne);
4. poolte ja esindajate valmisolek sõlmida kompromiss;
5. kohtunikule abiliste määramine (see küsimus on lahendatud kohtujuristi ametite loomise kaudu).

[419] Justiitsministeeriumist saadud andmed on autori valduses.

[420] Samas, viide 48.

[421] Töövaidlused tabelina 2005-2023.xlsx Arvutivõrgus: https://www.ti.ee/asutus-uudised-ja-kontaktid/kontakt/statistika (11.11.2024).

Tsiviilkohtumenetluse seadustik sisaldab rida sätteid, mis peaksid soodustama kompromissi sõlmimist. Need on alljärgnevad:

- TsMS § 38 lg 2 lubab kuulutada menetluse poolte lepitamise huvides kinniseks;
- TsMS § 64 lg 2 järgi poolte kokkuleppel võib nii seaduses sätestatud kui kohtu määratud menetlustähtaega lühendada. Seega kohtulahend jõustub kiiremini.
- TsMS § 150 lg 2 p 1 kohaselt tagastatakse pool tasutud riigilõivust, kui pooled või hagita menetluses osalised sõlmivad kompromissi;
- TsMS § 168 lg 3 järgi kompromissi sõlmimise korral kannavad pooled oma menetluskulud ise, kui nad ei ole kokku leppinud teisiti;
- TsMS § 190 lg 7 kohaselt kohus võib mõjuval põhjusel, muuhulgas kompromissi sõlmimise tõttu, ette näha kulude riigituludesse tasumise hilisema tähtpäeva või osadena tasumise kohta määratud tähtaja jooksul, samuti vabastada isiku menetluskulude riigituludesse tasumise kohustusest;
- TsMS § 359 järgi kohus võib kompromissi läbirääkimise ajaks menetluse peatada;
- TsMS § 428 lg 1 p 4 järgi kohus lõpetab menetluse otsust tegemata, kui pooled on sõlminud kompromissi ja kohus kinnitab selle.
- TsMS § 430 lg 5 kohaselt kompromiss kehtib täidedokumendina ka kohtumenetluses mitteosaleva isiku suhtes, kes on võtnud kompromissi alusel kohustuse.[422]

Eeltoodust ilmneb, et seadusandja eesmärgiks oli soodustada kompromisside sõlmimist.

Autor on seisukohal, et need sätted ei ole aga piisavad ning näeb ühe võimalusena kompromisside soodustamiseks lepingulise esindaja tasu suuruse lahti sidumist menetluse kestusest. TsMS § 144 lg 1 kohaselt on üheks kohtuväliseks kuluks menetlusosaliste esindajate kulu. TsMS § 175 lg 1 kohaselt kui menetlusosaline peab menetluskulude jaotust kindlaksmäärava kohtulahendi kohaselt kandma teist menetlusosalist esindanud lepingulise esindaja kulu, mõistab kohus kulud välja põhjendatud ja vajalikus ulatuses.[423] Seega ei mõisteta kohtuprotsessi kaotanud poolelt mitte kogu teise menetlusosalise lepingulise esindaja tasu, kuid selle suurus ei ole selle menetluseosalise jaoks siiski ettenähtav. Lisaks tuleb tal kanda ka oma lepingulise esindaja kulu.

[422] Tsiviilkohtumenetluse seadustik. RTI,22.03.2024.

[423] Riigikohtu tsiviilkolleegiumi 21.06.2021 kohtumääruse nr 2-17-13164/62 kohaselt "põhjendatud ja vajaliku menetluskuluna TsMS § 175 lg 1 tähenduses saab vastaspoolelt välja mõista lepingulise esindaja kulu ulatuses, mis vastab nõutava kvalifikatsiooniga ja hoolsalt tegutseva esindaja menetlusosalise esindamiseks vajalike menetlustoimingute tegemiseks tavapäraselt vajaliku ajakulu ja põhjendatud tunnitasu määra korrutisele. Seejuures võimaldab TsMS § 175 lg 1 arvestada menetlusosalise esindamiseks vajalike menetlustoimingute tegemiseks tavapäraselt vajaliku ajakulu hindamisel menetluse ja asja liiki, asja keerukust ja mahukust, menetlusdokumentide sisu ja mahtu. Lisaks tuleb selle sätte järgi arvestada esindaja põhjendatud tunnitasu suurust."

Menetlusosalise lepingulise esindaja tasu suurus oleneb sellest, kui palju on ta osalenud menetlustes ja milliseid menetlustoiminguid on teinud. Seega ei pruugi lepinguline esindaja olla huvitatud kompromissi sõlmimisest juba maakohtus.

Autori arvates oleks igati mõistlik kui tsiviilkohtumenetluses oleks sätestatud ka lepingulise esindaja tasu piirmäärad. Riigikohtu üldkogu tunnistas 26.06.2014 põhiseadusvastaseks ja kehtetuks Vabariigi Valitsuse 04.09.2008 määrusega nr 137 kehtestatud "Lepingulise esindaja kulude teistelt menetlusosalistelt sissenõudmise piirmäärad."[424]

Mitmes riigis on väljamõistetavaid esindaja-/õigusabikulusid konkreetsemalt piiratud. Seda nii Saksamaal, Austrias kui ka Šveitsis[425].

Autori arvates oleks mõistlik kaaluda, kas eelnimetatud riikide õigust ja praktikat ei oleks mõistlik ka Eestis eeskujuks võtta.

Riigikohtu menetlusse jõudis vaidlus lepingulise esindaja tasu suuruse määramise kohta. Riigikohtu tsiviilkolleegium on antud vaidluses 29.01.2024 kohtumääruse nr 2-21-9796 punktis 24 märkinud, et „ eelkõige on seadusandja ülesanne kehtestada õigusselguse huvides menetluskulude hüvitamise täpsem kord ja esindajakulude hüvitamise täpsem kord ja selgemad piirid. Kuni seda kehtestatud ei ole tuli lepingulise esindaja tasu määramisel juhinduda TsMS § 175 lg-st 1".[426]

Eeltoodust lahendist ilmneb, et kohtupraktikas on tõusetunud õiguslik küsimus lepingulise esindaja tasu piirmäära osas.

1. Kohtuväline vaidluse lahendamine tsiviilasjades

Alternatiivsete ehk kohtuväliste vaidluste lahendamise meetodite (ingl k *alternative dispute resolution methods*) all mõeldakse kohtupoolsele õigusemõistmisele alternatiivsete, kuid samas seda täiendavate vaidluse lahendamise meetmete kogumit.

Euroopa Komisjon on leidnud, et alternatiivsed vaidluste lahendamise meetodid on pidevas täiendamises ning kõige levinumad alternatiivsete vaidluste lahendamise meetodid on arbitraaž ehk vahekohtumenetlus, lepitusmenetlus, vahendusmenetlus ja läbirääkimised.[427]

Alternatiivse vaidluste lahendamise meetodi eeliseks on toodud vaidluste kiiremat lahendamist, konfidentsiaalsust ja rahalist kokkuhoidu võrreldes kohtuvaidlusega. Samuti võimaldab kohtuväline vaidluse lahendamine leida soodsamaid tingimusi

[424] RKÜKm 26.06.2014, nr. 3-2-1-153-13.
[425] Tsiviilkohtumenetluse seadustik I .Kommenteeritud väljaanne. Juura 2017. lk.841 .§ 175 komm.(V.Kõve.E.-K.Velbri).
[426] Riigikohtu tsiviilkolleegiumi 29.01.2024 määrus nr 2-21-9796/80 p 24.
[427] I. Nurmela, P.-M. Põldvere. Vaidluste efektiivne kohtuväline lahendamine. - Juridica 2014/1, lk 4 (11.11.2024).

omavaheliste suhete säilitamiseks ja jätkamiseks ka pärast vaidluse lahendamist."[428]

Käesolevas peatükis peab autor vajalikuks analüüsida tsiviilvaidluste lahendamist komisjonides, vahekohtumenetluses ning lepitusmenetlust.

Tsiviilvaidluste lahendamine komisjonides

Eestis on rida komisjone, kes asuvad haldusorganite juures ning lahendavad oma pädevuse piires eraõiguslikke vaidlusi nagu töövaidluskomisjon töövaidlustes, üürikomisjon üürivaidlustes, tarbijavaidluste komisjon tarbija kaebustes, tervishoiuteenuse kvaliteedi ekspertkomisjon tervishoiuteenuse osas, autoriõiguse komisjon autoriõigusega seotud vaidlustes, tööstusomandi apellatsioonikomisjon, kindlustusvaidluste komisjon.

Pean vajalikuks käsitleda töövaidluskomisjoni, üürikomisjoni, tarbijavaidluste komisjoni pädevust ja kindlustusasjades kohtuvälist menetlust.

Töövaidluse lahendamise seaduse (TLS) § 4 lg 1 kohaselt asub töövaidluskomisjon Tööinspektsiooni juures ning on kohtuväline töövaidlusi lahendav organ. TLS § 33–36 kohaselt töövaidluskomisjonis on võimalik ka töösuhete poolte lepitamine töövaidluskomisjoni juhataja poolt.[429] Töövaidlustes on töösuhete poolel õigus otsustada, kas ta pöördub hagiavaldusega kohtusse või töövaidluskomisjoni. Töövaidluskomisjoni valiku kasuks on menetluse kiirus, odavus ning menetlus on lihtsam.

2023.a saabus töövaidluskomisjoni 2297 avaldust, töötajalt – 2046 ja tööandjalt – 251; Kompromisse sõlmiti –498, avaldus rahuldati 348-s asjas. Keskmine menetlusaeg oli 32 päeva.[430].

Samal perioodil, s.o 2023.a saabus maakohtutesse kokku 174 tööasja, lahendati 163 töövaidlust. Keskmine menetlusaeg töövaidlustes oli – 324 päeva[431].

Eeltoodust ilmneb, et töövaidluskomisjon lahendab enamikke töövaidlusi ning menetlus on lihtsam, kiirem võrreldes kohtumenetlusega.

2022.a. analüüsis sotsiaalministeerium riigireformi raames, kas ja kuidas muuta töövaidluskomisjonide töökorraldust. Ühe variandina toodi töövaidluskomisjonide kaotamise ning töövaidluste lahendamise pädevuse üleandmise ainult kohtule. Selleks küsitleti Eesti-Kaubandustööstuskoja, Tööinspektsiooni, Tartu Ülikooli, Õiguskantsleri, Tartu ja Viru Maakohtu seisukohti. Eelnimetatud asutused olid seisukohal, et tegemist on toimiva töövaidluste

[428] OBLIN Attorneys at Law. Arvutivõrgus: https://oblin.at/et/teadmised-2/kogumik/alternatiivne-vaidluste-lahendamine/alternatiivne-vaidluste-lahendamise-uldulevaade/ (11.11.2024).
[429] Töövaidluste lahendamise seadus. RT I, 24.11.2020,6.
[430] Töövaidluskomisjoni töö statistika. Arvutivõrgus: https://www.ti.ee/asutus-uudised-ja-kontaktid/kontakt/statistika (11.11.2024).
[431] Arvutivõrgus: Aastaraamat.riigikohus.ee/maa-haldus-ja-ringkonnakohtute-2023-aasta-menetlusstatistika-kokkuvote/ (11.11.2024).

lahendamise menetlusega ning vaidluste lahendamine maakohtus ei too lisaväärtust, vaid tooks kaasa täiendava kulu.[432]

1.07.2023 jõustus üürivaidluste lahendamise seadus (ÜVLS)[433], mille paragrahvis 1 on sätestatud üürikomisjoni pädevus. ÜVLS § 1 lg 1 kohaselt eluruumi üürilepingust tuleneva vaidluse (üürivaidlus) lahendamiseks võib üürnik või üürileandja pöörduda üürikomisjoni või kohtusse. Kohaliku omavalitsuse pädevusse kuulub otsustusõigus üürikomisjoni asutamise üle (ÜVTL § 2 lg 1).

Tallinnas on vastav üürikomisjon asutatud. Tallinna üürikomisjoni andmetel on 2023 a. tehtud kokku 46 otsust. [434] ÜVTL § 6 lg 1 kohaselt üürikomisjoni esimees otsustab avalduse menetlusse võtmise kolme tööpäeva jooksul avalduse saamisest alates ning avalduse läbivaatamise tähtaeg on sätestatud ÜVTL §-s 7, mille lõike 1 kohaselt peab komisjoni istung toimuma ühe kuu jooksul avalduse menetlusse võtmisele järgnevast päevast alates. Komisjoni istungi edasilükkamise korral peab istung toimuma ühe kuu jooksul eelmise istungi toimumise päevast alates (ÜVTLS § 7 lg 2).

ÜVTLS § 9 lg 5 kohaselt selgitab komisjon pooltele täiendavate tõendite ja taotluste esitamise vajadust või kogub tõendeid oma algatusel, kui see on vajalik asja õiglaseks lahendamiseks.

Tsiviilkohtumenetluses on üürivaidlused hagimenetluse asjad ning menetluseks on võistlev menetlus, kus kohus tõendeid ei kogu. See on menetlusosaliste õigus otsustada, millised asjaolud ta esile toob ning milliste tõenditega neid tõendab. Seega on üürivaidlus poolte jaoks odavam, kiirem ja lihtsam.

Tarbijate ja kauplejate vahelisi vaidlusi lahendab Tarbijakaitse ja Tehnilise Järelevalve Ameti juures olev tarbijavaidluste komisjon.

Euroopa Liidus reguleerib tarbijavaidluste komisjoni tegevust Parlamendi ja nõukogu direktiiv 2013/11/EL, tarbijavaidluste kohtuvälise lahendamise kohta, (tarbijavaidluste kohtuvälise lahendamise direktiiv)[435] Eelnimetatud direktiivi punktis 5 on märgitud, et „vaidluste kohtuväline lahendamine pakub lihtsa, kiire ja odava kohtuvälise lahenduse tarbijate ja kauplejate vahelistele vaidlustele. Ent vaidluste kohtuväline lahendamine ei ole kõikjal liidus veel piisavalt hästi ja järjekindlalt välja töötatud.”[436]

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[432] Töövaidluste lahendamise analüüs. Justiitsministeerium.28.06.2023. Koostaja V.-P.Liin. Kättesaadav:.Töövaidluste%20lahendamise%20analüüs%20Justiitsministeerium.pdf (04.02.2025)

[433]Üürivaidluste lahendamise seadus. RT I 2003,15,86.

[434] Tallinna üürikomisjoni 2023.aasta otsused. Arvutivõrgus: https://www.tallinn.ee/et/tallinna-uurikomisjoni-2023-aasta-otsused (11.11.2024).

[435] Euroopa Liidu Parlamendi ja nõukogu direktiiv 2013/11/EL 21. mai 2013, tarbijavaidluste kohtuvälise lahendamise kohta, millega muudetakse määrust (EÜ) nr 2006/2004 ja direktiivi 2009/22/EÜ (tarbijavaidluste kohtuvälise lahendamise direktiiv). *ELT L 165, 18.6.2013*,[435]

[436] Samas, viide 62

Näiteks Saksamaal on suhteliselt keeruline tarbijavaidluste lahendamise süsteem. Mitmed üksused tegelevad ka finantsküsimusega. [437] Saksamaal on avaldatud arvamust, et üdiselt on tarbijavaidluste kohtuväline menetlus positiivne, kuid kui menetlus nurjub, siis see tähendab siiski aja- ja materiaalset kulu nii riigile kui ka pooltele.[438]

Nõustun, et ka Eestis tarbijavaidluse komisjoni otsusega mittenõustumise korral kohtusse pöördumisel vaidluse lõpptulemuse saavutamine on seotud vaidlevate poolte jaoks täiendava ajakuluga.

Tarbijakaitseseaduse (TKS) § 28 sätestab piiriülese või riigisisese tarbijavaidluse vaidluse lahendamise menetluse kohtuvälises korras. TKS § 40 sätestab tarbijavaidluste komisjoni staatuse ja pädevuse. TKS § 40 lg 1 kohaselt tarbijavaidluste komisjon on tarbijavaidlusi lahendav sõltumatu ja erapooletu üksus. Nimetatud paragrahvi lõike 3 kohaselt on komisjoni pädevuses lahendada tarbija ja kaupleja vahelisest lepingust tulenevaid nii riigisiseseid kui ka piiriüleseid tarbija algatatud tarbijavaidlusi, mille üheks osapooleks on kaupleja, kelle asutamiskoht on Eesti Vabariigis. TKS § 40 lg 4 kohaselt " komisjon ei lahenda vaidlust, mis on seotud:1) mittemajandusliku üldhuviteenuse osutamisega; 2) avalik-õiguslike juriidiliste isikute pakutava haridusteenusega; 3) tervishoiuteenusega, mida osutavad tervishoiutöötajad patsientidele nende tervise hindamiseks, säilitamiseks või taastamiseks, sealhulgas ravimite ja meditsiiniseadmete väljakirjutamine, väljastamine ja nendega varustamine; 4) komisjon ei lahenda vaidlust, mille puhul kahjunõue tuleneb surmajuhtumist, kehavigastusest või tervisekahjustusest, samuti vaidlust, mille lahendamise kord on ette nähtud teistes seadustes kooskõlas käesolevas seaduses sätestatud nõuetega."[439]

Tarbijavaidluste komisjoni pädevusse kuuluvad erinevatest õigussuhetest (nagu müügileping, töövõtuleping, kindlustusleping, pakettreisileping jne.) tulenevad vaidlused. Tarbijavaidluste komisjoni otsus ei ole täitedokumendiks ning pooltel on õigus otsusega mittenõustumise korral pöörduda hagiavaldusega maakohtusse. Kui lahend on kaupleja kahjuks ning ta otsust ei täida, siis satub ta nn musta nimekirja, mis on äriühingu jaoks negatiivse tähendusega ning seetõttu ta pigem täidab otsuse.

Tarbijakaitse ja Tehnilise Järelevalve Ametile laekus 2023.a. kokku 4086 tarbija avaldust, komisjon tegi 896 otsust. Nõude rahuldamine ilma komisjoni otsuseta lepituse teel toimus 897 avalduse osas. Menetlus on tasuta ja üle 90 päeva kestis tarbijate avalduste menetlemine 30% osas. [440]

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[437] C. Althammer,C.Meller-Hanninch(Hrsg,)VSBG Verbraucherstreitbeilegungsgesetz.Kommentar2 auflage,Wolfgang Metzner Verlag. Frankfurt am Main, 2021,lk.52.

[438] P. Röthemeyer. Der positive Blick der Rechtspolitik auf die alternative Streitlösung-reflektiert oder naiv? Zeitschrift für Konfliktmanagement. ZKM 6/2023, lk. 217.

[439] Tarbijakaitseseadus. RT I, 04.07.2024, 21.

[440]Tarbijakaitse ja Tehnilise Järelevalve Amet. Tarbijavaidluste komisjoni tegevusaruanne. 2023 Arvutivõrgus: https://ttja.ee/sites/default/files/documents/2024 (11.112024) . 03/Tarbijavaidluste%20komisjoni%202023.%20aasta%20tegevusaruanne.pdf. (11.11.2024).

Tarbijavaidluste statistika näitab, et võlaõiguslike vaidluste lahendamine tarbijavaidluste komisjonis vähendab kohtute töökoormust ning menetlus on poolte jaoks kiirem, odavam ning menetlus lihtsam.

Autori juhendatud magistritöös uuris H. Tipka tarbijavaidluste kohtuvälise lahendamise õiguslikke probleeme ning jõudis analüüsides ka teiste Euroopa Liidu riikide õigust järeldusele, et tarbijavaidluste komisjoni otsused peaksid olema siduvad ja sundtäidetavad.[441]

Nõustun eeltoodud seisukohaga, et oleks igati põhjendatud muuta tarbijakaitseseadust ning anda tarbijavaidluste komisjoni otsusele täitedokumendi tähendus analoogselt töövaidluskomisjoni ning üürikomisjoni otsusega. Pooltele jääks õigus otsusega mittenõustumise korral pöörduda maakohtusse ning tarbijavaidluse komisjoni otsus sellisel juhul ka ei jõustu. Seega oleks pooltele tagatud põhiõigus pöörduda oma õiguste kaitseks kohtusse.

Kindlustusvõtjate ja kindlustusandjate vahel tekkinud kindlustusvaidlusi lahendatakse Eesti Kindlustusseltside Liidu juures tegutsevas kindlustuse lepitusorganis ja Eesti Liikluskindlustuse Fondi (LKF) juures liikluskindlustuse lepitusorganis. Kui pooled saavutavad erapooletu lepitaja vahendusel kokkuleppe, siis on selle täitmine kohustuslik.

Kindlustusasjades on kohtuväline vaidluste lahendamine olnud efektiivne. Poolte vahel on lepitusmenetluse kaudu saavutatud erapooletu kindlustuslepitaja vahendusel kokkulepped. Kliendi jaoks on menetlus tasuta. Kui kokkulepet ei saavuta, siis on pooltel õigus pöörduda kohtusse. Kindlustuslepitusorgan alustas oma tegevust 11.04.2011 Eesti Kindlustusseltside Liidu juures.[442]

Kindlustuse ning liikluskindlustuse lepituskomisjoni tegevust iseloomustavad alljärgnevad statistilised andmed.

Kindlustuse lepitusorgani ja liikluskindlustuse lepitusorgani 2023. aruandes on toodud alljärgnevad andmed:”2023. aastal registreeriti 440 lepitusavaldust. 341-st lõpetatud lepitusest lõppes 200 kokkuleppega. Lepitusavalduste arv oli varasemate aastatega võrreldes märkimisväärselt suurem. Sel aastal suurenes liikluskindlustuse lepitusavalduste arv. Liikluskindlustuse lepitusorganile 229 avaldust, see on 34% rohkem kui 2022. aastal. Muudes kindlustusteenuste vaidlustes oli 2023. aastal esitatud avalduste arv sama nagu oli 2022. aastal. 59% lepitustest lõppes 2023. aastal kokkuleppega. 160-st liikluskindlustuse vaidlusest päädis kokkuleppega 70%. Muude kindlustusteenuste vaidlustes oli kokkulepete osakaal 49%.”[443]

[441] H. Tipka. Tarbijavaidluste kohtuvälise lahendamise õiguslikud probleemid. Magistritöö. Tallinna Ülikool, 2024. lk. 84.
[442] IURING Konsult OÜ. Lepitusmenetlus kindlustusvaidlustes. Arvutivõrgus: https://www.iuring.ee/lepitus-kindlustusvaidlustes. (11.11.2024)./
[443] Kindlustuse lepitusorgan Liikluskindlustuse lepitusorgan 2023.aasta aruanne. Arvutivõrgus: https://www.lkf.ee/sites/default/files/Lepitusorgan_aruanne_2023(7).pdf (11.11.2024).

Eeltoodud statistilised andmed näitavad, et kohtuvälises korras kindlustusvaidluste lahendamine vähendab kohtute töökoormust. Vaidluste lõpetamine kokkulepete sõlmimisega näitab, et komisjonid on teinud tõhusat tööd.

Komisjonide tegevust iseloomustavad andmed näitavad, et nende pädevuses olnud vaidluste võrra on kohtute töökoormus olnud väiksem ning lahenduse saavutamine on poolte jaoks kiirem, odavam ja lihtsam.

Vahekohtumenetlus

Üheks võimaluseks lahendada tekkinud tsiviilõiguslik vaidlus on vahekohtu poole pöördumine. Vahekohtud võivad asuda nii Eestis kui välisriigis.

M. Torga on välja toonud, et rahvusvahelistest alalistest vahekohtutest on tuntumad „Rahvusvahelise Kaubanduskoja ehk ICC vahekohus, Stockholmi kaubanduskoja ehk SCC Vahekohus, Londoni vahekohus ehk LCIA, Viini Rahvusvaheline vahekohtu Keskus ehk VIAC, Hiina Rahvusvaheline Majanduse ja Kaubanduse Vahekohtu Komisjon ehk CIETAC, Ameerika Vahekohtu Ühenduse ehk AAA egiidi all loodud Rahvusvaheline Vaidluste lahendamise keskus ehk ICDR, Aafrika Äriõiguste Harmoniseerimise Organisatsiooni ehk OHADA vahekohus, Rahvusvaheline Investeerimisvaidluste Lahendamise Keskus ehk ICSID ning WIPO vahekohus.“[444]

M. Torga on defineerinud vahekohtumenetlust kui „menetlust poolte kokkuleppe alusel loodud vaidluste lahendamise organis, mis lahendab vaidluse poolte kokku lepitud reeglitest lähtudes (arvestades siiski vahekohtupidamise riigis kehtivaid seaduseid), mille tulemusel tehakse otsus, mis on täidetav samaväärselt riiklike kohtute lahenditega.“[445]

Leian, et antud definitsioon avab vahekohtumenetluse olemuse.

Vahekohtu mõistet Eesti seadusandlus ei sisalda, kuid vahekohtumenetlust puudutavad sätted on TsMS §-des 712-758. Vahekohtumenetluse kokkuleppe esemeks võib olla varaline nõue ning mittevaralise nõude kohta kehtib kokkulepe üksnes juhul, kui pooled võivad vaidluse eseme suhtes sõlmida kompromissi (TsMS § 718 lg 1). TsMS § 718 lg 2 kohaselt vahekohtumenetluse kokkulepe on tühine, kui selle ese on Eestis asuva eluruumi üürilepingu kehtivuse ja ülesütlemise ning eluruumi vabastamise vaidlus; töölepingu lõpetamise vaidlus ning tarbijakrediidilepingust tulenev vaidlus. TsMS § 718 lg 3 kohaselt avalik-õiguslik varaline nõue võib olla vahekohtumenetluse kokkuleppe ese, kui pooled võivad sõlmida vaidluseseme kohta halduslepingu.

TsMS sisaldab erisätet tarbijate osas. Nimelt TsMS § 718^1 lõike 1 kohaselt vahekohtumenetluse kokkulepet, mille üheks pooleks on tarbija, ei või sõlmida enne nõude sissenõutavaks muutumist.

Vahekohtuid on kahte tüüpi: alalised ehk institutsionaalsed vahekohtud ja ajutised ehk ad hoc tüüpi vahekohtud. Ad hoci vahekohtute otsused ei ole

[444] Tsiviilkohtumenetluse seadustik III. Kommenteeritud väljaanne. Juura 2018. komm.14.osa 3.1 lk.1359 (M.Torgo).
[445] Samas lk. 1358 (viide 71.)

täitedokumendid ning otsuste täitmiseks kohtutäituri poolt tuleb pöörduda maakohtusse vahekohtu otsuse tunnustamiseks ja täidetavaks tunnistamiseks.

Eesti Kaubandus-Tööstuskoja Arbitraažikohtu ja Notarite Koja vahekohtu menetluses tehtud otsused tunnustatakse ja täidetakse ilma, et kohus seda tunnustaks ja täidetavaks tunnistaks (TsMS § 753 lg 1^1). Antud sätte jõustus 01.04.2019.

Eestis on alalisi vahekohtuid enam kui eelnimetatud kaks vahekohut. Viimased omavad pikaajalisi kogemusi vahekohtute töö korraldamisel ning seaduse nõuete järgimisel. Praktikas tekkis alaliste vahekohtute tegevuse osas probleeme, kus pooli ei teavitatud vahekohtumenetlusest ning kostja sai otsusest teada saada alles kohtutäiturilt täitemenetluse algatamise teate saamisel. Enne 01.04.2019 olid alaliste vahekohtute otsused täitedokumendid. Seega tsiviilkohtumenetluse seaduse muudatus oli igati põhjendatud.

Ülejäänud vahekohtute, nii rahvusvaheliste kui Eesti vahekohtute lahendid, tuleb maakohtu poolt tunnustada ja täidetavaks tunnistada. Sealjuures välisriigi vahekohtute otsuseid tunnustatakse ja võetakse Eestis täitmisele vastavalt New Yorgi 1958.a välisriigi vahekohtu otsuste tunnustamise ja täitmise konventsioonile ja teistele välislepingutele (TsMS § 754 lg1).

Poolte jaoks on Eesti vahekohtumenetlusel rida eeliseid võrreldes tsiviilkohtumenetlusega.

Nimelt pooled saavad valida vahekohtuniku, menetluses kasutatava keele, menetlus on konfidentsiaalne ja kiirem, odavam ning vaidluse lahendamine võib toimuda õigluse põhimõttel kui pooled on selles kokku leppinud (TsMS § 742). Lisaks on vahekohtumenetlusega seotud kohtumenetlus kinnine (TsMS §756 lg 6).

Otsuse peale kaebuse esitamine on piiratud (TsMS § 751). Konfidentsiaalsus on äriühingute puhul oluline põhjus, miks eelistakse vaidlust lahendada vahekohtus. See on ka põhjuseks miks vahekohtu lahendeid ei avalikustata.

Eesti Kaubandus-Tööstuskoja Arbitraažikohus on vanim alaliselt tegutsev vahekohus, kes lahendab eraõigussuhetest, sealhulgas väliskaubandus- ja muudest rahvusvahelistest majandussuhetest tulenevaid vaidlusi. Arbitraažikohus loodi 1992.a. Eelnimetatud vahekohtu reglemendi § 29 lg 1 kohaselt arbitraažikohus peab vaidluse lahendama võimalikult kiiresti, kuid mitte hiljem, kui kuue kuu jooksul arvates haginõude või hagiavalduse koos lisadega vaidlust lahendavale arbitraažikohtule üleandmisest. Reglemendi § 35 lg 1 kohaselt jõustub arbitraažikohtu otsus selle tegemise päeval.[446]

Eeltoodust ilmneb, et vahekohtumenetluse kiirusel on oluline tähendus ka arbitraažikohtus.

[446] Eesti Kaubandus-Tööstuskoja Arbitraažikohtu REGLEMENT. Kinnitatud EKTK juhatuse 14.12.2023 otsusega. Arvutivõrgus: https://www.koda.ee/sites/default/files/content-type/content/2024-04/REGLEMENT%20-%202024.pdf (11.11.2024.)

Kuivõrd lepitusmenetluse edendamisele on Euroopa Liidus pööratud rõhku ka ärisuhetes, siis Eesti Kaubandus-Tööstuskoja juhatuse otsusega 16.11.2017 on kinnitatud Eesti Kaubandus-Tööstuskoja Lepitusmenetluse reglement, milles on sätestatud lepitusmenetluse põhimõtted ning lepitaja valimine.[447].

Leian, et äriühingute puhul on oluline ärisuhete edasine jätkumine ning koostöö, millest tulenevalt lepitusmenetluse abil mõlemat poolt rahuldava mõistliku lahenduse otsimine ja leidmine on igati õigustatud.

Lepitusmenetlus

Viimastel aastatel on esile toodud kohtuvälise lahendamise meetoditest lepitusmenetlust, mis võimaldab vaidlevatel pooltel säilitada omavahelisi suhteid ning lahendada vaidlusküsimus mõlemale poolele vastuvõtval viisil kiiremini, odavamalt ning pooltevahelist kokkulepet täidetakse meelsamini võrreldes kohtulahendiga.

Lepitusmenetlus on üks poolte vabatahtlikkuse põhimõttel vaidluse lahendamise võimalikest meetoditest, mida tänapäeval tunneme kui alternatiivset kohtuvälise lahendamise viisi (inglise keeles ADR:-*alternative dispute resolution).*

Euroopa Liidus on oluliseks põhimõtteks kaupade ja inimeste vaba liikumise põhimõte, mis praktikas võib kaasa tuua piiriüleseid vaidlusi nii äriühingute kui ka inimeste vahel, seda ka lapsevanemate vahel lapse õigusi puudutavaid vaidlusi. Nendes vaidlustes on oluline menetluse kiirus ning pooltevaheliste kokkulepete saavutamine.

Lepitusmenetlus tsiviilõiguslikes vaidlustes

Euroopa Parlament ja Nõukogu võtsid 21. mail 2008 vastu direktiivi 2008/52/EÜ vahendusmenetluste teatavate aspektide kohta tsiviil- ja kaubandusasjades, mille preambula punktis 8 on välja toonud, et kohtumenetlus on aega nõudev, mis mõjub äritegevusele negatiivselt. Seega tuleb kasutada alternatiivseid võimalusi vaidluse lahendamiseks. Üheks võimaluseks saavutada vaidlevate poolte vahel mõlemaid pooli rahuldav tulemus on vahendusmenetluse kasutamine. Antud direktiivi tuleb kohaldada üksnes piiriüleste vaidluste puhul toimuva vahendusmenetluse suhtes, kuid seda saab kohaldada ka siseriiklike vahendusmenetluste suhtes.[448]

Eelnimetatud direktiivi preambula punktis 6 on märgitud, et "vahendusmenetlust võib kasutada kui kulutasuvat ja kiiret kohtuvälist vaidluste lahendamise viisi tsiviil- ja kaubandusasjades, kohandades menetlusi vastavalt

[447] Eesti Kaubandus–Tööstuskoja LEPITUSMENETLUSE REGLEMENT, kinnitatud Eesti Kaubandus-Tööstuskoja juhatuse otsusega 16.11.2017. Arvutivõrgus: https://www.koda.ee/et/teenused/lepitusmenetluse-reglement (11.11.2024).

[448] Euroopa Parlamendi ja Nõukogu direktiiv 2008/52/EÜ 21.mai 2008, vahendusmenetluste teatavate aspektide kohta tsiviil ja kaubandusasjades ELT 24.5.2008, L 136/8.

osapoolte vajadustele. Vahendusmenetluse tulemusena saavutatud kokkuleppeid järgitakse suurema tõenäosusega vabatahtlikult ning need aitavad tõenäolisemalt säilitada poolte vahel rahumeelset ja püsivat suhet. Nimetatud kasu on veelgi suurem olukordades, milles ilmnevad piiriülesed asjaolud."[449]

Euroopa Komisjon on avaldanud, et piiriüleste juhtumite menetlemise muudavad keeruliseks erinevused riikide õigusaktides ja kohtupädevuses, samuti erinevused ärikultuurides ning tekkivad praktilised küsimused nagu menetluse keel ja kulu. Kohtumenetluses on lahkhelide lahendamine kulukas, aeganõudev ning võib hävitada kasulikud ärisuhted ning pidas seetõttu erapooletu lepitaja abil vaidluse lahendamist konstruktiivseks.[450]

Eeltoodud direktiivi nr 2008/52/EÜ täitmiseks võttis Riigikogu 18.11.2009.a vastu lepitusseaduse (LepS), mis jõustus 01.01.2010[451] ning 10.12.2021 riikliku perelepitusteenuse seaduse (RPLS), mis jõustus 01.09.2022.[452]

Lisaks sisaldavad lepitusmenetluse sätted ka erinevates seadustes nagu töövaidluste lahendamise seaduses[453], õiguskantsleri seaduses[454], tarbijakaitseseaduses[455], kollektiivse töövaidluse lahendamise seaduses[456] jne.

Praktikas ei ole selgelt eristatud mõisteid „ lepitus" ning „vahendus", kuid nendes menetlustes on põhimõtteline erinevus[457]. Lepitusmenetlusega tsiviilasjas on tegemist juhul, kui vaidlus tuleneb eraõigussuhtest ning on lahendatav maakohtus ning lepitajal on võimalik esitada omapoolne konflikti lahenduskäik [458]. Vahendusmenetluse puhul kolmas pool ehk vahendaja ei langeta vaidlevate poolte eest otsust ning ei esita ka omapoolset lahendusvarianti. Ta vahendab pooli otsima ise tekkinud konflikti lahendamiseks lahendust.

Lepitusmenetluses vahendab vaidlevaid pooli lepitaja, kes on sõltumatu ja erapooletu ning ei otsusta poolte eest, kuid võib pakkuda lahendusvariandi. Lepitaja on kohustatud selgitama lepitusmenetluse olemust, õiguslikke tagajärgi. Tal on vaikimiskohustus, peab järgima konfidentsiaalsuse nõudeid, täitma dokumenteerimiskohustust (LepS §-d 3-8).

Lepitaja võib esitada pooltele omapoolse lahendusettepaneku (LepS § 1 lg 2). Kui pooled saavutavad kokkuleppe, siis lepitaja formuleerib lepitusosaliste soovil kirjalikult kokkuleppe, mille lepitusosalised ja lepitaja allkirjastavad (LepS § 13 lg 1).

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[449]. Samas, viide 77.

[450]Euroopa Komisjon: piiriüleste vaidluste lahendamine vahendusmenetluse teel hoiab kokku aega ja raha. Arvutivõrgus: https://ec.europa.eu/commission/presscorner/detail/et/IP_10_1060 (11.11.2024.)

[451] Lepitusseadus. RT I,10.12.2021,2.

[452] Riikliku perelepitusteenuse seadus. RT I 31.03.2022,15.

[453] Töövaidluste lahendamise seadus. RTI, 24.11.2023, 6.

[454] Õiguskantsleri seadus. RT I 26.05.2020.11 § 35 (5)-35(15).

[455] Tarbijakaitseseadus. RT I, 04.07.2024,21.

[456] Kollektiivse töötüli lahendamise seadus. RT I,30.06.2023,31.

[457] Samas, viide 78. Euroopa direktiivis 2008/52 kasutatakse terminit "vahendus"- inglise keele "mediaton".

[458] Samas, viide 79. Eestis lepitusseaduses on kasutatud mõistet „ lepitus", s.o inglise keeles „ conciliation".

Lepituseaduse eelnõu seletuskirja kohaselt on "eeskujuks võetud Austria mediatsiooniseadust, mis annab õigusliku aluse riiklikule järelevalvele alluvate vabakutseliste lepitajate tegevusele üleüldiseks lepitamiseks kõiki liiki tsiviilasjades (Bundesgesetz über Mediation in Zivilrechtssachen), eelpoolmainitud direktiiv ning UNCITRALi mudelseadus rahvusvahelise kaubandusalase lepitamise kohta. Kasutatud on ka Saksamaa liidumaade kogemusi lepitusorganite tegevusega ning Saksamaa ja Austria regulatsiooni notaritest lepitajate kohta"[459].

Eelnimetatud seaduse eelnõu seletuskirjas on märgitud, et „see, kes võib olla lepitajaks ja milliseid lepitusorganeid eksisteerib, on riigiti väga erinev. Üldjuhul on menetlus vabatahtlik, kuid "teatud valdkondades tegutsejad (nt pangad, kindlustusseltsid jm mingit liiki teenuse pakkujad, kes sageli ka selliseid lepitusorganeid rajavad ja finantseerivad), kohustuvad kliendiga lepingulistesse suhetesse astudes juba ette teise lepingupoole (tarbija) soovi korral enne kohtusse pöördumist nimetatud lepitusmenetluse läbima. Sageli moodustavad ja peavad ülal lepitusorganeid erinevad kutsekojad- ja ühendused ise (pangad, kindlustusseltsid, arstid, arhitektid (Saksamaal)." [460].

Eelnimetatud seaduse eelnõu seletuskirja kohaselt "lepitajad võivad olla lihtsalt eraõiguslikud isikud, kes osutuvad seda turul tavalise teenusena (levinud Iirimaal ja Suurbritannias). Riik ei pruugi eraõiguslike lepitajate tegevust või nende kvaliteeti reguleerida, jättes selle lepitajate iseregulatsiooni hooleks (mediatsioon Saksamaal). Sellisel juhul tegutsevad praktikas sageli kutseorganisatsioonid, mis valvavad ise organisatsiooni kuuluvate lepitajate taset. Riik võib eraõiguslike lepitajate üle ka ise järelevalvet teostada, kandes neid nimekirja ja kontrollides perioodiliselt nende kutseoskusi (Austrias). Lepitajad võivad olla ka riigi poolt asutatud ja finantseeritavad ning olla osaks riigihaldusaparaadist (Soomes, Rootsis, Saksamaal); sellisel juhul on nende tegevus ka õigusaktidega reguleeritud. Lõpuks võib lepitamine toimuda ka kohtute juures ja kohtunike poolt kohtusüsteemi raames. Erinevad lepitusvormid ja võimalused eksisteerivad enamasti ühes riigis koos."[461]

Eestis tsiviilkohtumenetluses lepitust ei toimu. Küll toimub lepitamine halduskohtumenetluses [462]ja kriminaalmenetluses[463].

Riigikohtunik I. Pilving on haldusasjas lepitusmenetluse eeliseks pidanud, et „menetlus on kiirem, odavam kui lõpliku kohtuotsuseni jõudmine, suurendades õiguskaitse kättesaadavust ja hoides kokku õigusemõistmiseks vajalikke

[459] Lepitusseaduse eelnõu seletuskiri. Arvutivõrgus: https://www.riigiteataja.ee/oigusuudised/eelvaadeSeadusUudis/584#2 lk.2 (10.10.2024).
[460] Samas, viide 87.
[461] Lepitusseaduse eelnõu seletuskiri.
.Arvutivõrgus:https://www.riigiteataja.ee/oigusuudised/eelvaadeSeadusUudis/584#2 lk. 2 (10.10.2024.)
[462] Halduskohtumenetluse seadustik. RT I, 13.03.2019, 54.
HKMS § 137 lg 1 kohaselt " kõigi poolte ja kolmanadate isikute nõusolekul võib kohus via läbi lepitusmenetluse, mille raames menetlusosalised lahendavad kohtuniku abiga vaidluse läbirääkimistel."
[463] Kriminaalmenetluse seadustik.. RT I, 06.01.2016, 19.

ressursse."[464] I. Pilving rõhutas, et lepitusmenetluses püütakse saavutada tegelik leppimine, mitte seadusejõus lahend.[465]

Eestis on võimalik lepitusmenetlus ka kriminaalasjades, kui on tegemist teise astme kuriteoga, kuriteo asjaolud on piisavalt selged, puudub avalik menetlushuvi kriminaalmenetluse jätkamiseks, on olemas kannatanu ja kahtlustatava/süüdistatava nõusolek ning kriminaalmenetlust on alustatud (KrMS§ 203¹ ja 203²). Alaealiste puhul on tingimused sätestatud KrMS § 201 lg 2 p-s 5.[466]

Lepitusmenetluse läbiviimise korra § 2 kohaselt on lepitusmenetluse eesmärgiks "pakkuda õigusvastase teo toime pannud isikule, kahju kannatanud isikule ja vajaduse korral teistele osalistele võimalust turvalises keskkonnas ja lepitaja toel arutada toime pandud teoga seonduvaid asjaolusid ja mõjusid, et lepitusmenetluse toimumise ja vajaduse korral kokkulepitavate edasiste tegevuste abil heastada teoga kaasnenud emotsionaalset ja materiaalset kahju, tagada kannatanu rahulolu ja vähendada riski, et õigusvastase teo toime pannud isik paneb toime uusi õigusrikkumisi."[467]

Eelnevast tuleneb, et lepitusmenetlus on võimalik mitte ainult tsiviilasjades, vaid ka haldusasjades ning kriminaalasjades ning viimaste puhul ka kohtumenetluses. Tekib õiguslik küsimus, kas ei võiks kaaluda ka tsiviilkohtumenetluses lepitusmenetluse läbiviimist. Autori arvates vääriks see kaalumist, näiteks kaasomandi lõpetamise, kinnisasjalt avalikult kasutatavale teele juurdepääsu nõuetes, kinnistute omanike vahel naabrussuhteid puudutavates nõuetes või pärandavara jagamise nõuetes, kus on oluline heade suhete jätkumine. Kindlasti on lepitamine oluline lapse õigusi puudutavates vaidlustes, kuid selleks on TsMS § 560¹ lg-s 1 sätestatud, et lapsega suhtlemise korraldamise asjas kohtusse pöördumisel tuleb esitada tõend lepitusmenetluse edutuse kohta. Seega peavad vanema läbima lepitusmenetluse enne kohtusse pöördumist. Kui on tegemist olukorraga, kus vanem on olnud vägivaldne lapse või teise vanema vastu või esineb muu mõjuv põhjus, siis ei tule kohtusse pöördumisel lepitusmenetlust läbida (TsMS § 560¹ lg 2).

Lepitusmenetluses peab lepitaja omama vastavaid teadmisi, mida saadakse koolituse abil ning kogemusi, et tulemus oleks positiivne. Vastavate kogemuste omamine tuleb eriti kasuks piiriülestes vaidlustes. Lepitajaks saab olla LepS § 2 kohaselt:1) füüsiline isik, kellele pooled on teinud ülesandeks käesoleva seaduse § 1 lõikes 2 kirjeldatud tegevuse. Lepitaja võib tegutseda juriidilise isiku kaudu, olles sellega töö- või muus lepingulises suhtes; 2) vandeadvokaat käesoleva seaduse §-s 17 nimetatud juhul; 3) notar käesoleva seaduse §-s 16 nimetatud juhul, 4) seaduses sätestatud juhul riigi või kohaliku omavalitsuse lepitusorgan.[468]

[464] Halduskohtumenetluse seadustik. Kommenteeritud väljaanne .Juura 2013, lk.469 §137 komm. (I.Pilving).
[465] Samas, viide 93, lk. 469..
[466] Kriminaalmenetluse seadustik. RT I, 06.01.2016,19.
[467] Lepitusmenetluse läbiviimise kord. RT I,26.01.2018, 23.
[468] Lepitusseadus. RT I,10.12.2021,2

Lepituseaduses ei ole sätestatud lepitaja kvalifikatsiooni nõuded. Kui notarite ja vandeadvokaatidele esitavad nõuded tulenevad seadusest, mille kohaselt peab vandeadvokaat ja notar omama õiguse õppesuunal vähemalt riiklikul tunnustatud magistrikraadi [469], siis LepS § 2 punktis 1 toodud nõuded füüsilisest isikust lepitaja osas puuduvad.

Juba enne lepitusseaduse ja riikliku perelepitusteenuse seaduse jõustumist toimis Eestis lepitus ning kutsestandardi nõuded olid kutseorganisatsiooni poolt kehtestatud. Eesti Lepitajate Ühing on perelepitaja osas kehtestanud kutsestandardi ja hariduse nõuded, mille kohaselt on nõutav perelepitaja puhul kõrgharidus, soovitavalt psühholoogia, sotsiaalteaduste või õigusteaduste erialalt.[470]

Riikliku perelepitusteenuse seaduse (RPLS) § 6 lg 1 p 1 kohaselt perelepitajal peab olema kõrgharidus. [471] Eesti esimene perelepitusalane väljaõpe toimus Sotsiaalministeeriumi projekti raames juba augustis 1997.a ning koolitusi tehakse senini.[472]

Autor on seisukohal, et kõrghariduse nõue ning vastav koolitus lepitajate puhul on igati õigustatud. Autori arvates lepitaja kutse eeldab nii õigusalaste kui ka psühholoogiaalaste teadmiste omamist. TsMS § 627[1] lg 3 kohaselt kohus ei tunnista täidetavaks lepitaja vahendusel sõlmitud kokkulepet, kui see väljub LepS § 14 lg-1 kehtestatud piiridest, on vastuolus heade kommetega või seadusega või rikub olulist avalikku huvi või kokkulepet ei ole võimalik täita.

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[469] Advokatuuriseadus. RT I, 05.05.2022,5

§ 23. Advokaadile esitatavad nõuded

(3) kes vastab kohtunikule esitatavatele haridusnõuetele vastavalt kohtute seaduse § 47 lõike 1 punktile 1 või kelle välisriigis omandatud kutsekvalifikatsiooni on tunnustatud vastavalt käesoleva seaduse §-le 65;

Kohtute seadus. RT I 04.01.2024

Kohtute seadus. § 47. Kohtunikule esitatavad nõuded

(1) Kohtunikuks võib nimetada Eesti Vabariigi kodaniku, kes: 1) on omandanud õiguse õppesuunal vähemalt riiklikult tunnustatud magistrikraadi, sellele vastava kvalifikatsiooni Eesti Vabariigi haridusseaduse § 28 lõike 2^2 tähenduses või sellele vastava välisriigi kvalifikatsiooni;

(2) Notariaadi seadus.RT I , 06.07.2023,60

Notariaadiseaduse § 6

(1) Notariks võib saada kandidaaditeenistuse läbinud ja notarikandidaadi hindamise sooritanud teovõimeline Euroopa Liidu liikmesriigi kodanik, kes valdab kõnes ja kirjas eesti keelt, on aus ja kõrgete kõlbeliste omadustega ning kes vastab kohtunikule esitatavatele haridusnõuetele vastavalt kohtute seaduse § 47 lõike 1 punktile 1.

[470] Eesti lepitajaje Ühing. **Kutse perelepitaja, tase 6 taotlemise eeltingimused on:**

1. kõrgharidus, soovitavalt psühholoogia, sotsiaalteaduste või õigusteaduste erialalt,
2. perelepitusalane väljaõpe mahus 160 ak/tundi (millele on lisandunud klienditöö praktika ja eksam),
3. vähemalt kolme superviseeritud juhtumi lahendi olemasolu.

Kutse perelepitaja, tase 7 taotlemise eeltingimused on:

1. kõrgharidus, soovitavalt psühholoogia, sotsiaalteaduste või õigusteaduste erialalt,
2. perelepitusalane väljaõpe mahus 160 ak/tundi (millele on lisandunud klienditöö praktika ja eksam),
3. perelepitusalane ja/või erialalähedane täiendusõpe (tõendatud koopiatega tunnistustest),
4. töötanud vähemalt 20 menetlusse võetud juhtumiga,
5. läbinud vähemalt 30 supervisioonitundi (superviisorite allkirjad),
6. superviseerinud ise vähemalt 5 perelepitusjuhtumit.

Arvutivõrgus: https://lepitus.ee/kutse-taotlemine/ 15.10.2024

[471] Riikliku perelepitusteenuse seadus. RT I 31.03.2022, 15.

[472] Sotsiaalministeerium. Riiklik perelepituse aluskoolitus. Lk. 16-17.

Seega lepitaja peab teadma eelnimetatud õiguse põhimõtteid. Kohtupraktikas tekkis õiguslik probleem, kui lepituskokkulepe oli tingimuslik, s.o kindlustusjuhtumi üle toimuva vaidluse lahendus sõltus eksperdi arvamusest.[473]

Tallinna Ülikoolis pakub mikrokraadi koolitust kohtuvälise vaidluste lahendamiseks vajalike teadmiste omandamiseks. Antud koolitus koosneb nii õigus- kui psühholoogiaalastest loengustest/seminaridest. Arvates 2024.a on Tallinna Ülikoolis avatud ka magistriõpe kohtuvälise vaidluste lahendamise osas. Magistriõppesse tulnud üliõpilased töötavad väga erinevates töökohtades ja ametitel, mis näitab, et vajadus ja huvi lepitaja oskuste vastu on praktikas olemas.

Lepitusseaduse eelnõu seletuskirja kohaselt alternatiivsete vaidluste lahendamise viiside efektiivsemaks rakendamiseks on vajalik „nende vähemalt osaline reguleerimine seadusandja poolt. Seaduslik reguleeritus ning konkreetsete õiguslike tagajärgede sidumine lepitusmenetluse käiguga (nõude aegumise peatamine lepitusmenetluse ajaks, osaliste õigusi tagavad menetlussätted, saavutatud kokkuleppe täidetavus, riigi õigusabi võimaldamine jms) tagavad reaalse võimaluse lepitusmenetluse kasutamiseks tavapärase kohtuliku tsiviilmenetluse alternatiivina"[474] Leian, et eeltoodud ettepanekud olid igati asjakohased ja põhjendatud.

Lepitusseaduse eelnõu seletuskirja kohaselt käsitleb direktiiv küll üksnes piiriülest vahendusmenetlust, kuid liikmesriikidel on soovi korral võimalik kohaldada samu reegleid ka siseriikliku menetluse suhtes. Seda ongi lepitusseaduse eelnõus arvesse võetud.

Oluliseks lepitusseaduse eelnõu eesmärgiks on peetud ühtsete põhimõtete kehtestamist Eestis tegutsevate lepitusorganite jaoks, menetluskorda. Pikemas perspektiivis on nähtud eesmärgina Eestis kohtuväliselt õigusvaidlusi lahendavate komisjonide maastiku korrastamist.[475]

Eestis tegutseb mitu lepitajate ühingut. Seejuures Eesti Lepitajate Ühingu kodulehe kohaselt esimesed perelepitajad alustasid tööd Eestis juba aastal 1997.a. ning nende tähelepanu keskmeks on perelepituse valdkond ja selle areng.[476] Praktika näitab, et lepitusmenetlusi tsiviilasjades ongi olnud suuremas osas perelepituse osas.

Lepitusmenetlus perevaidlustes

Riikliku perelepitusteenuse seaduse § 1 kohaselt seadusega reguleeritakse riiklikku perelepitusteenust ja sätestatakse lepitusmenetluse korraldamise alused eesmärgiga toetada vanemaid lahkumineku järel oma alaealise lapse edasises

[473] Riigikohtu22.03.2023 kohtumäärus nr 2-21-4060 p-s 15.4. asuti seisukohale, et tingimuslik lepituskokkulepe ei võimalda kokkulepet täidetavaks tunnustada.

[474] Lepitusseaduse eelnõu seletuskiri. Arvutivõrgus: https://www.riigiteataja.ee/oigusuudised/eelvaadeSeadusUudis/584#2 (10.10.2024).

[475] Eesti Lepitajate Ühing. https://lepitus.ee/uhingu-info/ (10.10.2024).

[476].Eesti lepitajate Ühing.Arvutivõrgus: https://lepitus.ee/uhingu-info/ (11.11.2024)

elukorralduses kokkuleppele jõudmisel, soodustada vanemate koostööd lapse kasvatamisel ning seeläbi tagada lapse huvide kaitse ja heaolu.

Lapse õiguse kaitse tagamiseks on vastu võetud nii rahvusvahelisi konventsioone, Euroopa Liidu õigusakte kui ka siseriiklikke õigusakte.[477] Nende eesmärgiks on tagada, et lapse õigusi puudutavates vaidlustes seatakse esiplaanile lapse huvid ning küsitakse tema arvamust ning sellega ka arvestatakse.

RPLS § 3 kohaselt on perelepitaja käesoleva seaduse tähenduses Sotsiaalkindlustusametiga lepingulises suhtes olev lepitusmenetlust vahetult läbiviiv isik, kes aitab vanematel (edaspidi) lepitusosalised leida nende alaealise lapse elukorralduslikes küsimustes tekkinud vaidlusele lapse huve arvestava lahendusse.

Eelnimetatud seaduse vastuvõtmisega muudeti ka tsiviilkohtumenetluse seadustikku ning TsMS § 560¹ kohaselt lapsega suhtlemise korraldamise asjas tuleb kohtule tuleb koos avaldusega esitada riikliku perelepitusteenuse seaduse §-s 13 või lepitusseaduse §-s 12 nimetatud tõend lepitusmenetluse edutuse kohta.

Kui seda tõendit ei ole esitada ning ei esine vägivaldsust vanema või lapse suhtes või muud mõjuvat põhjust, siis kohus suunab vanemad osalema riikliku perelepitusteenuse seaduses sätestatud lepitusmenetluses (TsMS 560¹lg 4).

Autor nõustub, et lapse huve puutavates vaidlustes on igati mõistlik, et vanemad saavutaksid kohtuvälises korras kokkuleppe. Seda vanemluskokkulepet täidetakse meelsamini ilma kohtutäituri abita ning vanemate omavahelised suhted oleksid normaalsemad ning mõjuksid positiivselt lapse ja temast eraldielava vanema omavahelistele suhetele.

Autori arvates oleks igati põhjendatud, kui TsMS-is oleks nõue, et kohtusse pöördumisel kohustuslikuks tingimuseks lapse õigusi puudutavates vaidlustes on eelneva lepitusmenetluse läbimine, välja arvatud vägivalduse aset leidmine teise vanema või lapse suhtes või muu mõjuva põhjuse olemasolu.[478]

Autori jaoks on küsimuseks miks ei või vanemad otsustada kas nad pöörduvad riiklikkuse perelepitusse või siis lepitaja kutset omava isiku poole.

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[477] Autor toob välja mõningad õigusaktid, mis puudutavad lapse õigusi. Nimekiri ei ole täielik.
ÜRO lapse õiguste konventsioon. RT II1996,16,56.
Lapseröövi suhtes tsiviilõiguse kohaldamise rahvusvaheline konventsioon. RT II 2001,6,33.
Euroopa Liidu põhiõiguste harta. ELT C326/391.
Nõukogu määrus (EL) 2019/1111, 25. juuni 2019, mis käsitleb kohtualluvust, abieluasjade ja vanemliku vastutusega seotud kohtuasjades tehtud lahendite tunnustamist ja täitmist ning rahvusvahelisi lapseröövе (uuesti sõnastatud) Brüssel II bis määrus ELT 178, 2.7.2019.
Nõukogu määrus (EÜ) nr 4/2009, 18. detsember 2008, kohtualluvuse, kohaldatava õiguse, kohtuotsuste tunnustamise ja täitmise ning koostöö kohta ülalpidamiskohustuste küsimustes, ELT 2009,7,1.
Euroopa sotsiaalharta. RT II 2000,15,93.
Riikliku perelepitusteenuse seadus. RT I 31.03.2022, 15.
Lastekaitseseadus. RT I, 06.01.2023,15.
Perekonnaseadus. RT I,06.07.2023,7.

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[478] TsMS § 560¹ sätestab lepitusmenetluse lapsega suhtluskorra korraldamise asjus, kuid vaidlus võib puudutada ka hooldusõigust, s.o lapse elukoha määramist.

Teada on, et perelepitajad tegutsesid aastaid enne riikliku perelepitusteenuse seaduse jõustumist ning said vastava koolituse ning omasid ka vastavaid kogemusi. Mingit õiguslikku põhjendust ei leia riikliku perelepitusteenuse seaduse eelnõu seletuskirjast. Autori arvates sellise küsimuse esitati põhjendatult ka Eesti õigusteadlaste päevadel 2024.a.

Samale seisukohale asusid autori juhendatud magistritöö uurimustes .M. Salme-Gordijevitš[479] ja L.Lindeberg.[480]

R. Uudeküll tegi 2020.a. ekspertanalüüsi perelepitusteenuse korraldusest kuue Euroopa riigi võrdlusel, s.o võrdlusriikideks olid Eesti, Norra, Leedu, Suurbritannia Soome ja Saksamaa, mille eesmärgiks oli riikliku perelepitussüsteemi loomise toetamine. Analüüsis on välja toodud, et Leedus on kohtuväline ja kohtulik lepitus ning 2020.a. jõustus kohustuslik kohtueelne lepitus perekondlikes vaidlustes. Seejuures on see poolte initsiatiiv leida endale sobiv perelepitaja[481].

L. Lindeberg on märkinud, et Leedu vahendusseaduse[482] kohaselt on loodud lepitajate kvalifikatsioonieksami kohustus. "Lepitaja, kes on sooritanud eksami, kantakse Leedu Vabariigi vahendajate nimekirja. Kui vanematel tuleb kohustuslik perelepitus läbida, siis saab valida konkreetse lepitaja, kes on kantud Leedu Vabariigi vahendajate nimekirja. Pooled võivad pöörduda omal kulul eravahendaja poole või kasutada riigi poolt pakutavaid tasuta kohustuslikke vahendusteenuseid. Neid pakub riigi tagatud õigusabi talitus. Leedu Vabariigi vahendajate nimekiri on leitav õigusabi elektroonilisest süsteemist TEISIS."[483]"

R Uudeküll on ekspertanalüüsis välja toonud, et Suurbritannias (Inglismaa ja Wales) on lepitusteenus vabatahtlik, kuid seoses lapsevanemate lahutusega või lahkumineku korral ülalpidamisvaidlustes ja finantsvaidlustes on kohustus osa võtta MIAM kohtumisest (Mediatsion Information AND Assessment meeting), mille käigus tutvustatakse ka perelepitusteenust. Perelepitusteenus on tasuline.[484]

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[479] Merilyn Salme-Gordijevitš . Lepitusmenetluse õiguslikud probleemid tsiviilasjades. Magistritöö. Tallinna Ülikool 2024, lk 77

[480] L. Lindeberg. Riikliku perelepitusteenuse seaduse rakendamise õiguslikud probleemid. Magistritöö. Tallinna Ülikool 2024, lk.54

[481] Sotsiaalkindlustusamet. Ekspertanalüüs prerelepitusteenuse korraldusest kuue Euroopa riigi võrdlusel. Tallinn 2020. Lk. 25-36 (R.Uudeküll)) Arvutivõrgus: https://sotsiaalkindlustusamet.ee/sites/default/files/documents/2023 03/ekspertanaluus_perelepitusteenuse_korraldusest_kuue_euroopa_riigi_vordlusel.pdf (11.11.2 024).

[482] Lietuvos Respublikos mediacijos įstatymas. Arvutivõrgus: https://www.etar.lt/portal/lt/legalAct/TAR.27B041C4CCDE/asr (1.11.2024).

[483] L. Lindeberg . Riikliku perelepitusteenuse seaduse rakendamise õiguslikud probleemid. Magistritöö. Tallinna Ülikool 2024, lk.54.

[484] [484] Sotsiaalkindlustusamet. Ekspertanalüüs prerelepitusteenuse korraldusest kuue Euroopa riigi võrdlusel. Tallinn 2020. Lk. 25-36 (R.Uudeküll)) Arvutivõrgus: https://sotsiaalkindlustusamet.ee/sites/default/files/documents/2023 03/ekspertanaluus_perelepitusteenuse_korraldusest_kuue_euroopa_riigi_vordlusel.pdfSama lk. 37-50.

Soomes on kasutusel kohtuväline ning kohtulik lepitus. Kohtuväline perelepitusteenus toimub juba 1987. aastast. Kohtulik lepitus lapse hooldusõiguse vaidluses toimub aastast 2006.[485]

Saksamaal lepitusteenus ei ole riiklik teenus. Saksamaal on perekohtud, kus kohtunik täidab ka vahendaja rolli vaidluse kiiremaks lahendamiseks. Perekohtute roll ning perelepitusteenuse tagamine ei ole reguleeritud lepitusseaduses ning ei ole üleriigiliselt tagatud.[486]

R. Uudeküll tegi rida ettepanekuid nagu erijuhtumite korral (lähtesuhtevägivald) kaasata kahte kogenut perelepitajat. Oluliseks pidas lapse kaasamist perelepitusse ning perelepituses juriidiliste teadmiste omamist, et kokkulepe oleks õiguslikult siduv.[487] Autori hinnangul igati põhjendatud ettepanekud.

M.-S. Gordijevitsi uuringus on välja toodud alljärgnev tabel riiklike perelepituste kohta perioodil 01.09.2022 kuni 31.03.2024".[488]

	01.09.2022 - 31.12.2022	2023	01.01.2024- 31.03.2024	KOKKU (01.09.2022- 31.03.2024)
Algatatud menetlused	228	736	212	1 176
sh kohtu määrused	39	180	42	261
kohtumääruste %	*17%*	*24%*	*20%*	*22%*
Lõpetatud menetlused	228	581	6	815
Lõpetatud menetluste %	*100%*	*79%*	*3%*	*69%*
Edutuse tõend	145	370	6	521
Edutuse tõendite % lõpetatud menetlustest	*64%*	*64%*	*100%*	*64%*
Vanemluskokkulepe	81	197	0	278
VKL % lõpetatud menetlustest	*36%*	*34%*	*0%*	*34%*
Keeldumised	2	13	1	16
Keeldumiste % lõpetatud menetlustest	*1%*	*2%*	*17%*	*2%*

[485] Samas, lk.51-61.
[486] Samas lk. 62-69.
[487] Samas lk. 76.
[488] Merilyn Salme-Gordijevitš . Lepitusmenetluse õiguslikud probleemid tsiviilasjades. Magistritöö. Tallinna Ülikool 2024.lk. 57.

Tabelit analüüsides võib järeldada, et toimunud on 1176 lepitusmenetlust. Kohus on lapsevanemad perelepitusse suunanud 261 korral. Poolteise aastaga on sõlmitud 278 vanemluskokkulepet, s.o 23,6 % lepitusmenetlustest. [489]. Kuigi vanemluskokkulepete arv on suhteliselt tagasihoidlik on see iga lapse osas, keda vanemluskokkulepe puudutab, olulise tähendusega. Seejuures lõpetatud asjades võib olla ka vanemate omavahelisi kokkuleppeid, kes ei soovinud sõlmida vanemluskokkulepet.

2018.a. viis PRAXIS läbi lapse õiguste ja vanemluse uuringu, milles jõuti järeldusele, et tuleb tõsta nii vanemate kui ka laste teadlikkust lapse õigustest.[490] Autori arvates tuleks juba koolis kasvatada teadlikkust perekonnaõigusest ning lapse õigustest.

L. Lindeberg analüüsis, kas Sotsiaalkindlusameti kinnitatud vanemluskokkulepe peaks olema täitedokument ning jõudis seisukohale, et „kuna vahendusdirektiiv nõuab, et vahendusmenetluse tulemusena saavutatud kirjalik kokkulepe oleks võimalik täidetavaks tunnistada, siis täitedokumendi jõudu vanemluskokkuleppelt ära võtta ei saaks, küll aga on võimalik anda kinnitamise roll kohtule, nii nagu seda on tehtud näiteks Leedus ning Saksamaal. Kui vanemluskokkuleppe kinnitamise roll jääb siiski SKA-le, peaks koordinaatoritel olema nõutav juriidiline haridus, samuti ka perelepituse koolituse läbimine. Kui vanemluskokkulepete kinnitajal oleks juriidiline haridus, oleksid ka kohtutäituritele esitatavad vanemluskokkulepped parema kvaliteediga, järgides formaalsuse printsiipe ning kergemini täidetavad. Nii perelepitajad kui ka SKA koordinaatorid peavad olema pädevad, et tagada efektiivne, menetlusosaliste, sealhulgas lapse õigusi kaitsev menetlus.”[491]

Leian, et L.Lindebergi uurimuses tehtud ettepanek on igati põhjendatud, sest RPLS § 12 lg 2 kohaselt vanemluskokkulepet kinnitab Sotsiaalkindlustusamet ning see on täitedokumendi tähendusega täitemenetluse seadustiku § 2 lg 1 p 25 mõttes. Uurimuses jõuti järeldusele, et vanemluskokkulepet kinnitab koordinaator, kellele mingeid kvalifikatsiooni nõudeid ei ole sätestatud. Täitemenetluses kehtib kohtutäituri jaoks formaliseeritusse põhimõte, mis tähendab, et täitedokument peab olema õiguslikult selge tekstiga, et ei tekiks põhjendamatud vaidlusi.

R.Uudeküllli analüüsist ilmneb, et Euroopa Liidu liikmesriikides on perevaidlustes lepitusmenetlust puudutav õigus erinev. R. Uudeküll on pidanud vajalikuks lepitajate osas õigusteadmiste omamist ning lapse ärakuulamist.

Lapse õigusi puudutavates vaidlustes lapsearvamuse ärakuulamist ja sellega arvestamist on peetud oluliseks ÜRO lapse õiguste konventsiooni artiklis 12, mille lõige 1 kohaselt osalisriigid tagavad lapsele, kes on võimeline iseseisvaks

[489] Samas viide114,

[490] PRAXIS. Lapse õiguste ja vanemluse uuring 2018. Lk 75. Arvutivõrgus: https://www.praxis.ee/uploads/2017/11/Lapsed-vanemad-aruanne.pdf (11.11.2024)

[491] L. Lindeburg. Riikliku perelepitusteenuse seaduse rakendamise õiguslikud probleemid. Magistritöö. Tallinna Ülikool 2024 lk.67.

seisukohavõtuks, õiguse väljendada oma vaateid vabalt kõikides teda puudutavates küsimuste, hinnates lapse vaateid vastavalt tema vanusele[492].

Eesti TsMS § 552¹ lg 1 muudeti ja 20.11.2022 jõustunud sätte muudatuse kohaselt kuulab kohus last puudutavas asjas isiklikult ära lapse, kes on suuteline seisukohti omama, kui seaduses ei ole sätestatud teisiti[493]. Kuni 20.11.2022 kehtinud TsMS § 552¹ lg 1 kohaselt kuulas kohus last puudutavas asjas ära vähemalt 10-aastase lapse isiklikult, kui seaduses ei ole sätestatud teisiti.[494]'

Leian, et eelnimetatud TsMS muudatus on igati põhjendatud ja vastavuses rahvusvahelise õiguse põhimõtetega.

Nõustun R. Uudeküll arvamusega, et perelepituses on oluline lapse heaolu toetamine, et vanemad suhtleksid omavahel konstruktiivselt ja tasakaalukalt ning leiaksid lapse elukorralduse jaoks parimad lahendused. Samuti tuleks tagada, et lepitusteenus oleks reaalselt kättesaadav kõigis kohalikes omavalitsustes.[495]

Kokkuvõte

Tekkinud tsiviilvaidluste lahendamiseks on mitmed võimalused. Eesti Vabariigi põhiseaduse paragrahv 15 lause 1 kohaselt on igaühel õigus pöörduda oma õiguste ja vabaduste rikkumise korral kohtusse. See on põhiõigus ning õigusriigi oluline põhimõte. Õigusemõistmise pädevus kuulub ainult kohtule, kes tõlgendab õigust ning kujundab kohtupraktikat.

Kohtute menetlusstatistikast ilmneb, et Eesti kohtud on tsiviilasjade menetlemisel olnud tõhusad. Kohtunikele on seatud kõrgendatud kvalifikatsiooninõuded. Maa- ja ringkonnakohtu lahendeid on võimalik vaidlustada kõrgemas kohtuastmes.

Tsiviilasjades võib menetlus kujuneda pikemaks, kui on keskmine menetlusaeg ning võib menetlusosalise jaoks osutuda kulukaks. Tsiviilkohtumenetluses on võimalik menetlust kiirendada kasutades tehnilisi võimalusi, kohtunike spetsialiseerumist teatatud liiki vaidluste lahendamisele, varaliste nõuete puhul ka maksekäsu kiirmenetlust ning kompromisside sõlmimist. Tsiviilkohtumenetluse lõpetamine kompromissiga on olnud suhteliselt tagasihoidlik. Seega tuleks analüüsida, milliseid õiguslikke meetmeid võiks lisaks kehtivatele menetlusnormidele kasutada kompromisside soodustamiseks. Autori arvates üheks võimaluseks oleks lepingulise esindaja tasu piirmäärade kehtestamine, mis võiks soodustada kompromissi sõlmimist juba maakohtus.

[492] ÜRO lapse õiguste konventsioon. RT II 1996, 16, 5
[493] Tsiviilkohtumenetluse seadustik. RT I 22.03.2024,8
[494] Tsiviilkohtumenetluse seadustik. RT I 09.04.2021,17.
[495] K.Valma L.Surva, H. Hääl. Lepitusmenetlus perevaidlustes. Juridica 1/2014 lk. 103.

Nüüdisajal on üha enam pööratud tähelepanu nii rahvusvahelises õiguses, Euroopa Liidu õiguses kui ka Eesti õiguses kasutada alternatiivseid kohtuväliseid lahendamise meetodeid nagu läbirääkimised, vahekohtumenetlus, vahendusmenetlus ning lepitusmenetlus.

Autor uuris töövaidluskomisjoni, tarbijavaidluste komisjoni, üürikomisjoni ning kindlustusvaidluste komisjonide pädevust ja statistikat ning vahekohtumenetlust. Autor jõudis järeldusele, et vaidluste lihtsam, kiirem ja odavam lahendamine kohtuvälises korras on eeliseks võrreldes kohtumenetlusega. See on odavam viis vaidluse lahendamiseks nii riigile kui ka pooltele.

Mitte vähem oluline ei ole pooltevaheliste suhete jätkumine ka pärast vaidluse lõppemist. Seda nii äris, naabrite vahel, töövaidlustes, perevaidlustes. Selle eesmärgiks on vaidlusküsimuses pooltevahelise kokkuleppe saavutamine lepitajate abil. Vanemate kokkulepped lapse õigusi puudutavates vaidlustes teenivad enim lapse õigusi ja huve.

Riikliku perelepitusteenuse seaduse vastuvõtmine on oluline õigusakt perevaidluste lahendamiseks lepitaja vahendusel. Eelnimetatud seaduse jõustumisest on möödunud kaks aastat. Seega võiks analüüsida, miks lapsevanemate vahel vanemluskokkulepete sõlmine on olnud suhteliselt tagasihoidlik. Mida on võimalik teha, et vanemaid suunata kokkuleppe sõlmimisele.

TsMS § 560[1] lg 4 kohaselt kui vanemad ei ole läbinud lepitusmenetlust ning ei esita edutuse tõendit, siis kohus suunab vanemad osalema riikliku perelepitusteenuse seaduses sätestatud lepitusmenetluses.

Leian, et vanemad peaksid juba enne kohtusse pöördumist läbima lepitusmenetluse, mis tähendaks kohustuslikku kohtueelset vaidluse lahendamise nõuet. Vaidlevatel pooltel peaks olema õigus otsustada, kas pöörduda riikliku perelepitaja või muu lepitaja poole, kellel on vastav lepitaja kutse ja kogemused.

Kokkuvõttes õigusemõistmise pädevus kuulub ainult kohtule ning see on oluline põhimõte demokraatlikus riigis. Samas alternatiivsed kohtuvälise lahendamise viisid vähendavad kohtute töökoormust eraõiguslike vaidluste osas ning menetlused on kiiremad, odavamad, lihtsamad ning on ka riigile majanduslikult kasulikud.

Summary

The goal of this article is to highlight the benefits of solving civil disputes outside of court compared to civil proceedings and what the possibilities are for speeding up civil disputes at court. One method of speeding up proceedings is directing the participants to sign a compromise, which is also a task of the court. Unfortunately, this option is not very popular. One reason for why this might be

is the lack of upper limits for the fees of contractual representatives, which does not encourage agreements being made in the district courts. Substantive law has become rather complicated, and there is no stable case law to draw from. Proceedings could be sped up and more stable case law could be created by the specialising of judges. This has already happened in certain cases, so these efforts should continue.

Justice can be decided only in court, which is an important core tenet of a democratic state. However, alternative out-of-court solutions can help reduce the workload of courts when it comes to private disputes, making proceedings faster, cheaper, more simple and economically viable for the state. Additionally, alternative out-of-court dispute-solving mechanisms themselves can be implemented more efficiently and effectively. One issue is that the Consumer Disputes Committee has not been granted an enforceable title, while for example, the Labour Dispute Committee and Rental Committee are. There is no strong argument for such a decision. In family disputes, the parents should have the right to decide whether they want to use a state-provided family mediation service or another certified occupational family mediator for their conciliation proceedings.

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Aastatel 1985-1993 töötas esimese astme kohtunikuna ning 1993-2014 Tallinna Ringkonnakohtu tsiviilkolleegiumi liikmena. Aastatel 1993-2023 oli Balti Riikide Kohtunike Ühingute Nõukogu president, asepresident.

Eesti põhiseadus ja Eesti Panga pädevusega seotud õigusküsimused

The Estonian Constitution and legal issues related to the competence of Eesti Pank

Ilmar Selge

Abstract

Ilmar Selge's article discusses legal issues related to the competence of Eesti Pank: what is the competence of Eesti Pank provided for in the Constitution and its meaning in the current Estonian legal order, and how should the provisions of the Constitution concerning Eesti Pank be interpreted within the framework of the provisions of the Treaty on the Functioning of the European Union?

The institutional, functional independence of Eesti Pank and the personal and financial independence of the members of its decision-making bodies cannot be achieved without legislative powers and the right to issue regulations, i.e. the right to issue general legal acts binding on third parties. If Eesti Pank were to request that the legal acts necessary for the performance of its tasks arising from the European System of Central Banks be issued by the Government of the Republic or the Minister of Finance, representing the executive power, this would not be in accordance with the fundamental European principles of the independence of the central bank of a Member State of the European Union, and Eesti Pank would become dependent on the Government of the Republic or the Minister of Finance in the field of legislation. Therefore, the article takes the position: if the Riigikogu, as the legislator, decides that the right to issue legal acts needs to be delegated to Eesti Pank in an appropriate enabling provision, this is a question of the expediency of the law in order to ensure Eesti Pank's independence in a similar way to the European Central Bank. Since, according to Section 112 of the Constitution, Eesti Pank operates on the basis of law and reports to the parliament or Riigikogu, the decision to delegate legislative powers to Eesti Pank falls within the decision-making competence of the Riigikogu.

Keywords: *Constitution, European Union law, European Central Bank, European System of Central Banks, Eesti Pank, legislation.*

Kokkuvõte

Artiklis käsitletakse Eesti Panga pädevusega seotud õigusküsimusi: milline on Eesti Panga põhiseaduses sätestatud pädevus ja selle tähendus kehtivas Eesti õiguskorras ning kuidas tuleks põhiseaduse Eesti Panka puudutavaid sätteid Euroopa Liidu aluslepingute raames tõlgendada.

Eesti Panga funktsionaalne ja institutsionaalne sõltumatus ning tema otsustusõiguslike organite liikmete isiku- ning rahaline sõltumatus ei ole saavutatavad ilma seadusandlike volituste ning määrusandlusõiguseta ehk õiguseta anda välja kolmandate isikute suhtes kohustuslikke õiguse üldakte. Kui Eesti Pank peaks taotlema, et tema Euroopa Keskpankade Süsteemist tulenevate ülesannete täitmiseks vajalikke määrusi annaks täidesaatvat võimu esindav Vabariigi Valitsus või rahandusminister, ei oleks see kooskõlas Euroopa Liidu liikmesriigi keskpanga sõltumatuse euroopaliku keskpanganduse aluspõhimõtetega ning Eesti Pank muutuks õigusloome valdkonnas sõltuvaks Vabariigi Valitsusest või rahandusministrist.

Seetõttu asutakse artiklis järgmisele seisukohale: kui Riigikogu seadusandjana otsustab, et õiguse üldakti või määruse andmise õigus tuleb asjakohases volitusnormis delegeerida Eesti Pangale, on tegemist seaduse otstarbekohasuse küsimusega, millega tagatakse Eesti Panga sõltumatus analoogselt Euroopa Keskpangaga. Kuna põhiseaduse paragrahvi 112 kohaselt tegutseb Eesti Pank seaduse alusel ja annab aru parlamendile ehk Riigikogule, siis kuulub seadusandlike volituste Eesti Pangale delegeerimise üle otsustamine Riigikogu otsustamispädevusse.

Sealjuures ei ole parlament (seadusandja) Eesti Panga õigusloome eesmärkide, sisu ja ulatuse ehk õiguslike piiride üle otsustamisel täiesti vaba, vaid on seotud Euroopa Keskpankade Süsteemile antud ülesannete täitmisega riigi tasandil. Ühtlasi peab seadusandja järgima Eesti põhiseadust ja tagama, et seadusandlike volituste Eesti Pangale delegeerimisel ei esineks teiste isikute põhiõiguste ja vabaduste ning põhiseadusega kaitstud väärtuste (põhiseaduslike institutsioonide garantiide) riivet. Kui seadusandja väljuks seadusandlike volituste delegeerimisel põhiseadusega ette nähtud eesmärkidest ja õiguslikest piiridest ja annaks Eesti Pangale näiteks õiguse kehtestada kohalikele omavalitsustele laenu andmisel ja finantskohustuste võtmisel täiendavad nõuded ja piirangud, võib tekkida vastuolu põhiseadusega, sest kohalike omavalitsuste finantstegevuse üle kontrolli kehtestamisel tuleb arvestada põhiseaduse paragrahvides 154 ja 157 sätestatud kohaliku omavalitsuse kui institutsiooni põhiseaduslike tagatistega (omavalitsusõiguse kaitseala võimalik riive).

Kokkuvõttes jõutakse artiklis seisukohale, et Eesti Panga õigusloome ei ole vastuolus põhiseaduse ega Euroopa Liidu õigusega. Eesti riigiõiguslikus tavas on õiguskantsler põhiseaduslikkuse järelevalve funktsiooni täitmisel käsitlenud Eesti Panka põhiseadusliku institutsioonina, kelle puhul põhiseaduse paragrahvis 112 nimetatud seaduse alusel ülesannete täitmine määrusandlusõiguse teel ei välista,

vaid eeldab põhiseaduse paragrahvi 3 lõikes 1 sätestatud seaduslikkuse printsiibi rakendamist ning järgimist määruse andmisel. Kui Eesti Pank ei ole põhiseaduse paragrahvi 3 lõikes 1 sätestatut järginud, on õiguskantsler Eesti Panga presidendi vastava määruse kui õigustloova akti ka vaidlustanud.

Märksõnad: põhiseadus, Eesti Pank, õigusloome, Euroopa Liidu õigus, Euroopa Keskpank, Euroopa Keskpankade Süsteem.

The Estonian Constitution and Legal Issues Related to the Competence of Eesti Pank

I. Sissejuhatus

Artiklis uuritakse, milline on Eesti Panga põhiseaduses sätestatud pädevus ja selle tähendus tänases Eesti õiguskorras ning kuidas tuleks põhiseaduse Eesti Panka puudutavaid sätteid Euroopa Liidu õigust ja ühisrahale üleminekut arvestades tõlgendada.

Sellega seoses tuleb anda vastus kolmele küsimusele.

1. Milliseid ülesandeid täidab Eesti riigi keskpank ehk Eesti Pank tulenevalt põhiseadusest ja Eesti Panga seadusest?
2. Millised seadusandlikud volitused on põhiseaduse printsiipidest ja normidest lähtudes vajalikud selleks, et Eesti Pank saaks täita põhiseadusest ja seadusest tulenevaid ülesandeid?
3. Kas parlament ehk Riigikogu võib Eesti Panga puhul seadusandlikud volitused anda ka neile asutustele ja isikutele, kellel põhiseaduse järgi seda õigust ei ole või keda põhiseaduses ei ole otseselt nimetatud?

II. Regulatsioon Euroopa Liidu õiguse ja Eesti riigisisese õiguse kontekstis

1. Riigi keskpanga õiguslik seisund Eesti põhiseaduse alusel

Eesti Vabariigi põhiseaduses[496] (edaspidi: PS) puudutavad Eesti Panga õiguslikku seisundit kaks paragrahvi – 111 ja 112. Riigi keskpanga õigusliku seisundi, sealhulgas raha emissiooni ainuõiguse fikseerimisega põhiseaduse tasandil eristub Eesti paljudest teistest Euroopa Liidu liikmesriikidest. Näiteks Saksamaa Liitvabariigis reguleerib riigi keskpanga õiguslikku seisundit mitte põhiseadus, vaid eraldi seadus – *Gesetz über die Deutsche Bundesbank*[497].

[496] RT 1992, 26, 349; RT I, 15.05.2015, 2.

[497] Arvutivõrgus: https://www.gesetze-im-internet.de/bbankg/ (30.11.2023).

Põhiseaduse paragrahvi 111 kohaselt on Eesti raha emissiooni ainuõigus Eesti Pangal, kes korraldab raharinglust ja seisab hea riigi vääringu stabiilsuse eest. Paragrahvist 111 tulenevad Eesti Pangale seega Eesti raha emiteerimise, raharingluse korraldamise ja riigi vääringu stabiilsuse tagamise ülesanded.

Paragrahv 111 oli kuni 31. detsembrini 2010 oluline Eesti Panga pädevust reguleeriv põhiseaduse säte, kusjuures Eesti Panga pädevused olid täpselt reguleeritud nii Eesti Panga seaduse[498], Eesti Vabariigi rahaseaduse[499] kui ka Eesti Vabariigi seadusega Eesti krooni tagamise kohta[500].

Põhiseaduses ei ole esitatud Eesti Panga pädevuse kirjeldust täies ulatuses, vaid toodud välja ainult Eesti Panga tegevuse eesmärki (tagada riigi vääringu stabiilsus) kajastavad ülesanded. Eesti Panga puhul on tegemist põhiseaduse VIII peatükis „Rahandus ja riigieelarve" sätestatud põhiseadusliku institutsiooniga, kes põhiseaduse paragrahvi 111 järgi täidab täidesaatvale riigivõimule omaseid täitev-korraldavaid ülesandeid (sealhulgas Eesti raha emiteerimise ainuõiguse realiseerimine, raharingluse korraldamine ning riigi vääringu stabiilsuse tagamise kohustuse täitmine). Põhiseaduse paragrahvi 112 järgi tegutseb Eesti Pank seaduse alusel ja annab aru Riigikogule, olles seega Vabariigi Valitsusest sõltumatu.

2. Eesti põhiseaduse § 111 tõlgendamisega seotud probleemid

Põhiseadust täiendab 14. septembri 2003. aasta rahvahääletusel vastu võetud põhiseaduse täiendamise seadus[501] (edaspidi: PSTS). Selle seaduse paragrahv 2 sätestab tõlgendamisklausli ehk Eesti õiguse ja Euroopa Liidu õiguse vastuolu ületamise reegli: „Eesti kuulumisel Euroopa Liitu kohaldatakse Eesti Vabariigi põhiseadust, arvestades liitumislepingust tulenevaid õigusi ja kohustusi."

Euroopa Liiduga liitumise kontekstis kasutati Eestis põhiseaduse täiendamiseks teatavasti ka juristide hulgas üsna vaieldavat õiguslikku struktuuri, mille kohaselt põhiseaduse enda sätteid formaalselt ei muudeta ja põhiseaduse täiendused sätestatakse eraldi konstitutsioonilises aktis. Seejuures ei nähtud ette põhiseaduse enda muutmise vajadust.

„Õigusteoreetiliselt on PS täiendamine eraldiseisva seadusega, tegemata PS tekstis muudatusi, samuti PS muutmine. PS teksti tuleb lugeda alati koos PSTS-

[498] RT I 1993, 28, 498; RT I, 01.03.2023, 45.

[499] RT 1992, 21, 299. RT I 2002, 63, 387. Redaktsiooni kehtivuse lõpp: 31.12.2010.

[500] RT 1992, 21, 300. Redaktsiooni kehtivuse lõpp: 31.12.2010.

[501] RT I 2003, 64, 429.

ga ja PS tekstist kohaldatakse üksnes seda osa, mis ei ole PS täiendustega vastuolus."[502]

Arvestades asjaolu, et riigi keskpanga õigusliku seisundi määratlemist põhiseaduse tasandil ei peetud paljudes Euroopa Liidu riikides vajalikuks sätestada, tõusis Eesti liitumisel Euroopa Liiduga ja ühisrahale ülemineku ettevalmistamisel päevakorda vajadus muuta või tõlgendada põhiseaduse § 111.

Enne Eesti liitumist euroalaga (kuni 31.12.2010) oli Eesti Pangal põhiseaduse §-st 111 tulenev ainupädevus – ainuõigus emiteerida Eesti raha. Seoses Eesti Panga võimaliku saamisega majandus- ja rahaliidu täieõiguslikuks liikmeks tõstatas Euroopa Komisjoni rahandusvolinik küsimuse, kuidas tõlgendada põhiseaduse §-s 111 sätestatud Eesti Panga ainuõigust emiteerida Eesti raha koostoimes põhiseaduse täiendamise seaduse ja Euroopa Liidu õigusega. Euroopa Komisjon vajas lisaks rahandusministri, Eesti Panga presidendi ja õiguskantsleri kirjalikele seisukohtadele põhiseaduse § 111 tõlgendamise kohta kinnitust ka läbi riigi kõrgeima kohtu – Riigikohtu – menetluse, et Eesti vastab nõuetele, mille kohaselt majandus- ja rahaliidu täieõigusliku liikmelisuse tingimustes ei ole euro emiteerimise ainuõiguse reserveerimine liikmesriigi keskpangale lubatud ning liikmesriigi keskpangal pole õigust emiteerida rahvusvaluutat euro kõrvale või asemele (paralleelvaluuta kasutuselevõtu võimaluse välistamine).

Riigikogu võttis 12. septembril 2005. aastal menetlusse Eesti Panga seaduse muutmise seaduse eelnõu (720 SE), mille eesmärk oli võimaldada Euroopa Liidu ühisraha euro kasutuselevõttu Eestis. Riigikogu menetlusse võetud Eesti Panga seaduse muutmise seaduse eelnõu (720 SE) sätted, eelkõige eelnõu §-d 2 ja 13, sätestasid Eesti Panga muutunud pädevuse Euroopa Liidu majandus- ja rahaliidu täieõiguslikuks liikmeks oleva liikmesriigi keskpangana. Olulisim pädevuse muudatus seisnes selles, et Eesti Panga ainuõigus emiteerida Eesti krooni koos sellest tulenevate teiste õigustega (sh õigus iseseisvale rahapoliitikale ja intressipoliitikale) pidi kaduma: ette nähti Eesti krooni käibelt kõrvaldamine majandus- ja rahaliidu täisliikmeks saamisel ning Eesti Pank pidi hakkama osalema eurode ringluse korraldamises vastavalt Eesti riigi kohustustele Euroopa Liidu ees, tunnustades Euroopa Keskpanga ainupädevust selles küsimuses. Liitumislepinguga[503] Eestile täitmiseks kohustuslikuks muutunud ühinemisakti

[502] J. Laffranque, C. Ginter, L. Mälksoo jt. Eesti Vabariigi Põhiseaduse täiendamise seaduse kommentaar. Komm.14. – Ü. Madise jt (toim). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 5., täiend. vlj. Tartu: sihtasutus Iuridicum, 2020, lk 1127.

[503] Leping Belgia Kuningriigi, Taani Kuningriigi, Saksamaa Liitvabariigi, Kreeka Vabariigi, Hispaania Kuningriigi, Prantsuse Vabariigi, Iirimaa, Itaalia Vabariigi, Luksemburgi Suurhertsogiriigi, Madalmaade Kuningriigi, Austria Vabariigi, Portugali Vabariigi, Soome Vabariigi, Rootsi Kuningriigi, Suurbritannia ja Põhja-Iiri Ühendkuningriigi (Euroopa Liidu liikmesriikide) ning Tšehhi Vabariigi, Eesti Vabariigi, Küprose Vabariigi, Läti Vabariigi, Leedu Vabariigi, Ungari Vabariigi, Malta Vabariigi, Poola Vabariigi, Sloveenia Vabariigi ja Slovaki Vabariigi vahel Tšehhi Vabariigi, Eesti Vabariigi, Küprose Vabariigi, Läti Vabariigi, Leedu Vabariigi, Ungari Vabariigi, Malta Vabariigi, Poola Vabariigi, Sloveenia Vabariigi ja Slovaki Vabariigi ühinemise kohta Euroopa Liiduga. Arvutivõrgus: https://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX:12003T/TXT (24.11.2023).

artikkel 4 ja Euroopa Ühenduse asutamislepingu artikli 122 lõige 2 sätestasid sisuliselt kohustusliku ülemineku eurole ning Eesti krooni käibelt kõrvaldamise alates Eesti Panga majandus- ja rahaliidu täisliikmeks saamisest.

Kõnealust eelnõu menetledes otsustas Riigikogu kasutada põhiseaduslikkuse järelevalve kohtumenetluse seaduse[504] 23. detsembril 2005 jõustunud muudatust ehk §-s 7^1 sätestatud õigust küsida Riigikohtult seisukohta, kuidas tõlgendada põhiseadust koostoimes Euroopa Liidu õigusega, kui põhiseaduse tõlgendamine on Euroopa Liidu liikme kohustuse täitmiseks vajaliku seaduse eelnõu vastuvõtmisel otsustav.[505]

Põhiseaduskomisjon ja Euroopa Liidu asjade komisjon esitasid 16. jaanuaril 2006 Riigikogule otsuse eelnõu, millega Riigikogu küsis Riigikohtult seisukohta, kuidas on euro võimalik kasutuselevõtt Eestis 2007. aastal kooskõlas Eesti põhiseadusega. Põhjendusena osutati põhiseaduskomisjonis, et Euroopa Keskpank on avaldanud oma raportites väidetavalt kahtlust, et Eesti Pank võib Eesti põhiseaduse §-st 111 tulenevalt säilitada Eesti krooni emiteerimise õiguse ka majandus- ja rahaliidu täieõigusliku liikmelisuse tingimustes.[506]

Riigikogu võttis 25. jaanuaril 2006. aastal vastu otsuse nr 550 X „Riigikohtu seisukoha taotlemine Eesti Vabariigi põhiseaduse § 111 koostoimes Eesti Vabariigi põhiseaduse täiendamise seaduse ja Euroopa Liidu õigusega tõlgendamise asjus"[507].

Otsusega taotles Riigikogu Riigikohtult seisukohta küsimuses, „kas Eesti Vabariigi põhiseaduse § 111 saab koostoimes Eesti Vabariigi põhiseaduse täiendamise seaduse ja Euroopa Liidu õigusega tõlgendada selliselt, et:

1) Eesti Pangal on majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes Eesti raha emiteerimise ainuõigus;

2) Eesti Pank säilitab majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes Eesti krooni emiteerimise õiguse".[508]

Riigikogu hinnangul oli Riigikohtult seisukoha saamine põhiseaduse § 111 tõlgendamise kohta koostoimes põhiseaduse täiendamise seaduse ja Euroopa Liidu õigusega otsustava tähtsusega, et võtta vastu Riigikogu menetluses olev Eesti Panga seaduse muutmise seaduse eelnõu (720 SE).

Põhjendusena märgiti, et Euroopa Liidu liikme kohustus on Eesti Euroopa Liiduga ühinemise akti artiklis 4 ja Euroopa Ühenduse asutamislepingu artikli 122

[504] RT I 2002, 29, 174; RT I, 07.03.2019, 4.

[505] RT I 2005, 68, 524; jõustunud 23.12.2005.

506 Riigikogu küsib arvamust Riigikohtult, 16.01.2006. Pressiteated. Arvutivõrgus: https://www.riigikogu.ee/pressiteated/riigikogu-kusib-arvamust-riigikohtult/ (26.11.2023).

[507] RT I 2006 6, 33.

[508] RT I 2006, 6, 33.

lõikes 2 sätestatud kohustus võtta kasutusele ühisraha. Majandus- ja rahaliidu täieõiguslikuks liikmeks saamisel kaob käibelt Eesti kroon ning Euroopa Keskpangal on vastavalt Euroopa Ühenduse asutamislepingu artikli 106 lõikele 1 ainuõigus anda luba pangatähtede emissiooniks ühenduse piires. Samas sätestab põhiseaduse § 111, et Eesti raha emissiooni ainuõigus on Eesti Pangal, kes korraldab raharinglust ja seisab hea riigi vääringu stabiilsuse eest. Eesti Vabariigi põhiseaduse täiendamise seaduse § 2 näeb ette, et Eesti kuulumisel Euroopa Liitu kohaldatakse Eesti Vabariigi põhiseadust, arvestades liitumislepingust tulenevaid õigusi ja kohustusi.[509]

Olenemata sellest, kas Riigikohtult seisukoha taotlemise tingis vajadus anda Euroopa Komisjonile põhiseaduslikkuse järelevalve kaudu kohtumenetluse õigusselgus põhiseaduse § 111 tõlgendamise osas või jäi Riigikogu põhiseaduse sätete tõlgendamisega hätta, osundab põhiseaduslikkuse järelevalve kohtumenetluse seaduse § 7^1 jõustumine 23. detsembril 2005 ja vahetult sellele järgnev Riigikohtult arvamuse küsimise menetluse algatamine siiski asjaolule, et põhiseaduse sätete Euroopa Liidu õigusega vastavusse viimine eraldi konstitutsioonilise aktiga – põhiseaduse täiendamise seadusega – oli Euroopa Komisjoni ja Euroopa Keskpanga vaates õiguslikult probleemne ja õigusselguse huvides oleks pidanud vastuolu kõrvaldama, muutes põhiseaduse § 111.

Põhiseaduslikkuse järelevalve kohtumenetluses avaldasid oma seisukoha põhiseaduse § 111 tõlgendamise kohta kõik menetlusosalised (Riigikogu põhiseaduskomisjon, rahanduskomisjon, Eesti Pank, õiguskantsler ja justiitsminister).

„Riigikogu põhiseaduskomisjoni, rahanduskomisjoni ja Eesti Panga arvates ei ole Eesti Pangal majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes põhiseaduse § 111, põhiseaduse täiendamise seaduse ja Euroopa Liidu õigusega koostoimes tõlgendades Eesti raha emiteerimise ainuõigust. Ka ei säilita Eesti Pank majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes Eesti krooni emiteerimise õigust.

Riigikogu põhiseadus- ja rahanduskomisjon leiavad, et põhiseaduse täiendamise seadus moodustab koos põhiseaduse ja põhiseaduse rakendamise seadusega konstitutsiooniliste aktide süsteemi, milles põhiseaduse täiendamise seadus muudab läbivalt kogu põhiseadust. Kui mõni põhiseaduse säte ei võimalda mõnda Euroopa Liidu liikme kohustust täita, lähtutakse Euroopa Liidu õigusest.

Eesti Pank on seisukohal, et PS § 111 ei saa vastavalt põhiseaduse täiendamise seaduse §-ga 2 Eesti põhiseaduslikku akti inkorporeeritud Euroopa

[509] Vt Seletuskiri Riigikogu 25. jaanuari 2006. aasta otsuse juurde, lisad 1 ja 2. Arvutivõrgus: https://www.riigikogu.ee/?s=&checked=eelnoud (30.11.2023).

Liidu õiguse ülimuslikkuse põhimõttele alates Eesti suhtes kehtestatud erandi kaotamisest enam kohaldada."[510]

„Õiguskantsler ja justiitsminister leiavad, et põhiseaduse § 111 saab koostoimes põhiseaduse täiendamise seaduse ja Euroopa Liidu õigusega tõlgendada selliselt, et Eesti Pangal ei ole majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes Eesti raha emiteerimise ainuõigust. Samuti ei saa Eesti Panga võimalik õigus emiteerida majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes Eesti krooni tuleneda põhiseaduse §-st 111.

Kui õiguskantsler peab põhiseaduse sätetele tõlgendamise teel uue, Euroopa Liidu õigusega kooskõlas oleva sisu andmist võimalikuks, siis justiitsministri arvates saab olenevalt põhiseaduse sättest seda kas Euroopa Liidu õigusega kooskõlas olevalt tõlgendada või tuleb asjaomane säte Euroopa Liidu õigust eelistades kohaldamata jätta.

Õiguskantsler peab kahetsusväärseks olukorda, kus põhiseaduse grammatiline säte ja tegelik sisu on kasvanud lahku. Põhiseaduse rakendatavuse tagamiseks ning õigusselguse põhimõttest lähtudes on parim lahendus põhiseadus, kuhu on sisse viidud liitumislepingust tulenevad ja Euroopa Liidu õiguse ülevõtmisega kaasnenud muudatused.

Justiitsminister märgib, et Eesti Vabariigi põhiseaduse täiendamise seaduse § 2 välistab võimaluse, et põhiseadus ja Euroopa Liidu õigus võiksid omavahel vastuollu minna, sest Eesti kuulumisel Euroopa Liitu kohaldatakse põhiseadust, arvestades liitumislepingust tulenevaid õigusi ja kohustusi. Võimalik on üksnes grammatiline (vormiline) vastuolu. Euroopa Liidu Kohtu praktikast tulenevate Euroopa Liidu õiguse ülimuslikkuse ja vahetu kohaldamise põhimõtete alusel ei ole siseriikliku õigusakti, sealhulgas põhiseaduse Euroopa Liidu õigusega vastuolus olev säte kohaldatav. Seejuures jääb Euroopa Liidu õigusega vastuolus olev siseriikliku õiguse säte kehtima.[511]

Eespool toodust tulenevalt toetasid kõik menetlusosalised Riigikohtus seisukohta, et majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes tuleb põhiseaduse § 111 koostoimes Eesti Vabariigi põhiseaduse täiendamise seaduse (PSTS) ja EL õigusega tõlgendada selliselt, et Eesti Pangal ei ole rahaliidu täieõiguslikuks liikmeks olemise tingimustes Eesti raha emiteerimise ainuõigust ning Eesti Pank ei säilita majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes Eesti krooni emiteerimise õigust.

Oma arutluskäigus täpsustas Riigikohus põhiseaduse § 111 tõlgendamist ja leidis, et: „Riigikogu küsimusele vastamiseks tuleb PS § 111 vastavalt PSTS §-le 2 tõlgendada koostoimes asjakohase (Euroopa Liidu liikme kohustuse täitmise

[510] RKPJKa 11.05.2006, 3-4-1-3-06, p 4.

[511] RKPJKa 11.05.2006, 3-4-1-3-06, p 5.

eesmärgil menetletava eelnõuga seonduva) Euroopa Liidu õigusega, st Euroopa Ühenduse asutamislepingu artikliga 106. Riigikohtu arvates puutub lisaks nimetatud artiklile asjasse ka Euroopa Ühenduse asutamislepingu artikkel 109, mille kohaselt iga liikmesriik tagab, et hiljemalt Euroopa Keskpankade Süsteemi asutamiskuupäevaks on tema siseriiklikud õigusaktid, kaasa arvatud tema keskpanga põhikiri, vastavuses käesoleva lepinguga ja Euroopa Keskpankade Süsteemi põhikirjaga.

Kuna põhiseaduse § 111 sätestab Eesti Panga ainuõiguse emiteerida Eesti raha ja Euroopa Ühenduse asutamislepingu artikli 106 kohaselt on Euroopa Ühenduse piires ainsa seadusliku maksevahendi staatust omava euro emiteerimise lubamise ainuõigus Euroopa Keskpangal, siis ei ole põhiseaduse § 111 ühitatav Euroopa Liidu õigusega, see tähendab, et PS § 111 ja Euroopa Liidu õigust ei ole võimalik samaaegselt kohaldada. Tulenevalt põhiseaduse täiendamise seaduse §-st 2 tuleb seega põhiseaduse § 111 kohaldamata jätta ja lähtuda Euroopa Ühenduse asutamislepingu artiklist 106. Nii tekib pärast Eesti Vabariigi majandus- ja rahaliidu täieõiguslikuks liikmeks saamist õiguslik olukord, kus Eesti Pank võib emiteerida euro pangatähti Euroopa Keskpanga loal ja euro münte Euroopa Keskpanga poolt ettenähtud mahus, kusjuures euro on Eesti Vabariigi territooriumil ainus seaduslik maksevahend.

Kolleegiumi arvates on täidetud ka Euroopa Ühenduse asutamislepingu artikli 109 nõuded, sest põhiseaduse täiendamise seadus lubab põhiseadust lugeda kooskõlas Euroopa Liidu õigusega."[512]

Lähtudes eespool toodud arutluskäigust, vastas Riigikohtu põhiseaduslikkuse järelevalve kolleegium mõlemale Riigikogu küsimusele eitavalt.

„Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi arvates ei ole Eesti Pangal majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes Eesti raha emiteerimise ainuõigust ega Eesti krooni emiteerimise õigust."[513]

Seega kinnitas Riigikohus läbi põhiseaduslikkuse järelevalve kohtumenetluse, et kolmanda konstitutsioonilise akti – põhiseaduse täiendamise seaduse – vastuvõtmisega sai Euroopa Liidu õigusest üks põhiseaduse tõlgendamise ja rakendamise alus, mis sisuliselt tähendab põhiseaduse läbivat muutmist selles osas, mis ei vasta Euroopa Liidu õigusele. See järeldus võimaldab tõlgendamist, et põhiseadusest kehtib ainult see osa, mis on kooskõlas Euroopa Liidu õigusega.

Esiletõstmist väärivad põhiseaduslikkuse järelevalve kolleegiumi (RKPJK) 11. mai 2006. aasta arvamuse suhtes põhiseaduse § 111 tõlgendamise kohta esitatud kahe riigikohtuniku kriitilised eriarvamused.

Riigikohtunik Villu Kõve eriarvamuse kohaselt on Riigikohtu põhiseaduslikkuse järelevalve kolleegium „Euroopa Liidu õiguse ülimuslikkuse

[512] RKPJKa 11.05.2006, 3-4-1-3-06, p 18.

[513] RKPJKa 11.05.2006, 3-4-1-3-06, p 19.

põhimõtet Eesti õiguskorra suhtes „üle hinnanud", leides, et põhiseadus on PSTS-i tulemusena läbivalt muutunud ning et põhiseadusel on jätkuvalt toime vaid osas, mida Euroopa Liidu õigusega ei reguleerita või mis on Euroopa Liidu õigusega kooskõlas." Põhiseaduse täiendamise seaduse paragrahvi 2 järgi on liitumisleping põhiseaduse ees kohaldamise mõttes ülimuslik, probleemne on aga selle ülimuslikkuse sisu. Euroopa Liidu Kohtu praktikast tuleneva Euroopa Liidu õiguse kohaldamise ülimuslikkuse nõude liikmesriigi ees on põhiseaduslikkuse järelevalve kolleegium põhjendamatult lugenud põhiseaduse muutmiseks.

Riigikohtu üldkogu on oma 19. aprilli 2005. aasta otsuses põhiseaduslikkuse järelevalve asjas nr 3-4-1-1-05 (RT III 2005, 13, 128, p 49) leidnud, et: „Euroopa Liidu õigus on küll ülimuslik Eesti õiguse suhtes, kuid see tähendab Euroopa Liidu Kohtu praktikat arvestades kohaldamise ülimuslikkust. Kohaldamise ülimuslikkus tähendab, et Euroopa Liidu õigusega vastuolus olev siseriiklik õigus tuleb konkreetses vaidluses kohaldamata jätta" (vt ka ühendatud kohtuasjad C-10/97 kuni C-22/97, Ministero delle Finanze *vs*. IN.CO.GE.'90, EKL 1998, lk I-6307).

Osundades Riigikohtu üldkogu 19. aprilli 2005. aasta otsusele põhiseaduslikkuse järelevalve asjas nr 3-4-1-1-05 (p 49), toob riigikohtunik Villu Kõve esile vastuolu põhiseaduslikkuse järelevalve kohtumenetluse seaduse 11. mai 2006. aasta arvamuse ja Riigikohtu üldkogu 19. aprilli 2005. aasta otsuse vahel, leides, et „põhiseaduslikkuse järelevalve kolleegium on käsitlenud Euroopa Liidu õiguse kohaldamise ülimuslikkuse põhimõtet sisuliselt põhjendamatult laiemalt, kui seda tegi Riigikohtu üldkogu, tuletades kohaldamise ülimuslikkuse põhimõttest koostoimes PSTS-ga põhiseaduse läbiva muutmise."[514]

Ka riigikohtunik Erik Kergandberg oli Riigikohtu 11. mai 2006. aasta arvamuse osas erimeelt, märkides, et „Riigikohtu põhiseaduslikkuse järelevalve menetluse analüüs oleks pidanud hõlmama ka PSTS §-is 1 sätestatut, kuna puudus alus väita nagu oleks sellest seadusest regulatiivne toime üksnes teisel paragrahvil ja et ülejäänud paragrahvid tohiks jätta või suisa peaks jätma tähelepanuta."[515]

Kuigi Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi arvamus 3-4-1-1-05 selle õiguslikku olemust arvestades ei kõrvaldanud lõplikult formaal-juriidilist vastuolu põhiseaduse §-s 111 sätestatu ja Euroopa Liidu õiguse vahel, märkisid Euroopa Komisjon ja Euroopa Keskpank oma 5. detsembri 2006. aasta lähenemisaruandes, et „11. mail 2006 tunnistas Riigikohus põhiseaduse § 111 kohaldamatuks ning tõi seega küsimusse selgust," ning asusid samas jätkuvalt seisukohale, et „põhiseaduse § 111 sõnastus tuleks selle edasisel muutmisel asutamislepinguga vastavusse viia."[516]

[514] Riigikohtunik Villu Kõve eriarvamus RKPJKo arvamusele 3-4-1-3-06, p 3.

[515] Riigikohtunik Erik Kergandbergi eriarvamus RKPJKo arvamusele 3-4-1-3-06, p-d 1 ja 2.

[516] Euroopa Keskpank. Lähenemisaruanne, detsember 2006, lk 211. Arvutivõrgus: https://www.ecb.europa.eu/pub/pdf/conrep/cr200612et.pdf (19.11.2023).

Arvestades asjaolu, et 1. jaanuaril 2011 tühistati Euroopa Liidu Nõukogu 13. juuli 2010. aasta otsuse nr 2010/416/EL artikli 1 alusel 2003. aasta ühinemisakti artiklis 4 nimetatud erand Eesti suhtes[517], ei ole põhiseaduse §-s 111 sätestatu sellest kuupäevast alates ühitatav Euroopa Liidu õigusega, mistõttu kaotas põhiseaduse § 111 koostoimes PSTS §-ga 2 oma õigusliku toime Eesti õiguskorras ega mõjuta enam Eesti Panga õiguslikku seisundit.

3. Eesti Panga seadusest tulenevad eesmärgid ja ülesanded

Täiendavalt põhiseadusele sätestab Eesti Panga õigusliku seisundi, sealhulgas tegevuse õiguslikud alused, konstitutsioonilise seadusena Eesti Panga seadus[518] (edaspidi: EPS). Eesti Pank on Eesti Vabariigi keskpank ja Euroopa Keskpankade Süsteemi liige. Eesti Pank on 1919. aastal Eesti Vabariigi keskpangana asutatud Eesti Panga õigusjärglane (EPS § 1 lg 1), kusjuures talle kuulub ka kinnis- ja vallasvara, mis oli 1919. aastal Eesti keskpangana asutatud Eesti Panga omanduses ning mis 1940. aastal õigusvastaselt võõrandati.

Õiguspraktikas on korduvalt tõstatatud küsimus Eesti Panga varast ja selle võimalikust kuuluvusest riigile. Eesti Pank juriidilise isikuna valdab, kasutab ja käsutab oma vara iseseisvalt (EPS § 1 lg 2 ja § 26 lg 2). See tähendab, et Eesti Panga vara ei ole käsitatav riigi varana, sest juriidilise isiku vara ega juriidiline isik ise ei saa kuuluda teistele isikutele, vaid tema vara kuulub talle endale (seos asjaõigusseaduse[519] § 6 lõike 2 lausega 2). Eesti Panga varaliselt sõltumatut seisundit avalik-õigusliku juriidilise isikuna iseloomustab kõige paremini asjaolu, et Eesti Pank ei vastuta riigi varaliste kohustiste eest ja riik ei vastuta Eesti Panga varaliste kohustiste eest (EPS § 3 lg 2). Eesti Pank kannab seaduses märgitud eraldiste tegemisest ülejääva kasumi vastavalt nõukogu otsusele riigieelarvesse (EPS § 30 lg 5). Eesti Panga seaduse eespool nimetatud sätete koostoimest järeldub, et Eesti Panga puhul on tegemist omapärase juriidilise üksusega: nii põhiseaduse VIII peatükis sätestatud põhiseadusliku institutsiooni kui ka põhiseaduse paragrahvide 111 ja 112 alusel loodud sõltumatu avalik-õigusliku juriidilise isikuga. Seega on tegemist Eestis ainsa juriidilise isikuga, mis on loodud otse põhiseaduse sätete alusel. Kõik muud juriidilised isikud on seaduse kui õigusakti liigi alusel loodud õigussubjektid (TsÜS § 24 lause 1).[520]

[517] Euroopa Liidu Nõukogu 13. juuli 2010. aasta otsus vastavalt aluslepingu artikli 140 lõikele 2 euro kasutuselevõtu kohta Eestis 1. jaanuaril 2011 (2010/416/EL). Arvutivõrgus: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:196:0024:0026:ET:PDF (19.11.2023).

[518] RT I 1993, 28, 498; RT I, 01.03.2023, 45.

[519] RT I 1993, 39, 590; RT I, 17.03.2023, 57.

[520] RT I 2002, 35, 216; RT I, 06.07.2023, 98.

Eesti Pank juhindub oma tegevuses Eesti Vabariigi põhiseadusest, Eesti Vabariigi põhiseaduse täiendamise seadusest, Euroopa Liidu toimimise lepingust, Euroopa Keskpankade Süsteemi ja Euroopa Keskpanga põhikirjast, Euroopa Keskpanga õigusaktidest, Eesti Panga seadusest, muudest seadustest ning oma põhikirjast.[521]

Olles Euroopa Keskpankade Süsteemi liige ja Eesti riigi keskpank, on Eesti Pangale nii Euroopa Liidu kui ka Eesti õigusaktidega antud keskpanga ülesannete täitmiseks laialdased volitused, aga ka kohustused osaleda eurosüsteemi otsuste tegemisel ja nende elluviimisel, sh osalemine eurosüsteemi keskpangana euroala ühtse rahapoliitika kujundamises ja hinnastabiilsuse säilitamisel, riigi raharingluse korraldamisel, maksesüsteemide usaldusväärses ja tõrgeteta toimimises ning riigi finantssüsteemi stabiilsuse tagamisel. Selleks teeb Eesti Pank makrofinantsjärelevalvet ehk analüüsib ja hindab finantssektorit ohustavaid süsteemseid riske ning rakendab riskide vähendamiseks poliitikameetmeid. Lisaks kujundab Eesti Pank finantssektori poliitikat, osaledes õigusaktide väljatöötamises ning arendades kriisihaldusraamistikku.[522]

Põhiseaduse paragrahvide 111 ja 112 kõrval sätestab Eesti Panga seaduse paragrahv 2 Eesti Panga eesmärgi ja ülesanded majandus- ja rahaliidu täieõiguslikuks liikmeks olemise tingimustes. Alates 1. jaanuarist 2011 kehtivas seaduse redaktsioonis on Eesti Panga esmase eesmärgiks seatud hindade stabiilsuse säilitamine. Hindade stabiilsuse tagamine on olnud Eesti Panga esmane eesmärk alates Eesti Vabariigi ühinemisest Euroopa Liiduga.

Kooskõlas Euroopa Liidu toimimise lepinguga[523] toetab Eesti Pank ka muude majanduspoliitiliste eesmärkide saavutamist (EPS § 2 lg 1). Eesti Panga teiste majanduspoliitiliste eesmärkide kohaväärtust on seaduses muudetud ning sõnastuse osas on nende eesmärkide järgimine viidud kooskõlla Euroopa Liidu õigusega. Tähelepanu väärib Euroopa Keskpanga avaldatud seisukoht Eesti Panga teiste majanduspoliitiliste eesmärkide suhtes: „ühenduse üldise majanduspoliitika toetamine on prioriteetsem kui Eesti Vabariigi valitsuse majanduspoliitika toetamine.“[524]

Põhiseadus koostoimes enne ühisrahale üleminekut jõustunud Eesti Panga seaduse muudatustega ja Euroopa Liidu õigusest tulenevate nõuetega annab alates 1. jaanuarist 2011 riigi keskpanga pädevusse iseseisva raha- ja krediidipoliitika ülesannete asemel uute ülesannetena Euroopa Ühenduse

[521] Eesti Panga seaduse § 1 lg 3 (jõust. 01.01.2011). RT I 2010, 22, 108.

[522] Eesti Panga ülesanded. Arvutivõrgus: https://www.eestipank.ee/keskpangast/eesti-panga-ulesanded (19.07.2024).

[523] Euroopa Liidu toimimise leping (13. detsember 2007), konsolideeritud versioon (ELT C 202, 7.6.2016, lk 47–360).

[524] Euroopa Keskpank. Lähenemisaruanne, detsember 2006, lk 211. Arvutivõrgus: https://www.ecb.europa.eu/pub/pdf/conrep/cr200612et.pdf (19.11.2023).

rahapoliitika kujundamisele kaasaaitamise ning Euroopa Keskpanga nõukogu määratletud rahapoliitika elluviimise Eestis. Kusjuures välised mõjutajad, sh ükski valitsusasutus, ei tohi määrata, kuidas riigi keskpank peab nimetatud poliitika ellu viima. Selles seisneb riigi keskpanga institutsionaalse sõltumatuse kriteerium.

Eesti Panga seaduse regulatsioon on selles mõttes kooskõlla viidud Euroopa Liidu õigusaktide ja õiguspraktikaga, mida arenenud Lääne-Euroopa riigid on juba aastakümneid kohaldanud. Rahapoliitika elluviimise ülesanne on Euroopa õigusruumis antud sõltumatule keskpangale. See rahvusvaheline tava põhineb majanduse lühi- ja pikaajaliste eesmärkide paratamatul vastuolul. Rahapoliitilise keskkonna mõjutamine eesmärgiga suurendada lühiajaliselt majandusaktiivsust, mis huvitab sageli valitsust poliitilistel põhjustel, saab anda vaid väga piiratud tulemusi. Pikema aja jooksul võib see viia raha stabiilsuse vähenemiseni, mis on vastuolus riigi pikaajaliste huvidega. Seetõttu on osutunud vajalikuks anda rahapoliitika elluviimine täidesaatvast võimust eraldiseisvale asutusele.[525]

III. Eesti Panga õiguslik seisund

1. Eesti Panga funktsionaalne ja institutsionaalne sõltumatus

Eesti Panga seaduse paragrahv 3 sätestab Eesti Panga sõltumatuse. Eesti Pank tegutseb muudest riigiasutustest eraldi. Ta annab oma tegevusest aru Riigikogule, ei allu Vabariigi Valitsusele ega ühelegi teisele täidesaatva riigivõimu asutusele ega kolmandatele isikutele. Kuuludes Euroopa Keskpankade Süsteemi, võivad Eesti Pank ja tema juhtimisorganite liikmed taotleda ja saada täitmiseks juhiseid vaid Euroopa Keskpangalt. Kõnealuse sätte sõnastuse puhul esineb otsene seos Euroopa Liidu toimimise lepingu artikli 130 esimeses lauses sätestatuga: „Kasutades volitusi ning täites ülesandeid ja kohustusi, mis on neile pandud aluslepingutega ja EKPS ja EKP põhikirjaga, ei taotle ega saa Euroopa Keskpank ega ükski riigi keskpank ega ükski nende otsuseid tegeva organi liige mingeid juhiseid liidu institutsioonidelt, organitelt või asutustelt, ühegi liikmesriigi valitsuselt ega üheltki teiselt organilt."

Eesti Panga institutsionaalset sõltumatust iseloomustab asjaolu, et Eesti Pank toetab oma funktsioonide täitmisel Eesti Panga seadusega ette nähtud volituste piires Vabariigi Valitsuse majanduspoliitikat, kui see ei ole vastuolus nimetatud seaduse paragrahvis 2 sätestatud Eesti Panga eesmärkide ja ülesannetega ega takista nende täitmist. Praktikas tähendab see Eesti Panga koostööd Vabariigi Valitsusega ja valitsuse nõustamist majandus- ja rahanduspoliitilistes küsimustes. Üldjuhul ei tohi valitsus langetada olulisi majandus- ja rahanduspoliitilisi otsuseid ilma Eesti Panga seisukohta ära kuulamata. Lisaks nimetatud ülesannetele esindab Eesti Pank riiki Vabariigi Valitsuse volitusel rahvusvahelistes rahandusorganisatsioonides, mille liige on

[525] A. Tupits. Euroopa Liidu riikide keskpankade õigusliku seisundi võrdlus. – Juridica, 2000, nr 1, lk 59.

Eesti Vabariik. Seejuures näeb seadus ette, et Eesti Vabariigile jagatud Rahvusvahelise Valuutafondi arveldusühikud kuuluvad Eesti Pangale (EPS § 26 lg 1^1).

Rahvusvahelises ja Euroopa õigusruumis tunnustatud sõltumatu ja täidesaatvast võimust eraldiseisva keskpanga põhimõtet järgides osaleb riigi keskpank üldises EL majanduspoliitikas: aitab kaasa Euroopa rahapoliitika kujundamisele ning viib ellu Euroopa Keskpanga nõukogu määratletud rahapoliitikat, kahjustamata seejuures Eesti Panga eriomaseid põhiseadusest ja Eesti Panga seadusest tulenevaid eesmärke ning ülesandeid.

Euroopa Liidu aluslepingute sätetest, aga ka Euroopa Keskpanga ja Euroopa Keskpankade Süsteemi põhikirjast ja nendega kooskõlas olevatest Eesti Panga seaduse kontseptuaalsetest sätetest tuleneb Eesti Panga kui riigi keskpanga funktsionaalne ja institutsionaalne sõltumatus ning tema otsustusõiguslike organite liikmete isikusõltumatus. Eesti Panga sõltumatuse riigiõiguslikuks garantiiks on taasiseseisvumise järel saanud Eesti Panga nõukogu esimehe professor Uno Mereste[526] mõte ja ettepanek, et Eesti Panga õiguslikku seisundit ei tohiks muuta n-ö lihtseaduste vastuvõtmise teel, vaid et seda tuleks teha ainult Eesti Panga seaduse muutmise seaduse kaudu (ettepanek realiseerus Eesti Panga seaduse § 1 lõike 4 uues sõnastuses, mis võeti vastu 15. aprillil 1994).

Tähelepanu väärib asjaolu, et 18. mail 1993 Riigikogus vastu võetud Eesti Panga seaduse § 1 lõige 4 sätestas deklaratiivselt: „Käesoleva seadusega vastuolus olevad õigusaktid Eesti Panga suhtes ei kehti.“[527] Pärast Eesti Panga seaduse jõustumist 18. juunil 1993 jõuti koos Eesti Panga nõukogu esimehe ja õiguskantsleriga konsulteerimise tulemusel seisukohale, et Eesti Panga õigusliku seisundi õiguslikult korrektseks vormistamiseks on vajalik Eesti Panga seaduse sätte deklaratiivset sõnastust muuta ja seadusesse sisse viia regulatsioon, mis ei võimaldaks riigi keskpanga õiguslikku seisundit muuta, ilma et järgitaks põhiseaduse § 104 lõikes 2 sätestatud konstitutsioonilise seaduse muutmise regulatsiooni. Alates 15. aprillist 1994 kehtib Eesti Panga seaduse § 1 lõige 4 järgmises redaktsioonis: „Eesti Panga õiguslikku seisundit võib muuta ainult Eesti Panga seaduse muutmise seaduse kaudu.“[528]

Eespool toodust tulenevalt on Eesti Panga seaduse puhul tegemist konstitutsiooniliste seaduste süsteemsesse kataloogi kuuluva seadusega, mida saab vastu võtta ja muuta põhiseaduse paragrahvi 104 lõike 2 punkti 12 kohaselt ainult Riigikogu koosseisu häälteenamusega. See asjaolu tagab Eesti Pangale ka euroopaliku keskpanganduse aluspõhimõtetele vastava rolli – olla tasakaalustav ja erapooletu poliitikaväline organ nii riigi rahanduse kui ka erasektori

[526] 21.12.1992 kuulutas Vabariigi President oma otsusega nr 15 välja Eesti Panga nõukogu esimehe ametisse nimetamise seaduse, millega Riigikogu nimetas Eesti Panga nõukogu esimeheks Uno Mereste. Vastavalt Eesti Panga seadusele oli Eesti Panga nõukogu esimehe ametiaeg viis aastat. Arvutivõrgus: https://www.eestipank.ee/varasemad-eesti-panga-noukogu-koosseisud (25.09.2024).

[527] RT I 1993, 28, 498.

[528] RT I 1994, 30, 463.

rahandusturgude korraldamisel. See oli seadusandja tahe ja eesmärk ka Eesti Panga seadust 18. mail 1993 vastu võttes – analüüsida seda küsimust, lähtudes teleoloogilisest tõlgendusest ning seaduse eesmärgist ja tekkeloost.

2. Kooskõla Euroopa Liidu õiguse ja rahvusvahelise keskpanganduse tavaga

Riigi keskpanga funktsionaalse ja institutsionaalse sõltumatuse nõue tuleneb Euroopa Liidu toimimise lepingust (edaspidi ka: EL toimimise leping, endine EÜ asutamisleping), mille kohaselt koosneb Euroopa Keskpankade Süsteem Euroopa Keskpangast ja riikide keskpankadest.

Üks olulisem Euroopa Liidu õiguses sisalduv Euroopa Keskpanga sõltumatuse tunnus on juriidilise isiku staatuse omamine. EL toimimise lepingu artikli 282 lõikes 3 on sätestatud: „Euroopa Keskpank on juriidiline isik. Loa eurode emiteerimiseks võib anda ainult Euroopa Keskpank. Euroopa Keskpank on oma volituste teostamisel ja oma rahandusasjade haldamisel sõltumatu. Liidu institutsioonid, organid ja asutused ning liikmesriikide valitsused austavad seda sõltumatust."

EL toimimise lepingu artikli 282 lõige 5 sätestab konsulteerimiskohustuse: „Euroopa Keskpangaga konsulteeritakse tema pädevusvaldkondades kõigi ettepanekute üle, mis on tehtud liidu õigusaktide ja riigi tasandi õigusaktide vastuvõtmiseks, ning Euroopa Keskpank võib nende kohta arvamusi esitada."

Euroopa Keskpanga põhiülesanne on kujundada ja viia ellu liidu rahapoliitikat Euroopa Keskpankade Süsteemi kuuluvate riikide keskpankade kaudu. EL toimimise lepingu artikli 127 lõige 2 (endine EÜ asutamislepingu artikkel 105) sätestab Euroopa Keskpankade Süsteemi (EKPS) põhiülesannetena:

„– määratleda liidu rahapoliitika ja rakendada seda;

– sooritada välisvaluutatehinguid artikli 219 sätetele;

– hoida ja hallata liikmesriikide ametlikke välisvaluutareserve;

– edendada maksesüsteemide tõrgeteta toimimist."

Osundatud artikli lõike 4 kohaselt tuleb Euroopa Keskpangaga (EKP) konsulteerida riikide ametiasutustel iga EKP pädevusse kuuluva õigusakti eelnõu puhul, kuid ulatuses ja tingimustel, mis nõukogu vastavalt artikli 127 lõikes 4 sätestatud menetlusele kindlaks määrab. Selline liikmesriigi tasandi asutuste konsulteerimiskohustus aitab parandada riigisiseste õigusaktide ja Euroopa Liidu õigusaktide omavahelist ühilduvust ja kooskõla EKPS põhiülesannete ja EKP rahapoliitikaga ning lõppkokkuvõttes parandada riigi õigusloome kvaliteeti, arvestades EKP pädevusvaldkondi.

EL toimimise lepingu artikkel 130 (endine EÜ asutamislepingu artikkel 108) sätestab EKP ja liikmesriigi keskpanga sõltumatuse põhimõtte: „Kasutades volitusi ning täites ülesandeid ja kohustusi, mis on neile pandud aluslepingutega ja EKPS ja EKP põhikirjaga, ei taotle ega saa Euroopa Keskpank ega ükski riigi keskpank ega ükski nende otsuseid tegeva organi liige mingeid juhiseid liidu institutsioonidelt, organitelt või asutustelt, ühegi liikmesriigi valitsuselt ega üheltki teiselt organilt. Liidu institutsioonid, organid või asutused ning liikmesriikide valitsused kohustuvad seda põhimõtet austama ega püüa mõjutada Euroopa Keskpanga või riikide keskpankade otsuseid tegevate organite liikmeid nende ülesannete täitmisel." Seega ei tohi ükski kolmas isik või organ, sealhulgas liikmesriigi valitsus, mõjutada riigi keskpanka tema ülesannete täitmisel tehtavates raha-, krediidi- ja panganduspoliitilistes otsustustes, samuti välisvaluuta reservide haldamist riigi keskpanga poolt, keskpanga välisvaluuta tehinguid ning maksesüsteemide tõrgeteta toimimist, sest see võib piirata asutamislepinguga ette nähtud riigi keskpanga sõltumatuse põhimõtet.

Eesti Panga suhtes kehtib Euroopa Liidu toimimise lepingu artikli 123 lõikest 1 (endine EÜ asutamislepingu artikkel 101) tulenevalt avaliku võimu institutsioonide, asutuste ja organite krediteerimise keeld. Keelatud on Euroopa Keskpanga või liikmesriikide keskpankade arvelduslaenud või muud liiki laenuvõimalused liidu institutsioonidele, organitele või asutustele, liikmesriikide keskvalitsustele, piirkondlikele, kohalikele või muudele avaliku võimu organitele, teistele avalik-õiguslikele isikutele või riigi osalusega äriühingutele. Samuti on keelatud Euroopa Keskpangal või liikmesriikide keskpankadel osta neilt otse võlakohustusi. Analoogne krediteerimise keeld sisaldus varasemalt Eesti Panga seaduse paragrahvis 16, mis on alates 1. novembrist 2011 kehtetu.[529]

Eespool toodu põhjal tuleneb Eesti Panga funktsionaalne ja institutsionaalne sõltumatus ning tema otsuseid tegevate organite liikmete isikusõltumatus ning distantseeritus Vabariigi Valitsusest ja täidesaatvast võimust ning tema õiguslik seisund avalik-õigusliku juriidilise isikuna Euroopa Liidu õiguse põhimõtetest ja normidest, mis on kooskõlas rahvusvahelise keskpanganduse tava ning raha- ja finantspoliitikaga, mida Lääne-Euroopa riigid (eriti Saksamaa Liitvabariigi eeskujul) on viimastel aastakümnetel rakendanud.

IV. Eesti Panga seadusandlikud volitused põhiseaduse kontekstis

Eesti riigiõiguslikus tavas on Euroopa Liidu õigusest tuleneva e-raha asutuste seaduse menetlemisel Riigikogus põhiseaduskomisjon tõstatanud põhimõttelise küsimuse Eesti Panga seadusandlike volituste kohta anda kolmandatele isikutele välja kohustuslikke õiguse üldakte ehk tervikuna küsimuse Eesti Panga määrusandlusõiguse, selle sisu ja ulatuse ning kooskõla kohta Eesti Vabariigi põhiseaduse ja Euroopa Liidu õigusega.

[529] Euro kasutusele võtmise seadus. Jõust. 01.01.2011 – RT I, 2010, 22, 108.

Vabariigi Valitsus algatas 16. juunil 2004 Riigikogus e-raha asutuste seaduse eelnõu (415 SE I), mis nägi mitmetes volitusnormides rahandusministrile ette volituse anda seaduse rakendusmäärusi. E-raha asutuste seadusega paljudes küsimustes seaduse rakendusmääruste andmine rahandusministrile erines oluliselt senisest Eesti riigiõiguslikust tavast ja ka halduse üldaktide andmise tavast, kus analoogsete küsimuste reguleerimine oli seaduse volitusnormi alusel antud Eesti Panga (presidendi) pädevusse. E-raha asutuste seaduse eelnõu menetluse käiku ja tulemuslikkust Riigikogus iseloomustab kõige paremini asjaolu, et õiguslike vaidluste tekkimisel volitusnormide adressaatide üle otsustas Vabariigi Valitsus eelnõu tagasi võtta.[530]

1. Eesti Panga pädevuse õiguslik reguleerimine põhiseaduses ja teistes seadustes

Põhiseaduse paragrahv 112 sätestab Eesti Panga tegevuse seaduse alusel. Eesti Panga pädevust täpsustab ja pangale annab õiguslikud vahendid nende ülesannete täitmiseks Eesti Panga seadus. Osundatud seadus volitab Eesti Panga otsustusõiguslikke organeid välja andma õiguse üld- ja üksikakte. Eesti Panga seaduse paragrahvi 1 lõige 5 sätestab, et Eesti Panga ülesannete täitmiseks annab Eesti Panga nõukogu välja otsuseid ning Eesti Panga president määrusi ja käskkirju. Samas sätestab seaduse paragrahv 11 Eesti Panga presidendi pädevuse. President annab määrusi ja käskkirju ning presidendi määrused kui normatiivse (õigustloova) iseloomuga õigusaktid avaldatakse Riigi Teatajas (lõiked 5 ja 6).

Seega nähakse Eesti Panga seadusega ette, et Eesti Panga ülesannete täitmiseks annavad Eesti Panga nõukogu ja Eesti Panga president välja õigusakte, mis hõlmavad nii õigustloovaid akte *määruse* vormis kui ka õiguse üksikakte *otsuse* või *käskkirja* vormis. Praktikas vormistatakse Eesti Panga tegevust käsitlevate küsimuste lahendused Eesti Panga nõukogu otsusena (nõukogu normatiivse iseloomuga otsused avaldatakse Riigi Teatajas, EPS § 9 lg 9), väljapoole Eesti Panka ulatuvate küsimuste lahendused aga Eesti Panga presidendi määrusena.

Eesti Panga pädevusse kuuluvad küsimused (õigused ja kohustused) rahapoliitika ja raharingluse korraldamise valdkonnas on sätestatud Eesti Panga seaduse 3. peatükis. Eesti Panga seaduse paragrahvi 14 esialgse redaktsiooni järgi oli Eesti Pangal õigus kasutada raharingluse reguleerimiseks peamiselt järgmisi vahendeid:

- rahaturgu reguleerivate eeskirjade kehtestamine (punkt 3);

[530] Märkus: eelnõu 415 SE I on tagasi võetud. Arvutivõrgus: https://www.riigikogu.ee/?s=&checked=eelnoud (30.11.2023).

- kohustuslike reservide ja muude normatiivide kehtestamine Eestis tegutsevatele krediidiasutustele (punkt 4);
- Eesti Panga intressimäärade kehtestamine (punkt 6);
- laenuandmise limiitide kehtestamine krediidiasutustele (punkt 7).

Alates 1. jaanuarist 2011 kehtib § 14 uues redaktsioonis. Arvestades Euroopa Keskpanga ja Euroopa Keskpankade Süsteemi pädevust, on § 14 alusel Eesti Pangal oma ülesannete täitmiseks õigus anda välja eeskirju (täpsustamata seaduse volitusnormis õigusakti liiki!), sealhulgas

„5) käsitleda maksejuhiseid ning arveldada makseid; [---]
7) kehtestada rahaturgu reguleerivaid eeskirju ja seaduse alusel usaldatavusnormatiive;
8) kehtestada europangatähtede ja euromüntide käitlemist reguleerivaid eeskirju[531];
9) rakendada sanktsioone raharingluse kohta kehtestatud eeskirjade rikkujate suhtes, välja arvatud sanktsioonid, mida rakendab Euroopa Keskpank Euroopa Keskpankade Süsteemi ja Euroopa Keskpanga põhikirja artikli 34.3 alusel;
10) saada riigi- ja kohaliku omavalitsuse asutustelt ning muudelt isikutelt ja asutustelt oma ülesannete täitmiseks vajalikke andmeid;
11) teha muid oma ülesannete täitmiseks vajalikke toiminguid."

Eesti Panga seaduse paragrahv 14[1] sätestab europangatähed ja euromündid, tunnustades ühtlasi Euroopa Keskpanga ainupädevust anda luba emiteerida paberraha. Euroopa Keskpanga loal on Eesti Pangal õigus emiteerida europangatähti (lg 1). Eesti Pangal on ainuõigus emiteerida Eesti Vabariigis euromünte. Euromüntide emissioonimahu peab eelnevalt heaks kiitma Euroopa Keskpank (lg 2). Vigastatud ja rikutud europangatähti ja euromünte võtavad vastu ning asendavad uutega Eesti Pank ning tema volitatud krediidiasutused Euroopa Liidu õigusaktidega sätestatud korras. Eesti Panga presidendil on õigus oma määrusega kehtestada täpsemad reeglid vigastatud ja rikutud europangatähtede ja euromüntide käitlemise kohta (lg 3).[532]

Eesti Pank kehtestab seaduse alusel välisvaluuta Eestisse sisse- ja väljaveo, välisvaluutareservide moodustamise ja kasutamise eeskirjad. Samuti kehtestab Eesti Pank krediidiasutustele ja muudele juriidilistele isikutele panganduslike välistehingute sooritamise tingimused ja eeskirjad (§ 15 lg 2 ja 3). Ametlike välisvaluutareservide hoidmine ja juhtimine toimub kooskõlas seaduste ja Eesti Panga põhikirja ning Euroopa Keskpanga nõukogu antud suunistega (§ 26 lg 4).

[531] Eesti Panga presidendi 15.12.2010 määrus nr 24 „Europangatähtede ja müntide Eesti Panka saatmise kord". – RT I, 20.12.2010, 8; RT I, 20.12.2010, 8.

[532] Eesti Panga presidendi 15.12.2010 määrus nr 24 „Europangatähtede ja müntide Eesti Panka saatmise kord". – RT I, 20.12.2010, 8; RT I, 20.12.2010, 8.

Eesti Panga seaduse paragrahvi 19[1] lõige 1 sätestab volitusnormi seoses arvelduste, maksesüsteemide reeglite ja liitumistingimuste kehtestamisega Eesti Panga poolt.

Eesti Pank võib toimida maksesüsteemide, sealhulgas makse- ja arveldussüsteemide seaduses määratletud arveldussüsteemide korraldajana, kui see on tema ülesannete täitmiseks vajalik. Maksesüsteemide reeglid ja liitumistingimused kehtestab Eesti Pank.[533]

Seoses Euroopa Keskpanga rahapoliitika teostamisele kaasaaitamisega on Eesti Pangale antud ulatuslikud seadusandlikud volitused, sh kehtestada seaduse alusel õiguse üldakti vormis eeskirju Eesti Panga seaduses sätestatud küsimuste reguleerimiseks (nt seaduse alusel usaldatavusnormatiivid, arveldused Eesti Pangas, krediidiasutuste kaudu toimuvate sularahata arvelduste, välisvaluutatehingute ja -reservide, maksesüsteemide reeglid ning maksete eeskirjad).

Alates 19. maist 2014[534] jõustus seadus, millega muudeti Eesti Panga seadust ja anti Eesti Panga pädevusse makrofinantsjärelevalve (§ 24[1]) ülesanded.

Makrofinantsjärelevalve eesmärk on kaasa aidata finantssüsteemi kui terviku stabiilsuse tagamisele finantssüsteemi vastupanuvõime suurendamise ja süsteemsete riskide kuhjumise vähendamise kaudu, kindlustades finantssektori jätkusuutliku panuse majanduskasvu (lg 1). Makrofinantsjärelevalve teostamisel on Eesti Pank volitatud rakendama õigusaktides sätestatud meetmeid süsteemsete riskide vähendamiseks[535]; (§ 24[1] lg 2 p 6).

Eesti Panga pädevusse on selle seadusega antud ka maksesüsteemide järelevaatamise (§ 24[2]) ülesanded.

Maksesüsteemide järelevaatamise eesmärk on kaasa aidata maksesüsteemide ülesehituse ja toimimise usaldusväärsuse tagamisele. Eesti Pank kui maksesüsteemide järelevaataja kehtestab õigusaktides sätestatud juhtudel maksesüsteemide pidajate ning nende tegevuse ja ülesehituse kohta täpsemaid nõudeid ning annab õigusaktides sätestatud juhtudel hinnanguid maksesüsteemide toimimise põhimõtete ja reeglite kohta (§ 24[2] lg 2 p 3 ja 4).[536]

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533 Eesti Panga presidendi 22.09.2022 määrus nr 6 „TARGET-Eestis osalemise ühtsete tingimuste kinnitamine“. – RT I, 24.09.2022, 2.

534 RT I, 09.05.2014, 2 – jõust. 19.05.2014.

535 Eesti Panga presidendi 27.08.2019 määrus nr 6 „Kinnisvaraga tagatud jaenõuete riskikaalu alampiiri kehtestamine“. – RT I, 04.09.2019, 1; RT I, 09.06.2021, 7.

536 RT I, 01.03.2023, 3 – jõust. 11.03.2023.

Lisaks Eesti Panga seadusele sisalduvad õigusloomet puudutavad konkreetsed volitusnormid (spetsiaaldelegatsioonid), mille alusel on Eesti Panga presidendil õigus anda üldakte, krediidiasutuste seaduses[537]:

1) § 85[4]. Täiendavad makrotasandi usaldatavusnormatiivid. Makrofinantsjärelevalve raames võib Eesti Pank kehtestada kõigile Eestis tegutsevatele krediidiasutustele, nende Eestis asuvatele ema- ja tütarettevõtjatele ning välisriikide krediidiasutuste Eestis tegutsevatele tütarettevõtjatele, filiaalidele ja esindustele mitmesuguseid nõuded (p 1–3): sh Eesti finantssüsteemile ja reaalmajandusele tõsist negatiivset mõju avaldavate süsteemsete riskide maandamiseks[538], arvestades Euroopa Parlamendi ja nõukogu määruse (EL) nr 575/2013 artiklis 458 sätestatut.

2) § 86[47]. Globaalne süsteemselt oluline krediidiasutus ja selle puhver, lõige 9: Eestis tegutsevate globaalsete süsteemselt oluliste krediidiasutuste loetelu kinnitab Eesti Pank.[539]

3) § 86[48]. Muu süsteemselt oluline krediidiasutus ja selle puhver, lõige 7: Eestis tegutsevate muude süsteemselt oluliste krediidiasutuste loetelu kinnitab Eesti Pank.[540]

4) § 86[49]. Süsteemse riski puhver, lõige 2. Eesti Pank kehtestab:
1) süsteemse riski puhvri määra[541];
2) süsteemse riski puhvri arvutamise korra[542];
3) teises lepinguriigis või kolmandas riigis kehtestatud süsteemse riski puhvri nõude tunnustamise korra[543].

5) § 86[50] lõige 8: Maksimaalse jaotatava summa arvutamise korra kehtestab Eesti Pank.[544]

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[537] RT I 1999, 23, 349; RT I, 17.03.2023, 16.

[538] Eesti Panga presidendi 27.08.2019 määrus nr 6 „Kinnisvaraga tagatud jaenõuete riskikaalu alampiiri kehtestamine". – RT I, 04.09.2019, 1; RT I, 09.06.2021, 7.

[539] Rakendusakti ei ole kehtestatud või avaldatud. Arvutivõrgus: https://www.riigiteataja.ee/vaheleht.html (23.11.2023).

[540] Eesti Panga presidendi 30.05.2016 määrus nr 7 „Muude süsteemselt oluliste krediidiasutuste loetelu kinnitamine ja muu süsteemselt olulise krediidiasutuse puhvri nõude kehtestamine". – RT I, 01.06.2016, 4; RT I, 29.11.2022, 6.

[541] Eesti Panga presidendi 17.05.2022 määrus nr 4 „ Süsteemse riski puhvri määra kehtestamine elamukinnisvaraga tagatud Leedu jaenõuete suhtes". – RT I, 19.05.2022, 9.

[542] Eesti Panga presidendi 02.06.2021 määrus nr 9 „Süsteemse riski puhvri arvutamise kord". – RT I, 09.06.2021, 2; RT I, 03.12.2021, 6.

[543] Eesti Panga presidendi 02.06.2021 määrus nr 10 „Süsteemse riski puhvri nõude tunnustamise kord". – RT I, 09.06.2021, 3.

[544] Eesti Panga presidendi 09.07.2014 määrus nr 13 „Maksimaalselt jaotatava omakapitali summa arvutamise kord". – RT I, 06.01.2015, 19; RT I, 09.06.2021, 5.

6) § 87 lõige 1: Krediidiasutus peab avama Eesti Pangas konto. Eesti Pangas krediidiasutuste kontode avamise ja kasutamise tingimused kehtestab Eesti Pank.[545]

7) § 91 lõike 1 punktid 1–3: Eesti Pank kehtestab aruannetele esitatavad nõuded.[546]

Väärib märkimist, et õigusloomet puudutavad volitusnormid Eesti Panga õiguse kohta anda üldakte sisaldusid ka varem kehtinud e-raha asutuste seaduses[547] (vt § 37 lõige 8, § 39 lõige 4, § 44 lõige 4, § 45 lõige 2, § 46 lõige 2).

Siinkohal tuleb täpsustada, et alates 22. jaanuarist 2010 kehtib makseasutuste ja e-raha asutuste seadus[548] (MERAS). MERAS § 82 lõige 11 sätestab aruanded ja nende esitamise. Eesti Pangal on õigus Eesti Panga seadusest ning makse- ja arveldussüsteemide seadusest tulenevate ülesannete täitmiseks nõuda kõnealuses paragrahvis sätestatud isikutelt (makseasutus või e-raha asutus) täiendavaid ühekordseid või regulaarseid aruandeid. Aruannete vormid, aruannete koostamise metoodika ja esitamise korra kehtestab Eesti Pank.[549]

Eesti Pangale suunatud õigusloome volitusnorme leiab ka võlaõigusseaduses[550] (VÕS § 709 lg 16 ja 17). Võlaõigusseaduse paragrahv 709 sätestab makseteenuse lepingu ja sellega seotud mõisted. Arveldused Eesti Pangas ja Eesti Pangaga toimuvad Eesti Panga seaduse ja sellest tulenevate õigusaktide alusel (lg 16). Eesti Pank võib kehtestada täpsemad nõuded krediidiasutuste ning muude finantseerimisasutuste poolt maksekontode pidamise ja maksete arveldamise kohta (lg 17).[551]

Lisaks eespool toodule sisalduvad Eesti Panga presidendile suunatud õigusloome volitusnormid ka riikliku statistika seaduses[552] (RStS § 30^1 lg 3^1). Riikliku statistika seaduse paragrahvis 30^1 on sätestatud Eesti Pangale integreeritult andmete kogumine ja nende andmete jagamine. Integreeritud

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[545] Eesti Panga presidendi 22.09.2022 määrus nr 7 „Krediidiasutuste kontode avamise ja kasutamise tingimused eesti Pangas“. RT I, 24.09.2022, 3.

[546] Seotud aktide nimekiri koosneb kaheksast Eesti Panga Presidendi määrusest. Arvutivõrgus: https://www.riigiteataja.ee/dynaamilised_lingid.html?dyn=117032023016&id=13346010;107012014010;128052014001;103062014001;105062014001;103072014040;109022016019;105062018001;122012021008;118062021023 (22.11.2023).

[547] RT I 2005, 61, 473; 2007, 65, 405.

[548] RT I 2010, 2, 3; RT I, 17.03.2023, 18.

[549] Rakendusakti ei ole kehtestatud või avaldatud. Arvutivõrgus: https://www.riigiteataja.ee/vaheleht.html (22.11.2023).

[550] RT I 2001, 81, 487; RT I, 01.03.2023, 54.

[551] Eesti Panga presidendi 11.05.2010 määrus nr 4 „Maksejuhiste aktsepteerimise tingimused“. – RTL 2010, 25, 446.

[552] RT I 2010, 41, 241; RT I, 11.03.2022, 2.

andmekogumine on Eesti Pangale riikliku statistika tegemiseks vajalike andmete kogumine koos muude andmetega, mida Eesti Pank või paragrahvi 30^1 lõikes 3 või 3^1 nimetatud määruses osutatud isikud vajavad neile õigusaktidega pandud ülesannete täitmiseks (lg 1). Eesti Panga president võib aruandlust reguleeriva määrusega kohustada krediidiasutusi esitama aruandeid, mis on vajalikud integreeritud andmekogumiseks (lg 3^1).[553]

Eelnevast tulenevalt on Eesti Panga seaduse kui konstitutsioonilise seadusega riigi keskpangale põhiseaduse paragrahvide 111 ja 112 alusel antud rahapoliitika ja raharingluse valdkonna pädevuste teostamiseks ette nähtud seadusandlikud volitused, sealhulgas kolmandatele isikutele kohustuslike õiguse üldaktide ja määruste andmise õigus.

Eesti põhiseaduse paragrahvid 111 ja 112 ei sätesta Eesti Pangale *expressis verbis* seadusandlikku volitust, st määruste kui õiguse üldaktide andmise õigust, samas ei näe põhiseadus ette ka määruste andmise otsest keeldu või piirangut. Seega on Eesti Panga õigusloome puhul tegemist küsimusega, mida põhiseaduses ei ole reguleeritud.

2. Eesti Panga pädevusega seotud seisukohad ja arvamused õiguskirjanduses

Eesti õiguskirjanduses on avaldatud kriitilisi seisukohti, mille järgi Eesti Pangale seadusandlike volituste või määrusandlusõiguse delegeerimine ei tulene põhiseadusest või on õiguslikult problemaatiline.

Eesti Panga seaduse, sealhulgas määrusandlusõigust puudutavate sätete võimalikule vastuolule põhiseadusega viidates märgib põhiseaduse juriidilise ekspertiisi komisjon (1998):

„Eesti Pangale on seadusega antud õigusi ja funktsioone, mis on oluliselt laiemad põhiseaduse §-s 111 loetletust. Need õigused puudutavad eelkõige õigusloomet ja järelevalvet.

Nimelt on Eesti Pangale delegeeritud osa täidesaatva võimu funktsioone, mis vastavalt Põhiseadusele kuuluvad Vabariigi Valitsuse pädevusse. Selliste funktsioonide hulka kuuluvad näiteks riikliku raha- ja panganduspoliitika teostamine (Eesti Panga seaduse § 2 lg 4, § 4), järelevalve krediidiasutuste tegevuse üle, litsentside andmine ja tühistamine, sanktsioonide rakendamine, moratooriumi kehtestamine, sundlikvideerimise määramine jne (Eesti Panga seaduse § 2 lg 5, §-d 17–24), rahaturgu reguleerivate eeskirjade kehtestamine ning sanktsioonide rakendamine nimetatud eeskirjade rikkujate suhtes, kohustuslike reservide ja muude normatiivide kehtestamine krediidiasutustele

[553] Seotud aktide nimekiri koosneb neljast Eesti Panga presidendi määrusest. Arvutivõrgus: https://www.riigiteataja.ee/dynaamilised_lingid.html?dyn=111032022002&id=117092020002;122012021006;122012021007;122012021008;122012021009;118062021023 (23.11.2023).

(Eesti Panga seaduse § 14 p-d 3, 4, 8), välisvaluutatehingute litsentside andmine (Eesti Panga seaduse § 15 lg 4). Järelevalve krediidiasutuste üle ning nende tegevust reguleerivate normatiivaktide väljaandmine ei ole otseselt seotud Eesti Panga kui keskpanga põhiseaduses sätestatud funktsiooniga ning selliste õiguste äravõtmine ei kahjusta ei Eesti Panga sõltumatust ega Eesti krooni stabiilsust. Lähtudes põhiseaduse kehtivast redaktsioonist, tuleb Eesti Pangale jätta ainult emissiooni ja raharingluse korraldamisega seonduvad ülesanded ning kõik õigusloome- ja halduskontrolli alased funktsioonid tuleb anda Vabariigi Valitsusele, st rahandusministeeriumile ning tema haldusalas loodavale pangainspektsioonile."[554]

Õigusteadlased Kalle Merusk ja Raul Narits on samuti väljendanud seisukohta, et

„Eesti Pangale seadusandja poolt nimetatud õiguse andmine on problemaatiline, kuna see ei tulene otseselt ega kaudselt põhiseadusest ning määruste adressaatideks on panga suhtes nn kolmandad isikud."[555]

Lasse Lehis on avaldanud arvamust:

„Eesti Pangale põhiseadusega antud funktsiooni – raharingluse korraldamist ning Eesti krooni kursi stabiilsuse tagamist – on võimalik täita ka ilma üldaktide andmise õiguseta. […] Seega võib väita, et põhiseadusest ei tulene Eesti Panga õigust anda kolmandatele isikutele adresseeritud õiguse üldakte. Sellise õiguse andmisega on seadusandja laiendanud omavoliliselt Eesti Panga pädevust üle Põhiseaduses lubatud piiride."[556]

Eesti Vabariigi põhiseaduse kommenteeritud väljaande VIII peatükis „Rahandus ja riigieelarve" on järjekindlalt asutud seisukohale, et

„Paljud määrused on siiski vaadeldavad üldaktina ning need tuleks asendada kas Vabariigi Valitsuse või rahandusministri määrustega."[557]

Põhiseaduse 2020. aasta märkuste autorid asuvad sarnasele seisukohale: „Kuigi ilmselt saab suurema osa Eesti Panga määrustena vormistatud akte kvalifitseerida kas internseteks aktideks ehk halduseeskirjadeks (st puudutavad Eesti Panga sisemist töökorraldust, vt nt RKHKo 02.04.2014, 3-3-1-72-13) või

[554] Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne. – Põhiseaduse 8. peatükk „Rahandus ja riigieelarve", P. 4. Arvutivõrgus: https://www.just.ee/era-ja-avalik-oigus/pohiseadus-ja-pohioigused/pohiseadus#komisjoni-liikmed (23.11.2023).

[555] K. Merusk, R. Narits. Eesti konstitutsiooniõigusest. Tallinn, 1998, lk 48.

[556] L. Lehis. Eesti Panga staatus ja pädevus tulenevalt põhiseaduse §-dest 111 ja 112. – Juridica, 1999, nr 10, lk 480–486.

[557] E-J. Truuväli jt (toim). Eesti Vabariigi põhiseadus: Kommenteeritud väljaanne. Tallinn 2002, 499; 2008, 565; 2012, 666–667; 2017, 752–753.

halduse üksikaktideks (üldkorraldusteks), võib siiski olla vajalik osa määrusi asendada Vabariigi Valitsuse või rahandusministri määrustega".[558]

3. Põhiseaduse printsiibid seoses õigusloomega

Avaliku võimu põhiseadusliku ja demokraatliku teostamise aluseks on selle rajanemine õigusel (põhiseaduse preambul) ning võimude lahususe ja tasakaalustatuse (§ 4), demokraatliku õigusriigi (§ 10) ja seaduslikkuse (§ 3 lg 1) printsiipidel.

Nimetatud printsiipide järgimiseks ning igaühe põhiseaduslike õiguste ja vabaduste kaitseks peavad seadusandlikud ja täitev-korraldavad funktsioonid olema eristatud ning täpselt kindlaks määratud ja nende täitmine peab toimuma kooskõlas põhiseadusega ja õigusteoorias tunnustatud põhimõtetega.

Tõlgendades seaduslikkuse mõistet, märkis Euroopa Inimõiguste Kohus kohtuasjas Malone *vs*. Ühendkuningriik (1984), et seaduslikkuse printsiibiga oleks vastuolus see, kui täidesaatev võim teostaks talle antud seaduslikku voli piiramatu võimuna. Järelikult peab seadus määrama vajaliku selgusega kindlaks pädevatele asutustele delegeeritud otsustamisõiguse ulatuse ja teostamise viisi, pidades silmas käsitatava abinõu seaduslikku eesmärki anda üksikisikule vajalik kaitse meelevaldse sekkumise eest.[559]

Määrusandlus tähendab seadusandliku võimu poolt täidesaatvale võimule antud õigust vastu võtta üldakte.[560] Määrus on halduse üldakt, mille annab välja täidesaatev organ piiritlemata arvu juhtude reguleerimiseks. Määrus on kolmandate isikute suhtes õiguslikult siduv nagu parlamendiseadus. Haldusakti teooria kohaselt on määrus *secundum legem* üldakt, mis peab olema kooskõlas põhiseaduse ja seadusega.

Määruste kui täitevvõimu üldaktide andmine täidesaatva võimu poolt on sisuliselt seadusandja ülesande teostamine, mille on täidesaatvale võimule delegeerinud seadusandja (parlament).

Määrusandlusõigus ehk täidesaatva võimu õigus anda määrusi mõjutab oluliselt ka võimude lahususe printsiipi, mille kohaselt seadusandlik võim kuulub Riigikogule (põhiseaduse § 59).

Õiguskirjanduses on seoses määrusandlusega märgitud järgmist:

„See ei tähenda siiski selle printsiibi tegelikku rikkumist, kuna täidesaatev võim tohib seadusandlikku funktsiooni täita mitte omal initsiatiivil, vaid ainult formaalse

[558] L. Lehis, K. Lind. Põhiseaduse § 112 kommentaar, komm. 6. – Ü. Madise jt (toim). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 5., täiend. vlj. Tartu: sihtasutus Iuridicum, 2020.

[559] Vt RKPJKo 20.12.1996, nr 3-4-1-3-96.

[560] T. Annus. Riigiõigus. Tallinn, Juura 2006, lk 80–81.

seadusega antud volituse, st parlamendi volituse alusel. Põhiseaduse § 80 lg 1 nõuab, et seaduslik volitus peab määratlema volituse sisu, eesmärgi ja ulatuse."[561]

Seadusandjast sõltub, millist täidesaatvat organit, mis eesmärgil ja millistes sisulistes küsimustes ning ulatuses ehk õiguslikes piirides volitatakse määrust andma. Määruse kui halduse üldakti andmiseks peab seaduses olema vastavasisuline delegatsiooni- ehk volitusnorm. Selles normis täpsustatakse määruse andmiseks pädev haldusorgan ning talle antava määrusandliku volituse selge eesmärk, sisu ja ulatus. Peale selle võib seaduse delegatsioonisäte kehtestada ka muid norme täitevvõimu kohustamiseks või tema seadusandliku funktsiooni piiramiseks. Volituse eesmärgi, sisu ja ulatuse sätestamine seaduses on vajalik selleks, et igaüks saaks aru, missugust halduse üldakti tohib anda.

4. Õiguseteooria seisukohad seoses seadusandlike volitustega

Õigusteoorias on asutud järgmisele seisukohale:

„Oma sisu ja ulatuse poolest määrusõigust korraldatakse *intra, praeter* ja *contra legem.* Oma toimejõult alluvad aga kõik määrused, ka nn *contra legem* juhud sekka arvatud, tavalistele seadustele."[562]

Määrusandlusõiguse ulatuse järgi võib eristada kolme liiki määrusi: 1) *intra legem*; 2) *praeter legem* ja 3) *contra legem* määrused.[563]

Põhiseaduse sätete (§ 87 p 6 ja § 94 lg 2) ning võimude lahususe (§ 4) ja legaalsuse (§ 3 lg 1) põhimõtete koosmõjust tulenevalt on täidesaatev võim üldjuhul volitatud andma üksnes *intra legem* määrusi ehk seadust täpsustavaid määrusi. Selle põhimõtte järgimise vajadusele on osundanud ka Riigikohus oma varasemates lahendites:

„*Intra legem* määruse puhul peab seaduses olema norm, mis sätestab selgelt, et haldusorgan võib selle alusel anda haldusakti. See põhimõte on väljendatud ka Vabariigi Valitsuse seaduse §-s 27 lg 2*. Intra legem* määruse korral võib volituse eesmärk, sisu ja ulatus olla ka seadusest tõlgendamise teel tuletatav. Kuid õiguse subjektil peab seadusega tutvumisel olema võimalik jõuda kindlale arusaamale, et selle seadusega reguleeritud küsimustes võib täitevvõim anda halduse üldakti. Samas ei tohi *intra legem* korras antud määrus väljuda volitusnormi sisaldava seaduse reguleerimiseseme raamidest.

Tulenevalt võimude lahususe põhimõttest, mille kohaselt legislatiivfunktsiooni teostamine kuulub seadusandja pädevusse, on seaduse reguleerimiseseme raamest väljunud halduse üldakt *praeter legem* või *contra legem* määrus. Riigi põhiseadusest võib tuleneda seadusandja õigus seadusega

[561] H. Maurer. Haldusõigus. Üldosa. 14., ümbertöötatud ja täiendatud trükk. Tallinn: Juura 2004, lk 42–43.

[562] A-T. Kliimann. Administratiivakti teooria. Tartu: Akadeemiline Kooperatiiv, 1932, lk 181–182.

[563] K. Merusk, I. Koolmeister. Haldusõigus. Tallinn: Juura, 1995, lk 96.

volitada haldusorganit andma *praeter legem* määrust. Seadusega käsitlemata valdkonda reguleeriva määruse ehk *praeter legem* määruse volitusnorm peab sisaldama selget luba, et täitevvõim võib selle sätte alusel anda niisuguseid määrusi. Toimides *praeter legem*, võtab valitsus üle osa seadusandja kompetentsist ning seda saab ta teha üksnes siis, kui seadusandja on teda selleks *expressis verbis* volitanud. *Praeter legem* määruse volitusnorm peab sisaldama peale selge loa ka veel määruse andmiseks pädeva haldusorgani nimetuse ning vastava määruse eesmärgi, sisu ja ulatuse täpsustuse.

Contra legem määrustega muudetakse ja tühistatakse seadusi. Eestis on võimude lahususe põhimõttest tulenevalt *contra legem* määrused Põhiseadusega välistatud."[564]

Õiguskirjanduses on avaldatud arvamust seadusega käsitlemata valdkonda reguleeriva määruse erandlikkuse kohta:

„Lähtudes õigusriigi üldistest põhimõtetest, eelkõige võimude lahususe printsiibist, mis on sätestatud ka Eesti põhiseaduses, tuleks *praeter legem* määrusi käsitleda siiski kui erandjuhtumeid. Sellistena tulevad kõne alla üksnes nn korramäärused, millega kehtestatakse teatud eeskirju."[565]

5. Eesti Panga presidendi õigusloomepädevus riigiõiguslikus praktikas võrdsustatud ministri pädevusega

Põhiseaduse paragrahvi 87 punkti 6 kohaselt annab Vabariigi Valitsus seaduse alusel ja täitmiseks määrusi ja korraldusi. Sama põhimõte ministri määruse suhtes tuleneb põhiseaduse paragrahvi 94 lõikest 2. Seega sätestab põhiseadus *expressis verbis* täidesaatvat riigivõimu teostavate organite õigusaktidena Vabariigi Valitsuse määrused ja korraldused (PS § 87 p 6) ning ministri määrused ja käskkirjad (PS § 94 lg 2). Õiguskirjanduses ja -praktikas on sageli vaidlusi põhjustanud küsimus, kas määrusi saavad anda teised, põhiseaduses selleks otse nimetamata organid või isikud.

Eesti Panga seaduse kui konstitutsioonilise seadusega on riigi keskpangale põhiseaduse paragrahvi 112 alusel ja Euroopa Keskpanga rahapoliitika ülesannete täitmise eesmärgil ette nähtud seadusandlikud volitused, sealhulgas õigus anda kolmandatele isikutele kohustuslikke õiguse üldakte ehk määrusi.

Seadusandja on Eesti Panga seaduses (§ 1 lg 5 ja § 11 lg 5) põhiseadusest tulenevate õigusaktide liikide osas Eesti Panga presidendi õigusloomepädevuse anda määrusi sisuliselt võrdsustanud ministri sama pädevusega. Selle järelduse alus oli Eesti riigiõiguslikus tavas õiguskantsleri 6. jaanuari 1994. aasta ettepanek Riigikogule Eesti Panga seaduse (RT I 1993, 28, 498 redaktsioonis) kooskõlla viimiseks Eesti Vabariigi põhiseaduse ja seadusega.

[564] Vt RKPJKo 20.12.1996, nr 3-4-1-3-96.

[565] K. Merusk, I. Koolmeister. Haldusõigus. Tallinn: Juura, 1995, lk 97–98.

Eesti Panga seaduse paragrahvi 1 lõike 5 esialgses redaktsioonis (algtekst) sätestati, et Eesti Panga ülesannete täitmiseks annavad Eesti Panga nõukogu ja Eesti Panga president seaduste alusel ja täitmiseks välja õigusakte. Eesti Panga seadusega (18.05.1993 redaktsioonis) nähti õiguskantsleri hinnangul Eesti Pangale põhiseadusest tulenevate õiguste ja kohustuste täitmiseks ette (põhiseadusest lahknevate) eri liiki õigustloovate aktide andmine, millega ühtlasi tõlgendati laiendavalt ehk muudeti põhiseadust.

Õigusteoorias, põhiseaduses ja Eesti Panga seaduses ning teistes valdkonna seadustes, samuti Riigikohtu praktikas kinnitust leidnud volitusnormi nõuded kehtivad ka Eesti Panga presidendi määruste suhtes. Põhiseaduslikkuse järelevalve praktikas on õiguskantsler hinnanud Eesti Panga presidendi määrusi õigusaktidena, mis sisaldavad kolmandatele isikutele suunatud õigusnorme. Kui määruse andmisel põhiseaduse ja Eesti Panga seaduse ning krediidiasutuste seaduse sätetest ja volitusnormi nõuetest ei ole kinni peetud ning määrus on antud õigusliku aluseta, on õiguskantsler algatanud põhiseaduslikkuse järelevalve menetluse ning vaidlustanud Eesti Panga presidendi määruse kui õigustloova akti. Sellise järelevalve näiteks on õiguskantsleri 7. septembri 1999. aasta ettepanek nr 35 Eesti Panga presidendi 24. märtsi 1999. aasta määruse nr 6 „Kohalike omavalitsuste maksevõimelisuse ja tagatiste kontrollimine laenu andmisel ja finantsnõuete omandamisel" (RTL 1999, 54, 731) kooskõlla viimiseks põhiseaduse paragrahviga 112.

6. Eesti Panga seadusandlikud volitused riigi keskpanga sõltumatuse põhimõtte ja Euroopa Liidu aluslepingute alusel

Kui arvestada seda, et Euroopa Liidu üldine rahapoliitika on liikmesriigi majanduspoliitika oluline osa ning Euroopa õigusruumis on rahapoliitika ülesanded antud valitsusest distantseeritud ja sõltumatule riigi keskpangale, tuleb seadusandjal kooskõlas põhiseaduse paragrahvi 104 lõike 2 punktiga 12 otsustada Eesti Panga seaduse kui konstitutsioonilise seaduse vastuvõtmisel ka küsimus selle kohta, millised on Eesti Panga ülesannete täitmiseks vajalikud õigusloomevahendid (reguleerivad õigusaktid).

Ühe võimaliku Eesti Pangale põhiseaduse paragrahvis 112 osutatud seadusest tulenevate ülesannete täitmise õigusliku vahendina on käsitletav Eesti Panga õigusloome, mis sisaldab õigust anda kolmandatele isikutele kohustuslikke õiguse üldakte ehk määrusandlusõigust. Kui Eesti Panga puhul oleks tegemist Vabariigi Valitsuse juures asuva või temale alluva keskpangaga, ei tekiks ilmselt küsimust Eesti Panga määrusandlusõiguse kooskõlast põhiseadusega. Alternatiivne lahendus oleks olnud põhiseaduse kommenteeritud väljaannetes korduvalt esitatud ettepanek viia õiguse üldaktide andmine Vabariigi Valitsuse või Rahandusministeeriumi pädevusse ja selle tulemusena teha Eesti Pangast mitte sõltumatu rahapoliitikat teostav ja raharinglust korraldav, vaid haldusakte

ettevalmistav organ, kelle ette valmistatud akte kinnitaks neid sisuliselt vastuvõttev organ (nt Vabariigi Valitsus või Rahandusministeerium). Kuna Eestis on riigi keskpangandus alates Eesti Panga seaduse jõustumisest 18. juunil 1993 üles ehitatud Euroopa Liidus üldtunnustatud kontseptuaalse põhimõtte kohaselt eraldiseisvana ja lahus Vabariigi Valitsusest, siis on Eesti Panga kui sõltumatu institutsiooni ja EKPS osana tegutseva riigi keskpanga eesmärkide ning ülesannete täitmise õiguslik vahend kahtlemata Eesti Panga õigus anda kolmandatele isikutele kohustuslikke õiguse üldakte.

Riigi keskpank, mis on funktsionaalselt, isikuliselt ja rahanduslikult sõltumatu, eraldiseisev ja Vabariigi Valitsusest täiesti lahus institutsioon, ei saa ega tohi täita Euroopa Liidu üldise rahapoliitika elluviimise ülesandeid Vabariigi Valitsuse kaudu või olla valitsuse või rahandusministri kontrollitav. Võrdluseks: Euroopa Liidus on Euroopa Keskpanga puhul tegemist vertikaalse pangandussüsteemi, Euroopa Keskpankade Süsteemi juhtimisorganiga, millel on oma sõltumatu eripädevus ja mis on selgelt distantseeritud liikmesriikide valitsustest. Euroopa Keskpankade Süsteemile antud ülesannete täitmiseks ja kooskõlas asutamislepingu sätetega ning Euroopa Keskpankade Süsteemi põhikirjas esitatud tingimustega omab Euroopa Keskpank seadusandlikke volitusi ning samuti õigust anda kolmandatele isikutele kohustuslikke õiguse üldakte ehk määrusi, võtab vastu otsuseid, esitab soovitusi ja avaldab arvamusi. Seejuures tuleb Euroopa Liidu toimimise lepingu artikli 127 lõike 4 järgi Euroopa Keskpangaga konsulteerida ka riikide ametiasutustel iga Euroopa Keskpanga pädevusse kuuluva õigusakti eelnõu puhul (Eesti riigiõiguslikus tavas e-raha seaduse eelnõu menetlemisel jättis Riigikogu konsulteerimiskohustuse täitmata). Ühtlasi on Euroopa Keskpangal õigus määrata ettevõtjatele Euroopa Keskpanga määrustest ja otsustest tulenevate kohustuste täitmata jätmise eest trahve (EKP määruste andmise õigus on sätestatud Euroopa Liidu toimimise lepingu artikli 132 lõikes 1, endine EÜ asutamislepingu artikli 110 lõige 1). Seega on Euroopa Keskpank pädev nii kooskõlas Euroopa Liidu toimimise lepingu sätetega kui ka Euroopa Keskpanga ja Euroopa Keskpankade Süsteemi põhikirja nõuetest tulenevate tingimustega välja andma siduvaid õiguse üldakte – määrusi.

Ehkki Eesti Panga õigusloome puhul on tegemist küsimusega, mida ei ole Eesti põhiseaduses käsitletud, ei tähenda asjaolu, et põhiseaduses nimetatakse üksnes Vabariigi Valitsust ja ministreid ning ei ole Eesti Panga õigust anda määrusi eraldi nimetatud ega käsitletud, iseenesest veel Eesti Panga määrusandlusõiguse vastuolu põhiseaduse ja Euroopa Liidu õigusega. Sellest ei järeldu, et parlament seadusandjana ei saa või ei tohi Eesti Pangale seadusandlikke volitusi anda ega delegeerida. Eesti Panga seadusandlikud volitused on tuletatavad põhiseaduse paragrahvis 112 sätestatud Eesti Panga sõltumatuse printsiibist, samuti Euroopa Liidu liikmesriigi keskpanga sõltumatuse kontseptuaalsest alusprintsiibist ja Euroopa Keskpanga pädevusest.

V. Kokkuvõte

Eesti Panga funktsionaalne ja institutsionaalne sõltumatus ning tema otsustusõiguslike organite liikmete isiku- ning rahaline sõltumatus ei ole saavutatavad ilma õiguseta oma õigusloomele, mis hõlmab määrusandlusõigust ehk õigust anda kolmandatele isikutele kohustuslikke õiguse üldakte. Kui Eesti Pank peaks taotlema, et tema Euroopa Keskpankade Süsteemist tulenevate põhiülesannete täitmiseks vajalikke õigusakte annaks välja täidesaatvat võimu esindav Vabariigi Valitsus või rahandusminister, ei oleks see kooskõlas Euroopa Liidu liikmesriigi keskpanga sõltumatuse euroopaliku keskpanganduse aluspõhimõtetega ning Eesti Pank muutuks määruste andmisel sõltuvaks Vabariigi Valitsusest või rahandusministrist. Seetõttu võib väita: kui Riigikogu seadusandjana otsustab, et õiguse üldakti või määruse andmise õigus tuleb asjakohases volitusnormis delegeerida Eesti Pangale, on tegemist seaduse otstarbekohasuse küsimusega, millega tagatakse Eesti Panga sõltumatus analoogselt Euroopa Keskpangaga.

Kuivõrd põhiseaduse paragrahvi 112 kohaselt tegutseb Eesti Pank seaduse alusel ja annab aru Riigikogule, siis kuulub parlamendi ehk Riigikogu otsustamispädevusse seadusandlike volituste Eesti Pangale delegeerimise üle otsustamine. Sealjuures ei ole parlament (seadusandja) Eesti Panga seadusandlike volituste eesmärkide, sisu ja ulatuse ehk õiguslike piiride üle otsustamisel täiesti vaba, vaid on seotud Euroopa Keskpankade Süsteemile antud ülesannete täitmisega liikmesriigis. Ühtlasi peab seadusandja järgima Eesti põhiseadust ja tagama, et seadusandlike volituste Eesti Pangale delegeerimisel ei esineks teiste isikute põhiõiguste ja vabaduste ning põhiseadusega kaitstud väärtuste (põhiseaduslike institutsioonide garantiide) riivet. Kui seadusandja väljuks seadusandlike volituste delegeerimisel põhiseadusega ette nähtud eesmärkidest ja õiguslikest piiridest ja annaks Eesti Pangale näiteks õiguse kehtestada kohalikele omavalitsustele laenu andmisel ja finantskohustuste võtmisel täiendavad nõuded ja piirangud, võib tekkida vastuolu põhiseadusega, sest kohalike omavalitsuste finantstegevuse üle kontrolli kehtestamisel tuleb arvestada põhiseaduse paragrahvides 154 ja 157 sätestatud kohaliku omavalitsuse kui institutsiooni põhiseaduslike tagatistega (omavalitsusõiguse kaitseala võimalik riive).

Kokkuvõttes võib asuda seisukohale, et Eesti Panga seadusandlikud volitused anda kolmandatele isikutele kohustuslikke õiguse üldakte ehk määrusandlusõigus ei ole vastuolus põhiseaduse ega Euroopa Liidu õigusega. Eesti riigiõiguslikus tavas on õiguskantsler põhiseaduslikkuse järelevalve funktsiooni täitmisel käsitlenud Eesti Panka põhiseadusliku institutsioonina, kelle puhul põhiseaduse paragrahvis 112 nimetatud seaduse (Eesti Panga seadus) alusel ülesannete täitmine määruste andmise teel ei välista, vaid eeldab põhiseaduse paragrahvi 3 lõikes 1 sätestatud seaduslikkuse printsiibi rakendamist ning selle järgimist õigusloomes. Kui Eesti Pank ei ole põhiseaduse paragrahvi 3 lõikes 1

sätestatud põhimõtet järginud, on õiguskantsler Eesti Panga presidendi vastava määruse kui õigustloova akti ka vaidlustanud.

Summary

The article discusses legal issues related to the competence of Eesti Pank: what is the competence of Eesti Pank provided for in the Constitution and its meaning in the current Estonian legal order, and how should the provisions of the Constitution concerning Eesti Pank be interpreted within the framework of the Treaties of the European Union?

The functional and institutional independence of Eesti Pank and the personal and financial independence of the members of its decision-making bodies cannot be achieved without legislative powers and the right to issue regulations, i.e. the right to issue general legal acts binding on third parties. If Eesti Pank were to request that the regulations necessary for the performance of its tasks arising from the European System of Central Banks be issued by the Government of the Republic or the Minister of Finance, representing the executive power, this would not be in line with the fundamental principles of European central banking of the independence of the central bank of a Member State of the European Union, and Eesti Pank would become dependent on the Government of the Republic or the Minister of Finance in the field of legislation.

Therefore, the article takes the following position: if the Riigikogu, as the legislator, decides that the right to issue a general act or regulation of law must be delegated to Eesti Pank in the relevant authorization norm, this is a question of the expediency of the law, which ensures the independence of Eesti Pank in analogy to the European Central Bank. Since, according to Section 112 of the Constitution, Eesti Pank acts on the basis of law and reports to the parliament, i.e. the Riigikogu, the decision on the delegation of legislative powers to Eesti Pank falls within the decision-making competence of the Riigikogu.

In this regard, the Parliament (legislator) is not completely free to decide on the objectives, content and scope or legal limits of the legislation of the Bank of Estonia, but is related to the performance of the tasks assigned to the European System of Central Banks at the national level. The legislator must also comply with the Estonian Constitution and ensure that the delegation of legislative powers to the Bank of Estonia does not infringe upon the fundamental rights and freedoms of other persons and the values protected by the Constitution (guarantees of constitutional institutions). If the legislator were to go beyond the objectives and legal limits prescribed by the Constitution when delegating legislative powers and would, for example, give Eesti Pank the right to establish additional requirements and restrictions when granting loans to local governments and assuming financial obligations, a conflict with the Constitution may arise, because when establishing control over the financial activities of local governments, the constitutional guarantees of local governments as institutions, as set out in Articles 154 and 157 of the

Constitution, must be taken into account (possible infringement of the protected area of local government rights).

The article concludes that the legislation of Eesti Pank is not in conflict with the Constitution or European Union law. In Estonian constitutional practice, the Chancellor of Justice, when performing the function of constitutional supervision, has considered Eesti Pank as a constitutional institution, in which case the performance of tasks under the law specified in Section 112 of the Constitution by means of the right to issue regulations does not exclude, but rather requires the implementation of the principle of legality provided for in Section 3(1) of the Constitution and compliance with it when issuing a regulation. If Eesti Pank has not complied with the provisions of Section 3(1) of the Constitution, the Chancellor of Justice has also contested the relevant regulation of the Governor of Eesti Pank as a law-making act.

Keywords: *constitution, Eesti Pank, legislation, European Union law, European Central Bank, European System of Central Banks.*