EAST-WEST STUDIES

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

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Preface

Differently from most of the previous issues of our *East-West Studies*, this one is not devoted to a single branch of law, memorable date or development. It is as eclectic as is life, which the law intends to order. We start with Professor Igor Gräzin's theoretical reflections on postmodernism in law and monumental arts, which is followed by what may be considered in a way a novelty for our journal. Namely, Massimo La Torres' theoretical study on institutionalism and constitution is written and published not in English but in French. We intend to continue this experiment and solicit articles also in other widespread European languages, including Russian, of course. Next comes the topical study by Mart Susi and Rain Veetõusme on legal regulation of mass media, which is followed by two articles on international law: Tiina Pajuste writes about women in peace agreements and Rein Müllerson about the most important legal developments related to the use of military force in international relations at the beginning of the twenty first century. Terry McDonald's extremely topical essay on China's control of its currency and economic sovereignty is similarly worth reading by a wide audience. Anneli Soo and Mare Merimaa devote their studies to topical issues of Estonian criminal and civil procedure, respectively, while Ilmar Selge writes about the entrepreneurial freedom in the domain of liquid fuel in Estonia and in Europe. We also have an article by a collective of authors on legal aspects of mental health policy in Armenia. Finally, another collective of authors has devoted their study to the community-based practices that help avoid the need for institutional care in Estonia.

There is no doubt that extremely interesting, often worrying, developments in the world, on our continent as well as in Estonia will give material for further interesting studies in different fields of law, politics and social issues.

Rein Müllerson

Editor-in-Chief

Grotesque-Dominated Postmodernism.
Are the Normative Systems to Survive? Focusing on Monumental Art

Igor Gräzin

Motto: "Tragedy is comedy plus time." Woody Allen ("Annie Hall")

We live in times of tough cultural clashes that we watch on TV news on daily basis. European fear of Eastern and Southern newcomers is economic, political, and ethnic, but most of all – cultural by nature. Today we realise that that we do not understand the co-existence of cultures at all (the failure of the infamous 'multiculti' ideologies), but then it would be natural to start at least some microanalysis of cultural shifts in our own culture. Thus, unexpectedly, the latest developments in postmodernistic[1] culture – of its normative systems (law, ethics, aesthetical standards) – obtain more significant value than that of semiotic theorising.

The "best before" of postmodernism is over and before we can start to draw some first blueprints of "new academism" (= postpostmodernism) it might make sense to look at how postmodernism started to fade away as a cultural phenomenon (as we have stated earlier and agreed with Amy Adler – postmodernism does not have or even structurally cannot have a positive definition as such (1.)), and whether it is going to restore chances for the newly legal regulation of the society. (Keeping in mind that postmodernism denies legal norms in principle – with some exceptions like feminist jurisprudence, etc.)

Therefore, we first have to agree on the minimalistic concept of postmodernism and here is the one I offer:

(a) deconstruction (Derrida et al); and the

(b) tolerance (practical and gnoselogic) of alternative truths.

The latter one points at the peaceful co-existence that is not at the same time eclecticism. If eclecticism is the accidental co-existence of artefacts in time (that is why we prefer term 'room' to the more traditional 'landscape' while talking about the urban environment), then postmodern co-existence includes some intentionality or shared cultural values towards the fundamentals of culture – art, technology, ways of life, etc.

Search for What Postmodernism "IS" Through Simple Phenomena. Mainly: Sculpture

For Noam Chomsky, but also Umberto Eco, Brian McHale, Kirby Olson, then Rosalind Krauss on Avant-Garde, John Frow, Douglas Kellner, and for many others, postmodernism is never considered as something self-sufficient (and that can be completely described by tolerance and deconstruction) and thus it has inevitably been conceptualised in its relations to modernism. The latter is quite an ambiguous notion itself. Postmodernism is not just a school or trend in some specific field of culture (although it started from architecture) but a pan-European cultural phenomenon. It is manifested in art (from impressionism to cubism, fauvism and Dali), in technical sciences, music, court procedures, interior design, etc. Postmodernism in gas-technology (based on LNG) is the technological equivalent to Prokofiev's music, although separated by about a century.

Thus, we have a double problem here: (a) postmodernism is defined in these examples by references to modernism, and (b) modernism itself is a quite an unknown variable.

[1] The term 'postmodernism' is sometimes used very loosely to designate the areas of jurisprudence that fall outside of its classical boundaries, like – feminist jurisprudence, environmental law, race law, etc. All these areas have nothing to do with postmodernism as an intellectual method and manifest just the expansion of 19th century thinking – basically the proto-sociological school – into the 21st century.

To put it cynically: we'd like to know what modernism was (or sometimes – is), but it is a matter of intellectual curiosity. On the other hand, POSTmodernism is something that we have today and it costs a lot (like an LNG terminal or shale gas drilling with postmodern technology) or is asking for a lot (of money from the state budgets or corporations, who are unable to resist these demands because of social pressures). In other words, postmodernism becomes a significant budgetary and political issue.

Therefore, it is not only an intellectual task but a practical one as well (how to finance postmodernism) – to define at least in some initial sense what we are talking about in the first place.

Knowing that the situation of not knowing what postmodernism is even in its fading phase can't be cured easily. Let us try to simply describe postmodernism as something existing (and by now – fading) by itself and to define it by using the simplest case as proof and as an example. Thus, my additional statement to what postmodernism is will go like this:

POSTMODERNISM NOT ONLY LEADS TO NEW PRIMITIVISM. (Not to confuse with naivism as a school in arts.) IT IS UNWILLINGLY ITSELF THE GROTESQUE.

The statement "postmodernism defined positively is new primitivism" can be argued analytically, philosophically and through empirical evidence in the spheres of art, education, engineering, psychopathology, the works of the European Commission, etc. But here I shall present as proof to the argument ("postmodernism is neoprimitivism, grotesque") the references or examples from the sphere of **monumental art** in the spatial dimensions of urban environment.

Impersonality of Monumental Sculpture and its Semiotic Implications.

Monumental political sculpture has certain features that make it a very good example for theoretical discussion – it is relatively unsophisticated as a medium and also collective-minded. The scale of the sculpture in a city and the need to find a common denominator for it do not leave much room for an author to shade away too many hidden or ambivalent meanings in his work, since monumental sculpture is – monumental, i.e. big, visible, ambitious.

As political sculpture is expensive and it needs to be socio-politically or communally and collectively relatively widely accepted by the public (to be approved by the public authority, the land owner, the municipal administration, etc.), emotional, aesthetic, and accidental elements related to the individuals are almost completely excluded. The creation of a sculpture combines at least some commissioning entity, then a sculptor, an architect, a designer, workmen, an engineer, and a crane driver in a joint effort. Their motives might be very different (from eternal fame for the sculptor to a six-pack for men on the site, like in Dovlatov's *Suitcase*[2]), and the result is de-individualised. Political sculpture represents a more stable trend in the society than verses of a teenage poet in love or of a romantic political dissident aching for prison.

The same can be said about the practical level of ordinary political thinking: being collectively formed (by propaganda, public sentiments, headlines, ads, catch phrases, superstitions, stereotypes, etc.) it is relatively primitive as well. Thus, it has to be stated that although here we are talking mainly about sculpture in an urban environment and only about its political semantics, we use these phenomena as an intentional simplification of the problem: what is postpositivism? Although postpositivism has a primitivistic trend, we can not argue that here yet because we have taken the examples that are simplistic intentionally for the sake of a clearer statement of the main thesis. (Although examples from elsewhere can be used – the *déjà vu* of romantic literature in TV soap-operas, the kitsch of Christ the Saviour Church in Moscow in confrontation with its destroyed original; the 'coalition of the willing' to fight Taliban as the simplistic and primitive reincarnation of the Crusades, etc.)

[2] Dovlatov, S. *The Suitcase, Counterpoint Press*, 2011

Political sculpture in this study is not an object of research but proof and argument for the statement:

If postmodernist sculpture is at the same time newly primitive, then it is highly probable that so is postmodernism as such.

However, it is proven only if we can (with natural reservations) extrapolate its features to postmodernism in general.

One of the most evident and essential features of modernism have been classifications. Examples of these classifications in politics are: political right and political left; in art – impressionism and expressionism; in architecture – funk and *art nouvea*u; in theology Hegel and Kierkegaard. Those quite strict distinctions make it possible to find semiotic correspondences and semantic overlapping of meanings between these classifications. *Art deco* has corresponding meaning in cubism. Look: the Miami Beach *art deco* seashore is visually cubistic and both of these qualifications are covered by being postmodern.

Miami Beach Embankment

Beethoven can be attributed to the different stages of the French Revolution, etc. These correspondences between schools, parties and styles are possible because they exist in the minds of those societies and there is a general understanding of the frames and limits of the classes in them.

The fundamental situation of connotation is never completely clear, of course, especially on the margins of the designated core (or in the 'grey areas'), but the principal relations between the coordinated parties to the relation of designation are always there. "The question is whether you can make words mean so many different things," asked Alice in Lewis Carroll's *Through the Looking Glass*. In our case, political monumental art must always mean something and that 'something' must be quite evident. (Here we omit the fundamental semantic deviation of the meaning by the means of graffiti, as graffiti – although almost as old as sculptural art – is, strictly said, not a part of an original artefact but its interpretation through the semiotic means of another form of art.)

Isomorphism (Translatability) Within Postmodernism: Sculpture and Politics.

It is then just natural to assume that the clarity of the system of the modern world, able to make clear distinctions in politics, chemical elements, sexual orientations and academic degrees (everything is classified and the true hero of modernism is not Darwin, but Linne; the truly modern science is not evolution but taxonomy) will manifest itself in the simple form of political sculpture that did not exist in this sense before. (In the pre-modern era, sculpture was more a decorative element of the interior or a cult item in totem and taboo based religions.)[3]

The proof that something went "wrong" with postmodernism is that the mechanisms of semantic connotations start to fail – the pieces of art do not fall into the semiotic room predesigned for them and – more than that – they start to mean something else. In the extreme case, artefacts of sculpture meant seriously (by the authors, commissioners, art critics and other semiotically unsophisticated folks) may turn out grotesque.

It has to be noted that it happens unintentionally and within intellectually sophisticated communities, which differentiates it from stupidity – the kitsch. I will give only one example of the latter: the so-called "Brugge Embankment" (sic!) in the Republic of Mari EL capital of Yoshkar Ola (Russia) – this is meant seriously, but by people who do not construct the foundation of the semiosphere.

"Brugge Embankment"

The "normal" relation between sculpture and politics may be demonstrated by sculptures being destroyed in times of sharp political changes – dismantling of the statues of Saddam Hussein and of Dzerzhinsky (visually, footages of these episodes are carbon copies of each other) has become iconic in modern times. The sculptural history of the Soviet period in Moscow precisely reflects the different stages of the developments and intrigues in the CPSU. Khrushchev's policies that led to cultivating virgin lands in steppes have been reflected in various pieces of monumental art (including VDNKh). The metro Station Voykovskaya, named after a member of the squad that shot the late Czar and his family, tends to represent the corresponding deco.

The semiotics of destruction is even more meaningful than that of creation: like the demolition of the Church of the Christ the Saviour in Moscow, the Pussy Riot action in its kitsch version (girls were arrested for that by Putin's orders), or the removal of the *Bronze Soldier* in Tallinn. Deconstruction is a sign in its own right.

[3] Freud, S. *Totem and Taboo,* Beacon Press, 1913.

Postmodernism can't destroy classificational connotations because it has destroyed them already. Adler points out an important fact: the creation of new boundaries is a self-destructive activity because it provokes new trespassing of them. (1.) Classification needed intellectual effort, declassification – just some courage. Classification presupposes repetitiveness: things falling into the same classes must resemble each other, i.e. reproduce each other to some extent. Here we see the embryo of postmodernistic decadence. Something to be repeated is normal, but something repeated too many times is comic. Not necessarily and not immediately, but over the course of passing time. To quote Karl Marx, "History repeats itself, first as tragedy, second as farce."

Here is an example of the simple semiotic phenomenon of political propaganda. Two sculptures coming seemingly from different foundations of primary modelling systems. A statue of George Bush (Sen.) at the Houston airport and one of the thousands of Lenins around the USSR – they are semiotically equivalent. (Picture 1.)

Picture 1: George Bush (USA) and Vladimir Lenin (Soviet Russia).

In this particular case, the transformation of postmodernism away from its pretence to intellectualism raises the question: would it make sense to dismantle Bush from Houston airport because it has turned into a parody of many truly meaningful things?

The Change of Semiotic Context Makes Text Grotesque. It Might Be the Case with Law too.

Sculptural art that is placed in an urban landscape is fundamentally political due to its monumental character – it requires significant material resources, time and labour and, thus, can be commissioned by either big money or by big politics (or by both of them). Even a nude next to a swan lake represents some kind of communal power behind it. Thus, all the sculptural art has been (in the modernistic paradigm) political, whether explicitly (the Statue of Liberty or *Let Us Beat Swords into Plowshares* in the yard of the UN HQ) or implicitly (Michelangelo's *David* is not only a symbol of Florence but of an exiled Medici as well). I believe that this idea – monumental forms of art require monumental resources (time, people, money, common will) has been proven by the case of the semiotic genesis of New York City – adequately expressed by Woody Allen and Alan Alda (the latter's monologue in "Annie Hall", also Allen's introductory text to his movie "Manhattan") and Milan Kundera (in his novel *The Unbearable Lightness of Being*, part 3.5, titled *The Beauty of New York*.[4])

Some tendencies that are titled as postmodernist ones are in reality just only NON-modernistic. In politics, these include the diffusion of political discourse (for instance – the rise of True Finns in Finnish elections, April 2011; the disappearance of political agenda in Russian presidential elections; the collapse of the structural role of the euro zone; the elimination of all international law in the refugee crises in Europe, etc.). It would be natural to assume that this process would be manifested in the sculptural public room as well. Conversely, it might be a case of something opposite: the semiotic revolution that occurred earlier elsewhere (Twitter, Wikileaks, Snowden, then in architecture and even in our own "soul-searching" – in

[4] Kundera, M Unbearable Lightness of Being, Harper and Row, 1984.

the academic semiotic community – what is semiotics as an academic discipline? As a science? Why study it? How to sell it?) and had been manifested most visibly in the political sculpture that actually preceded the events that are now going on in the "real" social "realities".

Fundamentally, two democratic practices based on the atomism of an individual civic being, those of Pericles and of Facebook, are somewhat similar. To quote Lyotard – the big narratives of history are replaced by tales, anecdotes and graffiti, and nobody really understands what they mean in their complexity[5].

Let us take the example of the Beat Generation writers: there were three of them, each having his own decade – Jack Kerouac in the 1950s, Allen Ginsberg in the 1960s, and then William S. Burroughs in the 1970s, whose *Naked Lunch* is definitely outside of any sort of a narrative and consists of intentionally separated fragments of different styles, topics and genres. The fact that it was written in the 1950s is without relevance here – the book was published in the1960s and became a fact of culture in the 1970s. To complete the case of the Beat Generation development, I draw a dotted line from here to Tucker Max, as a postmodern Beat *par excellence*, although he was not born then yet. This is the case of text developing in harmony with its context and, thus, remains semiotically equivalent to itself for a culturally long period of time. In other words: **time as context matters. At times.**

It would be analytically simple to assume that if there were no classes or classifications, there could be no belonging to any semiotic space that presupposes at least some minimal structure (like the relation between the sign and the designated). Elsewhere I have tried to express that the fundamental idea of Kafka in his novel *The Trial*[6] was: being means being within a semiotic space and bearing at least some minimal system of connotations. That is what makes his case possible – *das Prozess* of K. does not have any content whatsoever but it has meaning due to being a legal structure.

For example, if there were no institution like the Academy of Arts or its *Salon de Paris*, there would have been no rules to follow and the birth of modernism (in an artistic sense – impressionism, etc.) would have been impossible. See our reference to Adler above.) Whatever the rules are, they are to be learned to be performed, to be practiced and to be adopted. A good example of that is the distinction between the material and procedural law in legal theory and practice. (The contradiction between them constitutes the comic plot of the quasi-legal film "My Cousin Vinnie".) Procedural rules may be different, but they need to include at least this one among them: under what conditions this or that orally expressed regulation is considered to be a valid law. In theory of law, Hart calls them the "rules of recognition"[7]. A similar function is performed by paradigms in Thomas Kuhn's theory of the history of science (rules that determine which statements are scientific, permissible, arguable versus those that do not belong to the realm of "recognised" science at all.)

The pan-European failure of ACTA was not related so much to its intentions but to the procedural rules (search and seizure in the straightforward meaning of the US Constitution's IV Amendment). Thus, European pro-ACTA politicians were not seen by the IT community as evildoers but as comedians.

Part of the rules comes through the system of official learning and education; thus, in the postmodern era being trained is not so fundamental anymore. We call those untrained, un-connected reactions to the realities and expressions of a human soul primitive ones. (I hope to look into the case of postmodernism as "educated" dilettantism in later research.)

Primitive things need not to be produced by primitive intellectuals (naive art by Pirosmani was discovered by impressionists as something intellectually significant), but they still may be (H.Rousseau was definitely primitivist within the impressionist tradition).

The Russian radio station Euro FM has a catch phrase for one of its programs – "Time runs by, but the times do not change". Isn't that a methodologically valid paradigm for some semiotic research?

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[5] Lyotard, Jean Francois. The Postmodern Condition: A Report on Knowledge (Minneapolis Univ Press, 1989)

[6] Gräzin. I. „Law Is Myth" *International Journal for the Semiotics of Law*, 2005, v 18, pp 23-51

[7] Hart. H.L.A. *The Concept of Law*. Oxford, 1961

The New Context is Hard to Perceive. Involuntary Deheroisation

Neither selfies nor drones can produce, it seems, any true revolution in the human semiosphere, but since they are "cool" today we can use them as an analytical tool for a fictional experiment.

Let us start from a temporal statement: statues stand longer than their immediate urban surroundings and people. (I use the word "immediate" surrounding here to separate it from parts of the urban landscape of monumental character – cathedrals, city walls, towers – they may stand long enough as well: Notre Dame, The Tower, etc.)

The statue as a piece of monumental art that by the definition is monumental gains its meaning from being anchored into a socio-political and ideological environment. The political tensions arise once the site they are anchored to disappears. The classical case here being the dispute about the Eiffel Tower after the World Exhibition was closed. Estonian events in the case of the removal of the *Bronze Soldier*/Monument to Soviet War veterans (authors: Enn Roos and Arnold Alas) manifested itself as a political event, but essentially it was one of the new acts of postmodern primitivism against neo-classicism (that in Stalinist version was primitive too, but not primitivistic). (Picture 2.)

Here we are going to reference three pieces of monumental art in the capital city of Estonia – Tallinn. For simplicity, we shall use their nicknames: the *Schoolboys' Monument* – dedicated to the college students' who as volunteers fought for the independence of Estonia against Soviet Russia in the War of Liberation of 1918 – 1920; *The Cross* – a recently established monument to the same war as to a historical event; and *The Bronze Soldier* – a monument honouring the fallen soldiers of the Soviet Army who fought the Nazis and "liberated" Estonia in 1944 – the monument had become the symbol of the Soviet occupation and Russification of Estonia. All the necessary references can be found in the text of the essay.

Picture 2: *The Cross* and the *Bronze Soldier*

To make this point clear, I also want to present another pair – the same *Cross* as opposed to another piece commemorating the same actual historical event, one produced in 1927 (authors: Ferdi Sannamees, Anton Soans Picture 3). *The Cross* was installed in 2009. Spatially, they both stood some 500 hundred meters apart, but were not part of the same urban-spatial room. None of the three had been visible at the same time. Two of them – *The Cross* and the *Schoolboys' Monument* – represent the same myhtologeme. But one of them – *The Cross*, being a part of the world of sculptural art in theory is not a piece of art itself in reality. The design of *The Cross* is visibly a copy-paste produced phenomenon and that was almost exactly the case indeed – the authors are anonymous virtually forever (although their names are known, of course, for the purposes of copyright, at least) engineers, who aimed at producing a technologically sophisticated artefact by primitivisation of the structure of semiotic links.

Picture 3: *The Cross* and the *Schoolboys' Monument*

Thus, here we have a double-motion combination of semiotic development – first, a primitive postmodern sculpture destroys another one for seemingly political reasons (the artistically valuable *Bronze Soldier* is removed from the town and *The Cross* of no value as symbolic opposition to the former Soviet regime is installed. Putting ideologies aside – it is the replacement of art by postmodern non-art). Then, second – it is the even more evident aggression of non-art against the truly modern one (not physically, but semiotically).

Officially, these two monuments bear the same political content. *The Cross* and the *Schoolboys' Monument* both refer to the Estonian War of Liberation, 1918-1920; thus, the removal of the latter could not be the issue. But its downgrading within the urban life was. Official delegations honour *The Cross* now, but not the *Schoolboys* anymore. Semiotically, it is non-art honoured over art.

To avoid sidetracking, it needs to be specially mentioned that the removal of the *Bronze Soldier* from its original location was an extremely public event with pan-European political consequences. Interestingly, these events provoked the first ever cyber attack in history that led to the foundation of a NATO cyber defence centre and its establishment in Estonia. This is extremely powerful semiotics. Its complexity is the extrapolation of a semiotic event almost to perfection.

Norman's book is not just a catalogue but a collection of the most basic texts, quotations and references referring to the perhaps the most outstanding semiotic event of the 20th century. (Both world wars are definitely incomparably larger than the *Bronze Soldier* "riots" in all other senses, but not in the semiotic one.)

A monument is a sign. Its installation is a very strong sign. But its removal or demolition is a SUPER-SIGN, kind of a nuclear blast in the semiotic world.

The design of *The Cross* and its erection were arranged and supervised by the Ministry of Defence. This fact includes an element of the grotesque element in and of itself. Then: the "thing" (to avoid the word "sculpture") did cost a huge amount of money (costs estimated at 3.5 million EUR, in reality - more) for technical reasons. The structure of *The Cross* is made of crystal glass, the lighting system of the "thing" (the monument) was extremely complicated and consisted of 250 000 LEDs controlled by a computer. That lighting system COLLAPSED (= the monument was damned dark) in a matter of months after it had been completed. Constructive and material malfunctions started before the completion of *The Cross* and still continue. *The Cross* is lighted according to the same principles as a candle lighted the desk of Shakespeare or Pushkin's Tatyana. (By simple sources of light from outside and from within.) Bulbs instead of candles – that is the only sign of

technical progress for the last 400 years.) This leads us to the conclusion that *The Cross* as a piece of postmodernism is grotesque. Its primitivism had been shadowed (or better for this case – illuminated) by technological trickery and its size. The comparison of the sizes of two artefacts with the same social connotation (both are dedicated to the same event – the War of Liberation of Estonia) seems to be noteworthy. *The Cross* is huge, the *Schoolboys' Monument* is soul-touchingly small. (Look at the photos – the size is visible from the size of people and cars next to both of them.) The new primitivism wants to be as big as possible. The survival of brainless dinosaurs required them to be big...

As the last 20 years of my research have been occasionally related to legal issues in Kafka's works, I can't *nolens-volens* avoid the metaphysical background of the example discussed here. Not only was *The Cross* commissioned from a foreign contractor (i.e. the monument that supposedly intended to appeal to the national-historic feelings of Estonians was contracted out to a foreign country). Furthermore, that contractor was a company from the Czech Republic, deeply embedded in its advertising campaign in its own national identity – its slogan ran: "800 years of Bohemian crystal". *The Cross* has never been placed as an example of the company's products on the front page and in 2012 Sans Souci merged with the Dutch Glass Deco and, thus, even the possibility of a continuation of possible scandal with that monument in Tallinn had been put behind. The Czechs are definitely among the emotionally and culturally closest nations for Estonians in the world. But one of their symbols is the Brave Soldier Schvejk. He can stand next to classic art only in a postmodern world and under the strict condition that the latter bears its primitivistic appearance. Kafka, Vaclav Havel and Milan Kundera have repeatedly noted that Schvejk is not simple at all. But he is not as deadly serious as the perception of their War of Liberation by the Estonians.

Shift from "Simplicity" to "Grotesque"

The company that erected *The Cross* bears a name of semantic significance: Sans Souci, translated from French as "no problems!"[8] It leads to further connotation. Sanssouci Palace in Potsdam represents the highest level of European sophistication in architecture and beauty and connotes the highest levels of spiritual sophistication *with* a Voltaire Room in it. In other words: the fundamental artistic and technical failure of *The Cross* is underlined by being related to the most sophisticated levels of European culture. To the best of my knowledge, neither the authors nor the commissioners or the government had ever been aware of the connotations, neither with Potsdam nor Voltaire. But the chain of signs: *The Cross* – Schvejk – SansSouci – Voltaire creates a somewhat perverse linkage between sophistication and stupidity.

Woody Allen has given the definition of "comedy" through the formula: (Alda's monologue in "Crimes and Misdemeanours"):

Comedy = Tragedy + Time.

The Cross = War + Postmodernism. The tragedy of war had turned into a comedy with a multiplicity of grotesque meanings: Schvejk, blind LED-bulbs, "sans souci", copy-paste design, etc., that could co-exist only due to the primitiveness of the whole artistic concept behind that piece.

The fact that none of the officials of the Ministry of Defence never even resigned due the issue of *The Cross* mishaps leads us to the conclusion: *The Cross* is socio-politically accepted and it truly represents the new being of minds in general – the one definitely primitivistic in opposition with the state of modernism. Semiotically, *The Cross* does not make sense in the late postmodern urbanistic room without its history of technical failure. In other words, *The Cross* makes all its sense only due to the fact that it is an ongoing technical failure. Without its technical misery, its ideological, artistic and political failure would become evident and that would be worse in many senses and for too many people. The essence of meaning here is the conflict between two sets of semiotics – the set of the semantic aspect of technology and the set of primitive essences of postmodern art. The more often *The Cross* fails (now it turns out that the turf supporting it has been washed away by rain! Can we call it an agro-botanical failure?), the more heroic it becomes. To exaggerate it slightly: the battle for the technical survival of the Monument for the War of Liberation has surpassed the battles of the war itself. And now that battle has become a part of the definition of postmodernism in general, i.e. it has become for us an item of metaphysical significance for the science of semiotics.

Which brings us to another feature of postmodernism as primitivism – its comic and grotesque modality.

First, let it be remembered that the equivalence of grotesque and primitivism (in the early era of modern jurisprudence) was revealed by Jeremy Bentham. His idea of an auto-icon (i.e. of the sculpture to be made of his own stuffed dead body)

[8] See www.sanssouciint.com

is an expression of the most sophisticated primitivism and of "black humour" at the same time[9].

When we refer back to the examples already presented, we can notice that the Bush sculpture is, after all, unintentionally comic and even grotesque if we add just the 15-metre wider context of Houston Airport. Being titled as *Winds of Freedom*, they "blow" over the airport security machinery and grim personnel working just next to the Bush statue and within the same range of visibility. The surreal mood of the whole situation is sharpened by an additional twist – there is a sign next to the Bush sculpture at Houston Airport and the screening machine. It says that mocking security personnel of the airport is punishable by law! The image of Bush suggests the image of a brutal and slightly drunk Texan who could be considered the prototype of a potential terrorist under the rules inspired by himself. (Texas is not the birthplace of the rule of law anyway.) Look at the image once again: whether Bush looks like a freedom fighter or like a guy determined to commit a suicide bombing? Does he look like, say, Lincoln, or like Stalin?

The most productive concept of "grotesque" has been produced outside the scientific and analytical studies. It was a man of letters Sherwood Anderson, who gave his collection of short stories *Winesburg, Ohio* its subtitle – *Book of Grotesque*. The essence of his (and our) concept is – the stable solitude of the subject of semiotic process and then an instantaneous and short period of its exposition to something "else", which we call a "semantic event." Under current circumstances of co-habitation between the modernistic environment and the postmodern visual art, this has produced effects that aesthetically can be called – comical. Anderson described the mechanism – solitude suddenly exposed – and here we witness the aesthetic appearance: grotesque as something related to the comical, primitive, stupid, ignorant, uneducated.

Self-Awareness of Failure to Come: the Hope for Something New

The intentional grotesque is something modernistic in its essence, most of its forms like parody, art criticism, other meta-textualisations are sophisticated, and they assume the existence of the structures of the texts, classifications, parties, roles, systems of signs and languages, etc. Postmodern grotesque manifesting itself in its comical mode might be described in a human way by the word "failure". Just as the art of rap required the band members to have at least some minor criminal record, so must a good postmodernist have his record of being laughed at. A perfect example is George Bush N 2.

The most tragic semiotic event of the postmodern world was the attack on the WTC in New York (9/11). It had been arranged by an NGO, a non-for-profit civic institution – thus, by a social entity of a clearly postmodern nature. Its semiotic essence is grasped by a set of semiotic signs like "terrorism" and "war on terror", "9/11", etc. Even a modern technological term – "weapons of mass destruction" has become a pure semiotic label within an emotionally loaded discourse. "Weapons of mass destruction", once a horrible expression does not mean anything today – after Colin Powell's direct lies about Iraq, nobody takes them seriously, even if the argument might be used again. (Like in Syria, intelligence agencies report about them, but who can trust the intelligence agencies after their fundamental failures? As the American joke goes: what does the "I" stand for in the acronym "CIA"?) The invention of the new word – NUCULAR by Bush junior (comic twist!) manifests the existence of the grotesque in Sherwood Anderson's sense. The misspelling of the word "potato" by Vice President Dan Quayle did not change the world, but the switch from "nuclear" to "nucular"did.

Inspired by the tragic events of 9/11, infamous sculptor Zurab Tsereteli (Russia) designed a monument called *The Teardrop* to be installed in New Jersey next to the place where the terrorist-driven planes hit the Twin Towers. Tsereteli, to be noted, is a successfully enterprising and mass-producing sculptor (search for "Tsereteli" images in Google.)

It was Tsereteli who had performed the interchangeability of sculptural meanings in the postmodern urban environment in the literal sense: by replacing the head of Columbus with the head of Peter the Great in what now stands as a monument to Peter the Great in the Moscow River (but still dressed in Columbus' clothes and on a Columbus era ship) – the act of fast transformation of one statue into another one by replacing its head is of semiotic value by itself.

[9] See: www.ucl.ac.uk/Bentham-Project/who/autoicon

Peter's head on Columbus' torso

Anyway: *The Teardrop* stands in New Jersey, and according to the story behind the installation, it represents a tear that mourns for the victims of a tragic event. But actually we have here a copy of another sculpture – located at the Institute of Microbiology of Tübingen University. The sculpture is properly titled in the accurate modernistic (i.e. NON-postmodernistic) way – *Vulva*. It is based on modernistic semiotic elements like "anatomical taxonomy", "higher education", "physiology", all the mythologema that I may call "Tübingen academia" or rather "Tübingen STYLE of academia". Visually, it also has to be projected against the background of a fairytale mood and visuality that Tübingen and its University present.

Picture 4: Tübingen *Vulva* and New Jersey/Tsereteli *Teardrop*

The *Vulva* in Tübingen is definitely a piece from the world of modernistic semiotics, while *The Tear* is unquestionably a piece of postmodern world of tabloids, where even pornography has lost its erotic tension. The introduction of piercing airport screening of human bodies by security officers and the mass production of images of naked bodies of all the people on their screens is just the manifestation of the eradication of any eroticism of the human body. (Regarding the semiotics of the situation of surveillance see: (11)).

To quote a senior security officer at a big European airport (who asked to remain anonymous), "Now people have to figure it out whom to f… or with whom to do that. Other humans seem to be out."

Conclusion

We are in the middle of a transfer from modernism into something else. We have to keep in mind that in monumental art the artefacts of previous semiotic spaces stand longer than in many other spheres of semiotic interest. The classical (or modern, for that sense) pieces of sculptural art may create new tensions in societies that go through their rebirth through structural (or destructural) changes of the postmodern era. Thus, there is a meeting point and the joint life time of sculptures from the former semiotic ages and the new ones that are created technically very fast – the switch of heads from Columbus to Peter the Great by Tsereteli, the erection of *The Tear* and the establishment of *The Cross* in Tallinn (by irrelevant engineers-turned-artists) happened in the blink of an eye and even here most of the time was spent on the legal issues (planning, zoning, contracting, recontracting, litigating). The lawyers' contributions to these pieces of sculpture were definitely more creative and artistic than those of the sculptors – one more fact in the case of postmodernism degraded to grotesque.

And it is just one step away from not being taken seriously anymore.

Institutionnalisme et constitution. L'enjeu de la matérialité du droit *

Massimo La Torre

I.

L'institutionnalisme est une théorie du droit qui se développe dans le milieu du droit public. Ses deux grands fondateurs, Maurice Hauriou et Santi Romano, étaient tous les deux des juspublicistes et des constitutionnalistes. Le troisième institutionnaliste de notre histoire, un institutionnaliste hétérodoxe et plutôt opportuniste, est Carl Schmitt. Il n'est pas nécessaire ici de rappeler son rôle dans la doctrine et, hélas, dans la pratique constitutionnelle de l'Allemagne de Weimar. Et les continuateurs de cette version de pensée juridique – de l'institutionnalisme je veux dire – mais avec des schémas et des valeurs bien différents de ceux défendus par les fondateurs, Neil MacCormick et Ota Weinberger, ont eux aussi été beaucoup plus à leur aise avec le droit public qu'avec le droit privé.

L'institutionnalisme est en effet une théorie juridique qui élabore son concept du droit à partir de la considération de problèmes qui sont propres au droit public et tout particulièrement à la notion et à l'expérience du constitutionnalisme. Donc, le lien entre institutionnalisme et théorie constitutionnelle ne pourrait être plus étroit.

II.

C'est la crise de l'État au dix-neuvième siècle qui pousse vers l'élaboration du concept de droit comme « institution1». La société européenne de cette fin de siècle doit déjà faire front à la décadence d'une société civile éminemment composée de propriétaires et à l'émergence d'une masse sociale qui jusqu'ici n'avait pas eu accès aux décisions dans la sphère publique. C'est le mouvement ouvrier qui frappe à la porte de l'État et demande à y entrer avec ses représentants et ses partis. L'homogénéité de la sphère publique est brisée par un nouveau pluralisme qui se reproduit comme conflit d'intérêts de classe en son sein. L'État ne peut plus se projeter comme neutre face à une société civile fondamentalement univoque dans son appui à l'économie de marché et au régime propriétaire. Avec l'inclusion de la classe ouvrière comme parti politique, l'unité de l'État comme régime de gouvernement d'élites se rompt. Cela signifie aussi que la constitution ne peut plus refléter la simplicité du régime politique d'antan. Sa structure ne peut se donner comme fait neutre et technique. Il faut que l'on résolve en son intérieur le pluralisme émergent.

Le constitutionnalisme de la fin du dix-neuvième siècle est désormais dominé par la doctrine allemande, où prévaut une notion de constitution minimaliste, une sorte d'horaire des trains, un document pas trop lourd qui établit les règles fondamentales de l'organisation de l'État. C'est la représentation que nous en donne Paul Laband. Pas de droits fondamentaux. La citoyenneté est plutôt garantie au niveau de l'administration, qui est sujette à une juridiction spéciale (ce qui nous offre la notion basique de Rechtsstaat), et ici ce sont les droits publics subjectifs qui confèrent aux citoyens une certaine dignité d'acteurs publics. Mais tout est régi, du point de vue théorique, par une idée qui fait la fortune du droit public allemand, celle de l'État comme personne juridique, comme entité abstraite néanmoins douée d'un pouvoir absolu de domination et production du droit. L'État pourrait même se décider pour l'anarchie dans le contenu de ses prescriptions, mais cette anarchie – c'est l'argument de Georg Jellinek – ne pourrait se donner que sous forme d'une prescription souveraine, donc logiquement en reniant la situation d'anarchie telle quelle. C'est un des multiples paradoxes qui affligent cette puissante doctrine, comme celui de « l'état négatif », *status negativus* la liberté des Modernes selon Benjamin Constant, qui ne peut qu'être le résultat de l'état de subjection, statut tout à fait passif, *status subjectionis*, c'est-à-dire d'une situation de dépendance absolue du sujet au regard de l'autorité de l'État[2].

Nous savons comment cette doctrine devient la cible du normativisme et de l'anti-volontarisme de la théorie pure d'Hans Kelsen. Le juriste viennois « dévolontarise » la norme en la conceptualisant comme un jugement, pas plus comme impératif ou prescription, avec toute l'ambiguïté que ce terme, « jugement », *Urteil*, notion bien sûr de provenance kantienne, peut impliquer. Et nous savons aussi que Kelsen « désubstantialise » l'État en le conceptualisant comme un système de règles qui

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* Article présenté au Colloque « Quelles doctrines constitutionnelles aujourd'hui pour quel(s) droit(s) constitutionnel(s) demain », Université Toulouse 1 - Capitole, Institut Maurice Hauriou, 29-30 septembre 2016.

[1] C'est justement le sujet du discours inaugural donné par Santi Romano à l'Université de Pise en 1909, « Lo Stato moderno e la sua crisi », qu'on peut lire dans : S. Romano, *Lo Stato moderno e la sua crisi*, Milan 1969.

[2] V. G. Jellinek, *System der subjektiven öffentlichen Rechte*, deuxième édition, Tübingen 1905.

se ferme logiquement moyennant une simple hypothèse ou présupposé épistémologique, qui toutefois est pensé donner une validité réelle aux règles qui doivent l'assumer comme leur source[3].

En faisant ça, avec ses deux mouvements théoriques, la « nomostatique » et la « nomodynamique », Kelsen croit pouvoir réinterpréter et rendre compte de la complexité de l'État du début du vingtième siècle. Un État qui est un système de règles n'est pas conceptuellement hostile au pluralisme social ; il est plutôt à même de le recomposer procéduralement. La « théorie pure » toutefois ne se voit pas comme prenant en charge la complexité du conflit social et politique ; elle veut plutôt rester à côté de celui-ci. Elle n'a pas besoin d'accepter ou de refléter l'articulation de la société dans la structure normative qu'elle propose. Avec l'approche de la pureté méthodologique, on prétend réaliser aussi la neutralité du droit et de sa pratique. Ce qui pourrait permettre un *overlapping consensus* avant la lettre, à savoir une structure constitutionnelle légère, ou libérale, c'est-à-dire capable d'intégrer les plus diverses conceptions du bien et de ce qui est le style de vie à pratiquer.

Cette perspective neutraliste ou neutralisante doit néanmoins payer un prix élevé. Il y a un prix théorique à payer, celui d'isoler le droit dans un espace ontologique pas du tout clair, ou autosuffisant. Le Sollen, l'espace du droit, n'est pas ici simplement une forme linguistique ou une dimension de la sémantique du langage ordinaire, même si technicisé. C'est quelque chose de beaucoup plus lourd. Il se produit et se reproduit comme une norme valide, donc qui existe. Mais, *où* existe-t-il ? En outre, le contenu de la règle doit être déclaré comme anodin pour ce qui concerne la validité et l'existence de la règle même. On se rappelle ce passage fameux de la *Reine Rechtslehre*, première édition : le droit peut avoir un contenu quelconque (« jeder beliebige Inhalt kann Recht sein »)[4]; pas de limites à l'autoproduction de règles par les règles. Donc, tout État sera un État de droit[5], conclusion qui est moralement et politiquement dangereuse.

Or, l'institutionnalisme croit être capable de fournir une alternative qui soit pratiquement, disons politiquement, et théoriquement, disons philosophiquement, plus plausible et plus efficace. C'est la matérialité du droit qui se fait valoir contre toute construction formaliste ou juridiciste. Cette matérialité, il est vrai, avait été déjà comprise et thématisée par Georg Jellinek. Mais ce dernier en fait la base du droit même, qui la développe en la domestiquant et en l'incluant dans son système, en fin de compte en la niant. Santi Romano, qui est un bon lecteur du juriste autrichien, reprend ce sujet, mais la matérialité chez lui n'est jamais vraiment stabilisée ou normalisée. On le voit dans son traitement des droits publics subjectifs où leur matérialité n'est pas fournie par le *status subjectionis* qui renvoie au dehors du droit subjectif, mais par une dimension du droit subjectif liée au pouvoir effectif des individus[6], un petit peu à la manière de Spinoza : ipsa *naturae potentia*.

En fin de compte, c'est Romano qui le dit, le droit public subjectif trouve son fondement dans l'autonomie, ou la force, que serait capable de démontrer ou de déployer socialement le citoyen. Romano a aussi une théorie de l'État d'exception qui en fait l'origine du droit, bien avant Carl Schmitt[7]. C'est le pouvoir social qui fait la règle, il ne se transforme jamais en figure toute juridique, en personne juridique. C'est à ce moment-là qu'on introduit la notion d'*institution*. La personne juridique est une fiction, et une abstraction ontologisante ; l'institution est une réalité existentielle immédiate que l'expérience n'a pas besoin de reconceptualiser et de projeter hors de soi-même. Et dans l'institution qui est un champ d'action sociale, on retrouve de la hiérarchie et de l'organisation, et donc des règles[8]. La constitution est toute dans cette matérialité de l'institution. En ce sens, Costantino Mortati, le théoricien de la « constitution matérielle », est un disciple assez fidèle de l'institutionnalisme romanien[9]. Le pluralisme politique ou le régime qui sort de ce pluralisme n'est pas quelque chose d'extérieur à l'État ; c'est l'État même, qui se fait donc État social, dans le sens qu'il est producteur de la somme des relations sociales. Il n'est plus au-dehors de la société civile ; il en est le centre.

Hauriou dit une chose similaire. Son problème est l'individualisme et l'égoïsme libéral, plutôt que le pluralisme social. Il veut reconstituer la communauté homogène de la tradition, mais il se rend compte qu'on ne peut pas le faire en tournant le dos à l'État républicain. De sorte que l'institution pour lui est une communauté qualifiée, et elle l'est par la séparation des pouvoirs républicains et par un principe de représentation. On connaît l'ambiguïté de cette notion dans la pensée d'Hauriou qui se rapproche de le *Repräsentation* de la doctrine allemande antilibérale et qui a été revendiquée par la suite par la critique de la démocratie lancée par Erich Voegelin[10]. Mais derrière Romano, il y a Jellinek et son intelligente et tout laïque réflexion sur la « force normative des faits », « *die normative Kraft des Faktischen* », tandis que derrière Hauriou (et

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[3] Cette désubstantialisation est déjà proposée dans son œuvre après la première guerre mondiale *Das Problem der Souveränität* de 1920, mais elle est développée chez H. Kelsen, *Der juristische und soziologische Staatsbegriff*, deuxième édition, Tübingen 1928.

[4] H. Kelsen, *Reine Rechtslehre*, nouvelle impression de la première édition de 1934 sous la direction de Matthias Jestaedt, Tübingen 2008, p. 74.

[5] *Ibid*., p. 136.

[6] V. S. Romano, *I diritti pubblici subbiettivi*, Milano 1911. Cf. M. La Torre, *Jellinek e il sistema dei diritti publici soggettivi: il paradosso dei diritti di libertà*, « Materiali per una storia della cultura giuridica », juin 1982, p. 79 et suivantes.

[7] V. S. Romano, *Sui decreti-legge e lo stato di assedio in occasione del terremoto di Messina*, 2Rivista di diritto pubblico e della pubblica amministrazione in Italia2, 1909, pp. 251-272.

[8] V. S. Romano, *L'ordinamento giuridico*, troisième édition, Firenze 1978.

[9] V. C. Mortati, *La costituzione materiale*, Milano 1940.

[10] V. E. Voegelin, *The New Science of Politics*. An Introductory Essay, Chicago 1952.

Voegelin) on entrevoit la conception thomiste et la Weltanschauung traditionaliste d'un ordre normatif fondée sur une ontologie communautaire et hiérarchisée. Mais ce n'est pas mon sujet aujourd'hui et je n'en dirai pas plus.

Je veux plutôt souligner l'autre grande notion d'Hauriou dans sa théorie de l'institution, c'est celle de « l'idée directrice»[11].Il y a là une intuition qu'on retrouve dans un autre contexte ; dans la réflexion sur l'institution de Ludwig Wittgenstein. On ne peut pas comprendre celle-ci, un jeu par exemple et même une forme de vie, à laquelle le jeu renvoie, et ainsi s'interroger sur son sens, sans considération de ce que Wittgenstein appelle l'*esprit* de la règle, « *Witz einer Regel* »[12]. Et on sait bien, en étudiant les systèmes de règles du point de vue interne, ou herméneutique, que l'action qu'elles permettent ou contribuent à produire ne peut se comprendre avec la seule référence aux règles mêmes. On peut savoir au moyen des règles quand est-ce qu'on gagne une partie d'échecs, mais les règles ne nous expliquent pas ce qu'est un jeu, ni quel est le sens de gagner à un jeu. Tout ça requiert quelque chose de plus, et la même situation on la retrouve dans la pratique juridique, où le droit comme système de règles ne nous dit pas ce qui signifie le droit, cette pratique, cette institution comme champ de conduites sociales. Afin d'apprendre ce que tout ça signifie, nous avons besoin de saisir et comprendre son « idée directrice ».

Sur ce point, Romano n'est pas si explicite et clair. On se rappellera qu'il ne voit pas de distinction essentielle entre mafia et État comme systèmes de droit. Les deux sont considérées comme des institutions de plein droit et la question de leur légitimité, ou de leur sens, n'est envisagée que comme un problème moral, pas juridique.

III.

Neil MacCormick et Ota Weinberger, les deux grands néo-institutionnalistes contemporains, viennent d'un parcours tout à fait différent. Leur formation s'est faite dans le milieu de la philosophie analytique, surtout en ce qui concerne MacCormick, et dans celui du néoempirisme logique dans le cas de Weinberger. MacCormick est un élève d'Herbert Hart ; Weinberger l'est de Franz Weyr, un ami très proche de Kelsen et le leader du pendant tchèque de la « théorie pure ». C'est donc en discutant la doctrine de Hart et Kelsen que cette nouvelle version d'institutionnalisme se développe. Mais, comme dans le cas de Romano et d'Hauriou, c'est tout de suite la question de la constitution qui est au centre de leurs investigations.

Pour Hart, la constitution est donnée par la « règle de reconnaissance » (*rule of recognition*) ou par quelque chose qui lui est très proche et similaire. Pour Kelsen, la constitution est une émanation de la norme fondamentale (*Grundnorm*) et la règle fondamentale finit quelques fois par coïncider avec la constitution. Mais dans les deux cas, la matérialité de la constitution, son caractère substantif, soit politique, soit social, n'est pas vraiment pris en charge. La « règle de reconnaissance » est surtout une chose de juges, elle n'est pas adressée à, ni employée ou appliquée par, les citoyens[13], mais le juge – comme il est souligné de manière critique par MacCormick[14] – présuppose la validité et la force obligatoire de la règle de reconnaissance, qui néanmoins est dite dépendre de son acceptation par les juges. Ici, la circularité de l'argument est assez évidente. À son tour la constitution kelsénienne n'est pas capable d'auto-fondation, et pour se justifier normativement, de manière systémique, doit renvoyer à la *Grundnorm*, qui est un principe épistémique de la science juridique, où évidemment les citoyens comme tels ont très peu à dire et à faire. Surtout, la *Grundnorm*, en tant que principe épistémique, ne peut produire de réalité, mais seulement une *connaissance*. D'où dérivera alors la constitution sa réalité comme norme valide ?

Le remède à ces incohérences est, c'est maintenant les néo-institutionnalistes qui parlent, la notion *d'institution*, qu'on peut mobiliser dans un spectre beaucoup plus large d'expériences et de conduites, pouvant toutes être reconduites par le sens commun au champ du droit. C'est vrai qu'il y a une différence importante entre MacCormick et Weinberger, au moins au début de leur entreprise théorique néo-institutionnaliste. Le premier est plutôt intéressé par l'élucidation de la prise des concepts juridiques sur la pratique et il croit pouvoir l'expliquer avec une duplication pour ainsi dire ontologique des concepts dans une portion de réalité sociale. Un contrat plus qu'un concept juridique serait donc un « fait institutionnel ».

Weinberger est obsédé par le statut ontologique des règles, qu'on ne peut pas expliquer simplement comme des pièces de langage, et surtout pas d'une façon strictement impérativiste, ce qui empêcherait le traitement logique des règles, c'est-à-dire une logique propre des normes, bien différente de la duplication de la logique propositionnelle qui traiterait le raisonnement sur les règles comme considération descriptive de second degré (ce qui est proposé par Georg Henrik Von Wright et frontalement attaqué par Weinberger[15]).

Il faut pouvoir donner un repère réel aux normes, sans pour autant leur soustraire la possibilité d'un traitement logique, ce qui est malheureusement la finalité du réalisme ou de toute sociologie empiriste du droit. Comment faire du droit quelque chose qui soit en même temps réel, qui soit dans le temps, et qu'on puisse néanmoins concevoir comme régi par

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[11] V. M. Hauriou, *Aux sources du droit: le pouvoir, l'ordre et la liberté* (1925), réimpression, Caen 1990. Sur l'institutionnalisme d'Hauriou on peut utilement lire E. Millard, *Hauriou et la théorie de l'institution*, « Droit et société », 1995, pp. 381-412.

[12] V. L. Wittgenstein, *Philosophische Untersuchungen*, Frankfurt am Main 1977, p. 238.

[13] V. H. L. A. Hart, *The Concept of Law*, Oxford 1961, p. 112.

[14] N. MacCormick, *H. L. A. Hart*, London 1981, pp. 108-111.

[15] V. par exemple O. Weinberger, *Studien zur Normenlogik und Rechtsinformatik*, Berlin 1974, p. 41 et suivantes, et pp. 157-168.

une rationalité et une logique formalisable ? Comment penser une constitution qui soit matérielle, mais en même temps ouverte soit à la normativité formelle, à la possibilité de la mobiliser dans le raisonnement juridique ; soit à un point de vue idéal, de façon qu'on puisse en discuter au-dedans de la pratique juridique comme ouverte aux valeurs de la justice ? Et comment introduire la matérialité (la pratique des « faits ») dans le système juridique sans recourir à l'espace dangereux d'une souveraineté sans contrôle et sans limites?

Pour MacCormick, la solution, qui passe par la notion d'institution[16], est le pluralisme constitutionnel[17]. Si nous n'employons pas le concept très lourd de personne juridique, et que par contre on reconnaît qu'il y a des champs d'action qui se constituent moyennant de règles institutives, ou constitutives, nous pourrons accepter l'ordre juridique comme une pluralité de ces champs d'action et comme une structure de multiples systèmes normatifs, où la question de la *Kompetenz-Kompetenz* n'est plus centrale. Ce qui permet au théoricien écossais de remettre en question la notion étatique de souveraineté à l'intérieur de l'Union Européenne sans devoir appeler à une souveraineté supranationale. C'est la leçon du pluralisme constitutionnel qui a été depuis accepté avec enthousiasme par plusieurs experts de droit communautaire[18]. Weinberger est moins centré sur le droit de la communauté européenne. Son problème est plutôt comment pouvoir justifier l'empire de la constitution réglant le droit étatique interne. On connaît la construction kelsénienne d'une validité *ex nunc* des prononcements du juge constitutionnel, solution qui est due à la primauté accordée par Kelsen à la dynamique de délégation de compétences sur la dérivation logique matérielle par déduction ou argumentation substantive. C'est là une des différences fondamentales de la « théorie pure », celle entre ordre normatif *statique*, celui de la morale, et ordre normatif *dynamique*, celui du droit. Weinberger n'accepte pas cette distinction. La délégation de pouvoir nécessite de la déduction ; on ne peut pas la mettre en place et la mobiliser sans formes logiques opératives. Mais on ne pourrait aussi attribuer de validité aux normes, c'est-à-dire créer d'autres normes selon Weinberger, qui introduit le principe de co-validité, Mitgeltung[19], si leur validité n'était que purement hypothétique. Qu'une norme soit valide signifie – selon le juriste tchèque – qu'on puisse dériver logiquement, inférentiellement, d'autres normes. La validité ici – soit dit en passant – est une notion inférentialiste qui est proche de la perspective à partir de laquelle Richard Brandom explique la signification des énoncés linguistiques en général[20].

La *Grundnorm* ne pourrait donc agencer cette dynamique de production de normes au moyen de normes, si elle n'est pas une norme existante, réelle, ce que Kelsen refuse de penser. Mais, si la norme fondamentale du système n'est pas une hypothèse, que sera-t-elle ? La réponse est qu'elle sera la norme fondamentale, ou l'ensemble des normes fondamentales, d'une *institution*, portion de la réalité sociale qui se constitue aussi moyennant des règles. C'est l'effectivité de l'institution et de ces règles institutives qui confère validité à l'ensemble des normes du système. Et la relation entre cette norme fondamentale et les normes qui dérivent de cette norme ne sera pas seulement dynamique, se donnant par acte de délégation et ascription de compétences, mais aussi par dérivation logique de contenus sémantiques qui peuvent aussi être porteurs de valeurs et d'instructions substantives, car – comme on l'a vu avant – la validité de la norme est régie par le principe de co-validité, *Mitgeltung*.

L'invalidité donc est un péché originel de la norme, péché qui bien sûr doit être vérifié par l'organe qui en a la compétence, mais qui du début a fait de la norme qu'on vérifie une pièce défectueuse du système normatif. C'est justement ce défaut d'origine qui permet de mettre en place une juridiction constitutionnelle où la décision sur la constitutionnalité d'une loi n'est valide que du moment où la décision a été prise, mais qui invaliderait la loi de son début, *ex tunc*, du moment même de sa production législative.

IV.

Il y a bien sûr des problèmes à résoudre dans la théorie constitutionnelle de MacCormick et Weinberger. MacCormick est dans l'embarras lorsqu'il veut maintenir le pluralisme constitutionnel une fois qu'on entreprend de l'activer du point de vue interne. Ici – on pourrait objecter – on ne peut qu'être moniste. Et ce, de surcroît, comme le fait MacCormick, si on accepte l'idée de la prétention de correction de la décision judiciaire au sens élaboré par Robert Alexy[21]. Même si on refuse qu'on puisse toucher à une « seule réponse juste », comme le croit par contre Ronald Dworkin[22], l'idéal de la « justesse » doit pouvoir nous donner des renseignements sur ce qui est moins ou plus juste, et dans la balance des deux possibilités ce qui est plus juste devra d'une façon évidente prendre le dessus et être accepté comme la décision judiciaire correcte. La pluralité normative devra donc se dissoudre – il me semble – à la lumière de la prétention de justesse. Quelle que soit sa satisfaction finale. De

[16] C'est sa leçon inaugurale comme *Regius Professor* à l'Université d'Édimbourg en 1973, « Laws as Institutional Fact », qui marque son virage institutionnaliste : v. N. MacCormick, O. Weinberger, *An Institutional Theory of Law*, Dordrecht 1985, chap. 1.

[17] VV. N. MacCormick, *Questioning Sovereignty*, Oxford 1999.

[18] Cf. par exemple C. Richmond, *Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law*, « Law and Philosophy », 1997, p. 377 et suivantes.

[19] V. O. Weinberger, *Norm und Institution. Eine Einführung in die Theorie des Rechts*, Vienna 1988, p. 67.

[20] Pour une présentation de cette perspective on peut renvoyer à R. Brandom, *Articulating Reasons. An Introduction to Inferentialism*, Cambridge, Mass. 2001.

[21] V. R. Alexy, *Begriff und Geltung des Rechts*, Stuttgart 1992.

[22] « It is in the nature of legal interpretation – not just but particularly constitutional interpretation – to aim at happy endings […] Telling it how it is means, up to a point, telling it how it should be »(R. Dworkin, *Freedom's Law*, Cambridge, Mass. 1996, p. 38).

l'autre côté, Weinberger avec son non-cognitivisme rigide ne peut fonder la norme fondamentale que sur l'efficacité, s'il ne se donne pas la chance de normativiser d'une façon forte la norme fondamentale du système, ou sa pratique institutionnelle. S'il ne veut pas ou ne peut pas se donner cette chance, la conséquence sera que l'acceptation de la dimension statique, ou matérielle, du système ne trouvera pas de justification substantive ; elle devra s'arrêter au fait accompli, on pourrait dire, de l'efficacité de l'institution. Weinberger ne conceptualise jamais la norme fondamentale comme norme constitutive spécifique, c'est-à-dire comme acte de langage et situation phénoménologique distincte d'une prescription.

Surtout Weinberger, mais MacCormick ne va pas plus loin sur ce terrain, n'est pas capable de penser le *Witz*, le sens, de l'institution. C'est encore une fois son scepticisme méta-éthique, qui heurte en vérité avec son ontologie de l'idéalité réelle de la normativité juridique, qui l'empêche d'être plus libéral, c'est-à-dire moins réductionniste, dans la conception du champ du normatif. Et sa sémantique, malgré tout, est encore celle du néo-positivisme et reste figée dans le piège de l'alternative sans sortie entre descriptif et prescriptif, ce qui le pousse à affirmer que toute ontologie ne pourrait qu'être stipulative[23]. Toutefois, sans définir la norme juridique comme « idée en sens objectif » (*Gedanke im objektiven Sinne*) – nous dit-il –, on ne pourrait pas agencer la norme d'une façon logique et rationnelle ; il faudrait alors donner raison au dernier Kelsen qui renie la possibilité de relations formelles, logiques, entre règles[24].

Le néo-institutionalisme est donc en condition de faire progresser la théorie constitutionnelle que nous laisse en héritage la philosophie positiviste du droit de Hart et Kelsen, mais jusqu'à un certain point. Dans la forme que lui ont donnée MacCormick et Weinberger, doit-il rester aveugle face à la complexité ontologique du droit et surtout face à son côté existentiel ? Il est ainsi empêché de bien articuler les implications politiques et morales qui donnent le *Witz*, le sens, l'imaginaire social – si vous préférez –, de ce que nous appelons l'État constitutionnel. Pour lui rendre justice il faut faire un effort de plus : il faudrait se débarrasser une fois pour toutes de la méta-éthique non-cognitiviste et de la sémantique simpliste et réductionniste qui pivote sur la distinction crue centrale entre fonction descriptive et fonction prescriptive du langage, un pas déjà fait par le second Wittgenstein.

MacCormick et Weinberger, bien qu'ils adhèrent, surtout le premier, à la théorie des actes de langage de John L. Austin et se servent d'elle[25], et en dépit de l'ontologie pluraliste de Nicolai Hartmann à laquelle de temps en temps se réfère Weinberger[26], restent tous les deux rattrapés par la tradition de Hume et dans un empirisme trop étroit. Le langage pour eux est quelque chose de fondamentalement externe à la réalité empirique qui pour eux est encore le noyau dur des conduites sociales. Les mots sont ou des modèles ou reflets de la réalité, ou des instruments pour la manipuler, ou bien des schémas pour l'interpréter, mais jamais des conditions de sa possibilité et perceptibilité.

C'est pourquoi ces deux auteurs refusent obstinément la notion de *règle constitutive*[27], même si plusieurs fois, lorsqu'ils traitent des normes constitutionnelles, ou des actes juridiques, ils soulignent qu'il ne s'agit pas là d'actes impératifs. Ils les définissent plutôt comme *faits institutionnels*, en tant qu'opposés aux « faits bruts », et comme tels, comme « faits institutionnels », rendus possibles par une règle qui d'une certaine façon les « constitue » : « Tout acte juridique valide, tout exercice de pouvoirs légaux, présuppose une certaine règle qui est constitutive de l'*acte* en tant qu'*acte juridique*[28] ». Ils en donnent donc une explication en termes d'un type de règle qui est très proche de la substance d'une règle constitutive, règle qui est logiquement dépendante de son objet et avec une force productive de cet objet-là, et qui par conséquent ne peut pas être conceptualisée dans le cadre d'une sémantique qui n'opère qu'avec les deux fonctions descriptive et prescriptive.

La voie de sortie de cette impasse serait une notion d'institution ontologiquement plus complexe et phénoménologiquement plus précise, au-delà par exemple de la définition trop facile, et évasive, et même circulaire, de l'institution comme « système des règles », lorsque pour expliquer en suite la notion de règle on se voit obligé de se référer à la notion d'institution. Ce n'est pas tout à fait clair chez le néo-institutionnalisme de MacCormick et Weinberger quelle est la prise de la règle sur la conduite humaine et sa réalité sociale. Il n'est pas non plus défini quelle serait la phénoménologie différente de la règle et de l'institution qui en serait le résultat.

Il faudrait aussi que le *sens* de l'institution soit thématisé d'une façon explicite en reprenant les intuitions de « l'idée directrice » d'Hauriou, et du « Witz » de Wittgenstein, et que ce sens puisse tout de suite être traité dans le cadre d'une théorie, et d'une pratique, modérément cognitive du raisonnement normatif. La constitution est un fait social et normatif qu'on ne saurait traiter comme un simple horaire de trains. Elle est imbue des valeurs et principes matériaux dont le contenu axiologique et son élaboration résultent du raisonnement pratique. La théorie du droit devrait donc être capable d'élucider et d'activer ce contenu-là comme faisant partie de plein droit de la réalité normative de la constitution même.

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[23] O. Weinberger, Einleitung, dans N. MacCormick, O. Weinberger, *Grundlagen des Institutionalistischen Rechtspositivismus*, Berlin 1985, p. 18.[17] VV. N. MacCormick, *Questioning Sovereignty*, Oxford 1999.

[24] O, Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen*, Berlin 1981, p. 46.

[25] Un sommaire intelligent de cette théorie est offert par John Searle dans son chapitre *Langage ou esprit*? dans le recueil d'essais Un siècle de philosophie 1900-2000, Paris 2000, p. 367 et suivantes.

[26] Par exemple O. Weinberger, *Recht, Institution und Rechtspolitik*, Stuttgart 1987, p. 112.

[27] Pour laquelle il faudrait tout d'abord lire John R. Searle, *Speech Acts. An Essay in the Philosophy of Language*, Cambridge 1969.

[28] N. MacCormick, Z. Bankowski, *La théorie des actes de langage et la théorie des actes juridiques*, dans *Théories des actes de langage, éthique et droit*, sous la direction de P. Amselek, Presses Universitaires de France, Paris 1986, pp. 196-197.

The Doctrine of Self-regulation in the Contemporary Media Environment: Mapping Some Challenges

Rain Veetõusme and Mart Susi

Introduction

Rapidly developing technical possibilities in the modern society have caused a rare situation where the legal and social regulation of media enterprises lags behind the challenges faced by the media enterprises in everyday situations, raising the question of whether self-regulation may be the answer. The proposition that the internet may "... be the greatest innovation in speech since the invention of the printing press[1]" means that the challenges emerging from the internet possibilities to media enterprises are equally enormous. The international debate about the balance between the right to freedom of expression and the right to privacy[2] so far has not resulted in a consensus on the question of the liability of an internet company for data it has not originally produced – such as anonymous comments on the internet or data processed by search engines. At the start of the new millennium, a tendency appeared that limits the accountability of online media enterprises. Thus, the European E-Commerce Directive is built upon the principle of the internet host's non-liability[3]. The United States courts apply the internet host immunity provision in an extensive manner[4]. However, recent doctrinal developments in the case law of European regional courts challenge the proposition of host immunity of online media enterprises, while at the same time pointing to the difficulties of normative regulation. This article will identify some of the main reasons supporting the doctrine of self-regulation and will explore the dilemmas it causes for the media and judicial communities, as well as the civil society at large. The article will propose a solution whereby the different interested actors need to co-operate to achieve a binding and reasonable methodology for securing, on the one hand, the economic interests of media enterprises together with the possibility to retain the function of media as a public watch-dog, and on the other hand, balance these interests with the right of the public to receive *bona fide* information based on the respect towards the right to privacy and ability to stay informed. Methodologically, the article will first review some fundamental principles and their interpretation concerning the accountability of contemporary media, moving on to provide examples on the basis of the Estonian advertising environment. Estonia serves as a good example for this academic exercise, particularly since it has earned an excellent international reputation both for its internet and press freedoms[5].

Conceptual issues

Although the concept of 'soft enforcement' of the countries' general human rights obligations seeks to consolidate compliance via non-governmental organizations[6], the actual responsibility over human rights protection remains within the government[7]. The question about horizontal human rights protection has largely remained as a theme of doctrinal constitutional interest[8]. From the perspective of self-regulation by media enterprises, the concept of horizontal protection of various rights may become decisive, since the factor of time prohibits both media enterprises and commercial organisations interested in promoting advertisements, as well as individuals concerned by their right to privacy, from seeking the protection of judicial institutions. Questions need to be decided quickly and, therefore, the availability and applicability of consensual standards becomes ever more significant.

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[1] Raymond Shih Ray Ku, Open Internet Access and Freedom of Speech: A First Amendment Catch 22, TULANE LAW REVIEW 87, 88 (2000).

[2] For discussion about the different approaches to liability of internet companies, see: Christopher T. Marsden, Internet co-regulation and constitutionalism: Towards European judicial review, International Review of Law, Computers and Technology, volume 6, no 2-3, July – Nov 2012, pp 211 – 228.

[3] 08 June 2000 Directive of the European Parliament and the Council 2000/31/EC

[4] Frydman, B., and Rorive, I, Regulating internet context through intermediaries on Europe and the US, Zeitschrift für Recthssoziologie, Bd. 23/H1, July 2002

[5] The Freedom on the Net 2013 index, published by the Freedom House, ranked Estonia 2nd after Iceland in the global context. The 11th Press Freedom Index ranked Estonia in the 11th place for 2013. The 11th Press Freedom Index is available at: http://en.rsf.org/press-freedom-index-2013,1054.html

[6] For discussion see: Elizabeth Mottershaw and Rachel Murray, *National Responses to Human Rights Judgments: The Need for Governmental Co-ordination and Implementation*, European Human Rights Law Review, no 2, 2012, 639 – 653, p 652.

[7] See the discussion in the European Court of Human Rights Grand Chamber 12 June 2014 judgment in the case *Fernandez Martinez vs Spain* (application no 56030/07), especially the dissenting opinion of judge Sajó

[8] For discussion see: Sophie van Bijsterveld, *Human Rights and private corporations. A Dutch legal perspective*, East European Human Rights Review, vol 17, no 11, 2011, pp 101 – 128.

Another and perhaps even more decisive factor supporting the doctrine of self-regulation is related to the economic interests of media enterprises. At the end of the first decade of this century, a new trend became common in the press, whereby marketing, which had formerly used advertising spaces, started to infiltrate journalistic content. This trend concerns equally all press media forms, being especially vigorous in online press, where it is often very difficult for a consumer to differentiate between commercial and journalistic content[9]. Differences in various channels are more technical than essential. Mixed use of media channels complicates the situation further. Radio can be listened to and TV can be viewed on the internet, while many online channels can be viewed with a regular TV set. This in turn raises a question of whether the rules set for TV advertisements are also valid online and, the other way round, how should online content presented on TV be regulated.

Positioning commercial messages in journalistic content generates several fundamental questions. For the purposes of this article, the following may be identified. Will we manage to protect press freedom when commercial interests dictate the content of information? Can the press in such context retain independence and reliability? How can we regulate the transmission of legally restricted advertising messages through journalistic content? How to ensure advertising revenue if the advertiser is not interested in classical advertising space and wants to position the message in journalistic content?

Against this background it, therefore, appears that in the search for self-regulation principles and the possibility of its widespread acceptance *prima facie*, a variety of factors need to be addressed. The article will now proceed to analyse some of the legal and communication challenges of media self-regulation.

Legal challenges

The international legal community has recently witnessed several significant judgments from European regional courts – the European Court of Justice and the European Court of Human Rights – identifying some of the challenges faced by the modern media in securing reasonable balance between various factors at stake. Take, for example, the doctrines of the 'right to be forgotten' and the question of online media control over anonymous comments.

The Grand Chamber of the Court of Justice of the European Union (the ECJ) delivered a judgment on 13 May 2014 in the case of C-131/12[10], which is the first case ever decided by an international court recognising 'the right to be forgotten'. Responding to the request for a preliminary ruling from the *Audiencia Nacional*[11], the Grand Chamber composed of 13 judges found that under articles 7 and 8 of the Charter of Fundamental Rights of the European Union[12], the data subject may request from internet search engines that certain information no longer be made available to the general public[13]. By applying the indispensable concept of balancing competing fundamental rights, the Court underlined that the 'right to be forgotten' overrides, as a rule,

> "…not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name[14]."

The judgment is significant since it not only introduces a new core fundamental right to the expanding list of fundamental rights[15], but it also aims to establish more clarity in the area which courts and legislators find difficult to regulate – the internet. The ECJ also stated that the 'right to be forgotten' is not absolute[16]. From an analytical perspective, the judgment

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[9] Wybenga, E. (2013). *The Editorial Age*. AdfoGroep. Amsterdam, the Netherlands.

[10] The European Court of Justice case C-131/12, judgment of 13 May 2014, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*. The case law is available through http://www.curia.europa.eu

[11] The National High Court of Spain

[12] Articles 7 and 8 of the EU Charter of Fundamental Rights (2000/C 364/01 - 18.12.2000 Official Journal of the European Communities C 364/1EN) provide: article 7 (Respect for private and family life) – everyone has the right to respect for his or her private and family life, home and communications; article 8 (Protection of personal data) – Everyone has the right to the protection of personal data concerning him or her (para 1); Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law (para 2 1st sentence).

[13] Case C-131/12, resolution para 4

[14] *Ibid.*

[15] Devaluation' of human rights has caused the international community of scholars and practitioners to look for new ways of measuring human rights performance, such as more reliance on quantitative methods. For discussion see: Malcolm Langford and Sakiko Fukudo-Parr, *The Turn to Metrics*, Nordic Journal of Human Rights Vol 30, No. 3 (2012), pp 222 – 238

[16] The Court held that this right cannot be realised if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question (para 97).

raises two principal issues. The first concerns the Court's conclusion that an internet search engine has the undeniable responsibility to respect the right to privacy. In the Court's view, the internet search engine cannot escape liability using the argument that it is merely facilitating the available data from other, original and legitimate internet sources. The judgment of the ECJ about the 'right to be forgotten' demonstrates the 'trump' argument of human rights. It can, therefore, be argued that at least in the European legal space the obligation of internet companies to protect the right to privacy has crossed the threshold of predictability. The second main issue is whether the internet communication reality necessitates the introduction and application of legal techniques for the horizontal protection of human rights on the internet. This concept of horizontal protection can be realised via self-regulation.

In a recent judgment *Delfi vs Estonia*[17] concerning the liability of an internet news site for anonymous comments, the European Court of Human Rights found that the ease of information spreading over the internet creates a new social and legal paradigm. Therefore, the internet news site needs to put in place sufficient measures to avoid causing harm to third parties' reputation[18]. The suggestion that an internet news site needs to 'do more' to protect fundamental freedoms directly implies the need for the establishment of a self-regulation mechanism.

These debates are ongoing, since the European Commission is contemplating ways to introduce the right to be forgotten into legislative framework governing the operations of online media enterprises; also, the Grand Chamber of the European Court of Human Rights has accepted the *Delfi vs Estonia* case for review.

Communication challenges

The fundamental question emerges of whether legal methodology or whether various doctrines formulated by modern communication discourse become indispensable to media enterprises in their daily operations for fully comprehending the challenges posed by the modern media realities (including the commercial aspect). Narratives matter both in communication and law. The debate around law and narrative – both from the methodological and substantive side – has entered the international legal and communication debates in the past decade. But what if the legal narrative explaining the need and principles of self-regulation is preceded in time by the communication narrative that recognises the paramount need for such a paradigm? Traditionally, narrative reasoning is seen as subordinate to logical norm-based reasoning[19]. Linda Edwards introduced the term 'narrative reasoning' by suggesting that there is no conflict with rule-based reasoning[20]. Structural theory of communication has elaborated the concept of 'narrative discourse', which is understood as the manner in which the events, entities, and other elements of a story are presented[21]. While social scientists see narratives as an important sociological tool for understanding social reality, some express concerns about the misuse of narratives[22] in legal reasoning. But what may not be acceptable from the perspective of legal reasoning may well be so from the perspective of advertising reasoning and, thus, serve as the basis for media enterprises in self-regulation. This means that when the legal community is 'pressured' by the communication community to accept the need for the self-regulation of media enterprises, then the relevant stakeholders may also convince the legal community of the necessity to leave certain matters concerning the media to self-regulation.

In this context, the matter of credibility of content produced by the media is perhaps decisive. The shift from advertising spaces to journalistic content raises doubts about the reliability and transparency of the press itself and about the information distributed through the press. In Estonia, the reliability rating of the press is traditionally high. According to the data of the Eurobarometer survey conducted in autumn 2014, 69% of the Estonian population trusts TV and radio. 54% of the population trusts the press in general. The average corresponding results of the European Union are 48% and 41%[23]. However, higher trust also means higher vulnerability if that trust is misused. At the same time, reliability and transparency of information is overestimated at places[24].

Notwithstanding Estonian press freedom being positioned among the highest in the world, rules do exist for the Estonian media enterprises. Press regulations in Estonia can be divided into two groups: national or legal rules, and rules established

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[17] *Delfi v. Estonia*, application no 64569/09, ECtHR judgment of October 10, 2013. The judgments and decisions of the European Court of Human Rights are available through http://www.echr.coe.int

[18] *Ibid*, para 87

[19] For discussion see: Christy H.DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 Leg. Comm. Rhetoric: JALWD 149, 150 (2012)

[20] Linda Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. Forum 7, 30 (1996)[21] C

[21] H. Porter, *The Cambridge Introduction to Narrative*, 2nd edition 2008, at 15 – 16

[22] Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, Journal of the Association of Legal Writing Directors, Volume 7/ 2010, 229 – 246, at 235

[23] TNS opinion&social (autumn 2014) Standard Eurobarometer 82. Media use in the European Union. Available: http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_en.htm

[24] Etzioni, A. (2010) Is Transparency the Best Disinfectant? Journal of Political Philosophy, 18(4):389-404

and agreed by media organisations themselves or self-regulation rules. Operation of the media is regulated by the following acts: the Media Services Act, the Estonian Public Broadcasting Act, the Advertising Act and, somewhat surprisingly, the Medicinal Products Act. The most important acts for the purposes of this paper are the Advertising Act and the Medicinal Products Act. They define relevant sectorial terms and impose restrictions on advertising. While other acts have also established restrictions and rules, their general impact in the context of this theme is smaller.

From the aspect of self-regulation, the rules established by the Estonian Newspaper Association (EALL) have the greatest extent and impact. EALL is an umbrella organisation of major Estonian print and online publications that joins 34 publications. The central self-regulation document of EALL is the Estonian Press Ethics Code[25], which is also accepted by several other Estonian media channels. Fulfilment of the ethics code is supervised by the Press Council of EALL, whose members, in addition to the members of EALL, are also seven major TV, online and radio channels. As additional regulation, the ethics code is supplemented by the agreements of good practice, which regulate the correction of errors in web publications, commenting online articles, differentiation of advertisements and journalistic content, referring to articles, copyrights, the main attributes of newspapers and the criteria for membership in the association[26]. Although formally the relationships between the press and advertising have been regulated by the aforementioned legal acts in most critical points, the vagueness of the term of advertising enables to bypass the established rules in several ways. One can argue that if self-regulation were allowed to become the dominant instrument governing media standards, its scope and ways for holding media enterprises accountable for violations would still remain unclear.

Practical challenges for media enterprises (on the example of Estonia)

In Estonia, the press has two main sources of income: the fees collected from advertising customers and the fees collected from the consumers for the sale of journalistic material. Public press is financed mainly from the state budget. Other models are also used worldwide for financing the press[27], but due to traditions and habits, the financing model is difficult to change. In Estonia, a consumer can consume most local TV and radio channels free of charge, as well as some newspapers and most online publications. Thus, a major part of the fees collected from consumers is excluded in case of these channels.

Additional options for financing the press have been considered in Estonia. The most common options are establishment of a TV and radio tax, and fees for online publications. A radio tax was established in Estonia before World War II, but this experience is hopelessly obsolete considering today's technology. Establishment of a TV tax has been considered, based on the example of neighbouring Finland, but politicians expect the aggressive opposition of the people. In some cases, the establishment of a fee for online publications has been successful. However, here similar problems would arise, as did in case of The New York Times and other well-known international publications, who lost significant numbers of readers and advertising customers after establishing a fee for their online versions[28].

Within the global context, several new technical solutions have started to decrease the possibilities of channels to earn profits from the sale of advertising space. Cable and internet channels enable viewing TV programmes without advertisements or skipping the advertisements. Radio enables listening to broadcasts later, without hearing advertisements before and after the broadcast, and advertising breaks during a broadcast can also be skipped.

The attention of Estonian consumers is constantly turning more towards online media forms. While in their peak period newspapers held almost half of the market of media advertisements, in 2014 it was already just a quarter, and the decreasing trend continues. At the same time, advertising turnover of online media has increased 18% and the audience of TV channels is declining as well[29].

However, even the online environment has certain problems related to the transmission of messages. Major solutions used by online channels, such as banners and pop-up advertisements, are disturbing for the readers and interfere with reading. 84% of the visitors of web pages consider pop-up advertisements disturbing. However, disturbing advertisements

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[25] Estonian Union of Journalists (1998), the Code of Ethics of Estonian journalists - *Eesti Ajalehtede Liit (1998) Eesti ajakirjanduseetika koodeks.* – Available online at: http://eall.ee/eetikakoodeks.html

[26] Estonian Association of Newspapers – the Agreements on good practices - *Eesti Ajalehtede Liit (2004, 2005, 2008, 2013, 2015) Hea tava lepped.*- available online at: http://eall.ee/lepped/index.html

[27] Herzog, C., Karppinen, K. (2014) Policy streams and public service media funding reforms in Germany and Finland, European Journal of Communication, 29(4), 416–432

Sein, H (2001) Public broadcasting financing policies and models – Public service broadcasting in Estonia – Avalik-õigusliku ringhäälingu finantseerimise põhimõtted ja -mudelid, Avalik-õiguslik ringhääling Eestis (2001) 15-30

[28] Chiou, L., Tucker, C. (2013) Paywalls and the demand for news. Information Economics and Policy 25 (2013) 61–69

Cook, J. E., Attari, S. Z. (2012) Paying for What Was Free: Lessons from the New York Times Paywall

[29] Emor (2014). The balance of power becomes more strenuous. The newspapers losing out. - *Jõuvahekorrad aina pingelisemad. Kaotajaks ajalehed*. Available online at: http://www.emor.ee/jouvahekorrad-aina-pingelisemad-kaotajaks-ajalehed/

have a major negative impact on the readiness of a reader to return to a visited page in the future[30]. In 2006, the first enthusiasts introduced advanced software for web browsers that deletes all advertising banners and blocks pop-up windows containing advertisements. Today, these advertisement blocking options are offered for all internet browsers, and not only for computers, but also for smartphones and tablets. The most well-known solutions of the kind are probably AdBlock and AdBlockPlus.

A new phenomenon is interfering with the interests of advertisers, termed 'banner blindness' by J. P. Benway and D. M. Lane from Rice University in the US already in 1998. People just did not see online advertisements and specially highlighted links[31]. This phenomenon is a part of the remarkable adaptability of people. We learn fast to do and see what we need and to avoid anything unnecessary, also on web pages. Users adapt quickly to the structure of a web page, which enables them to find the required information and to avoid fixing attention on banners[32].

The attention of media users has become a valuable resource that is increasingly difficult to obtain and easy to lose. Readers have learned to ignore online advertisements by using various methods, which in turn leads to a situation, where online advertisements are no longer profitable enough for an advertiser[33]. At the same time, consumers are not ready to pay for online press. As the profitability of direct advertisement is decreasing, advertising messages have vigorously started to move into journalistic content[34]. A rather common advertising method from the past is the use of products in movies and on TV[35]. However, the shift of advertising messages into journalistic content is often confusing for the consumers and causes damage to the reliability of the press[36].

Advertisers try to find new and aggressive methods for making their messages visible. One method for increasing visibility of advertisement is ad placement in locations that break the traditional structure of a web page[38]. In the beginning, banners were located at the top of a web page, then moved into columns on both sides of a news story, and then finally squeezed between sections of the article. After this, the entire framework of a web page was turned into an advertising space, starting actively to offer pop-up windows. These are very difficult to ignore, because, as the name implies, they just pop up on the screen, covering all information actually searched for by the consumer. In order to get rid of them, paying attention is unavoidable. Brands can also make use of the interest of the society and press in specific fields, basing their marketing strategies largely on creating content that raises interest in the press, ranging from product presentations to highlighting the celebrities using the product. Such strategies are used by Apple and Tesla[39], for example.

One can easily note from this non-exhaustive list of specific challenges that the general doctrine of self-regulation will have an impact on a broad spectrum of issues, which are predominantly economic.

Specific challenges from restrictions

A specific group of problems includes socially established restrictions and how they are followed in case of hybrid media forms and hybrid content. Depending on the media channel, advertising some products is subjected to certain time limits or completely prohibited in Estonia, but new technological solutions generate confusion for the advertiser, the owner of the media channel, as well as the consumer. Alcohol advertisement on TV is prohibited in the daytime, but allowed during late night movies and TV series. At the same time, internet and cable broadcasting companies offer the possibility of recording broadcasts and movies, to watch them later at a time suitable for the consumer on TV. This creates a situation, where a child, who should not see alcohol advertisements, watches a late night movie in the middle of a day, while the TV channel has quite legally shown alcohol advertisement during an evening movie.

The situation is even more complicated when it comes to online press, where content creation and advertisement positioning takes place in other legal spaces, but such content is still available all over the world. YouTube, which has gained immense popularity over the last ten years, includes a lot of journalistic as well as entertainment content. An advertising customer can purchase advertisements in the presented video material. However, it is also possible to advertise products,

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[30] Mccoy, S., Everard, A., Polak, P., Galletta, D. F. (2007) The Effects of Online Advertising

[31] Benway, J. P., Lane, D.M. (1998).Banner Blindness: Web Searchers Often Miss "Obvious" Links

[32] Lapa, C. (2007). Using eye tracking to understand banner blindness and improve website design. Available: http://hdl.handle.net/1850/4768

[33] Wybenga, E. (2013). The Editorial Age. AdfoGroep. Amsterdam, The Netherlands

[34] *Supra*

[35] Newell, J., Salmon, C. T., Chang, S. (2006) The Hidden History of Product Placement. Journal of Broadcasting & Electronic Media.

[36] *Supra*, note 33

[37] *Supra*

[38] Hervet, G., Gurrard, K., Tremblay, S., Chtourou, M. S. (2011). Is Banner Blindness Genuine? Eye Tracking Internet Text Advertising

[39] Mangram, M. E. (2012)The globalization of Tesla Motors: a strategic marketing plan analysis, Journal of Strategic Marketing, Vol. 20, No. 4, July 2012, 289–312

whose advertisement is prohibited or restricted by the law. Also, the marketing distributor of a product under advertising prohibition can create their own content in online channels, to which the rules established for advertisements do not apply. The existing rules do not sufficiently define what should be considered advertisement and what should not.

The situation is similar when it comes to the relationship between journalistic content and advertising messages. Advertisements for tobacco products are prohibited in Estonian printed media, but a journalistic experiment that aims to find out which cigarettes taste the best is considered press freedom, as well as any photo material appended to the article. TV advertisements of alcohol are prohibited before 21:00, but reflection about the trademark disputes of alcohol producers is press freedom, together with appended video material.

Since advertising restrictions depending on the subject matter are related to direct economic value for the media enterprises, it is questionable whether self-regulation is sufficient to provide protection for the rights of vulnerable groups. It can be argued that the higher the economic value of an advertising interest, the less effective may be sole reliance on the self-regulatory effect of the media community.

Where are the limits?

Several press publications have already started to offer articles with commercial content for advertising customers. Such articles are tagged with a reference to commercial background, but in online channels they are located in the general news flow. In TV channels and periodicals, a practice has been adopted already for years, where many broadcasts and articles related to consumption are filled only with the content provided by organisations, who have paid for it. In such case, the presented material is focused on a specific product, introducing its positive features and usage possibilities. In periodicals, a common method appears, whereby a possibility to purchase advertising space is offered to an advertising customer, but they also get a relevant press article. This is neither directly in compliance with valid rules, nor is it directly prohibited. However, for a consumer it is very difficult to differentiate a general interesting topic, which the press could and should reflect, and a commercial message, which clearly promotes the business interests of some company. Nonetheless, it is often possible to find articles in the press that have dubious social value, but clearly stand out for some company's commercial interests.

Let us look at one example. The online site of Estonia's largest daily newspaper Postimees[40], which is also one of Estonia's biggest online reading news feeds[41], published an article titled "Newlyweds selected a Volvo truck for their wedding car " on 16 June 2014. The volume of the article including the title was 44 words, four of which were the word 'Volvo'. In addition, there was a photo gallery with nine photos, where only one picture was without the Volvo truck[42]. In July 2014, the same story was printed in the newspaper on page three, which in a journalistic sense is some of the most valuable surface in a newspaper. The title was changed slightly to "Newlyweds choose a big truck for their wedding car ". It was edited and the text volume in the newspaper article was 87 words including the title, with the word 'Volvo' occurring three times. In the article content, the selected car brand was in a central position. Also, there was a photo of the truck[43]. Nothing in the format indicated that it would be a commercial text. The online article had mentioned a reporter's name, but in the newspaper story the author was marked as just PM, which is the abbreviation of the name of the newspaper Postimees.

In 2014, as part of an international research project 'Transparency of New Forms of Media Advertising Online', 23 specialists of marketing, advertising and public relations were interviewed in Estonia. The database is currently at the stage of analysis, but it is already possible to draw preliminary conclusions. The interviews revealed several important findings about trends in marketing techniques. Most of the interviewees were convinced that various content marketing techniques would find increasingly more usage. At the same time, many of them also believe that advertising banners are a technique that is fading out for various reasons. At the same time, several interviewed marketing specialists said that, in their opinion, banners and pop-up windows are disturbing and useless. They would not use them in their marketing activities and would rather pay attention to other marketing methods. This, in turn, means a decrease of classical advertisement sales for the press and additional pressure for positioning commercial messages in journalistic content.

Thus, we should not assume that the technical solutions that allow avoiding advertisements or people's tendency to ignore advertisements will lead to the end of advertising messages in the press. Messages with a commercial purpose will still be distributed, only their form will change. Considering the rapidly changing advertising environment, self-regulation may be the only effective tool for catching up with the ever changing nature of modern media and advertising.

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[40] Available in the Estonian language – the number of copies of Estonian newspapers - *Eesti Ajalehtede Liit (2014) EALL liikmeslehtede ja Ajakirjade Liidu väljaannete keskmised tiraažid 2014* – available online at: http://www.eall.ee/tiraazhid/2014.html

[41] The results of the statistics of visits to internet news portals - *TNS Emor (2014) TNSMetrix - interneti lehekülgede külastusstatistika mõõtmissüsteem* – available online at: http://tnsmetrix.emor.ee/

[42] The featured article about the newlyweds using a Volvo car - *Sinikalda M. (2014) Noorpaar valis pulmaautoks Volvo reka, Postimees Online* - available online at: http://tallinncity.postimees.ee/2858721/noorpaar-valis-pulmaautoks-volvo-reka

[43] The featured articles about the newlyweds using the Volvo car - *Postimees (2014) Noorpaar valis pulmasõidukiks suure veoauto, Postimees*

Conclusions

The goal of this article was primarily to demonstrate that the doctrine of self-regulation of media enterprises for balancing individual freedoms – which democratic societies extend to individuals – against the freedom of expression is facing a variety of legal and communication challenges. After the proposition of self-regulation was introduced by various stakeholders on the conceptual level, little has been accomplished for moving from a general consensus to practical, useable and foreseeable standards. Various powerful courts have predominantly pointed to the limitations of traditional legal instruments for regulating media and advertising in the contemporary internet-dominated society, but have not offered 'workable solutions', thereby implying that the media itself needs to formulate applicable standards. Modern communication theory does not exclude the possibility of self-regulation, but mainly focuses on the question of whether self-regulation is part of the internet narrative. Media enterprises are faced with challenges to secure their economic sustainability and are applying innovative and sometimes questionable strategies. Perhaps the situation where courts seem to uphold the legal narrative of the impossibility of legal regulation of contemporary media and advertising is suitable for the media enterprises. Having eliminated the legal pressures, these enterprises themselves can direct the opinions of social groups, thus avoiding accountability for the content of advertising and create vagueness in protecting fundamental rights. Perhaps the time has arrived where the legal community, led by international courts, needs to revise the suggestion that self-regulation is an answer.

Women and Peace Agreements

Tiina Pajuste

Abstract:

This article provides an overview of the ways in which issues related to women have been addressed in peace agreements. To provide the context for analysis, the relevant international legal rules and policies of the main international organisations involved in peace negotiations are looked at, in order to highlight possible binding obligations for states. The role of women is addressed throughout the various phases of conflict resolution from peace negotiations to the post-conflict stage. As peace agreements tend to have three main categories of provisions – dealing with the participation, protection and advancement of women – this article is divided into corresponding sections. It will study the variety of ways in which these issues have been addressed in peace agreements, highlighting possible weaknesses and discrepancies with the relevant legal rules and the gender mainstreaming policy.

Keywords:

Women, peace agreements, conflict, human rights.

Introduction

Conflicts have devastating effects on everyone involved (either voluntarily or involuntarily). But certain groups experience additional problems and, accordingly, deserve increased focus in a conflict and post-conflict setting. The focus of this article is on one such group – women. In armed conflicts, women can face additional issues due to their gender, their role as the primary caretaker of the household and family, and their weaker position in society. The conflict can impact the mental and physical health of women and their economic survival, and can lead to the breakdown of their families and communities. To redress such effects on women, it is important to ensure that gender issues are addressed in the process of establishing peace after the conflict.[1]

Peace processes provide a moment of possible change in a society and an opportunity to reconfigure the state machinery. Including gender issues in peace agreements can provide the starting point for achieving political, legal and social gains for women. While the provisions of a peace agreement do not come with a guarantee of implementation, and the omission of an issue does not imply that it could not be addressed later on, issues that are not specifically mentioned in an agreement can be difficult to prioritise subsequently. [2] In addition, the Security Council has acknowledged that an understanding of the impact of armed conflict on women and girls, and effective institutional arrangements to guarantee their protection and full participation in peace processes would contribute significantly to the promotion and maintenance of international peace and security. Accordingly, involving women is not only necessary to advance their position, but also to improve peace-making in general.[3] Accordingly, involving women is not only necessary to advance their position, but also to improve peace-making in general.

This article will look at the various aspects of the inclusion of issues related to women in peace agreements. This will be done with reference to the international legal rules regulating the area, and by exploring possible divergence of peace agreement provisions with these rules. The role of women will be addressed in the various phases of conflict resolution: peace negotiations, the resulting agreements, and the post-settlement stage. The main issues considered in this article are: (a) the participation of women, (b) the protection of women from violence, and (c) the advancement of women. The article will study the variety of ways in which these issues have been addressed in peace agreements that have been concluded from the mid-20th Century until now.

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[1] See further in Naomi R. Cahn, "Women in Post-Conflict Reconstruction: Dilemmas and Directions", 12 *William and Mary Journal of Women and the Law* 335 (2006), pp 335-7; Christine Chinkin, "Gender, Human Rights, and Peace Agreements", 18(3) *Ohio State Journal on Dispute Resolution* 867 (2006), p 868, and Margaret E. McGuinness, "Women as Architects of Peace: Gender and the Resolution of Armed Conflict", 15 *Michigan State Journal of International Law* 63 (2006), p 66.

[2] This is also highlighted in Christine Bell and Catherine O'Rourke, "Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements", 59 *International and Comparative Law Quarterly* 941 (2010), pp 946-7.

[3] Women and Peace and Security, Report of the Secretary-General, UN Doc. S/2010/498, 28 September 2010, para 1, referring to SC Res. 1325 (2000), 31 October 2000.

2. Legal Background

There is a wide range of treaties dealing with the rights of women that are relevant in assessing the role of women in peace agreements:

- Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] (1979)[4] and the Optional Protocol to the Convention (1999)[5]
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)[6]
- Convention against Discrimination in Education (1960)[7]
- Discrimination (Employment and Occupation) Convention (1958)[8]
- Convention on the Nationality of Married Women (1957)[9]
- Convention on the Political Rights of Women (1952)[10]
- Equal Remuneration Convention (1951)[11]
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)[12]
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2003)[13]

In addition, the following declarations have been proclaimed by the UN General Assembly:

- Declaration on the Elimination of Violence against Women (1994)[14]
- Declaration on the Protection of Women and Children in Emergencies and Armed Conflicts (1974)[15]
- Declaration on the Elimination of Discrimination against Women (1967)[16]

Relevant provisions can also be found in general human rights instruments. Building on the Universal Declaration on Human Rights[17], the International Covenant on Civil and Political Rights [ICCPR] reaffirms the rights to equality and equal protection under the law, as well as the right to be free from all forms of discrimination.[18]

If fully implemented, the rights guaranteed in ICCPR would go a long way toward bringing about gender equality[19]. The International Covenant on Economic, Social and Cultural Rights [ICESCR], too, contains guarantees that could assist in promoting gender equality. For example, Article 7 of the ICESCR requires "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work".[20]

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[4] Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN Doc. A/34/46, *entered into force* 3 September 1981.

[5] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 2131 UNTS 83, *entered into force* 22 December 2000.

[6] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 521 UNTS 231, *entered into force* 9 December 1964.

[7] Convention against Discrimination in Education, 429 UNTS 93, *entered into force* 22 May 1962.

[8] Discrimination (Employment and Occupation) Convention (ILO No. 111), 362 UNTS 31, *entered into force* 15 June 1960.

[9] Convention on the Nationality of Married Women, 309 UNTS 65, *entered into force* 11 August 1958.

[10] Convention on the Political Rights of Women, 193 UNTS 135, *entered into force* 7 July 1954.

[11] Equal Remuneration Convention (ILO No. 100), 165 UNTS 303, *entered into force* 23 May 1953.

[12] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 UNTS 271, *entered into force* 25 July 1951.

[13] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2237 UNTS 319, *entered into force* 25 December 2003.

[14] Declaration on the Elimination of Violence against Women, GA Res. 48/104, 20 December 1993.

[15] Declaration on the Protection of Women and Children in Emergencies and Armed Conflicts, GA Res. 3318(XXIX), 14 December 1974.

[16] Declaration on the Elimination of Discrimination against Women, GA Res. 2263(XXII), 7 November 1967.

[17] Universal Declaration of Human Rights [UDHR], GA Res. 217A (III), UN Doc A/810 at 71 (1948).

[18] E.g. Articles 2(1), 3, 26, International Covenant on Civil and Political Rights, 999 UNTS 171, *entered into force* 23 March 1976.

[19] This point is made in Eve M. Grina, "Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings", 17 *William and Mary Journal of Women and the Law* 435 (2010-2011), p 443.

[20] Article 7, International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, *entered into force* 3 January 1976.

Probably the most important instrument in relation to women's rights is the Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]. It has been described as the international bill of rights for women[21]. Under CEDAW, states parties must incorporate gender equality into all levels of domestic law from their constitutions down and take all appropriate measures to eliminate discrimination against women[22]. In October 2013, the Committee on CEDAW issued General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations[23]. The General Recommendation tries to further state parties' implementation of CEDAW in relation to situations of conflict. It outlines the requirements of the application of CEDAW to conflict prevention, conflict and post-conflict situations by member states. Among other things, the Committee states that:

> "Protecting women's human rights at all times, advancing substantive gender equality before, during and after conflict and ensuring that women's diverse experiences are fully integrated into all peacebuilding, peacemaking, and reconstruction processes are important objectives of the Convention. The Committee reiterates that States parties' obligations continue to apply during conflict or states of emergency without discrimination between citizens and non-citizens within their territory or effective control, even if not situated within the territory of the State party."[24]

The detailed rules contained in CEDAW and the other international instruments will be looked at in the relevant sections of this article.

3. The Gender Mainstreaming Policy

One important strategy for promoting gender equality and women's rights is the gender mainstreaming policy. Gender mainstreaming appeared for the first time in international texts after the third UN World Conference on Women, held in Nairobi in 1985, in relation to the debate within the UN Commission on the Status of Women regarding the role of women in development.[25] It took several more years before references to gender mainstreaming became more frequent in the documents of various international organisations.

In 1993, the UN General Assembly issued the Vienna Declaration and Programme of Action, proclaiming that the "equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity".[26] The mainstreaming idea was featured at the Fourth World Conference on Women in Beijing in 1995 and was cited in the document that resulted from the conference:

> "In addressing the inequality between men and women in the sharing of power and decision-making at all levels, Governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that before decisions are taken, an analysis is made of the effects on women and men, respectively". [27]

In 1997, the Economic and Social Council defined gender mainstreaming as "the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels ... in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated". [28]

In the context of conflict resolution and post-conflict peacebuilding, the mainstreaming policy was introduced in October 2000 by Security Council Resolution 1325.[29] The adoption of the resolution was the culmination of years of concerted appeals and efforts, especially by civil society and women's organisations, to draw attention to and seek action to reverse the brutal treatment of women and girls, the denial of their human rights and their exclusion from decision-making in situations of armed conflict.[30] In this resolution, the Security Council calls upon governments and other parties to take steps toward the implementation of the eighteen actions outlined in it. The eighteen points are clustered into four categories.

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[21] Shelley Inglis et al, CEDAW and Security Council Resolution 1325: A Quick Guide, UN Development Fund for Women 5 (2006).

[22] Article 2, CEDAW.

[23] Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations, CEDAW/C/GC/30, 18 October 2013.

[24] *Ibid*, para 2.

[25] Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, UN Doc. A/CONF.116/28/Rev.1, July 1985, pp 30, 44, 66, 274.

[26] World Conference on Human Rights, June 14-25, 1993, Vienna *Declaration and Programme of Action*, UN Doc. A/CONF.157/23, 12 July 1993, para 37.

[27] Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women, UN Doc. A/CONF. 177/20 (1995), para 189.

[28] UN Economic and Social Council, Report of the Economic and Social Council for 1997, UN Doc. A152/3, 18 September 1997, p 28.

[29] SC Res. 1325 (2000), 31 October 2000.

[30] Women and Peace and Security, Report of the Secretary-General, UN Doc. S/2010/498, 28 September 2010, para 1.

These categories have been called the "four Ps": participation, protection, prevention and peacekeeping.[31]

Firstly, Resolution 1325 mandates participation of women at all levels of decision-making. The Resolution stresses "the importance of [women's] equal *participation* and full involvement in all efforts for the maintenance and promotion of peace and security".[32] Other provisions lay down an obligation to increase the number of women in peace negotiations, peace operations and in decision-making in general. The resolution also urges the Secretary-General to nominate women as special representatives and highlights the need to consult with women and women's organisations.

Secondly, the resolution lays down a requirement for the *protection* of women and girls from sexual and gender-based violence. It reaffirms "the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts". The resolution also emphasises that all states are responsible for putting an end to impunity and prosecute those responsible for war crimes relating to sexual and other violence against women and girls.[33]

Thirdly, Resolution 1325 has provisions dealing with *prevention*. Prevention has two aspects in this context – the prevention of violence against women and the prevention of conflicts. With regard to the latter, the resolution reaffirms "the important role of women in the prevention and resolution of conflicts and in peacebuilding".[34] As examples of the part they can play, activities such as early warning and defusing tensions and the likelihood of conflict at community-level have been highlighted. With regard to the prevention of violence towards women, there is overlap between the provisions mentioned above with regard to *protection*.

Fourthly, Resolution 1325 dictates the inclusion of gender perspectives in *peacekeeping* operations. It states "the urgent need to mainstream a gender perspective into peacekeeping operations". The main method foreseen for doing this is training. The resolution requests the Secretary-General to "provide to Member States training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peacebuilding measures" and invites states to incorporate these elements "into their national training programmes for military and civilian police personnel in preparation for deployment, and further requests the Secretary-General to ensure that civilian personnel of peacekeeping operations receive similar training". The resolution then urges "Member States to increase their voluntary financial, technical and logistical support for gender sensitive training efforts".[36]

These "four Ps" are interconnected and best addressed in a systematic manner. They have been built on by later Security Council resolutions. There have been six subsequent related resolutions that broaden the scope of Resolution 1325 and encourage its implementation.[37] The key points of those resolutions are highlighted in Table 1, below.[38]

Table 1 – Key Points of UN Security Council Resolutions Subsequent to UNSCR 1325

Res 1820 (2008)	– focuses on the need for protection of women from gender-based violence, demands appropriate measures of protection – states that sexual violence in conflict constitutes a war crime – highlights women's victimisation versus women's empowerment – urges increased participation of women in peace talks
Res 1888 (2009)	– complements Resolution 1820 on gender-based violence in conflict – promotes accountability mechanisms – mandates the appointment of a Special Representative on Sexual Violence and gender advisors within peacekeeping missions

[31] E.g., International Civil Society Action Network and MIT Center for International Studies, "What the Women Say: Participation and UNSCR 1325. A Case Study Assessment", October 2010, available online at: http://web.mit.edu/cis/pdf/WomenReport_10_2010.pdf [accessed 1 August 2016], p 15. Though most commentators agree on the first three P's – participation, prevention, and protection – other lists of categories or elements have also been offered, such as participation, protection, gender training, inclusion of gender perspectives, and prevention.

[32] Preamble, SC Res. 1325 (2000), 31 October 2000.

[33] Preamble, para 11, SC Res. 1325 (2000), 31 October 2000.

[34] Ibid, preamble.

[35] NGO Working Group on Women, Peace and Security, "Security Council Resolution 1325: Basic Overview", available online at: http://www.womenpeacesecurity.org/media/Basic_1325_PP_ENG.pdf [accessed 5 August 2015], p 20.

[36] Paras 6, 7, SC Res. 1325 (2000), 31 October 2000.

[37] SC Res. 1820 (2008), 19 June 2008; SC Res. 1888 (2009), 30 September 2009; SC Res. 1889 (2009), 5 October 2009; SC Res. 1960 (2010), 16 December 2010; SC Res. 2106 (2013), 24 June 2013; and SC Res. 2122 (2013), 18 October 2013.

[38] This table builds on a similar one provided in Barbara Miller et al, "Women in Peace and Security through United Nations Security Resolution 1325: Literature Review, Content Analysis of National Action Plans, and Implementation", May 2014, available online at: http://www.peacewomen.org/assets/file/NationalActionPlans/miladpournikanalysisdocs/igis_womeninpeaceandsecuritythroughunsr1325_millerpournikswaine_2014.pdf [accessed 5 August 2016], p 3. See further on relevant SC resolutions in Dina Francesca Haynes et al, "Women in the Post-Conflict Process: Reviewing the Impact of Recent U.N. Actions in Achieving Gender Centrality", 11 *Santa Clara Journal of International Law* 189 (2012), p 198.

Res 1888 (2009)	– complements Resolution 1820 on gender-based violence in conflict – promotes accountability mechanisms – mandates the appointment of a Special Representative on Sexual Violence and gender advisors within peacekeeping missions
Res 1889 (2009)	– calls for indicators to measure the implementation of Resolution 1325 – includes the of concept of women's empowerment
Res 1960 (2010)	– requires a monitoring and reporting framework to be set up to track sexual violence in conflict – emphasises the need to address sexual violence during conflict and by UN personnel/peacekeepers – asks states to deploy greater numbers of female police and military personnel in peacekeeping operations
Res 2106 (2013)	– addresses impunity and operationalises guidance on sexual violence in conflict – addresses areas of justice, women's empowerment, arms, women's human rights, and civil society engagement
Res 2122 (2013)	– builds on the participation elements of the women, peace and security agenda – addresses issues of women's empowerment, access to justice, information and documentation of human rights violations, civil society engagement – requests more briefings for the Security Council from various entities on issues of women, peace and security

The CEDAW Committee's General Recommendation No. 30, mentioned in the previous section, specifically references these resolutions (along with the original Resolution 1325) and connects them to the aims of CEDAW. It states that the implementation of the resolutions "must be premised on a model of substantive equality and cover all rights enshrined in the Convention".[39] The General Recommendation also suggests that the CEDAW reporting procedure should be used to report on implementation of these resolutions, which would enhance the enforcement mechanisms available.[40]

The gender mainstreaming policy is by no means limited to the UN; it has been adopted over the years by a number of other organisations. For example, the Council of Europe Committee of Ministers adopted a Recommendation on Gender Mainstreaming already in 1998.[41] It stated that "one of the main strategies to achieve effective equality between women and men is gender mainstreaming" and that "the implementation of the strategy of gender mainstreaming will not only promote effective equality between women and men, but also result in a better use of human resources, improve decision-making and enhance the functioning of democracy". [42] Gender mainstreaming was pushed up in the agenda again in 2012, with the launch of the Transversal Programme on Gender Equality and the adoption of the first ever Council of Europe Gender Equality Strategy 2014-2017, which includes the realisation of gender mainstreaming in all policies and measures as one of the five strategic objectives.[43] Moreover, the organisation has appointed Gender Equality Rapporteurs (GER) in its institutional bodies and set up monitoring mechanisms, which have led to a coordinated and sustained effort to introduce a gender equality perspective in all policies and at all levels of the Council of Europe.[44]

The European Union is also a firm supporter of the gender mainstreaming policy and its application in crisis management. A High Level Group on gender mainstreaming was set up in 2001 and it is composed of high level representatives responsible for gender mainstreaming at the national level. The Group is chaired by the European Commission and has regular meetings that are convened in collaboration with the Presidency.[45] The EU has made UN Security Council Resolution 1325 a reference document for European Security and Defence Policy [ESDP] operations and developed a framework for gender mainstreaming. For example, it adopted Council Conclusions on Promoting Gender Mainstreaming in Crisis Management, which, among other things, emphasises that:

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[39] Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations, CEDAW/C/GC/30, 18 October 2013, para 26.

[40] Barbara Miller *et al*, "Women in Peace and Security through United Nations Security Resolution 1325: Literature Review, Content Analysis of National Action Plans, and Implementation", May 2014, available online at: http://www.peacewomen.org/assets/file/NationalActionPlans/miladpournikanalysisdocs/igis_womeninpeaceandsecuritythroughunsr1325_millerpournikswaine_2014.pdf [accessed 5 August 2016], p 47.

[41] Council of Europe, Committee of Ministers, Recommendation No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming, 7 October 1998.

[42] *Ibid*, preamble.

[43] Council of Europe, Gender Equality Strategy 2014-2017, February 2014, available online at: http://www.coe.int/t/dghl/standardsetting/convention-violence/Docs/Council_of_Europe_Gender_Equality_Strategy_2014-2017.pdf [accessed 5 August 2016].

[44] Information available at the Council of Europe website at: http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/index_en.asp [accessed 5 August 2016].

[45] Information available at the European Commission website at: http://ec.europa.eu/justice/gender-equality/other-institutions/gender-mainstreaming/index_en.htm [accessed 5 August 2016].

> "Gender perspective needs to be fully integrated in peace building. All reconstruction efforts should draw on the knowledge and expertise of women's groups and networks within the community. The Council encourages the development of targeted EU activities to promote gender equality and the role of women in post-conflict situations."[46]

The EU also has a Check List to Ensure Gender Mainstreaming and Implementation of UNSCR 1325 in the Planning and Conduct of ESDP Operations, which should be used by military and civilian planners in member states and in the Council Secretariat. It provides concrete examples of what can be done during the different stages of the planning process.[47] This document is complemented by another EU document on Implementation of UNSCR 1325 in the Context of ESDP, which also proposes measures to bring gender mainstreaming to life in relation to ESDP operations.[48]

The African Union has also adopted the gender mainstreaming policy. It is most clearly reflected in the 2009 African Union Gender Policy, which acknowledges that the AU's approach to gender equality "has been informed by UN frameworks", mentioning Resolution 1325 among other documents. The AU Gender Policy declares as its main purpose "to establish a clear vision and make commitments to guide the process of gender mainstreaming and women empowerment to influence policies, procedures and practices which will accelerate the achievement of gender equality, gender justice, non discrimination and fundamental human rights in Africa".[49]

Other organisations that have supported Resolution 1325 principles directly through developing and adopting a Regional Action Plan are NATO, ECOWAS and the Pacific Islands Forum.[50] Considering the wide range of instruments that now contain references to gender mainstreaming, it can be concluded that the policy of gender mainstreaming has become firmly established in the framework of conflict resolution.

The gender mainstreaming policies of the various international organisations, along with the relevant instruments and rules of international law are part of the framework in which to analyse what the role of women in peace agreements is and whether it has changed (partly) as a result of these rules and policies. In addition to binding treaty obligations, further obligations arise for member states from decisions of the relevant organisations and the organisations themselves need to maintain consistency with their policies.

Having looked at the legal background, this article will now move on to demonstrate the various ways in which issues regarding women have been incorporated into peace agreements. Each following section will highlight relevant international rules and instruments in relation to the issue and look at the various ways in which the matter has been addressed. As mentioned above, the main issues that will be considered in this section are: (a) the participation of women, (b) the protection of women from violence, and (c) the advancement of women.

4. Participation

The Need and Obligation to Involve Women

In many states where conflicts occur, women may be systematically excluded from public life by local custom and tradition; and this situation is perpetuated when women are excluded from the various stages of the peace process.[51] Moreover, there is a lot to be gained by involving women in the post-conflict reconstruction process. Firstly, it can help address the potentially different experiences of women during and after conflict.[52] An effective peace process needs to be built on the widest base of experience and, accordingly, must consider what women had to endure during the conflict and what kind of enormous responsibilities they have in the post-conflict setting. Involving women in the peace process needs to entail listening and responding to the diverse experiences of women who have lived through the conflict.[53]

Secondly, involving women helps to move women from being perceived solely as victims of conflict to agents for transformation and rebuilding. Past conflicts have demonstrated how women can create movements, initiatives and

[46] Council Conclusions on Promoting Gender Equality and Gender Mainstreaming in Crisis Management, EU Doc. 14884/1/06, 11 November 2006, para 6.

[47] Check list to Ensure Gender Mainstreaming and Implementation of UNSCR 1325 in the Planning and Conduct of ESDP Operations, EU Doc. 12068/06, 27 July 2006, para 1.

[48] Implementation of UNSCR 1325 in the context of ESDP, EU Doc. 11932/2/06, 29 September 2005.

[49] African Union Gender Policy (2009), available online at: http://wgd.au.int/en/sites/default/files/Gender%20Policy%20-%20English.pdf [accessed 5 August 2016], p 9.

[50] NATO Action Plan to Mainstream UNSCR 1325 into NATO-led Operations and Missions, Doc. PO(2010)0162, 17 November 2010; The Dakar Declaration : ECOWAS Plan of Action for the Implementation of United Nations Security Council Resolutions 1325 and 1820 in West Africa, September 2010, available online at: http://www.iansa-women.org/sites/default/files/newsviews/ecowas_outcome_document_1325.pdf; Pacific Regional Action Plan: Women, Peace and Security, 2012-2015, available online at: http://www.forumsec.org/resources/uploads/attachments/documents/Pacific%20Regional%20Action%20Plan%20on%20Women%20Peace%20and%20Security%20Final%20and%20Approved.pdf [both accessed 5 August 2016].

[51] A similar argument is made in Christine Chinkin, "Gender, Human Rights, and Peace Agreements", 18(3) *Ohio State Journal on Dispute Resolution* 867 (2006), p 871.

[52] The important contributions of women are highlighted in Naomi R. Cahn, "Women in Post-Conflict Reconstruction: Dilemmas and Directions", 12 *William and Mary Journal of Women and the Law* 335 (2006), p 344.

[53] Christine Chinkin, "Gender, Human Rights, and Peace Agreements", 18(3) *Ohio State Journal on Dispute Resolution* 867 (2006), p 873.

networks and operate them throughout the duration of the conflict. Such movements often start as humanitarian and practical, for example, trying to find shared means of acquiring food and water or creating informal schooling programmes. But there have also been political initiatives such as forming groups to demand information about their disappeared male relatives. During conflict women also occupy positions and take on roles that had previously been filled by men who are now absent.[54] Thereby women have unique knowledge of local conditions and experiences, which can lead to a better solution for the post-conflict context.

Third, if women are only nominally present in the public arena during processes directed at stabilising their countries these processes have a smaller chance of success. Significant empirical evidence suggests that including women in the peace-making process will promote broader stability.[55]

Of course, there are also the legal principles of gender equality and non-discrimination, which demand that women participate equally in all aspects of public life. Several articles of CEDAW are relevant in that respect. Article 3 requires that states take "all appropriate measures" to ensure the advancement of women, "in particular in the political, social, economic and cultural fields", to ensure that they can fully enjoy their human rights. Article 4 clarifies that in order to "accelerat[e] de facto equality", temporary measures can be taken, which will not be considered discrimination and which have to be "discontinued when the objectives of equality of opportunity and treatment have been achieved". Article 7 obliges states to ensure that women are not discriminated against in the "political and public life of the country" and that they have the same rights as men:

> " (a) To … be eligible for election to all publicly elected bodies;
>
> (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
>
> (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country."

Article 8 finishes off by requiring member-states "to ensure to women, on equal terms with men, and, without any discrimination, the opportunity to represent their Governments at the international level".[56] Failure to include women in policy and decision-making about state and institution-building violates commitments under CEDAW and other human rights instruments.

Involvement of women in all stages of the peace process is also one of the main aims of the aforementioned UN gender mainstreaming policy. Security Council Resolution 1325 urges member states "to ensure increased representation of women at all decision-making levels in national, regional and international institutions", calls on all actors involved to adopt measures that "involve women in all of the implementation mechanisms of the peace agreements", and emphasises the importance of women's participation in relation to the "constitution, the electoral system, the policy and the judiciary".[57] A later Security Council resolution:

> "Urges Member States, international and regional organisations to take further measures to improve women's participation during all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding, including by enhancing their engagement in political and economic decision-making at early stages of recovery processes, through inter alia promoting women's leadership and capacity to engage in aid management and planning, supporting women's organizations, and countering negative societal attitudes about women's capacity to participate equally".[58]

Four years later in 2013, the Security Council expressed "its intent to employ, as appropriate, all means at its disposal to ensure women's participation in all aspects of mediation, post-conflict recovery and peacebuilding".[59] The gender mainstreaming policy tries to involve women already from the first stages of the peace-making process. Security Council Resolution 1888 urges "Secretary General, Member States and the heads of regional organizations to take measures to increase the representation of women in mediation processes and decision-making processes with regard to conflict resolution and peacebuilding".[60] And Resolution 1889, amongst other resolutions, emphasises the "need to improve the participation of women in political and economic decision-making from the earliest stages of the peacebuilding process".[61]

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[54] *Ibid.*

[55] This point is made in Dina Francesca Haynes et al, "Women in the Post-Conflict Process: Reviewing the Impact of Recent U.N. Actions in Achieving Gender Centrality", 11 *Santa Clara Journal of International Law* 189 (2012), p 196.

[56] Articles 3-4, 7-8, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS. 13, 19 ILM. 33, 38 (1980).

[57] Paras 1 and 8, SC Res. 1325 (2000), 31 October 2000.

[58] Para 1, SC Res. 1889 (2009), 5 October 2009.

[59] Para 5, SC Res. 2106 (2013), 24 June 2013.

[60] Para 16, SC Res. 1888 (2009), 30 September 2009.

[61] Para 15, SC Res. 1889 (2009), 5 October 2009.

Despite the potential for a positive contribution and the aforementioned legal rules, women often have no direct access to the mediator or the official mediation and negotiation teams. A 2012 UN Women review identified that, out of 31 major peace processes conducted between 1992 and 2011:

- 4% of signatories of peace agreements were women;
- 2.4% of chief mediators were women;
- 3.7% of witnesses to peace negotiations were women;
- 9% of negotiation team members were women.[62]

Involving women in official peace negotiations remains one of the areas that has shown the least progress.[63] Though the situation does seem to be improving, as the Secretary-General, in his 2014 Report on Women and Peace and Security, states that "Significant progress has been made with regard to the participation of women in conflict resolution, mediation and peace processes, in particular since 2010, including the appointment of a growing number of women as mediators and envoys, as members of mediation support teams and to the delegations of negotiating parties". [64]

Commitment to gender mainstreaming requires the identification of the obstacles to women's participation and finding ways to remove such hurdles.[65] The next section will look at how the involvement of women in the various stages of peacebuilding has taken place in practice, by studying the broad range of peace agreements and the provisions regarding this issue that have been included in the agreements.

Principal Approaches of Involving Women

As was mentioned above, one of the more problematic areas is ensuring the involvement of women in peace negotiations. Not many peace agreements have provisions mandating this. Part of the reason for it is that there may not be a peace agreement at this stage and the negotiating teams are assembled through informal agreements. Nevertheless, there are a few agreements that address the participation of women in peace negotiations. For example, the *Agreement Implementing Governance Transition in Yemen*, which established a Council for National Dialogue (responsible for the development of the transitional roadmap), mandated that "Women will be represented in all delegations".[66] An example of the involvement of women in peace negotiations without the existence of a peace agreement requiring this is provided by the Liberian peace process. In 2003, the Women in Peacebuilding Network supported the groundbreaking participation of women in the Liberian peace process. The Network funded a delegation of women to travel to Sierra Leone, where they organised meetings between then-President Charles Taylor and rebel leaders. Later, they led the Women of Liberia Mass Action for Peace Campaign to confront rebel leaders and spur progress in the area of disarmament.[67]

The same considerations that make the participation of women in peace processes important are also relevant in national dialogue processes and, accordingly, it is as important to include women in such processes. The *Agreement Implementing Governance Transition in Yemen* did just that by stating that the comprehensive Conference for National Dialogue (taking place as part of the transitional process) would involve:

"forces and political actors, including youth, the Southern Movement, the Houthis, other political parties, civil society representatives and women. Women must be represented in all participating groups".[68]

A similar approach is taken in the Juba Declaration on Dialogue and National Consensus, which acknowledges that "the process of forging national consensus requires open dialogue without prior conditions or exclusion of any party", and states that "There is need to continue this free democratic dialogue among all national forces, civil society and women organizations".[69]

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[62] Also, one should bear in mind that the 2011 Oslo negotiations regarding the Philippines, with 33% of female signatories and 35% of women on delegations, represent a stand-out high point without which the average number of women in that period drops to 3% of signatories and 7.5% of negotiators: UN Women, "Women's Participation in Peace Negotiations: Connections between Presence and Influence", available online at: http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2012/10/wpssourcebook-03a-womenpeacenegotiations-en.pdf [accessed 5 August 2016], p 3.

[63] Along with including women in peacekeeping operations. See further in Barbara Miller et al, "Women in Peace and Security through United Nations Security Resolution 1325: Literature Review, Content Analysis of National Action Plans, and Implementation", May 2014, available online at: http://www.peacewomen.org/assets/file/NationalActionPlans/miladpournikanalysisdocs/igis_womeninpeaceandsecuritythroughunsr1325_millerpournikswaine_2014.pdf [accessed 5 August 2016], p 47.

[64] Report of the Secretary-General on Women and Peace and Security, UN Doc. S/2014/693, 23 September 2014, p 9. The same report highlights that "In 2013, the United Nations led or co-led 11 formal mediation processes. As in 2012, all United Nations mediation support teams included women, an increase from 86 per cent in 2011. ... Seven processes (88 per cent) held regular consultations with women's civil society organizations in 2013, compared with 100 per cent in 2012 and 50 per cent in 2011" [p 11].

[65] Christine Chinkin, "Gender, Human Rights, and Peace Agreements", 18(3) Ohio State Journal on Dispute Resolution 867 (2006), p 871.

[66] Paras 8, 9, Agreement Implementing Governance Transition in Yemen, July 2011.

[67] Women and Peace and Security, Report of the Secretary-General, UN Doc. S/2010/498, 28 September 2010, para 15.

[68] Part IV, para 20, ibid.

[69] Para 1.1, Juba Declaration on Dialogue and National Consensus, 30 September 2009 (Sudan).

Moving on from the stage of negotiations to the post-conflict phase, it becomes important to ensure the participation of women in all aspects of public life. There is a variety of ways of doing this. The options include affirmations of the right to participate, references to ensuring participation, provisions about participation in various institutions and organs, and including quotas regarding the number of women in a given entity. These methods should ideally be used simultaneously, in a complementary manner.

The option of confirming women's right to participate has been used in the *Good Friday Agreement*, where the parties affirmed "their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community" and emphasised "the right of women to full and equal political participation".[70] The post-conflict Iraqi constitution adopted a similar approach by stating:

"Citizens, male and female, have the right to *participate in public matters* and enjoy political rights, including the right to vote and run as candidates.[71]

A variation is offered by the approach of acknowledging the relevance of participation, without an explicit reference to its nature as a legal right. This was done in the *Agreement on a Firm and Lasting Peace* in Guatemala, where the parties recognised that the "genuine participation of citizens - both men and *women* - from all sectors of society is essential for achieving social justice and economic growth" and agreed that the "State must broaden these opportunities for participation".[72] A comparable was included in the *Dar-Es-Salaam Declaration*, where it was agreed to "Promote effective participation of the different socioeconomic actors, specifically the private sector, civil society, *women* and youth in the consolidation of democracy and good governance".[73]

The inclusion of a general equality clause within the peace agreement or a post-conflict constitution on its own is unlikely to be sufficient to ensure gender balance in the political and legal positions of the post-conflict governance system. Specification within the international agreement of the inclusion of women within relevant national structures at least provides a binding commitment to reach this goal.[74] Accordingly, an option that has been widely used in addressing the participation of women is including a provision about representation of women in a specific context or in a particular institution or organisation.

The first type of provision does not specify which exact institutions it is addressing. Examples are the *Agreement on the Implementation Mechanism for the Transition Process in Yemen*, which states that "Women shall appropriately represented in all of the institutions referred to in this Mechanism",[75] and the *Doha Document for Peace in Darfur*, in which the parties agree to address the under-representation of women in government institutions and decision-making structures". The latter agreement continues by declaring that "special measures shall be taken and implemented, […], in order to ensure women's equal and effective participation in decision-making at all levels of government in Darfur". One of those measures is laid down in a later article, which provides that certain posts in the national civil service are reserved "exclusively for qualified women from Darfur".[76]

The second type of provision that can be utilised provides that women need to be represented in a specific body. This has been done in relation to the government, the legislature, the judiciary, the police force, the military, regional government structures, and various committees set up for specific purposes. Often specific quotas are used to ensure that there is sufficient involvement of women; other times an obligation of including representation of women is incorporated, without specifying how many women should be included for that obligation to be fulfilled.

As mentioned above, CEDAW lays down an obligation to ensure to women the right "to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government".[77] This obligation has contributed to the prevalence of provisions regarding participation of women in all the branches of government. Firstly, there are peace agreements that mandate the inclusion of women in the legislature. The Liberian *Peace Agreement* established a National Transitional Legislative Assembly in Liberia, composed of a maximum of seventy six members, which had to come from the following entities: the existing government of Liberia (12 seats), the LURD (12 seats), MODEL (12 seats), the relevant political parties (18 seats), civil society and interest groups (7 seats) including the National Bar Association, the Liberian business organisations, women's organisations, trade unions, teachers union, refugees,

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[70] Provision titled "Human Rights", para 1, Agreement Reached in the Multi-party Negotiations (The Northern Ireland Peace Agreement, The Good Friday Agreement), 10 April 1998.

[71] Article 20, Constitution of Iraq, 15 October 2005 [emphasis added].

[72] Section I, para 7, Agreement on a Firm and Lasting Peace, 29 December 1996 (Guatemala, URNG) [emphasis added].

[73] Para 33, Dar-Es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 19-20 November 2004 (Angola, Burundi, Central African Republic, Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda, Zambia) [emphasis added].

[74] Christine Chinkin, "Gender, Human Rights, and Peace Agreements", 18(3) *Ohio State Journal on Dispute Resolution* 867 (2006), p 883.

[75] Part VI, para 26, Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council, 5 December 2011.

[76] Article 2, para 34; Article 7, para 54, Doha Document for Peace in Darfur, 31 May 2011 (Sudan).

[77] Article 7(b), CEDAW, *supra* note ... .

the Liberians in the Diaspora/America and the youth, and the counties (15 seats).[78] It is clear that the 7 seats provided for all the interest groups are not enough to ensure that a sufficient number of women will be included in the Legislative Assembly. A comparatively more generous quota is included in the post-conflict Iraqi constitution, which states that "A proportion of no less than 25 percent of the seats in the Council of Representatives is specified for the participation of women".[79]

The *Bougainville Peace Agreement* reflects a different approach. It provides that the legislature would be a "mainly elected body", but that it can also include members appointed or elected to represent special interests, such as *women*, youth, and churches".[80] One could argue that appointing members, instead of the general public electing them, is not in accordance with relevant human rights norms (the same could be asserted about using quotas). But positive measures are allowed to facilitate the process of attaining equal rights. As mentioned above, CEDAW Article 4 clarifies that for "accelerating de facto equality", temporary measures can be taken, which will not be considered discrimination and which have to be "discontinued when the objectives of equality of opportunity and treatment have been achieved".

An indirect way to try to ensure the representation of women in the legislature is to provide for gender quotas in the electoral lists of the political parties (assuming that at least some of the women would end up being elected). Article 25 of the ICCPR provides that every citizen has the right "to be elected at genuine periodic elections". CEDAW reaffirms this in Article 7 by stating that state parties need to ensure to women the right to "be eligible for election to all publicly elected bodies".

In the *Agreement among Lesotho Political Parties regarding the Electoral Law Bill*, the parties agreed to include a gender quota on the party lists.[81] The *Arusha Agreement* revised the existing electoral system for the National Assembly and, among other changes, prescribed that electoral lists would be "multi-ethnic in character and reflect gender representation". It clarified by adding that "For each three names in sequence on a list, only two may belong to the same ethnic group, and for each five names at least one shall be a woman". [82] In Nepal, it was agreed that the political parties, while deciding on their lists of candidates, have to "ensure proportional representation of disadvantaged communities and regions, Madheshis (the Terai communities), women, low-caste groups and other communities".[83]

Secondly, it is as important to ensure that women gain access to government positions. The *Agreement on Resolving the Challenges Facing Zimbabwe*, in a section addressing the framework for a new government, acknowledged "the need for gender parity, particularly the need to appoint women to strategic Cabinet posts".[84] In the Liberian *Peace Agreement*, the parties agreed to "reflect national and gender balance in all elective and non-elective appointments within the NTGL [the National Transitional Government of Liberia]".[85] The *Agreement on Provisional Arrangements in Afghanistan* provided that the members of the interim administration would be selected "on the basis of professional competence and personal integrity", but "with due regard to the ethnic, geographic and religious composition of Afghanistan and to the importance of the participation of women". It then specified that the interim bodies need to ensure the participation of women in the subsequent Interim Administration.[86]

Other agreements provide for gender quotas in regional government bodies. The *Chittagong Hill Tracts Peace Accord* lays down the requirement that there need to be three seats for women in every Hill District Council and specifies that one third of those seats are reserved for non-tribal women. Another body, the Regional Council, is formed of twenty-two members, with the following composition:

> "Chairman -1
> Members tribal (men) - 12
> Members tribal (women) - 2
> Members non-tribal (men) - 6
> Members non tribal (women) -1".[87]

[78] Article XXIV, Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL) and the Political Parties, 18 August 2003.

[79] Article 151, Constitution of Iraq, 15 October 2005.

[80] Section 4, para 28; Bougainville Peace Agreement, 30 August 2001 (PNG Government, Bougainville Interim Provincial Government, MPs for areas of Bougainville, Leitana Council of Elders, Bougainville People's Congress, Bougainville Resistance Forces, Bougainville Revolutionary Army) [emphasis added].

[81] Paras 12-13, Agreement among Lesotho Political Parties regarding the Electoral Law Bill, 9 March 2011.

[82] Protocol II, Article 20, para 8, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[83] Section III, para 9(c), Unofficial Translation of the Decisions of the Summit Meeting of the Seven-Party Alliance and the Communist Party of Nepal (Maoist), 8 November 2006 (Nepal.

[84] Article 20, Agreement between the Zimbabwe African national Union-Patriotic Front (ZANU-PF) and the Two Movement for Democratic Change (MDC) Formations, on Resolving the Challenges Facing Zimbabwe, 15 September 2008.

[85] Article XXVIII, Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL) and the Political Parties, 18 August 2003.

[86] Section III, para A(3); Section V, para 4, Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, 14 November 2001 (participants in the UN Talks on Afghanistan). As another example, the Arusha Agreement provided that the government will "take into account the need to reflect ethic, religious, political, and gender balance in its decisions and appointments" – Protocol II, Article 15, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[87] Paras B(4)(a), C(3)(4), Chittagong Hill Tracts Peace Accord, 2 December 1997.

A similar division is included in the *Memorandum of Settlement on Bodoland Territorial Council*, which provided that the Council would have forty six members, "out of which 30 will be reserved for Scheduled Tribes, 5 for non-tribal communities, 5 open for all communities and 6 to be nominated by Governor of Assam from the unrepresented communities for BTC area of which at least two should be women". [88]

Thirdly, representation of women also needs to be ensured in the judicial branch of government. One option is to include an obligation to include women in the nomination stage. The Liberian *Peace Agreement* does this by providing that nominations for all new judicial appointments "shall be based on a shortlist of candidates for each position recommended by the National Bar Association, including the female lawyers". [89] Another option is to provide for reform of the judicial sector. The *Arusha Agreement* states that the transitional government has to reform the judicial machinery at all levels to promote gender (and ethnic) balance in the Burundian judicial sector through recruitment and appointments, creating training colleges for employees of the judicial system, promoting accelerated training, and improving the status and the internal promotion of magistrates. [90]

Law enforcement is another crucial area, where women need to participate, to assist in removing biases against women in that context and ensuring that women have an option to approach female officers with more sensitive information about crimes that have been committed against them. Several peace agreements have provisions that proclaim that recruiting more women into the police service is a priority. For example, this was done in the *Framework on Police Restructuring*, the *Chapultepec Peace Agreement*[91], and the *Arusha Agreement*[92]. The first contains the following paragraph:

"Acknowledging the present under-representation of women in the Republika Srpska police force, we agree to undertake measures to increase the training and hiring of women officers. We agree to step up active recruitment of women candidates into the Republika Srpska Police Academy".[93]

An alternative is to deal with both the police and the military together. The *Arusha Agreement*, in Article 14 of Protocol III, deals with the composition of the defence and security forces and states that both the national defence force and the national police will be composed of all components of the Burundian nation, who wish to form part of those bodies, irrespective of ethnic, regional, gender and social status.[94] A later article clarifies that the correction of the imbalances will be "approached progressively" and that this correction will be "achieved during the transition period" by opposition combatants into the current defence and security forces and by recruiting other Burundian citizens.[95]

To ensure that women are integrated into all aspects of public life, women have to be included in as many institutions and public entities as possible, in order to provide a positive example to the private sector, which would hopefully follow lead. Accordingly, it is often necessary to ensure that references to the representation of women are included in peace agreement articles that establish new committees or other such bodies. The more important the function of the entity, the more crucial it is to include women in its functioning. The Liberian *Peace Agreement*, for example, established a Governance Reform Commission, with the tasks of developing public sector management reforms, ensuring transparency and accountability in all government institutions and activities, and encouraging the practice of good governance in Liberia (among other aims). The Commission had seven permanent members and it was required to have women amongst its membership. It was also specified that the committee members had to be "men and women of known integrity with national and/or international experience". [96]

Another important area is post-conflict reconciliation. To ensure that transitional justice bodies are seen to represent all sides, it is vital to include persons from a wide range of backgrounds in such bodies, and, as importantly, women must play a role in such entities. This has been acknowledged in Kenya, with regard to the Truth, Justice and Reconciliation Commission that was established with the following specification:

> "The Commission will consist of seven members, with gender balance taken into account. Three of the members shall be international. The members shall be persons of high moral integrity, well regarded by the Kenyan population,

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[88] Para 4.2, Memorandum of Settlement on Bodoland Territorial Council (BTC), 10 February 2003 (Government of India, National Socialist Council of Nagaland-Isak Muivah(NSCN-IM)).

[89] Article XXVII, para 3, Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL) and the Political Parties, 18 August 2003.

[90] Protocol I, Article 7, para 18(b); Protocol II, Article 17, para 3, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[91] Para 7(D)(b), Peace Agreement, 16 January 1992 ("The Chapultepec Peace Agreement"; El Salvador, FMLN).

[92] Protocol III, Article 14, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[93] Para 14, Framework on Police Restructuring Agreement, Reform and Democratisation in the Republika Srpska, 9 December 1998 (Republika Srpska, UN Mission in Bosnia and Herzegovina).

[94] Protocol III, Article 14, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[95] *Ibid*, Article 16.

[96] Article XVI, paras 2-3, Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL) and the Political Parties, 18 August 2003.

> and shall include a range of skills, backgrounds, and professional expertise. As a whole, the Commission shall be perceived as impartial in its collectivity, and no member should be seen to represent a specific political group".[97]

Peace agreements often establish implementation bodies to ensure the full and proper implementation of the agreement in question. Again, women should be involved in such bodies, as they need to be engaged in all stages of the peacemaking process and implementation is often the most crucial stage in this process. Whether any actual changes are accomplished with the peace agreement depends on how successful the implementation of the agreement is. The *Agreement on Resolving the Challenges Facing Zimbabwe* establishes one such implementation mechanism. It provides for the creation of a Joint Monitoring and Implementation Committee [JOMIC], which is composed of four senior members from each of the former parties to the conflict. The agreement dictates that "Gender consideration must be taken into account in relation to the composition of JOMIC". [98]

As mentioned above, there is a plethora of different committees that are set up or reformed in the post-conflict setting. The aim should be to involve women in as many of such bodies as possible, regardless of the entity's area of activity. Other examples of types of committees that have been addressed in peace agreements in relation to the participation of women are electoral commissions[99], preparatory committees[100], committees of experts[101], various management bodies[102], and thematic councils.[103]

One criticism of the utilisation of quotas is that the issue of participation of women in peace processes is then reduced to the simple addition of women or a woman with no ties or credentials in either peace-making or women's rights movements. It can become a matter of ticking the box, rather than considering the qualitative issues.[104] Women elected through a quota system may not have "women's interests" at the forefront of their thinking and policy-making. Nevertheless, commentary about Afghanistan indicates that even in that very challenging socio-political environment, women's quotas can result in great gain for women. At the very least, having more women in political positions provides a role model effect for young girls and will likely have a marked impact on promoting women's views in politics in the future.[105]

Some categories of women can require additional protection. Often the position of rural women, indigenous women or female refugees is worse than that of the general female population. Such groups can face with additional problems, which should be addressed to mitigate the hardship that these women have to grapple with. The Guatemala *Agreement on Identity and Rights of Indigenous* Peoples recognised "that indigenous women are particularly vulnerable and helpless, being confronted with twofold discrimination both as women and indigenous people, and also having to deal with a social situation characterized by intense poverty and exploitation". In view of that, the Government agreed to take measures such as establishing an Office for the Defence of Indigenous Women's Rights (with the participation of such women), including legal advice services and social services; and eliminating discrimination against indigenous women with regard to "facilitating access to land, housing, loans and participation in development projects".[106]

When tackling the issue of participation of women in all aspects of the public life, it is important to ensure follow-up and implementation of the provisions that were incorporated to ensure representation of women. Often times women need to be trained to enable them to take up public positions and to pre-empt any arguments that they are inadequately prepared and unsuitable.[107] But not many peace agreements include such preparatory requirements. An agreement that is unique with respect to implementation is the Guatemala *Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreements*. It has provisions promoting the "convening of a women's forum on the commitments concerning women's rights and participation set out in the Peace Agreements". It requires follow up of the "commitments concerning women set out in the Peace Agreements" and calls for evaluation of "the progress made in women's participation". More importantly, it also

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[97] Paragraph on "Selection and Composition", Kenyan National Dialogue and Reconciliation, Truth, Justice and Reconciliation Commission, 4 March 2008 (PNU, ODM) [emphasis added].

[98] Article XXII, para 22, Agreement between the Zimbabwe African national Union-Patriotic Front (ZANU-PF) and the Two Movement for Democratic Change (MDC) Formations, on Resolving the Challenges Facing Zimbabwe, 15 September 2008.

[99] Article 18, Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone ("Abidjan Accord"), 30 November 1996.

[100] Para 76, Dar-Es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 19-20 November 2004 (Angola, Burundi, Central African Republic, Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda, Zambia).

[101] Part II, paras 6 and 9, The Constitution of Kenya Review Bill, 19 June 2008.

[102] Chapter II, para 2.5, Protocol I, Article 8, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[103] Section II, para E(22), Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreements, 29 December 1996 (Guatemala, URNG).

[104] International Civil Society Action Network and MIT Center for International Studies, "What the Women Say: Participation and UNSCR 1325. A Case Study Assessment", October 2010, available online at: http://web.mit.edu/cis/pdf/WomenReport_10_2010.pdf [accessed 1 August 2016], p 15.

[105] Barbara Miller *et al*, "Women in Peace and Security through United Nations Security Resolution 1325: Literature Review, Content Analysis of National Action Plans, and Implementation", May 2014, available online at: http://www.peacewomen.org/assets/file/NationalActionPlans/miladpournikanalysisdocs/igis_womeninpeaceandsecuritythroughunsr1325_millerpournikswaine_2014.pdf [accessed 5 August 2016], p 5.

[106] Section II, para B(1); Section IV, para F(9), Agreement on Identity and Rights of Indigenous Peoples, 31 March 1995 (Guatemala, URNG).

[107] This aspect is emphasised in Christine Chinkin, "Gender, Human Rights, and Peace Agreements", 18(3) *Ohio State Journal on Dispute Resolution* 867 (2006), p 883.

states that on the basis of this evaluation a "corresponding plan of action" should be drawn up.[108] Provisions like these need to be utilised more often as they help ensure that there are real practical improvements to the situation of women in post-conflict societies.

5. Protection

The second general issue area is the problem of violence towards women. In addition to suffering the same forms of violence as male civilians, female civilians are also the primary targets of gender-based violence. Such violence is an increasingly visible and acknowledged aspect of conflict.[109] The scale and scope of sexual violence against women in many contemporary conflicts are almost incomprehensible. One report notes:

> "An estimated half a million women were raped during the 1994 genocide in Rwanda. A staggering 50% of all women in Sierra Leone were subjected to sexual violence, including rape, torture and sexual slavery, according to a 2002 report by Physicians for Human Rights. In Liberia, an estimated 40 percent of all girls and women have fallen victim to abuse. During the war in Bosnia-Herzegovina in the 1990s, between 20,000 and 50,000 women were raped".[110]

Sex crimes are exceedingly commonplace during periods of conflict, with the crimes committed both opportunistically and purposefully, randomly and in a calculated manner, and by persons in control or those out of control.[111] Rape has come to be used as a war tactic against enemy civilian populations in order to terrorise and dehumanise them. It is used to establish the power of soldiers to take what they want, to punish anyone suspected of sympathising with another faction, and to humiliate individuals and communities.[112]

Sexual violence against women and girls affects them physically, psychologically, economically, and socially. The health impact ranges from unwanted pregnancies, miscarriages caused by the abuse, illness or death from illegal abortions, to sexually transmitted diseases, including HIV-AIDS. Sexual violence also has profound psychological consequences on its victims. Victims often experience insomnia, depression, post-traumatic stress disorder, and suicidal thoughts. All of these symptoms are exacerbated by the unavailability of appropriate health services and make the reintegration of women into post-conflict society all the more difficult. Many of these women are often frightened to report their rapes, fearing ostracism from their homes and communities.[113] Post-conflict arrangements often make provisions for the reintegration of soldiers back into society, but not for that of rape victims and their return to normal life. Attention should be given to ways of addressing condemnation or ostracism of women who have suffered sexual abuse.[114]

Acts of sexual and gender-based violence violate a number of human rights principles Acts of sexual and gender-based violence violate a number of human rights principles enshrined in international human rights instruments. Among others, these include: (a) the right to life, liberty and security of the person; (b) the right to the highest attainable standard of physical and mental health; and (c) the right to freedom from torture or cruel, inhuman, or degrading treatment or punishment. Several international instruments specifically address sexual and gender-based violence against women and girls – such as CEDAW, the UN Declaration on the Elimination of Violence against Women (1993), and the Beijing Declaration and Platform for Action (1995) – and reaffirm states' responsibility to work to eliminate them.[115] The Declaration on the Elimination of Violence Against Women defines gender-based violence broadly to include any gender-based act that causes physical, sexual, or psychological harm.[116]

During the past decade, sexual violence against women has begun to be recognised as a war crime, a crime against humanity, and an instrument of genocide. The first judgment issued by an international tribunal recognising rape as a war crime occurred in the monumental case against Jean-Paul Akayesu, a former mayor in Rwanda, by the International

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[108] Paras, 29, 88, 178, Agreement on Identity and Rights of Indigenous Peoples, 31 March 1995 (Guatemala, URNG).

[109] Eve M. Grina, "Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings", 17 *William and Mary Journal of Women and the Law* 435 (2010-2011), p. 448.

[110] IRIN Web Special on violence against women and girls during and after conflict, "Our Bodies - Their Battle Ground: Gender-based Violence in Conflict Zones", available online at: http://www.irinnews.org/pdf/in-depth/gbv-irin-in-depth.pdf [accessed 10 August 2016].

[111] Kelly D. Askin, "The Quest for Post-Conflict Gender Justice", 41 *Columbia Journal of Transnational Law* 509 (2002-2003), p 509.

[112] Naomi R. Cahn, "Women in Post-Conflict Reconstruction: Dilemmas and Directions", 12 *William and Mary Journal of Women and the Law* 335 (2006), pp 358-9.

[113] *Ibid*, p 359.

[114] Christine Chinkin, "Gender, Human Rights, and Peace Agreements", 18(3) *Ohio State Journal on Dispute Resolution* 867 (2006), p 881.

[115] See further, UN High Commissioner for Refugees, "Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response", May 2003, available online at: http://www.unhcr.org/3f696bcc4.html [accessed 11 June 2016].

[116] Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 1, U.N. Doc. A/RES/48/104 (Dec. 20, 1993): "For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".

Criminal Tribunal for Rwanda (ICTR)[117]. In the *Akayesu* Judgment, the ICTR found that rape and gender-based violence may constitute genocide[118] when "used as instruments of genocide". The International Criminal Tribunal for the Former Yugoslavia (ICTY) placed emphasis on gender issues in the *Celebici* case. In that case, the ICTY held that sexual violence can be prosecuted as torture, finding that such violence involves an element of gender discrimination because men and women are often tortured differently based on their sex, as in the case of rape. Thus, sexual violence often satisfies the "purpose" element of torture.[119] The ICTY has also held that rape involving a single victim can constitute a serious violation of international law.[120]

Addressing gender-based violence is also one of the main aims of the UN gender mainstreaming policy. Security Council Resolution 1325 (2000) emphasises states' responsibility to end impunity for crimes against humanity and war crimes, including sexual and other forms of violence against women and girls. It also calls on "all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict".[121] Resolution 1820 (2008) demands the cessation of sexual violence against civilians and "that all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence".[122] Resolution 1960 requires a monitoring and reporting framework to be set up to track sexual violence in conflict.[123] And Resolution 2106 (2013) emphasises "the important role that can be played by women, civil society, including women's organizations, and formal and informal community leaders in exerting influence over parties to armed conflict with respect to addressing sexual violence".[124] Summing up, both international human rights norms and Security Council resolutions demand that gender-based violence be addressed in the post-conflict context.

Addressing Violence towards Women

Often the first step to solving a problem is acknowledging its existence. The same is true in the context of violence towards women. This was done in the Lomé Agreement, which recognised that "women have been particularly victimized during the war", before moving on to state that therefore special attention should be accorded to their needs and potential in formulating and implementing post-conflict programmes.[125]

Once it has been acknowledged that there are victims of (sexual) violence, action needs to be taken to offer support and stop the violations from occurring. Security Council Resolution 1820 requires all parties concerned to develop and strengthen "the capacities of national institutions, in particular of judicial and health systems, and of local civil society networks in order to provide sustainable assistance to victims of sexual violence in armed conflict and post-conflict situations".[126] Support can take various forms. The Dar-Es-Salaam Declaration sets up:

> "regional mechanisms, including relevant traditional support mechanisms, aimed at providing psychosocial support, medical and legal assistance to women and girls who are victims of rape as well as other acts of sexual violence and exploitation".[127]

The *Arusha Agreement* provides for "Counselling, training and assistance with reintegration" to girls and women who have been "subjected to sexual abuse and forced marriages during and after the crisis". [128]

Of course, it is crucial to stop future gender-based violence. Security Council Resolution 1820 (2008) also "Demands

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[117] For a more detailed consideration, see Naomi R. Cahn, "Women in Post-Conflict Reconstruction: Dilemmas and Directions", 12 *William and Mary Journal of Women and the Law* 335 (2006), p 362-3.

[118] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), para. 731.

[119] Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 16, 1998), para. 941.

[120] Eve M. Grina, "Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings", 17 *William and Mary Journal of Women and the Law* 435 (2010-2011), p. 449.

[121] SC Res. 1325 (2000), 31 October 2000, paras 10-11.

[122] SC Res. 1820 (2008), 19 June 2008, paras 2-3.

[123] See further on relevant SC resolutions in Dina Francesca Haynes et al, "Women in the Post-Conflict Process: Reviewing the Impact of Recent U.N. Actions in Achieving Gender Centrality", 11 *Santa Clara Journal of International Law* 189 (2012), p 198.

[124] SC Res. 2106 (2013), 24 June 2013, para 11.

[125] Para 2, The Lomé Agreement, Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999, Article XXVIII, Post-war Rehabilitation and Reconstruction.

[126] SC Res. 1820 (2008), 19 June 2008, para 13.

[127] Para 67, Dar-Es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 19-20 November 2004 (Angola, Burundi, Central African Republic, Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda, Zambia).

[128] SChapter II, para 2.5, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect".[129] Accordingly, various peace agreements contain provisions that emphasise that the ceasefire involves the cessation of sexual violence. The Nepal *Agreement on Monitoring of the Management of Arms and Armies* mandates the parties to "scrupulously refrain" from "All acts and forms of gender-based violence" as part of upholding the ceasefire.[130] The 2006 Burundi Comprehensive Ceasefire Agreement clarifies that the ceasefire includes the "Cessation of all acts of violence against the civilian population, including sexual violence".[131]

According to the Declaration on the Elimination of Violence Against Women, states should take concrete action to investigate and punish violence against women, regardless of whether the violence occurs in the public or private sphere. States should also develop comprehensive "preventive approaches," including targeting social attitudes through education initiatives.[132] The prevention aspect is highlighted in the Arusha Agreement, which lays down the obligation of:

> "Prevention, suppression and eradication of acts of genocide, war crimes and other crimes against humanity, as well as violations of human rights, including those which are gender based".[133]

As another example, in the *Nepal Comprehensive Peace Accord* both parties "fully agree to provide special protection to the rights of women and children, to immediately stop all types of violence against women and children, including child labor, as well as sexual exploitation and abuse".[134]

It is also necessary to implement changes to the legislation to ensure that gender-based violence is prohibited and that violations would be punished appropriately. This is emphasised in Security Council Resolution 1888 (2009), which urges states to "undertake comprehensive legal and judicial reforms, as appropriate, in conformity with international law, without delay and with a view to bringing perpetrators of sexual violence in conflicts to justice and to ensuring that survivors have access to justice, are treated with dignity throughout the justice process and are protected and receive redress for their suffering".[135] The *Pact on Security, Stability and Development in the Great Lakes Region* obliges the member states to "undertake, in accordance with the Protocol on the Prevention and Suppression of Violence Against Women and Children, to combat sexual violence against women and children through preventing, criminalizing and punishing acts of sexual violence, both in times of peace and in times of war, in accordance with national laws and international criminal law".[136] In Guatemala, a couple of agreements specified that sexual harassment has to be classified as a criminal offence.[137]

Depending on the circumstances of the conflict, including provisions about the prohibition of sex trade can also be necessary. CEDAW Article 6 states that all appropriate measures, including legislation, have to be taken "to suppress all forms of traffic in women and exploitation of prostitution of women". A provision with such content was included in the post-conflict constitution of Iraq, which laid down that "the trading in women or children or the sex trade" if forbidden.[138]

6. Advancement

Gender Equality & Non-Discrimination

The third group of provisions that can be found in peace agreements regarding women deals with the advancement of women. Often the principle of gender equality means that action has to be taken to ensure that women benefit from the same rights and benefits as men. The international legal framework governing gender equality is clear: states must provide citizens with equal rights and protections regardless of their sex. In practice, however, many states fail to fulfil

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[129] SC Res. 1820 (2008), 19 June 2008, para 2.

[130] Para 5.1, Agreement on Monitoring of the Management of Arms and Armies, 8 December 2006 (Nepalese government, CPN[Maoist]).

[131] Article 2; Annexure 1, para 4, Comprehensive Ceasefire Agreement between the Government of the Republic of Burundi and the Palipehutu-FNL, 7 September 2006 (Government, Palipehutu-FNL). Similar provisions are included in Article II, Ceasefire Agreement between the Transitional Government of Burundi and the Conseil national pour la défense de la démocratie-Forces pour la défense de la démocratie, 2 December 2002 (Government + National Council for the Defence of Democracy = CNDD-FDD), along with Joint Communiqué of the Nineteenth Regional Summit on Burundi, Arusha, 1-2 December 2002 (Uganda, Tanzania, South Africa, AU, Ethiopia, Zambia, Gabon, Kenya, DRC); and Protocol III, Article 25, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[132] Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 1, U.N. Doc. A/RES/48/104, 20 December 1993, Article 4.

[133] Protocol I, Article 6, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[134] Para 7.6, Comprehensive Peace Accord Signed between Nepal Government and the Communist Party of Nepal (Maoist), 22 November 2006.

[135] SC Res. 1888 (2009), 30 September 2009, para 6.

[136] Article 11, Pact on Security, Stability and Development in the Great Lakes Region, 14-15 December 2006 (Angola, Burundi, CAR, DRC, Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda).

[137] Section II, para B(1), Agreement on Identity and Rights of Indigenous Peoples, 31 March 1995 (Guatemala, URNG; Para 177, Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreements, 29 December 1996 (Guatemala, URNG).

[138] Article 35, Constitution of Iraq, 15 October 2005.

their international obligations.[139] A 2002 report by the United Nations entitled *Women, Peace and Security*, noted that "Discrimination against women and girls and gender inequalities can persist or deepen during the period after conflict, thereby limiting the opportunities of women and girls to play a significant part in the design and implementation of the peace and reconciliation process".[140] Accordingly, it is important to tackle such issues during the peace-making process. The conflict resolution context provides an opportunity to address deficiencies in gender equality. The complexity and range of peace processes makes it impossible to provide a template for addressing gender equality in all different circumstances; therefore, the following sections will highlight some of the recurrent issues and demonstrate ways in which they have been tackled.

The UN Declaration on Human Rights, in Article 1 declares that "All human beings are born free and equal in dignity and rights". Subsequent articles provide that everyone is "entitled without any discrimination to equal protection of the law" and prohibit making a "distinction of any kind, such as race, colour, sex, language, religion […]" in the application of the Declaration.[141] The ICCPR has similar provisions, and CEDAW mandates that state parties "embody the principle of the equality of men and women" in all appropriate legislation.[142]

The first option that has been used in peace agreements to address the issue of gender equality and non-discrimination is the inclusion of an obligation to become a party to the main international agreements setting out equal rights and protection of women. This has been done in practice principally in relation to CEDAW.[143] An example of a longer list of agreements can be found in the *Contadora Act on Peace and Co-Operation in Central America*, where the parties are obliged:

> "To set in motion the constitutional procedures necessary for them to become parties to the following international instruments:
> …
> (g) The 1952 Convention on the Political Rights of Women;
> (h) The 1979 Convention on the Elimination of All Forms of Discrimination against Women;
> …
> (k) The 1953 Convention on the Civil and Political Rights of Women;"[144]

If a state is already a party to relevant international treaties, a provision emphasising the commitment to implementing the instrument has sometimes been included. The Agreement on Identity and Rights of Indigenous Peoples (Guatemala) contains an obligation for the government to "Promote the dissemination and faithful implementation of the Convention on the Elimination of All Forms of Discrimination against Women". [145]

Another option for addressing gender issues that has been utilised is the inclusion of provisions confirming the existence of such rights. This has often been done by using the language from the before-mentioned human rights instruments. For example, the *Doha Document for Peace in Darfur* asserts that all persons must be able to "enjoy and exercise" all rights "without discrimination on any grounds including sex, race, colour, language, religion, political or other opinion, national or social origin or social status".[146] It adds that "Women, children and men shall be guaranteed the equal enjoyment of all rights enshrined in the international human rights and humanitarian law instruments to which Sudan is a party". [147]

A variation is offered by the approach of declaring that the state, the new order, or the system of government is based on gender equality. The 2008 *Agreement on Resolving the Challenges Facing Zimbabwe* provides that the new Government "will ensure equal treatment of all regardless of gender, race, ethnicity, place of origin".[148] As another example, in South Africa it was agreed that the new constitution would provide for the establishment of a state with "a democratic system of

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[139] Such deficiencies and the mainstreaming policy are addressed in more detail in Eve M. Grina, "Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings", 17 *William and Mary Journal of Women and the Law* 435 (2010-2011), p. 473.

[140] United Nations, Women, Peace and Security: Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325 (2000), p. 11 (2002).

[141] Articles 2 and 7, UDHR.

[142] E.g. Articles 2(1), 3, 26, ICCPR; Article 2(a), CEDAW.

[143] E.g. Washington Agreement, Confederation Agreement between the Bosnian Government and Bosnian Croats, 1 March 1994 (Bosnia and Herzegovina, Croatia, Bosnian Croat Representative), Annex, para A; Timetable for the Implementation of the Most Important Agreements Pending, 19 May 1994 (El Salvador, FMLN), Annex I, para e(2); Draft Agreement on the Krajina, Slavonia, Southern Baranja and Western Sirmium, 18 January 1995 (Croatia, Republika Srpska Krajina [RSK]), Annex B, para 12.

[144] Part I, Chapter II, Section 3, para 11, Contadora Act on Peace and Co-Operation in Central America, 7 September 1984 ([draft agreement], Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua).

[145] Section II, para B(1)(c), Agreement on Identity and Rights of Indigenous Peoples, 31 March 1995 (Guatemala, URNG).

[146] Article 1(4), Doha Document for Peace in Darfur, 31 May 2011 (Sudan).

[147] *Ibid*.

[148] Article VII(7.1)(a), Agreement between the Zimbabwe African national Union-Patriotic Front (ZANU-PF) and the Two Movement for Democratic Change (MDC) Formations, on Resolving the Challenges Facing Zimbabwe, 15 September 2008.

government committed to achieving equality between men and women and people of all races".[149] The same instrument also contained an example of another way of addressing gender equality and non-discrimination – incorporating a ban on violations of these rights. It provided that the new Constitution will "prohibit racial, gender and all other forms of discrimination".[150] A similar approach was adopted in the 1992 Rwanda Protocol of Agreement, which entailed a "rejection of all exclusions and any form of discrimination based notably, on ethnicity, region, sex and religion".[151]

Advancement of Women

Building on a general reference to gender equality and non-discrimination, peace agreements can include provisions laying down an obligation on taking action to ensure non-discrimination. This can be a generic obligation to implement or promote gender equality, or it can involve a specific area where gender equality has been problematic in the past. Taking action to implement non-discrimination is part of the international legal duty of states to ensure the upholding of women's rights. Article 24 of CEDAW obliges states to "adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized" in it.

An example of a general provision can be found in the *Arusha Peace and Reconciliation Agreement for Burundi*, which requires the administration to "promote balance, including gender balance".[152] The same agreement also contains a broad provision on fighting discrimination, obliging the government to "pay special attention to the status of women and combat all discrimination against them."[153] A more detailed provision can be found in the 2004 *Dar-Es-Salaam Declaration*, where the states also refer to their international obligations:

> "[The signatories agree to] [a]dopt deliberate policies and mechanisms for promoting gender equality at all levels and in all sectors, at the national and regional levels, in accordance with the Millennium Declaration, the UN Security Council Resolution 1325 (2000), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the African Charter on Human and Peoples' Rights, the Protocol on the Rights of Women in Africa, the Beijing Platform for Action and the African Union's Declaration on Gender Equality in Africa"[154]

Even if the will to implement gender-specific obligations is there, implementation can be lacking due to insufficient resources. A unique provision is found in the *Doha Document for Peace in Darfur*, which provides for a "system of grants for specific purposes shall be established, with a view to realising the MDGs, alleviating poverty and realising gender equality."[155]

An alternative approach to statements about gender equality has involved incorporating a generic provision emphasising the importance of the promoting women's rights. Often the peace agreements that adopt this approach use the language of CEDAW Article 3, which declares that:

> "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the *full development and advancement of women*, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".[156]

Several peace agreements contain provisions referring to the "advancement of women" in a general manner. The *Agreement on the Implementation Mechanism for the Transition Process in Yemen* obliges the Conference for National Dialogue to discuss the "adoption of legal and other means to strengthen the protection and rights of vulnerable groups, including children, as well as the *advancement of women*".[157] The *Good Friday Agreement* also required the British government to pursue broad policies "for promoting social inclusion, including in particular community development and the *advancement of women* in public life" in Northern Ireland.[158]

[149] Section I, Schedule 4 - Constitutional Principles of the Interim Constitution [Act 200 of 1993] (South Africa).

[150] *Ibid*, Section III.

[151] Article 3, Protocol of Agreement between the Government of the Rwandese Republic and the Rwandese Patriotic Front on the Rule of Law, 18 August 1992.

[152] Protocol I, Article 7(5), Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government & internal actors).

[153] Annex IV, Chapter III(3.6), Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government & internal actors).

[154] Para 35, Dar-Es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 19-20 November 2004 (Angola, Burundi, Central African Republic, Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda, Zambia).

[155] Article 27, para 162, Doha Document for Peace in Darfur, 31 May 2011 (Sudan).

[156] Article 3, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS. 13, 19 ILM. 33, 38 (1980) [emphasis added].

[157] Part IV, para 21(g), Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council, 5 December 2011 [emphasis added].

[158] Para 1 (Economic, Social and Cultural Issues), Agreement Reached in the Multi-party Negotiations (the Northern Ireland Peace Agreement, the Good Friday Agreement), 10 April 1998 [emphasis added]. As another example, the Arusha Agreements provides for the "Initiation for tangible actions for the *advancement of women*": Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors), Protocol IV, Article 13.

The same aim can be fulfilled by using analogous wording. The *Doha Document for Peace in Darfur* provided that the government of Sudan would "promote the general welfare and economic growth in Darfur through provision of adequate basic needs, services and infrastructure, promotion of youth employment, *empowerment of women*, good governance, public services and allocation of appropriate resources".[159] A similar type of provision is contained in the *Istanbul Process on Regional Security and Cooperation for a Secure and Stable Afghanistan*, where Afghanistan reconfirms "its will and determination to […] strengthen its economy, especially by ensuring good governance, promotion of investments, and addressing corruption, fight radicalism and narco-trafficking, respect human rights, in particular *the rights of women*, and to work together with its friends and partners for enhanced regional co-operation."[160] When utilising long lists of activities, it needs to be ensured that women's rights do not get lost amongst other priorities. A stand-alone provision might serve better to highlight women's issues and rights. An example of such a provision is included in the *Lomé Agreement*:

> "Given that women have been particularly victimized during the war, special attention shall be accorded to their needs and potentials in formulating and implementing national rehabilitation, reconstruction and development programmes, to enable them to play a central role in the moral, social and physical reconstruction of Sierra Leone".

It is important to move beyond the abstract general affirmations of rights and provide for specific action in problem areas. Due to the length constraints of this article, only a few examples of specific focus issues will be provided – education, health and work.

Education

One area in which it is often necessary to enforce and promote women's rights is education. Education is central to the reconstruction of society and gender relations. A legal right to education is also laid down in several human rights instruments. The International Covenant on Economic, Social and Cultural rights [ICESCR] recognises "the right of everyone to education". The states parties agree, among other things, that: (a) primary education shall be compulsory and available free to all, (b) secondary education in its different forms shall be made generally available and accessible to all by every appropriate means, (c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and (d) the development of a system of schools at all levels shall be actively pursued and the material conditions of teaching staff shall be continuously improved.[162] CEDAW deals with the right to education in the context of women's rights. Article 10 obliges states parties to guarantee to women "equal rights with men in the field of education" and to ensure:

> "(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments […];
>
> (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
>
> (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education […], in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods; […]
>
> (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women; […]".

The importance of ensuring to girls and women equal access to education is also emphasised in Security Council Resolution 1889. The resolution directly links women's education to the ability of women to actually be full participants in the post-conflict decision-making process:

> *"The Security Council,*
>
> […]
>
> Urges Member States, United Nations bodies and civil society, including non-governmental organizations, to take all feasible measures to ensure women and girls' equal access to education in post-conflict situations, given the vital role of education in the promotion of women's participation in post-conflict decision-making". [163]

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[159] Article 1(9), Doha Document for Peace in Darfur, 31 May 2011 (Sudan).

[160] Para 6, Istanbul Process on Regional Security and Cooperation for a Secure and Stable Afghanistan, 2 November 2011 (Afghanistan, China, India, Iran, Kazakhstan, Kyrgyz Republic, Pakistan, Russia, Saudi Arabia, Tajikistan, Turkey, Turkmenistan, United Arab Emirates).

[161] Article XXVIII, para 2, the Lomé Agreement, Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999.

[162] Article 13, International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, *entered into force* 3 January 1976.

[163] SC Res. 1889 (2009), 5 October 2009, para 11.

Educating girls and women enables them to take on the roles that are foreseen in some of the more progressive peace agreements. Taking part in all aspects of public life is difficult to accomplish if women do not have the necessary knowledge or training. Moreover, many development specialists promote education as an entry point for addressing gender issues. Schooling for children and young adults comes at a time in human development when the mind is open to learning new information and ways of living. Thus, formal education is an important platform for reframing male and female understandings of gender roles and encouraging scrutiny of gender inequality.[164] Part of this involves the possible appraising of the curriculum: for example, to eliminate materials that present discriminatory or stereotyped views of women, or which omit significant facts, such as the exclusion of mention of the abuses suffered by the comfort women at the hands of the Japanese military in Japanese textbooks.[165]

Getting more girls through school not only directly impacts their own welfare, but also the welfare of other family members and the community. Research has shown that women with only a few years of primary education have better economic prospects, have healthier children, and are more likely in turn to ensure their own children go to school. Mothers who have received an education have their children immunised fifty per cent more frequently than uneducated mothers, and the survival rate of children of educated mothers is fifty per cent higher. Each of these outcomes improves both the local community and the overall development of the country as a whole.[166]

The *Doha Document for Peace in Darfur* has several articles that deal with gender issues in the education context. Article 1 states that the "needs of women, children and vulnerable groups shall be given due attention in the Darfur early recovery, reconstruction, rehabilitation and *education policies and programmes*". Article 2 follows by laying down an obligation for all levels of government to:

> "ensure the provision of continuing opportunities of general education, training and employment in public service to promote full and equal participation of the people of Darfur in advancing the nation's welfare. In this context, *special attention shall be given to women* and children in the field of education, capacity building and training. Training centres shall be established in urban and rural areas in collaboration with specialised international and regional organisations.

Article 16 provides that policies must be "drawn up and implemented to develop the educational system and to secure access by the population of Darfur, without discrimination on the basis of race or gender, to equal opportunities to education and training within Darfur and the country". The next sentence emphasises that "Special efforts shall be exerted to eliminate illiteracy among women".[167]

The *Arusha Agreement* contains a fascinating provision with regard to women and education:

> "In today's society, formal education is the key that opens the door to a better life. It affords access to jobs in the public and private sectors, where salaries are higher than in rural areas. Moreover, education beyond the primary level, especially for women, would help solve the problem of accelerated population growth, since educated households have better control over their fertility. It is for this reason that everyone in Burundi should receive an education. As Burundi is not yet able to educate its entire population, it must ensure that equity prevails in the sensitive area of school enrolment. Equity must be reflected in the location of schools and school infrastructure, and in the assignment of qualified teachers".

A later paragraph also contained an obligation for the government to "Find solutions to the problems that prevent large numbers of girls from pursuing their education at the secondary and university level".[168] Education certainly should be a priority area for advancing gender equality in most post-conflict situations.

Health

Women's health is an important issue in the post-conflict context, as they are often the primary caretakers of the family. Also, specific health care needs arise after a conflict has taken place, such as treatment for sexually transmitted disease, including HIV/AIDS, and other consequences of rape. The ICESCR recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and foresees steps to achieve the full realisation of this right such as: (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) the prevention, treatment and control of epidemic and other diseases; and (c) the creation of conditions which

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[164] Eve M. Grina, "Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings", 17 *William and Mary Journal of Women and the Law* 435 (2010-2011), p. 459.

[165] Christine Chinkin, "Gender, Human Rights, and Peace Agreements", 18(3) *Ohio State Journal on Dispute Resolution* 867 (2006), p 880.

[166] Naomi Cahn et al, "Returning Home: Women in Post-Conflict Societies", 39 *Baltimore Law Review* 339 (2010), p 353.

[167] Article 1(11), Article 2 (31), Article 16(101), Doha Document for Peace in Darfur, 31 May 2011 (Sudan) [emphasis added].

[168] Chapter III, paras 3.5, 3.6, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

would assure to all medical services and medical attention in the event of sickness.[169] The provisions of the ICESCR (and human rights in general) need to be applied without discrimination on any basis. This is emphasised in CEDAW Article 12, which stresses that states parties have to take "all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning".

The Security Council has also recognised "the particular needs of women and girls in post-conflict situations, including, inter alia, physical security, health services including reproductive and mental health". In Resolution 1889, the Council encouraged states to address women and girls' needs and priorities in post-conflict situations and "design concrete strategies […] which cover inter alia support for greater physical security and better socio-economic conditions, through education, income generating activities, access to basic services, in particular health services, including sexual and reproductive health and reproductive rights and mental health".[170] It is clear that women's health is an essential aspect of the gender mainstreaming agenda.

Despite the importance of this issue, references to women in the health context are not very widespread in peace agreements. The *Arusha Agreement* has a provision dealing with health that touches upon women's health issues:

> "The crisis has also lowered the population's standard of health. Immunization coverage, prenatal consultations and childbirth attended by qualified medical personnel have all declined. Acute malnutrition is on the rise, particularly among vulnerable groups such as children and pregnant and nursing women. The country must return to pre-crisis conditions and even improve on them in all areas".[171]

In Iraq it was agreed that the state would guarantee "social and health insurance, the basics for a free and honourable life for the individual and the family – especially children and women".[172] In conflicts where there have been a lot of physical assaults on women, it is important to include ways to address both the physical and mental harm inflicted upon them. Unfortunately, this has been mostly lacking thus far.

Work

Ensuring that women have the possibility to participate on the job market on an equal level with men is essential to ensuring that women play a role in all aspects of public life. Employment provides an income and empowers women. They are no longer dependent on their husbands or fathers to have resources to buy food and other essentials. There are various human rights norms that have a bearing on the regulation of women in employment. For example, Article 7 of the ICESCR mandates that there be "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work". CEDAW provides that states parties have to "take all appropriate measures to eliminate discrimination against women in the field of employment" and ensure:

> "(a) The right to work as an inalienable right of all human beings;
>
> (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
>
> (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training […];
>
> (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
>
> (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave".[173]

A later article of CEDAW states that women should be guaranteed the same rights as men with regard to "bank loans, mortgages and other forms of financial credit".[174] Access to employment and financing for women is addressed in the *Dar-Es-Salaam Declaration*. It contains an obligation to "Formulate national and regional policies that promote the *employment*

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[169] Article 12, International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, *entered into force* 3 January 1976.

[170] SC Res. 1889 (2009), 5 October 2009, para 10.

[171] Chapter III, para 3.5, Arusha Peace and Reconciliation Agreement for Burundi & Annexes, 28 August 2000 (Government + internal actors).

[172] Article 30, Constitution of Iraq, 15 October 2005.

[173] The full list is contained in Article 11, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS. 13, 19 ILM. 33, 38 (1980) [emphasis added].

[174] *Ibid*, Article 13.

of women and youth and develop appropriate regional financing mechanisms so as to give them *more access to micro-finance institutions*, investment opportunities in trade and control of factors of production such as land, property and capital". The same agreement later provides that "national and regional mechanisms" should be established and strengthened, in order to "mainstream gender issues in all sectors of economic development".[175]

The *Doha Document for Peace in Darfur* creates a micro-finance system, which is mandated to "give particular importance to women's income generating activities especially those of widows". The same agreement establishes the Darfur Reconstruction and Development Fund, which is tasked, among other things, with "Establishing financing mechanisms to meet the special needs of women, children and orphans. Such mechanisms shall include, but not be limited to, the provision of loans, investment opportunities, strengthening of productive capacities, production inputs and capacity building for women".[176] Another instrument that foresees a specialised fund is the Kenyan *Statement of Principles on Long-term Issues and Solutions*, which states that the Women's Enterprise Fund (dealing with Kenyan female entrepreneurs) should be enhanced.[177] Such mechanisms can assist in ensuring that steps are taken to ensure the actual implementation of the various types of provisions that have been included in peace agreements.

7. Conclusion

Summing up, both international legal rules and UN policy mandate the incorporation of gender considerations into all aspects of peace-making and post-conflict reconstruction of societies. Women's rights need to be included in peace agreements. However, most peace agreements do not contain any references to women. When the role of women is addressed in peace agreements, there is a lot of variation regarding the various kinds of provisions that have been incorporated, as can be seen from the examples provided in this article.

In practice, the most popular types of provisions are broad declarations of gender equality and the rights of women. But it is important that general affirmations be used alongside more specific provisions regarding problem areas. Gender mainstreaming should be done through tailored approaches to fit each specific conflict situation. The first priority should be a thorough study of domestic culture to find out elements within societies that impede gender equality. And then specific approaches need to be developed to address such elements.[178] It is important to understand local historic, cultural and legal contexts and ensure that the specific circumstances are taken into account when devising the most practicable methods of addressing women's issues in that context.

It should also be kept in mind that it is often necessary to move beyond just laying down rights for women in peace agreements. Though this is of course an essential first step, such an approach might not be enough to address the power imbalances and other structural factors that perpetuate the subordination of women.[179] Also, women are often unable to exercise those rights because they lack legal literacy or cannot access them because of longstanding cultural barriers that reinforce women's subordinate status.[180] Accordingly, various implementation provisions are crucial to ensure the impact of declarations of rights in peace agreements in practice and to advance gender equality in countries emerging from conflict.

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[175] Paras 48, 55, Dar-Es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 19-20 November 2004 (Angola, Burundi, Central African Republic, Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda, Zambia).

[176] Article 19(133), Article 21(141), Doha Document for Peace in Darfur, 31 May 2011 (Sudan).

[177] Agenda Item 4, para 7, Kenyan National Dialogue and Reconciliation: Statement of Principles on Long-term Issues and Solutions, 23 May 2008 (Government, ODM).

[178] This is also highlighted in Eve M. Grina, "Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings", 17 *William and Mary Journal of Women and the Law* 435 (2010-2011), pp. 454, 456.

[179] Julie Mertus, "Improving the Status of Women in the Wake of War: Overcoming Structural Obstacles", 41 *Columbia Journal of Transnational Law* 541 (2003), p 548.

[180] Naomi R. Cahn, "Women in Post-Conflict Reconstruction: Dilemmas and Directions", 12 *William and Mary Journal of Women and the Law* 335 (2006), p 345.

International Law and some Contemporary Problems of the Use of Force.

Rein Müllerson[1]

One of the most important but also one of the most controversial areas of international law is the legal regulation of the use of military force. The nature, content and effectiveness of this domain of international law expresses, much more clearly than any other branch, the very nature of international law. One of the most prominent 20th century international lawyers, Louis Henkin, wrote, 'Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[2] This observation is true - almost all nations almost all of the time also observe the principle prohibiting the use of force and the threat of force in international relations. However, the use of military force between states belongs to what one may call 'low probability-high consequence events', and therefore every use of military force, even if relatively minor, has almost incomparable negative consequences in terms of human lives lost, properties and livelihoods destroyed, refugee flows created and all kinds of miseries increased. Therefore, a greater observance and respect for the principle of the non-use of force in international relations remains one of the most important tasks of international law and international lawyers.

From the right to war to the prohibition to use military force

Thucydides' *History of the Peloponnesian War* demonstrates a complete absence of any legal (or even legal-moral-religious) restrictions on the recourse to war in the Ancient world. As Thucydides writes, 'the Athenians and the Peloponnesians began the war after the thirty-year truce' since 'Sparta was forced into it because of her apprehensions over the growing power of Athens.'[3] Such an explanation for going to war sounds not only familiar but eerily contemporary. There had been a change in the balance of power in Ancient Greece favouring Athens, which caused Sparta to ally with smaller Greek city-states, forming the Peloponnesian League to militarily counter the Delian League as led by Athens. But differently from today's or even from yesterday's world, Greek city-states did not need any justifications for their recourse to arms. Athenians believed it to be 'an eternal law that the strong can rule the weak', as 'justice never kept anyone who was handed the chance to get something by force from getting more.'[4] Athenian ambassadors explained to the Melians (Melos – a small island in the Aegean Sea) that 'those who have power use it, while the weak make compromises. Given what we believe about the gods and know about men, we think that both are always forced to dominate everyone they can. We didn't lay down this law, it was there — and we weren't first to make use of it. Each of us must exercise what power he really thinks he can.'[5] The most significant difference, which also testifies to the progress made by mankind, is that today a threatening change in a balance of power is not in and of itself a good enough cause to go to war. Other justifications have to be found.

Adam Watson writes that 'warfare was not considered reprehensible in the ancient world. Indeed, the ability to decide when to go to war was the hallmark of independence, for a king or city corporation'.[6] The words 'emperor' and 'empire' did sound glorious indeed. For the Romans, any war, if duly declared, would then be 'just' as well as 'pious'.[7] Starting from St Augustine of Hippo (354-430), through Thomas Aquinas (1225-1273) to Spanish theologians-philosophers-lawyers Francisco de Vitoria (1483-1549) and Francisco Suarez (1548-1617), different just war theories tried to limit the recourse to war (just war should have a just cause, the right authority, the right intention and be the last resort). After Emerich de Vattel (1714-1767), positivism gradually started to prevail in international law, and the differentiation between just and unjust wars based on religious laws or the laws of nature (human nature or the nature of the state) lost its importance. As Vattel, whose book Droit des gens was on the desk of every diplomat for a century or more[8], wrote, 'it belongs to each nation to judge whether her situation will admit of pacific measures, before she has recourse to arms'.[9] Although this was not a return to the naked

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[1] Research Professor, Tallinn University; L'Institut de Droit International, member,l'ancient Président.

[2] L. Henkin, How Nations Behave: Law and Foreign Policy, Columbia University Press, 1979, p. 47.

[3] Thucydides, *The Peloponnesian War*, W. W. Norton & Company, 1998, pp. 11–12

[4] *Ibid.*

[5] *Ibid.*

[6] A. Watson, *The Evolution of International Society*, Routledge, 1992, p. 10

[7] A. Nussbaum, *A Concise History of the Law of Nations* (revised edn.), Macmillan, 1964, p. 11.

[8] P. Allott, *The Health of Nations: Society and law beyond the State* (Cambridge University Press, 2002), p. 416.

[9] E. Vattel, *Droit des gens: ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758); *English translation used The Law of Nations, or the principles of natural law applied to the conduct and the affairs of nations and of sovereigns*, B. Kapossy & R. Whatmore (eds), Liberty Fund, 2008, Book II, xviii, & 335.

power politics of Ancient Greece, it was only thinly veiled power politics where any offense, real or perceived, may have sufficed to justify the use of military force. Even under the international law of 'civilised nations' states could legitimately use military force for a wide range of purposes. The right to resort to arms was an important attribute of state sovereignty. In the nineteenth century, the only limitation on the use of force by a state was the requirement that there should have been a previous violation of practically any right of that state. The offended state was the only judge in its own case, and any violation could give rightful cause to use military force to restore justice and punish the offender. Ian Brownlie writes that:

> The right of war, as an aspect of sovereignty, which existed in the period before 1914, subject to the doctrine that war was a means of last resort in the enforcement of legal rights, was very rarely asserted either by statesmen or works of authority without some stereotyped plea to a right of self-preservation, and of self-defence, or to necessity or protection of vital interests, or merely alleged injury to rights or national honour and dignity.[10]

For example, in 1914 during the Vera Cruz incident, which was triggered by the arrest of several crewmembers from the USS *Dolphin* by Mexican authorities, the United States used military force against Mexico when Mexican authorities refused to honour the US flag with a 21-gun salute as an official apology.[11] Similarly, Great Britain and Germany used gunboats to force Venezuela to pay its debts to nationals of these states.[12]

Although the idea of a world without wars has already existed for hundreds of years,[13] the first attempts at legal limitations on the use of force are no more than a century old. The 1907 Hague Peace Conference adopted the Convention Respecting the Limitation of Employment of Force for the Recovery of Contract Debts, which provided that there should be no recourse to armed force unless the debtor state should refuse submission to arbitration or should fail to carry out the arbitration award (the Convention never entered into force).[14] The so-called Bryan Treaties that the United States concluded with various states in 1913-1914 established a 'cooling off' period, during which it was prohibited to use military force.[15]The Covenant of the League of Nations purported to put some further brakes on the right of states to use military force.[16] Finally, the Kellogg-Briand Pact of 1928 outlawed 'war as an instrument of national policy'.[17] However, it was not so much the shortcomings of these legal documents as the political realities that led to the Second World War, after which the members of the victorious coalition created the United Nations, whose main task was meant to be to put an end not only to wars but also to any unilateral use of military force.

The current UN Charter paradigm concerning the use of force can be called normative positivism, since it is based on the consent of states and not upon what states (or at least the most powerful of them) always do in practice. It is normative since it is not premised on the actual practices of states. It is positivist since it does not make distinctions between just, unjust, more justified and less justified causes for the use of military force.

The UN Charter paradigm on the use of force

Article 2 (4) of the UN Charter reads, 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. This means that not only is the use of military force prohibited, but so is the threat to use such force. The Charter makes only two express exceptions to this prohibition: the use of military force in self-defence if an armed attack occurs (Article 51), and as a collective security measure authorised by the UN Security Council in cases of threats to international peace and security (Articles 39 and 42). However, notwithstanding, or maybe because of, its brevity, Article 2(4) has raised some heated discussions and doubts. First, as the article does not clarify what kind of force is prohibited, some authors and even states have tried to read economic and political pressure into the definition of force as prohibited by Article 2(4). However, it is clear from the *travaux preparatoires* of the UN Charter, as well as from the interpretations given by the majority of states to the content of this article, that its prohibition covers only the use, or threat of use, of military force. This, of course, does not mean that economic or political pressure is always lawful under international law; it only means that Article 2(4) does not cover such pressure. Second, as Article 2(4) singles out for special protection the above-mentioned three factors (territorial integrity, the political independence of states, and uses of force otherwise inconsistent with the purposes of the United Nations), certain authors, especially some American ones, have

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[10] Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1963), p. 41.

[11] *Ibid*. pp. 55-65.

[12] *Ibid*. p. 75.

[13] See, e.g., Abbe de Saint-Pierre, *Projet pour rendre la paix perpetuelle en Europe* (1713); E. Kant, *Toward Perpetual Peace* (1795).

[14] See, Nussbaum, *Op. cit*., p. 217.

[15] Brownlie, *Op.cit*., p. 23.

[16] *Ibid*. pp. 55-65.

[17] *Ibid*. p. 75.

tried to argue that if the use of force does not breach any of them (e.g., the use of force for the sake of the protection of human rights or the promotion of democracy) such use of force may be lawful. We will discuss some of these controversial issues later in this article, but here it suffices to say that such arguments express a minority view and are not accepted by most states. Although no state has overtly referred to such interpretations of Article 2(4) as a defence when using military force in violation of international law (e.g. NATO against Serbia over Kosovo in 1999, or Russia in annexing the Crimea in 2014), it is probable that some states may have believed that their behaviour did not breach either the letter, nor the spirit of Article 2(4). There has also been an increasing number of scholarly literature about the need for (or dangers of) the revival of medieval just war doctrines and their adaptation to the realities of the 21st century.[18] Bernard Badie, for example, observes that today 'France is at war almost everywhere, fighting not just enemies but simply "criminals" in "just wars" – the doctrine that had already fallen into desuetude but has now become resuscitated'.[19] Recourses to 'just war' theories have, of course, various causes and reasons, but usually the most ardent adherents of these theories have been those who have believed in the exclusivity of their social, political and economic models, who have been sure that their cause, in comparison with different causes, is so impartial, so just and so unbiased that it justifies the resort to military force. In addition, of course, one must have enough power in order to believe that one is able to prevail in a 'just war'. For the weak, 'just war' doctrines are of little practical use, if only as justifications of their acts of desperation.

The prohibition of the use of force is one of the few imperative *(jus cogens)* norms of international law, from which states cannot derogate even with mutual consent. Although it may be surprising, it is nevertheless true that the prohibition of the use of force in international relations became a legally binding norm relatively recently. As a legal principle, it started its evolution after World War I and matured as a result of World War II; it was enshrined in the United Nations Charter and its importance has not diminished since, notwithstanding its overly frequent breaches. As the International Court of Justice put it in the *Nicaragua case*, 'If a State acts in a *way prima* facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.[20] Frederic Kirgis, commenting on the relationship between practice and *opinio juris* in the Nicaragua case, proposes the rule of a sliding scale:

> On the sliding scale, very frequent, consistent state practice establishes customary rule without much (or any) affirmative showing of an opinio juris so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, stronger showing of an opinio juris is required. At the other end of the scale a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.[21]

Like Kirgis, Oscar Schachter concludes that 'issues of proof of custom involve an inverse (and some might say, dialectical) relation between evidence of State practice and of *opinio juris*. The cases show that a strong finding of *opinio juris generalis* tends to reduce the required proof of State practice'[22] and 'conversely, a record of widespread and consistent practice revealing a pattern of claim and response has given rise to inferences of *opinio juris*, without any further evidence'.[23] However, Schachter goes further than Kirgis in his explanation of this phenomenon. He emphasises the differences between the rules which, for instance, determine territorial limits, relate to the right of passage and deal with the modalities of treaty relations on the one hand, and the rules against aggression, the rules outlawing genocide, the killing of PoWs, torture and large-scale racial discrimination, on the other. He is right that, for example, 'the rules against aggression and on self-defence are not just another set of international rules'.[24] The special status of some rules has been expressed by characterising such rules as *jus cogens* or *erga omnes*. And Schachter concludes that 'it is that difference in their normative claim, reflected in the *opinio juris*, that underlies decisions to recognize their continued customary law status even if State practice in regard to them is not uniform or consistent'.[25]

We may conclude that the relationship between the objective and subjective elements of practice varies in different areas of international relations. Legal norms (usually these are general principles), which govern relatively invariable (structural) relations, can be changed or annulled only together with a radical change of the structure of an international society. Value-loaded norms can survive notwithstanding contrary 'actual' practice because of the strong support of *opinio juris generalis*,

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[18] See, e.g., W. V. O'Brien, 'Desert Storm: A Just War Analysis', *St. John's Law Review*, 1992, vol. 66, Issue 3; G. R. Lucas Jr., '"New Rules for New Wars": International Law and Just War Doctrine for Irregular War', *Case Western Reserve Journal of International Law*, 2011, Vol. 43, Issue 3. A very interesting and detailed study of 'just war' problems can be found in *La retour de la guerre juste: Droit international, épistémologie et idéologie chez Carl Schmitt* by Celine Jouin (Editions de l' Ecole des études en science sociales, Librerie philosophique J. Vrin, 2013).

[19] B. Badie, *Nous ne sommes seuls au monde: un autre regard sur l' 'ordre international* ', La Dévouverte, 2016, p. 215.

[20] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) , ICJ Decision of 27 June 1986, para. 186.

[21] F. Kirgis, 'Custom on a Sliding Scale', *The American Journal of International Law*, 1987, p. 149.

[22] O. Schachter, 'Entangling Treaty and Custom', in Y. Dinstein (ed.), *International law in a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), p. 731.

[23] *Ibid*.

[24] *Ibid*., p. 734.

[25] *Ibid*.

while value-neutral norms need much more consistent 'actual' practice for their formation as well as survival. The more consistent and general the practice, the lower the necessity to look for the subjective element confirming the acceptance of such practice as legally binding. And on the contrary, strong *opinio juris generalis* is able to compensate the lack of consistency in 'actual' practice.

In international society, there are different categories of relations: variable and relatively invariable relations; relations based on values where compromises may be rare and difficult to make and relations based mainly on interests, which often differ (like, for example, the interests of states with long coastlines and those of landlocked states), but where compromises (sometimes as package deals) are not only necessary, but quite possible. International law does not develop and function in the same way in these different areas. Some basic principles of international law reflect the relatively invariable structure of international society. The principle of the sovereign equality of states certainly belongs to this category. *Pacta sunt servanda* and the principles of the non-use of force and the non-interference in the internal affairs of states may also come close to this category, though not every part of their content is so invariable. The principles reflecting the relatively invariable structure of international society can be violated but their violation, even if frequent, cannot abolish them without undermining, or even bringing down, the very foundations of existing international society. Such principles may, of course, change over time, but they can cease to exist only when the basic characteristics of the current international system change (such a change took place when the medieval feudal multi-layered European system was replaced by the Westphalian international system).

Although some international lawyers have claimed that due to the inefficiency of the UN collective security system, the Charter prohibition of the use of force has become redundant,[26] no state has made such a claim. While justifying their own transgressions, states are usually 'appealing to exceptions or justifications within the rule', and when condemning the use of force by others, they confirm their own adherence to the principle.

The right to self-defence

Article 51 of the UN Charter provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The right to self-defence is the only right in the UN Charter that is called "inherent". On the one hand, such a reference to the inherent, inalienable, even natural character of this right shows its importance. Indeed, if states were not able to lawfully protect themselves against armed attacks, their very right to existence would be questionable. One the other hand, this formulation has led to some heated discussions, and opened doors to wide interpretations and even abuses.

Article 51 requests that states that use military force in self-defence report all the measures taken in the exercise of this right to the Security Council. The Council then decides what measures to take 'in order to maintain or restore international peace and security'. If the Council, say, authorises economic sanctions against an aggressor as a measure necessary to restore peace and security, does this mean that the victim state alone or together with its allies is barred from using military force in self-defence? Such an ambiguous legal situation existed in the period between the Iraqi invasion of Kuwait on the 1st of August 1990 and the 29th of November 1990, when the Security Council adopted resolution 678 authorising the 'use of all necessary means' (a euphemism implying the right to use military force) to liberate Kuwait and implement all the relevant Security Council resolutions. Could Kuwait and its allies start using military force in self-defence before the deadline given by the Council to Iraq to withdraw from Kuwait (the 15th of January 1991)? Such an ambiguous legal situation also caused the dispute over the character of Operation Desert Storm, which led to the liberation of Kuwait. Was it an operation of collective self-defence or an operation of collective security? In my opinion, it had characteristics of both.

Moreover, the Security Council may find that a state that is allegedly using force in self-defence is wrong in its assessment of its actions, that instead of lawfully using force in self-defence, it is in breach of the prohibition to use force. The possibility of facing such a situation means that states are not the final arbiters on matters of lawfulness regarding the use of force even in self-defence and, therefore, the right to self-defence may not be so inalienable after all.

However, the term 'inherent' in the context of self-defence has caused even more heated academic discussions and much more serious practical consequences in respect of so-called anticipatory self-defence, which is sometimes also called pre-emptive or even preventive self-defence. In short, the problem is the following: is it necessary for a victim of an armed

[26] See, e.g., T. Franck, 'Who Killed Article 2(4) or Changing Norms Governing the Use of Force by States', *The American Journal of International Law*, 1970, Vol. 64; but see also L. Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated', *The American Journal of International Law*, 1971, Vol. 65.

attack to wait until, figuratively speaking, the bombs and missiles of the attacker begin to explode, or is it legally justifiable to take counter-measures involving military force at some earlier point, for example, intercepting missiles or bombers before they reach their targets?

In the positivist era of international law, the right of anticipatory self-defence was grounded on the formula put forward by the American Secretary of State Daniel Webster in the Caroline incident of 1837. In that case, the British authorities situated in Canada – at that time a British colony – destroyed the US steamboat *Caroline* while she was anchored on the American side of the Niagara river, reason being the *Caroline* was used to supply rebels against the British rule in Canada with medicaments, ammunition and other goods. The United States disagreed with the British government as to the legality of the action. Secretary of State Daniel Webster wrote to Mr Fox, the British Minister to Washington, that it had to be demonstrated that it was necessary to use force in a self-defence that was 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation' and that the act 'justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it'.[27] It seems to be possible to generalise all these criteria by the terms of necessity, immediacy and proportionality. Every use of force, even in self-defence, in order to be lawful, has to be necessary (e.g. it is possible that a limited military incursion by the forces of state A into the territory of state B remained without adequate immediate response; in such a case, state B is not entitled to respond *ex post facto* militarily against state A; this would breach both the requirements of necessity and immediacy), exercised within a reasonable time *period and proportionate to the situation that calls for the use of force*. Here clarification may be necessary: Sometimes it is assumed that there should be proportionality between the scale of an armed attack and the scale of the defensive response. It may well be the case, but not always. For example, in order to expel Iraq from the occupied Kuwait in 1991, the Coalition needed significantly more massive force than Saddam Hussein had needed in August 1990 to occupy Kuwait. The requirement of proportionality of the response of the Coalition relates to the task of liberating Kuwait, which, taking account of the strength of the Iraqi army, necessitated massive use of air and land power by the Coalition.

Analysing self-defence modalities, Yoram Dinstein distinguishes between 'on the spot reaction', 'defensive armed reprisals', responses to an 'accumulation of events' and 'war of self-defence', all different modalities of the use of force that can be resorted to depending on the character of the armed attack that has triggered the right to use force in self-defence.[28] The legality of these various modalities of self-defence is dependent on the character of the armed attack.

Thus, whilst the *Caroline* incident evidences that the occurrence of an armed attack is not necessary to justify the exercise of self-defence, it qualified the right of pre-emptive action with several rather strict conditions in order to be legally accepted. According to this formula, pre-emptive action is only lawful when the danger is imminent in a way that leaves the defending state no time for deliberation or to choose an alternative course of action. This implies that the danger can be identified credibly, specifically and with a high degree of certainty.[29]

The Israeli use of force in 1967 in the 6-day war against Egypt and other Arab states seems to be an example of an anticipatory use of force in self-defence as per the terms of the *Caroline case*, customary international law and, it is possible to argue, of Article 51 of the UN Charter, since the Charter has to be interpreted in the context of existing customary international law. The withdrawal of UN peacekeepers (UNEF) at the request of President Gamal Abdel Nasser of Egypt, the mobilisation and movements of Egyptian and other Arab armed forces, and last but not least, the blockade of the Straits of Tiran for Israeli navigation, seem to indicate, with high probability, that an attack on Israel would have been imminent. Israel, in the UN, referred to the blockade of the Straits of Tiran as an act of war, and therefore didn't raise the defence of anticipatory self-defence. However, it seems that if Israel were relying on this fact alone, its response may have breached the requirement of proportionality. The Israeli response, surely, was much more massive than, say, an on the spot reaction in the Straits of Tiran would have been and can be justified as an act of anticipatory self-defence.

Developments related to the 'war on terror' have given support to the two hitherto somewhat controversial interpretations of self-defence: it is now more widely accepted that there is room for anticipatory self-defence as well as for what Oscar Schachter, Yoram Dinstein and some others have called defensive reprisals, i.e. reprisals whose main purpose is not to punish (so-called *punitive reprisals* are certainly prohibited by international law). Or rather, in responses to terrorist attacks these two wider interpretations of the lawful use of force go hand in hand. Effective responses to typical terrorist pinprick attacks have to be carried out in most cases either *ex post facto* or in anticipation of new probable attacks from the same source. That is why such responses can be characterised both as defensive reprisals or acts of anticipatory self-defence.

Often military responses to terrorist attacks have to draw a fine balance between these two controversial modalities of the use of military force in self-defence—the Scylla of anticipatory self- defence and the Charybdis of reprisals. As Gregory Travalio writes, 'if the anticipated action by terrorists is not sufficiently imminent, the right to use force is not available for purposes of deterrence. On the other hand, if past terrorist actions by a group are too remote in time, the response by force is likely to be characterized as an illegal reprisal'.[30] Because terrorist warfare usually consists of a series of relatively

[27] 'The Caroline', J, Moore, 2 *Digest of International Law*, p. 412 . See also, R.Y. Jennings, 'The Caroline and McLeod Cases'. 32 *American Journal of International Law* (1938).

[28] Y. Dinstein, *War, Aggression, and Self-Defence, 2nd edition* (Cambridge University Press, 1994), pp. 213-245.

[29] T. Franck, "Terrorism and the Right of Self-Defence", *The American Journal of International Law*, 2001, vol. 95, p. 841

[30] G.M. Travalio, 'Terrorism, International Law, and the Use of Military Force', *Wisconsin International Law Journal*, 2000, Vol. 18, p. 165.

small-scale attacks that often need to be dealt with by measures that combine some elements of retaliation (since a response comes after the attack) and anticipation (since a response comes in anticipation of new attacks), the exercise of the right to self-defence against terrorist attacks requires at least some (sometimes quite considerable) practical use of the concepts of a anticipatory self-defence and defensive reprisals.

However, there is a different interpretation of the right to self-defence, which is sometimes called the 'Bush doctrine' or 'preventive self-defence'. In response to its perception of a fundamentally changed international situation in the wake of the 9/11 attacks against the United States, in 2002 the USA adopted a new *National Security Strategy* that stated, 'While the US will constantly strive to enlist the support of international community, we will not hesitate to act alone if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country'.[31] What the 'Bush Doctrine' implies is that the traditional conditions of anticipatory self-defence and the requirement of clear demonstration of the threatening intentions of the adversary are no longer tenable, since an attack by terrorists using weapons of mass destruction could be launched anytime, anywhere, without warning. Rather than wait for that to happen or waiting for the last moment, which would reduce the chance of forestalling such an attack, states have the right to use force preventively to eliminate such a threat in its early stage. Thus, the strategy would be better described as 'preventive' rather than 'pre-emptive' self-defence, because the aim is to prevent the materialisation of generalised threats, rather than to avert an identified, foreseeable and imminent threat.[32]

Michale Reisman has defined preventive self-defence as 'a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that *is not yet operational* and hence is *not yet directly threatening*, but which, if permitted to mature, could be neutralized only at a high, possibly *unacceptable*, *cost*. It is not hard to imagine circumstances in which PSD [preventive self-defence] might appear justified. Yet if universalized, the claim, by increasing the expectation and likelihood of violence, could undermine minimum order'.[33] German scholar Michael Bothe believes that to adapt the right to self-defence to these new perceived threats is unacceptable, would lead to vagueness and increase the risk of abuse. He argues:

> If we want to maintain international law as a restraint on the use of military force, we should very carefully watch any attempt on the part of opinion leaders to argue that military force is anything other than an evil that has to be avoided. The lessons of history are telling. If we revert to such broad concepts, such as the just war concept, to justify military force we are stepping on a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal.[34]

This seems to be the dominant position within international legal scholarship. To clarify the differences between anticipatory self-defence, which under certain strict conditions is arguably lawful, and preventive self-defence, which is contrary to existing international law, it is possible to compare two uses of military force both involving Israel: the 6-day war of June 1967 (discussed shortly above), which many international lawyers have considered to be within the frame of legitimate self-defence, and the 7th of June 1981 Israeli attack on the Osirak nuclear centre in Iraq, which in the eyes of most international lawyers, as well as those of the UN Security Council, was a clear breach of international law. In its Resolution 487 of 19 June 1981, the Security Council strongly condemned 'the military attack by Israel in violation of the Charter of the United Nations and the norms of international conduct'.[35]

The concept of self-defence is inherently linked to the concept of an armed attack. The mere possession or attempted acquisition of nuclear weapons or other weapon systems cannot be equated with an armed attack, notwithstanding how wide an interpretation we give the concept of 'armed attack'. The proliferation of weapons of mass destruction (WMD) and self-defence are phenomena from different legal domains or branches of international law. The proliferation of nuclear weapons may be considered a threat to international peace and security. When we talk about possible use of force against nuclear proliferation, we are not in the domain of self-defence; we are in the domain of arms control, or in the domain of threats to international, including regional, peace and security, and this is a matter for the UN Security Council to decide. Such use of military force is not only beyond the pale of international law but it is also dangerous in political and military terms. Andrea Armstrong and Michael Reisman have observed that Washington's claims of the pre-emptive (what I would prefer to call preventive) use of military force have copycat or mimetic effects. They correctly write that 'although the doctrine of the United States [the Bush doctrine] not unreasonably aims at enhancing its own security against an adversary apparently impervious to deterrence, wider adoption of a legal policy of pre-emptive self-defence may actually undermine international security. States simply appropriate the language of pre-emption to fit their individual security concerns and the strategies they craft to maintain their security – essentially becoming „free riders" in the international legal system'. [36]

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[31] *The National Security Strategy of the United States of America*, September 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf.> [Hereinafter National Security Strategy]

[32] Sapiro, M. 'Iraq: The Shifting Sands of Pre-emptive Self-Defence', 97 *American Journal of International Law*, 2003, p 599; Falk, R. 'What Future of the UN Charter System of War Prevention', 97 *American Journal of International Law*, 2003, p 598

[33] M. Reisman, Self-defense in an Age of Terrorism, ASIL Proceedings, 2003, p. 142.

[34] M. Bothe, 'Terrorism and the legality of pre-emptive force', *The European Journal of International Law*, 2000, Vol. 14, No. 2, p. 227.

[35] SC Res. 487 (June 19, 1981).

[36] A. Armstrong, M. Reisman, 'The Past and Future of the Claim of Pre-emptive Self-Defense', *The American Journal of International Law*, 2006, Vol. 100, p. 549.

Moreover, an empirical study carried out by Tai-Heng Cheng and Eduardas Valaitis shows that the US's large scale uses of force in the 'war on terror' have not observably reduced aggregate attacks against the United States and have likely increased hostility against it.[37] This means that not only has the United States become less secure as a result of the wide use of military force abroad in its 'war on terror' but also the existing legal restrictions on the recourse to military force have become undermined. Jean-Yves Le Drian, the French Minister of Defence, adds a practitioner's touch to the matter, arguing that we should not accept 'the notion of preventive war – the notion lacking juridical precision, which was introduced a dozen of years ago by the American administration then in office and whose destabilising effects we feel today. ... It is clear that the obsession with absolute security, leading to interventions in anticipation and resting on the idea of preventive war, has had serious consequences'.[38]

The use of military force in self-defence against terrorist attacks shows that the drawn dividing line, as in the example of the International Court of Justice in the *Nicaragua Case* between armed attacks and "less grave forms" of the use of force,[39] is no longer tenable, if it ever was. Yoram Dinstein, referring to J.L. Hargrove and J.I. Kunz, has rightly emphasised that 'in reality, there is no cause to remove small-scale armed attacks from the spectrum of armed attacks. Article 51 in no way limits itself to large, direct or important armed attacks.'[40] The same criticism also applies to Article 3(g) of the Definition of Aggression, which emphasises that actions by armed bands, groups, irregulars or mercenaries 'sent by or on behalf of a state' that carry out acts of armed force against another state 'of such gravity as to amount to an actual armed attack conducted by regular forces' could be considered as acts of aggression.[41] Why only attacks of such gravity? Why this difference? It falls on the requirement of proportionality between a legitimate purpose for the use of force, and the character and scale of force necessary to achieve that purpose, to hopefully assure that relatively minor incidents involving the use of military force do not escalate (sometimes unintentionally) into whole-scale wars.

Finally, the necessity to use military force against terrorist attacks has raised the issue of the place of non-state actors in international relations generally, and particularly in the law regulating the use of military force in international relations. Until 9/11 the issue had been rather mute. Article 51, determining that 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs *against a Member of the United Nations',* does not, however, say anything about who may or should be the author of such attacks in order to invoke the right to use military force in self-defence. In the aftermath of the Second World War, when the UN Charter was drafted, it was understood even without explicit statement that it must be another state that must be the author of an armed attack. However, even before 9/11, it had become clear that some non-state actors had acquired the capabilities to use military force against states that in their scale and *modus operandi* amounted to armed attacks as per the terms of the UN Charter and customary international law. 'It is by now', as the former Legal Advisor of the British Foreign Office Daniel Bethlehem writes, 'reasonably clear and accepted that states have a right of self-defence against attacks by non-state actors – as reflected, for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States'.[42]

However, as non-state terrorist organisations operate from and have their bases on the territories of states, the issue of the role of such states arises both in terms of their responsibility for the behaviour of non-state actors and the right of victim states and their allies (or the world community as a whole) to take coercive measures against such states. Of course, in the first place, it is the responsibility of all states to see to it that their territories are not used by non-state actors, or by third states for that matter, to attack other states. A failure to do so may be due either to the fact that they are unwilling or unable to do so. Sometimes there may even be a combination of both of these factors. Such may have been the situation, for example, in Afghanistan in 2001 when the Taliban government was not only unable but also unwilling to take all necessary measures to stop al-Qaida from attacking the United States.

In 2012, in *The American Journal of International Law*, Daniel Bethlehem published an article where he enumerated 16 principles relevant to the scope of a state's right of self-defence against an imminent or actual armed attack by non-state actors. In my opinion, principles 9 through 11 concerning the position of states, the territories of which are used by non-state actors for the purposes of armed activities against third states, correspond indeed to the law governing the use of military force, as well as rules of state responsibility, and are not at all controversial.[43] They state as follows:

9. States are required to take all reasonable steps to ensure that their territory is not used by non-state actors for purposes of armed activities—including planning, threatening, perpetrating, or providing material support for armed attacks—against other states and their interests.

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[37] Tai-Heng Cheng, E. Valaitis, 'Shaping an Obama Doctrine if Pre-emptive Force', *Temple Law Review*, 2009, vol. 82, p. 737.

[38] J-Y Le Drian, *Qui est l'Ennemi?* (Les éditions du Cerf, 2016), Empl. 139.

[39] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Merits, I.C.J. Reports 1986, para. 191.

[40] Y. Dinstein, War, Aggression and Self-Defense (Cambridge University Press, 2001), p. 192.

[41] See 1974 U.N. Definition of Aggression, 29 U.N. GAOR, Supp. 31, art. 3(g), U.N. Doc. A/RES/3314 (XXIX) (1975).

[42] D. Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors', *The American Journal of International Law*, 2012, vol. 106, p. 5.

[43] Ibid.

10. Subject to the following paragraphs, a state may not take armed action in self-defence against a non-state actor in the territory or within the jurisdiction of another state ("the third state") without the consent of that state. The requirement for consent does not operate in circumstances in which there is an applicable resolution of the UN Security Council authorising the use of armed force under Chapter VII of the Charter or other relevant and applicable legal provision of similar effect. Where consent is required, all reasonable good faith efforts must be made to obtain consent.

11. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding with the non-state actor or is otherwise unwilling to effectively restrain the armed activities of the non-state actor such as to leave the state that has a necessity to act in self-defence with no other reasonably available effective means to address an imminent or actual armed attack. In the case of a colluding or a harbouring state, the extent of the responsibility of that state for aiding or assisting the non-state actor in its armed activities may be relevant to considerations of the necessity to act in self-defence and the proportionality of such action, including against the colluding or harbouring state.

There is, however, a problem with principle 12, which allows the use of military force on the territory of a state where non-state actors are operating *without* the consent of that state if that state is unable (though willing) to prevent these non-state actors of committing armed attacks against third states. First of all, this does not correspond to state practice, meagre though it may be. For example, after 9/11 the United States did not rush to bomb Afghanistan, but demanded that the Taliban, which moreover was recognised as the legitimate government of Afghanistan only by three states – Pakistan, Saudi Arabia and the United Arab Emirates (UAE), 'Deliver to United States authorities all the leaders of Al-Qa'ida who hide in your land. Release all foreign diplomats, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating'.[44] Only when the Taliban rejected this ultimatum, did Washington launch *Operation Enduring Freedom*. The rejection of these demands by the Taliban government made the Taliban an accomplice of Al-Qaida; it demonstrated the Taliban's unwillingness to put an end to Al-Qaida's terrorist activities from within the territory of Afghanistan.

If a state that is unwilling to take effective measures to prevent its territory from being used by non-state actors that attack third states, it becomes a harbouring or accomplice state, i.e. a state that in itself is in breach of the prohibition to use military force. Therefore, it has to bear consequences for its illegal behaviour. However, this is not the case with a state that is unable to prevent its territory from being used by non-state actors against a third state. For example, a substantial part of the territory of Syria was occupied by ISIL – a terrorist entity that had emerged and spread from the territory of Iraq, and that was operating not only on the territory of these two countries but also attacked other states, including those in Europe. However, the coalition led by the United States did not seek the consent of the Government of Syria, and did not even inform the latter before using airpower against ISIL on Syrian territory. And though the coalition did not use force against governmental forces (this would have been an armed attack under Article 51 of the UN Charter), but against ISIL, the fact of not even seeking the consent of the Government of Syria amounts, at least, to interference in the internal affairs of Syria.

Of course, one may say that in the eyes of the Washington led coalition, the Government in Baghdad had lost its legitimacy. Moreover, they had all earlier recognised the National Coalition for Syrian Revolutionary and Opposition Forces as the sole representative of the Syrian people. This, however, is pure geopolitics thinly covered by moralising preaching that has nothing to do with international law. Above we already dealt with the dubious case of the use of chemical weapons during the civil war in Syria, which was attributed to the forces of President Bashar al-Assad immediately and without any serious proof by Western politicians and media. The world was lucky that due to Russian diplomatic efforts Western intervention against Syria was avoided and Syria's chemical weapons arsenal destroyed. Renaud Girard is right that 'if the Russians would not have intervened and Damascus would have fallen, a genocide against the Alawites would have been unleashed and the Christians would have been expelled, while their churches would have been in flames'. And he blames French diplomacy of naively believing in the myth of 'the moderate opposition'. Although there were such people as well, they were not in Syria but 'in hotels of London or Geneva'.[45]

Unilateral, i.e. not authorised by the UN Security Council, support for opposition forces, labelling them as democratic movements or freedom-fighters, the demonisation of incumbent governments (calling them 'regimes' instead) and threats to use or the actual use of direct or indirect military force is a very slippery slope. The case of Syria shows that such policies may instead give support to terrorist groups. Moreover, as the propaganda machine rolls forward, it becomes almost impossible to put the whole machine in reverse gear - backpedalling, even if necessary, is not an easy option, as no state is ever prepared to admit: sorry, we were wrong.

Although the war in Syria, as we have shown above, was to a great extent caused and is more so sustained by geopolitical reasons and the ambitions of regional as well as global actors, there are also some important legal considerations as to the

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[44] Address Before a Joint session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 *Weekly Compilation of Presidential Documents*, 1347 (20 Sept. 2001).

[45] R. Girard, 'La diplomatie française doit en finir avec le néo-conservatisme', *Le Figaro, Vox Monde*, 29 mars, 2016.

role of outside powers and their military in this armed conflict.

After the two terrible terrorist attacks claimed by and attributed to ISIL against the Russian passenger jet over the Sinai on the 31st of October 2015 and the Paris attacks of the 13th of November 2015, the UN Security Council on the 20th of November 2015 unanimously adopted Resolution 2249 (2015) that

> [C]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria.[46]

The Resolution 2249 (2015), though reaffirming 'that terrorism in all forms and manifestations *constitutes one of the most serious threats to international peace and security* and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed', lacks some traditional attributes of resolutions that have been used to undertake military measures against states or non-state actors in the past. It does not refer to Chapter VII of the UN Charter, nor does it 'authorise' the use of 'all necessary means', as it had done on numerous occasions before (e.g., RES. 678 (1990) on Iraq or RES. 1973 (2011) on Libya) but called on Member States 'to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council'. This resolution has been defined by some as an exercise in 'constructive ambiguity', [47] while others believe that Resolution 2249 does not give any new legal authority for using force.[48]

The Resolution of the Security Council of the 20th of November 2015 was the first resolution of the UN Security Council regarding Syria where the permanent members could agree upon measures to be taken against various terrorist groups, quite a few of which had hitherto been under the protective umbrella of their powerful sponsors. As a result of many compromises, it indeed contains some convoluted and sometimes even obscure language that does not follow usual patterns. Moreover, the wars against terrorist groups, including by the coalition led by the United States, as well as by Russia and Iran, were already taking place and it was certainly the fact of Russia stepping in that had provided the impetus for the peace process, if it can be so called. That is why the Resolution confirmed the right of those states that had already been involved in military attacks against ISIL and other terrorist groups as designated by the Security Council, to continue doing so. Authorising something ongoing lacks logic. Moreover, it has to be also said that the term 'calls upon' in the Resolution is in no way weaker than the term 'authorises'. I read it as active encouragement to undertake all necessary measures to defeat designated terrorist groups, while the term 'authorises' is weaker since it makes something, which would otherwise have been illegal, lawful without actively urging states to do anything explicitly. In that respect, the resolution gave both political and legal support to the Russian position, since earlier both the United States as well as France had demanded that Russia hit only ISIL. This was certainly not acceptable for Russia, since the Kremlin's strategy was from the outset based on acting in concert with the ground troops of the governmental forces. This was also the only way to have any sustainable success in the fight against the terrorist groups, including ISIL. Besides, for military strategic reasons it could have indeed been necessary to hit other groups that were fighting governmental forces first and distracting them from attacking ISIL. Moreover, attacking ISIL only from the air, without the ground troops, which would have defeated the terrorists on the terrain and made their reappearance impossible, would have been an almost certainly futile exercise (only the Kurdish forces in Syria had fought in concert with American airpower; from whence came success).

Therefore, I believe that Resolution 2249 had both a political and legal impact by authoritatively confirming not only the right but also the obligation (at least political) of all states that were capable of contributing to the defeat of the designated terrorist groups in Syria to take all necessary measures in order to achieve this end.

It should to be noted that the American led coalition on the one hand, and the Russian Federation on the other, had different, though partly overlapping, legal grounds for using military force in Syria. If the Western powers had used the arguments of self-defence, both individual and especially collective, Russia additionally had the consent (invitation) of the Government of Syria. The American led coalition's use of force is based on the Iraqi Government's letter of the 22nd of September 2014 to the President of the Security Council, in which the Government had sought for international assistance

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[46] http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249 (2015).

[47] EJIL Talk by D. Akande/M. Milanovic, 'The Constructive Ambiguity of the Security Council´s ISIS Resolution,, http://www.ejiltalk.org/the-constructiveambiguity-of-the-security-councils-isis-resolution.

[48] M. Weller, Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self-Defence Against Designated Terrorist Groups, http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-selfdefence-against-designated-terrorist-groups.

against ISIL/Daesh. In this letter, the Iraqi Foreign Minister noted that ISIL posed a direct threat to Iraq and had established a safe haven outside of Iraq's borders; he requested for the US to strike ISIL.[49] Hence, the right of the American led coalition to use force against ISIL in Iraq arose from the request of Iraq and the right to collective self-defence. Moreover, since France was attacked and other Western states threatened by ISIL, it is possible to argue that they also used their right to individual self-defence.

It has to be noted, however, that using military force against ISIL on Syrian territory without any consultation with or consent of the Government in Baghdad, the Coalition was, at least until the adoption of Security Council Resolution 2249, violating the sovereignty of Syria notwithstanding that military force was used on territories not controlled by the Government of Syria and not against the armed forces of Syria. Professor Peter Hilpold is right in observing:

A last brief consideration has also to be made as to the question whether the fragile nature of the Syrian state broadens the scope for any possible intervention. This question has to be answered in the negative. Syria has an internationally recognized government and even if government troops have withdrawn from many regions and are embattled, in others state sovereignty is still in place and foreign intervention is prohibited without authorization by the government or the UN Security Council. In an *argumentum de minore ad maius* it should be remembered that the use of force is even prohibited against de facto regimes or failed states.[50]

Russia, acting upon an invitation from the Government of Syria, was also acting in collective self-defence together with the Government of Syria, as ISIL, besides downing the Russian airplane on the 31st of October 2015, had already for some time been a clear and present danger for Russia. Hundreds of young Russian men and also some women were fighting for ISIL in Syria and Iraq, establishing links with terrorist groups in Russia. Therefore, Russia was also acting in individual self-defence. Due to the request and consent of the Government of Syria, Russia's attacks did not need to be limited to ISIL.

Collective security and the use of force.

Although the UN Security Council has not always worked as it should, it is not the time nor is there reason to weaken the Council further. On the contrary, the Security Council is one of the only existing bodies that reflects, though imperfectly and somewhat outdatedly, the balance of power in the world. Strengthening the Council should not be accomplished by means of abolishing the right to veto, or by-passing the Council in cases of threats to international peace and security, but through the enlargement of its membership and increasing cooperation, particularly between the permanent members of the Council. As long as permanent members see each other more as global competitors and rivals and less as responsible partners (though not necessarily friends), allies or like-minded peoples, who may have different interests and values but who are ready to compromise and bracket their differences to find solutions to the challenges facing humankind, the Council will not function effectively. Therefore, it seems adequate that we also shortly analyse the potential and shortcomings of this collective security mechanism.

Article 39 of the UN Charter provides, 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Further, Article 42 stipulates, 'Should the Security Council consider that measures provided for in Article 41 (i.e., measures not involving use of military force) would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations'.

These articles of the UN Charter, and more widely Chapter 7 as a whole, provide for the possibility of the use of military force for the purposes of collective security. Such uses of force have to be decided or authorised by the UN Security Council. For example, in its resolution 678 of the 29th of November 1990, the Security Council authorised 'Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, *to use all necessary means* to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'. It is important to note that here the Security Council did not decide or order the 'use all necessary means'; instead, it authorised states individually and collectively to do that. The reason for such a nuance is that the initial intention of the drafters of the UN Charter to create United Nations armed forces, as provided in Article 43 of the Charter, was never realised in practice. Instead, special operations involving relatively lightly armed UN military personnel were invented, whose main task has been to help maintain peace, serving mostly as buffers between conflicting states or factions within the same state, though gradually such operations have become more muscled; they are no longer acting only as passive buffer zones.[51] These operations are called UN peacekeeping operations, and forces participating in them are called peacekeepers. Later, some

[49] http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf

[50] P. Hilpold, 'The Security Council and the Fight against Terrorism: Does SC Resolution 2249 (2015) lead to a more Hobbesian or a more Kantian international society?' (Available at SSRN:http://ssrn.com/abstract=2704467 or http://dx.doi.org/10.2139/ssrn.2704467http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704467)

[51] See, e.g., Kai Michael Kenkel, 'Five Generations of Peace Operations: from the "thin blue line" to "painting the country blue"', *Rev. Bras. Polit. Int*., 2013, 56 (1).

regional organisations, like the European Union, African Union and the Commonwealth of Independent States (CIS), have also resorted to peacekeeping operations. However, where there is no peace to keep but the situation constitutes a threat to international peace and security, the United Nations may have to authorise states either individually or collectively to use all necessary means, including military force, in order to maintain or restore international peace and security.

Chapter VIII of the UN Charter foresees the creation of regional organisations of collective security, and provides for the use of enforcement actions by such organisations. However, Article 53 stipulates that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'. Notwithstanding this clause in the UN Charter, some regional organisations have taken such actions without the Security Council's authorisation (e.g. the ECOWAS – the Economic Community of Western African States – at the beginning of the 1990s in Liberia and Sierra Leone). Moreover, the ECOWAS and the African Union changed their respective constitutive documents in order to provide for such enforcement actions without the Security Council's authorisation.[52] *The African Union (AU)* has formally claimed for itself the right to intervene in Member States in instances of gross human rights violations. In accordance with Art. 4 (h) Constitutive Act of the AU, the organisation may intervene in a Member State pursuant to a decision of the Assembly of Heads of State and Government in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity. In accordance with Art. 7 (1) Constitutive Act of the African Union, the Assembly may take such a decision on the basis of a 2/3 majority. Aside from arguing that the AU would be claiming a 'right of emergency' for itself, it is also arguable that Art. 4 (h) constitutes a collective, *ex ante form of intervention* by invitation. Since the Member States of the AU have given their express consent to military intervention under certain conditions, the use of force would fall outside the scope of the prohibition in Art. 2 (4) UN Charter and not be in violation of the UN Charter. However, this argument raises, in turn, the question whether such an invitation can be extended for an open-ended period of time, or whether it has to be limited to a particular conflict.[53]

The use of force for humanitarian purposes.

In the 1990s, after the collapse of the bi-polar world with its imposed discipline and relative stability, there was an increase in internal conflicts in different parts of the world. Somalia and then even more terribly Rwanda, and also in Haiti and the former Yugoslavia in the Balkans have been the most prominent examples. Such conflicts involved massive human rights violations (even acts of genocide) that often escalated into prolonged humanitarian crises. Some of these tragedies spilled over and constituted threats to regional peace and security, while others, though limited to a single state, like the military coup and its effects in Haiti in 1991, created refugee flows and disturbed public opinion abroad, especially in the nearby United States. As a result, the UN Security Council started adopting so-called Chapter VII resolutions (on Somalia, Haiti, the former Yugoslavia etc.) whereby the Council, having found that certain situations involving massive human rights violations constituted threats to international peace and security, decided to send peacekeepers whose mandate, among other tasks (maintaining or restoring peace, helping find political solutions to the conflict, etc.), included wide-range humanitarian components. As such operations were authorised by the UN Security Council and constituted a form of maintenance or restoration of peace and security, there have not been any serious doubts raised as to their legality or legitimacy, though such practice rather creatively enlarged the competences of the Security Council, extending it to humanitarian crises that had traditionally been beyond the remit of the Security Council.

However, a much more controversial question remains concerning the unilateral, i.e. not authorised by the UN Security Council, use of military force for humanitarian purposes, or as it has been usually called 'humanitarian intervention' or R2P (responsibility to protect). Historically, eminent authors such as Hugo Grotius and Emerich Vattel had supported the idea that in certain extreme circumstances states could lawfully use military force to protect nationals of other states from their own governments (however, one should not forget that at that time the use of military force was not prohibited, and was even considered an attribute of state sovereignty). In the nineteenth century, some European powers indeed intervened in the Ottoman Empire in support of the Christians in the Balkans and the Middle East.[54] However, when the conditions for the lawful use of military force became increasingly restricted, and especially after the adoption of the UN Charter with its Article 2(4) prohibiting the use and threat of force, it also became more and more difficult to justify the use of military force for humanitarian purposes.

Today, in most circumstances, the use of military force for humanitarian purposes is not only counterproductive, but in the absence of the Security Council's authorisation it is also unlawful. As a general proposition, such a conclusion is predicated on, in my opinion, political realities, existing legal norms, and maybe most importantly, sound morality, notwithstanding an allegedly noble aim for the use of force – the protection of human rights in cases of their massive violation. The important point to be made is that any use of military force, even one that would genuinely be carried out

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[52] See, e.g., A Abass 'The Security Council and the Challenges of Collective Security in the Twenty-First Century: What Role for African Regional Organisations?' in D Lewis (ed) *Global Governance and the Quest for Justice, vol 1 International and Regional Organisations* (Hart Oxford 2006), 91–112.

[53] E. De Witt, M. Wood, Collective Security, Max Planck Encyclopedia of Public International Law (http://www.mpepil.com/).

[54] L. R. Schumacher, 'The Eastern Question as a Europe question: Viewing the ascent of "Europe" through the lens of Ottoman decline,' Journal of European Studies (March 2014), pp 64–80; N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Springer, 1985).

for the sake of saving human lives, contains in itself the significant potential for even greater loss of life, the infliction of grievous bodily harm on a massive scale, the loss of property and the infringement of other values, including those which are protected as fundamental human rights.

Of course, the same may be said about the use of force in exercising one's inherent right to self-defence 'if an armed attack occurs', as confirmed in Article 51 of the UN Charter. However, wars of self-defence (though this right is also abused) are by their very nature wars of necessity – they are never wars of choice, if we discount surrendering as an acceptable moral choice (in which case there is no use of force). Yet, the use of force by state A with humanitarian purposes against state B, in a case where B does not in any way threaten A's security, can never be a war of necessity in the same sense (in both a physical and moral sense) as wars of self-defence are (though a humanitarian crisis in neighbouring country C may constitute a security threat for A due, for instance, to refugee flows, but this is a different issue to be addressed separately). However, one may ask: can there not be any circumstances in which the use of force by state A in the territory of and against state B, in the case of a severe humanitarian crisis in the latter, even if the crisis does not constitute security threats to A, may be considered a 'war of necessity', if not in the physical sense (in that respect there is always a choice: intervene militarily or not) as wars of self-defence are, but in a moral sense, which wars of self-defence also are? I believe that in certain circumstances it would be possible to give a positive answer to this question. In situations where the use of military force is the only means of preventing or stopping massive human rights violations such as genocide or crimes against humanity, the absolute proscription to use force would deprive the prohibition to commit massive human right violations of their enforceability even in principle. In such a case, these prohibitions cannot be considered valid human rights norms, since one of the conditions of validity for legal norms is their enforceability, at least in principle, if not always in practice. In that sense, the use of military force in certain extreme circumstances may have the characteristics of a 'war of necessity' – a war of moral necessity. For example, both the world community of states and individual states that had the necessary capacities to first prevent and then stop genocide in Rwanda (this would have clearly been a lesser evil than allowing the foreseeable and preventable genocide to happen and once started not to stop it), failed in their duty both collectively and individually. Theirs was a moral surrender similar to the behaviour of those nations which surrender without a fight, or attempt to fight, when attacked by an enemy, resisting whom would not necessarily be a lost cause.

Moral justification for the use of military force for the sake of the protection of human rights in a foreign country can be best based on ideas developed by British political and legal philosopher Lord Raymond Plant. As human rights are real only to the extent of their enforceability (at least in principle though not always in practice, but this is another, though no less important, matter which belongs more to the realm of practical politics and law than moral philosophy), their unenforceability, even in principle, deprives them of their quality as human rights. Lord Plant writes:

> Our responsibility for the rights of others is therefore not confined to non-interference in those rights, but also has to involve responsibility for doing what we can to secure those enforceability conditions, just because these are part of having a right and therefore must be involved in what respecting rights means. This seems to me to be the best way of linking a concern for rights and the possibility of intervention in a particular country, which may not be securing the enforcement conditions.[55]

If there are circumstances when the use of military force is the only means of protecting rights, and the resort to such an extreme measure, which in itself is wrought with the danger of massive violations of most fundamental human rights, is proportionate to the seriousness of the human rights violations (genocide, crimes against humanity and systemic massive violations of international humanitarian law), then the use of military force may be morally justified as a necessary condition of these rights being rights. The most important general guiding principle in such a situation should be that *extreme human suffering, which one attempts to stop or prevent, has to be significantly and foreseeably higher than the human suffering that inevitably results from the use of force to end the suffering.* And the objective should always be to stop or prevent extreme human suffering and not to effect regime change or promote democracy, though this may occur as an inevitable or even necessary corollary of the intervention.

From these arguments of moral philosophy, it is possible to move to the legal justification of the use of military force for the sake of the protection of human rights.

The UN Security Council's authorisation would make interventions on humanitarian grounds both lawful under international law and legitimate in the eyes of most people, and even though they may, in principle, do more harm than good, in such cases there is nevertheless less chance that hasty decisions, dictated by narrow self-interest and facilitated by an ignorance of the risks that any military operation involves, are made. However, in extreme circumstances, I believe, there may not only be a moral-philosophical, but also a legal justification for intervention on humanitarian grounds, even without the Security Council's authorisation. It is necessary to emphasise, first, the importance of the words 'in extreme circumstances' since any use of military force, as we have just discussed, inevitably leads to a serious loss of life – it always creates circumstances conducive to massive violations of the right to life – the most basic human right without which the enjoyment of all other rights becomes meaningless and impossible. Nevertheless, there may be circumstances when the use of military force may be justified not only on moral but also on legal grounds.

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[55] R. Plant, 'Rights, Rules and World Order' in *Global Governance: Ethics and Economics of the World Order*, M. Desai, P. Redfern eds. (Pinter, 1995), p. 207.

First, let us deal with a preliminary point. It is often said that if there were a right to use military force for the sake of human rights, states would constantly abuse it. This may well be the case, and in some military interventions allegedly carried out for humanitarian purposes, such justifications have been used to conceal other aims, or at least other aims have been paramount. However, so far states have more often referred to the right to self-defence when using force abusively, rather than referring to humanitarian concerns. Moreover, the fact that the use of military force with the purported aim of protecting human rights in cases of their gross and massive violation is sometimes abused, should not in itself serve as an absolute obstacle on the road to human rights protection even by means of force, if other means have proven to be, or would clearly be, inadequate, and it is also one of those rare situations when the use of force foreseeably does less harm than the abstention from the use of force would do. Almost every right, almost every good may be open to abuse. As the former President of the International Court of Justice Dame Rosalyn Higgins has written, 'we must face the reality that we live in a decentralised international legal order, where claims may be made either in good faith or abusively'.[56] The fact that claims over some goods or rights are made abusively should not mean that these goods or rights thereby become any less valuable.

Now, here is the main argument, in my opinion, in favour of both the legality and legitimacy of the use of force for humanitarian purposes in extreme circumstances of human suffering. There is no doubt, as we have discussed above, that the principle of the prohibition of the use of force is one of the fundamental principles of international law. *The United Nations International Law Commission*, in its various reports dealing with the issue of peremptory norms in international law (*jus cogens* norms), from which states cannot deviate or derogate even with the consent of other states, has always given as an example of such norms the norm prohibiting the use of military force.[57] As we discussed above, this norm has not lost and should not lose its fundamental importance notwithstanding its all too frequent violation. On the contrary, its significance is only enhanced by such breaches; the reason being that if a norm protects something that people continue to value highly (peace in this case), then violations of such a norm indicate that it is necessary to strengthen the norm instead of discarding it. In legal terms, we may say that in such cases strong opinio juris compensates for a less than perfect observance of the norm in practice. However, the prohibition of the use of force is not the only fundamental principle of international law. The principle of respect for and protection of human rights, acquired the same status during the second half of the previous century. In its *Draft Articles on Responsibility of States*, the *International Law Commissio*n emphasises not only the importance of the non-use of force principle as a peremptory norm of international law, but also the same character of certain human rights norms, such as the prohibition of genocide, slavery and torture.[58]

In cases of gross and massive violation of such fundamental human right as the right to life, which are always accompanied by egregious violations of many other rights, the prohibition of the use of military force may yield to the obligation to respect and protect human rights. In such cases, we have two equally important and weighty principles of international law that cannot be observed at the same time and in the same context; one has to give way. Such a potential for collision is enshrined in the very nature of the principles of international law. As one of the greatest twentieth century international lawyers Oscar Schachter wrote, 'principles, in contrast [to rules], lack the element of definiteness, they are "open-textured", leaving room for various interpretations'.[59] He also emphasises that sometimes 'particular situations are covered by more than one principle. … They point to different legal conclusions. Indeed, it has often been observed that principles like proverbs can be paired off into opposites'.[60] In particular situations, the prohibition to commit acts of genocide or crimes against humanity, and even more importantly, the obligation to prevent such acts being committed,[61] may outweigh the prohibition to use military force. In such extreme and rare situations, the use of force for humanitarian purposes, even without (though of course it would be better with) the Security Council's authorisation, may be both legitimate and lawful. Such legitimisation takes place *ex post facto* and may acquire different forms. Let us consider some examples.

There have been three significant, rather large-scale and successful foreign invasions that have put an end to massive human rights violations, which may have been characterised either as genocide, crimes against humanity or war crimes (though interestingly and understandably, none of the invading states referred to humanitarian concerns as the only or main reason or justification for their actions). The overthrow of the regimes of Idi Amin in Uganda in 1979, the ousting of Pol Pot in the same year in the so-called Democratic Kampuchea, and the Indian 1971-72 military intervention in Eastern Pakistan, which all put an end to massive crimes against civilian populations, and all ended with the removal of the regimes that had committed those atrocities (in the case of the Indian intervention, it led to the breakup of Pakistan

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[56] R. Higgins, Problems and Process: International Law and How We Use It, Clarendon Press, 1994, p. 247.

[57] See, e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 112.

[58] *Ibid*., pp.112-113.

[59] O. Schachter, *International Law in Theory and Practice. General Course in Public International Law*, Recueille des Cours de l'Academie de Droit International, 1982, vol. V, p. 43.

[60] *Ibid*

[61] Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide provides that 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'. (http://www2.ohchr.org/english/law/genocide.htm). It is necessary to reiterate that crimes against humanity and systemic war crimes are often no less serious crimes than acts of genocide. Crimes against humanity are, by definition, 'widespread and systematic', while war crimes, if not individual excesses but state policy (or policy of other organised groups), are also always massive and heinous. For an act to be considered as genocide, the massiveness of the crime is not an obligatory requirement. What matters most is the genocidal intent.

and the creation of a new state in Eastern Pakistan - Bangladesh). None of these interventions were sanctioned by the United Nations, and the intervening states preferred to refer more to the right of self-defence as the justification than to 'purely humanitarian concerns'.[62] Naturally, in all these cases, besides the humanitarian issues, there were other concerns and interests present, if not dominant, but none of these military operations could be qualified as actions of self-defence. There is something significant in the fact that all three of these large-scale, successful foreign military interventions, which were responses to genuine humanitarian catastrophes (even if not justified wholly by references to them) and which put an end to those catastrophes, were carried out by non-Western nations. One of the reasons for their success in the sense of the sustainability of the main objective of their interventions (the end of mass atrocities and not democracy building) may have been in that after overthrowing bloody dictators (Idi Amin and Pol Pot) and putting an end to Islamabad's repressions in Eastern Pakistan, the intervening states did not attempt to put in place pro-Western or Western-sounding and Western-looking governments. They also did not carry out nation building exercises with the aim of 'widening the circle of liberal democracies' in the world.

In favour of the legitimacy, and at the end of the day also of the legality, of these interventions speaks the fact that, though there was some criticism from at least certain states and circles at the time of the interventions, in two out of the three cases – the Indian and Tanzanian interventions – their results were relatively quickly accepted by the world community. So, Bangladesh – a state that emerged as a result of the Indian intervention, which took place, let us recall – in 1971-1972, became a member of the United Nations as soon as 1974, being approved for UN membership by its Security Council and the General Assembly. Compare this with the continuing non-recognition of the so-called Turkish Republic of Northern Cyprus, which was created as a result of the Turkish invasion of Cyprus in 1974. Neither the United Nations nor the Organisation of African Unity (the predecessor of the current AU) condemned the Tanzanian military invasion of Uganda, and most states soon recognised the new government in Kampala. The reaction to the Vietnamese intervention in Kampuchea was different due to the geopolitics of the region, where the interests of three permanent members of the Security Council – China, the Soviet Union and the United States – clashed. It is of interest to note that in 1999 Mr A. P. Van Walsum, the Dutch Representative to the United Nations, referred to the Vietnamese intervention in Cambodia in 1979 that had helped to put an end to Pol Pot's genocide. He expressed regret that at that time his own country, by its behaviour in the UN, had allowed the genocidal Khmer Rouge to occupy the Cambodian seat in the General Assembly for more than a decade.[63] Although this statement was somewhat ingenious and self-serving, as it was made, inter alia, to justify the Dutch support for the military intervention against Serbia over Kosovo, it nevertheless has some evidential value. As to the role and approach of the United States to the issue at the time, the attitude of Robert Rosenstock, an international lawyer and the then legal advisor of the US Mission to the United Nations, is revealing. Debbie Sharnak writes, 'The Carter Administration confronted the difficult choice of whether to vote to seat the Khmer Rouge's genocidal regime; support Samrin's communist, Vietnamese-installed government; or, to abstain from voting altogether. *After weighing geopolitical concerns about human rights costs against national interests in a Cold War context* [emphasis added], Carter's representative to the Credentials Committee, Robert Rosenstock, cast the vote in favour of seating the Khmer Rouge. As he rose from the table, - someone grabbed his hand to congratulate him. Rosenstock looked up to find to his horror that he was shaking hands with Pol Pot's foreign minister, Ieng Sary. "I felt like washing my hands", Rosenstock reported. Rosenstock's reaction to this episode, a mixture of disgust and resignation, encapsulates the contradiction of what this vote ultimately signified. In the act of seating the Khmer Rouge at the United Nations, Jimmy Carter, the supposed human rights president, aligned himself with an ousted genocidal regime'.[64]

One could also take note of the ECOWAS unauthorised intervention in Liberia, which instead of being condemned, was ex post facto ratified by the Security Council.[65] In February 1998 ECOWAS, once again without prior authorisation of the Security Council, intervened in the civil war and humanitarian crisis in Sierra Leone.[66] These developments seem to indicate that in extreme circumstances of humanitarian crises, the world community is ready to legitimise non-authorised (by the Security Council) use of military force for humanitarian purposes. However, these cases have been exceptions rather than a rule. And though it has been possible, as we showed above, to build moral and even legal justifications for such interventions, successful (i.e. those doing more good than harm) interventions on humanitarian grounds have been so exceptional that the more recent developments in the field, instead of giving support for the use of military force to protect human rights, have shown that the world community is not ready to accept military interventions on humanitarian grounds, if not authorised by the UN Security Council. The most important reason for this is not theoretical or normative but pragmatic – military interventions for humanitarian purposes have not, in most cases, worked. They have done more harm than good.

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[62] In December 1971, immediately after the Indian intervention had started, the Indian Ambassador to the UN declared: '[W]e have on this particular occasion absolutely nothing but the purest of intentions: to rescue the people of East Bengal from what they are suffering' (UN Doc. S/PV.1606, 4 December 1971, p. 86). Soon, however, the Indian Government denounced this statement of its Ambassador and referred to the right of self-defence instead.

[63] Press Release SC/6686 4011th Meeting (PM) 10 June1999.

[64] D. Sharnak, 'Jimmy Carter, Cambodia, and the United Nations. Human Rights in a Cold War Climate', University of Wisconsin-Madison, April 2010.

[65] ECOWAS forces entered Liberia on 23 August 1990. The first reaction of the Security Council came in January 1991 when the Council lauded ECOWAS for working to bring peace to Liberia and encouraged all parties to co-operate with ECOWAS. Note by the Press Office of the Security Council, S/22133, 23 January 1991.

[66] See more in R. Higgins, 'Some Thoughts on the Evolving Relationship between the Security Council and NATO', in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*, Bruylant, 1998, p. 521.

The twenty first century started with an attempt to reformulate and rephrase the concept of humanitarian intervention in terms of the responsibility to protect (R2P). First, the *International Commission on Intervention and State Sovereignty* elaborated this idea in its report in 2001's *The Responsibility to Protect*.[67] Then the idea was developed by the *High Level Panel on Threats, Challenges and Change* in its report *A More Secure World: Our Shared Responsibility*[68] in 2004. Then came the report of the United Nations Secretary General *In Larger Freedom: Towards Development, Security and Human Rights for All*,[69] and finally, the concept found its expression in the UN General Assembly 2005 Outcome Document.[70]

First, it is necessary to underline that none of these documents creates legally binding rights and obligations. Second, though using different terminology and emphasising different aspects of the problem, in substance they did not add much to what was already known. They also did not clarify the most controversial issues on which discussions had been and continue to be held. For example, there was not, and there still is not, any doubt that every state is responsible for the protection of the rights of its citizens (this obligation stems from numerous universal and regional human rights documents as well, as from customary norms of international law), and that if a state commits acts of genocide, war crimes, ethnic cleansing or crimes against humanity it bears responsibility for these acts under international law. Moreover, those individuals who are personally responsible for such acts, be they heads of states or governments or the highest ranking military officers, bear criminal liability under international law. What is not clear, and what none of these documents clarifies, is the question: is it lawful for individual states or international organisations to use military force in order to protect the nationals of foreign countries in the territory of a foreign country, if the government of that country commits acts of genocide, crimes against humanity, ethnic cleansing or war crimes against its own people or is unable or unwilling to protect its people in cases of such crimes committed on its territory by any other party?

It was the *Commission on State Sovereignty and Intervention* that in 2001 attempted to go furthest in allowing the use of military force in certain circumstances, even without the Security Council's authorisation. The Commission developed five criteria of legitimacy for intervention (just cause, right intention, last resort, proportionality of means, and reasonable prospect of success[71]), applicable both to the Security Council and states. In these criteria, we see a kind of revival of the old idea of 'just wars' that was prevalent when natural law concepts reigned in international legal literature, before positivist approaches started to prevail and the use of military force became outlawed in international law. The furthest the Commission went down the road towards legitimising the use of military force without the Security Council's authorisation is in the following two paragraphs:

6.39 The first message is that if the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations. If collective organizations will not authorize collective intervention against regimes that flout the most elementary norms of legitimate governmental behaviour, then the pressures for intervention by ad hoc coalitions or individual states will surely intensify. And there is a risk then that such interventions, without the discipline and constraints of UN authorization, will not be conducted for the right reasons or with the right commitment to the necessary precautionary principles.

6.40 The second message is that if, following the failure of the Council to act, a military intervention is undertaken by an ad hoc coalition or individual state which does fully observe and respect all the criteria we have identified, and if that intervention is carried through successfully – and is seen by world public opinion to have been carried through successfully – then this may have enduringly serious consequences for the stature and credibility of the UN itself.[72]

These propositions are not and are not meant to be legally binding norms, but rather warnings to the Security Council that if it does not act, others may react and the Council may lose its exceptional position and authority under international law.

Addressing the UN Human Rights Commission in April 1999, the then Secretary General of the United Nations Kofi Annan emphasised, 'Emerging slowly, but I believe surely is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty'.[73] Later, when speaking of Kosovo in Stockholm, he said, 'There is emerging international law that countries cannot hide behind sovereignty and abuse people without expecting the rest of the world to do something about it'.[74] Speaking in The Hague on the occasion of the centennial of the first Hague

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[67] See more in R. Higgins, 'Some Thoughts on the Evolving Relationship between the Security Council and NATO', in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*, Bruylant, 1998, p. 521.

[68] A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 56-57, para.2 01 (2004), available at <http:ll//www.un.org/secureworld/report. pdf>.

[69] In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, U N Doc. A/59/2005, paras.1 6-22 (2005), available at <http://www.un.org/largerfreedom/contents.htm>.

[70] 2005 World Summit Outcome, GA Res. 60/1, paras.1 38-39 (Oct. 24, 2005).

[71] *International Commission on Intervention and State Sovereignty, the Responsibility to Protect*, paras. 4.18, 4.32-48.

[72] *Ibid*, paras.6,39; 6,40.

[73] Press Release SG/SM 6949, 7 April 1999.

[74] *Financial Times*, 26 May 1999, p. 2.

Peace Conference, the Secretary-General, once again, stressed the need to act through the Security Council. At the same time, he expressed his belief that 'unless the Security Council can unite around the aim of confronting massive human rights violations and crimes against humanity on the scale of Kosovo, then we will betray the very ideals that inspired the founding of the United Nations'.[75] In autumn of the same year, in his article in *The Economist* Kofi Annan wrote that 'in cases where forceful intervention does become necessary, the Security Council–the body charged with authorising the use of force under international law–*must be able to rise to the challenge* [emphasis added]'.[76] Two days later, in his address to the General Assembly, the Secretary General warned, 'The Charter requires the Council to be defender of common interest, and unless it is seen to be so–in the era of human rights, interdependence, and globalisation–there is a danger that others could seek to take its place'.[77]

It seems to be possible to draw the following three conclusions from the statements of the former Secretary-General: (1) Although the United Nations has to be 'respectful of the sovereignty of States', in cases of massive human rights violations and crimes against humanity, humanitarian concerns must prevail over state sovereignty; (2) The role of the Security Council, and the United Nations as a whole, should be central in dealing with extreme humanitarian catastrophes threatening international peace and security; (3) However, the Security Council, and especially its permanent members, have to act responsibly and 'unite behind the principle that massive and systematic violations of human rights conducted against an entire people cannot be allowed to stand'.[78] The world community has to rely on the Security Council on issues involving the use of force, but it can do so only if the Council and its permanent members act with the utmost sense of responsibility. If the Council neglects its responsibility, other institutions may have to fill the void.

However, notwithstanding the report of the *Commission on State Sovereignty and Intervention*, Kofi Annan's cautious statements and other documents mentioned above that were adopted later foreclose any interventions on humanitarian grounds if unauthorised by the United Nations Security Council. Alex Bellamy's conclusion that 'as agreed by world leaders in 2005, R2P does not countenance non-consensual military force without the authorization of the Security Council and does not set out criteria for the use of force beyond the four threshold crimes [i.e. genocide, crimes against humanity, ethnic cleansing and war crimes] and the idea that the Council should assume responsibility in cases where the host state is "manifestly failing" to protect'.[79] Therefore, Carsten Stahn is justified in calling R2P partly 'Old Wine in New Bottles'.[80]

How relying on various interpretations of R2P may backfire can be seen in the situation in which Gareth Evans found himself. Being an ardent supporter of the concept of R2P as well as a co-chair of the International Commission on Intervention and State Sovereignty, Evans – the former Foreign Minister of Australia – encountered difficulties in explaining why Russia was wrong in August 2008 when invoking the R2P concept as justification for the Kremlin's response to the Georgian attack on Tskhinvali, the capital of South Ossetia.[81] He was forced to admit that 'in the absence of UN Security Council approval, there is no legal authority for an R2P-based military intervention'. And he added, 'The 2005 General Assembly Outcome Document makes it clear that any country or group of countries seeking to apply forceful means to address an R2P situation - where another country is manifestly failing to protect its people and peaceful means are inadequate - must take that action through the Security Council'.[82] Evans is certainly right in that 'the sense of moral outrage at reports of civilians being killed and ethnically cleansed can have an unintended effect of clouding judgement as to what is the best response, which is another reason to channel action collectively through the United Nations'.[83] The point is not whether Russia correctly invoked the R2P concept (in any case, it was only secondary in the Kremlin's justifications for its military response), and as Gareth Evans correctly points out, Russia's response was 'manifestly excessive', i.e. disproportionate to the Georgian attack. The point is that depending on the political, economic and strategic interests as well as the ideological proclivities, states use various concepts in their own self-interest. Moreover, as Alex de Waal comments on Gareth Evans' and Samantha Power's enthusiastic support of the concepts of R2P and humanitarian intervention, 'in the face of "evil", the idealists tend to turn righteous and forget to ask important questions about what they want to achieve and how'.[84] More often than not, lesser sharp instruments than military intervention or a dogged insistence on regime change save more lives. Although, they may hurt the idealists' sense of self-righteousness and also prevent or delay the achievement of other goals such as the 'democratisation of the wider Middle East' or securing control over energy resources.

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[75] Press Release, SG/SM/6997.

[76] *The Economist*, 18 September 1999.

[77] SG/SM/7136, 20 September 1999.

[78] *Ibid*.

[79] A. J. Bellamy, 'The Responsibility to Protect and the problem of military intervention', International Affairs, 2008, Vol. 84, No 4, p. 638.

[80] C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *The American Journal of International Law*, 2007, Vol. 101, p. 111.

[81] G. Evans, 'Russia, Georgia and the Responsibility to Protect', *Amsterdam Law Forum*, 2009, Vol. 1, No. 2.

[82] *Ibid*.

[83] *Ibid*.

[84] A. de Waal, 'How to End Mass Atrocities', *The New York Times*, 9 March, 2009.

The events, developments, mistakes, tragedies and disappointments after the high expectations of the post-Cold War period (though, no doubt, there have also been success stories, and they have to be taken into account and lessons learned from them also) testify that central principles of international law and the UN Charter, confirmed in the Nicaragua case by the International Court of Justice, such as the non-use of force and the non-interference in internal affairs of states, retain their relevance. And this notwithstanding (or maybe even because of) the emergence of international human rights law and the evolution of humanitarian law. This also means that the concept of responsibility to protect (R2P) has to be interpreted in the light of these and other principles of international law. The Institute of International Law *(l'Institut de Droit International)* studied the problems of humanitarian intervention that now are mostly considered under the heading of R2P, for more than a decade. In 2007 the Santiago (Chile) session, the Institute adopted a resolution where the question of 'the lawfulness of military actions which have not been authorised by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes' was left for further study due to the differing, often opposing, views of the members of the Institute.[85] However, in 2015 at the Tallinn session, the Institute, having meticulously studied the practice and views of various states in the period after 2007 (done by Professor Michael Reisman together with Judge Hisashi Owada and the 10th Commission), came to this conclusion: 'The Commission has concluded that state practice over the past decade has not witnessed enough clear movement away from the traditional requirement of Security Council authorisation for a putative Humanitarian Intervention; while some unilateral actions may have received a degree of informal or post hoc approval, practice indicates that the international community continues to view unilateral Humanitarian Intervention undertaken without the authorisation of the United Nations Security Council as presumptively unlawful, though sometimes subject to retroactive validation'.[86] After the high expectations of some that the world community, or those acting in its name, would be able to impartially interfere in order to prevent, or put an end to, atrocities within countries, the majority of experts have become rather pessimistic as to the ability of outside interveners to make things better. Usually the opposite is true.[87] And the matter is not only, or even much, that unilateral (i.e., without authorisation of the Security Council) interventions in the name of humanity are often abusive, but also because foreign military (and often non-military) interventions rarely make things better. Moreover, as Mathew Burrows and Robert A. Manning observe, 'in this increasingly post-Western world, Western policies and norms that are viewed as threats to national sovereignty are being more broadly questioned. Thus value-based issues such as democracy promotion and the Right to Protect (R2P) tend to spark strong counteraction from not just authoritarians like China, but also many emerging democracies who worry about maintaining their national sovereignty'.[88] And it is not only that. As two 2016 published books with revealing titles – *Mission Failure: America and the World in the Post-Cold War Era* by American Michael Mandelbaum and *Pourquoi Perd-On La Guerre?* by Frenchman Gérard Chaliand testify, no Western intervention in the post-Cold War era has achieved its political aims. Professor Mandelbaum writes, 'The United States did not succeed in getting China to protect human rights, or constructing smoothly functioning free markets or genuinely representative political institutions in Russia. It did not succeed in installing well-run, widely accepted governments in Somalia, Haiti, Bosnia, or Kosovo. It did not transform Afghanistan or Iraq into tolerant, effectively administered countries. It did not bring democracy to the Middle East or harmony between Israelis and Arabs'.[89] Gérard Chaliand observes that 'the balance sheet of wars waged by the major military power of the XXI century, the United States, often backed up by numerous allies, is without any doubt negative: enormous sums squandered with mediocre military results and politically disastrous consequences.'[90]

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[85] Present Problems of the Use of Armed Force in International Law—Humanitarian Action (Rapporteurs Mr Reisman/Owada), Institut de Droit Internationale, Session de Santiago—2007 (http://justitiaetpace.org/resolutions_chrono.php?start=2001&end=2007).

[86] 10th Commission: Humanitarian Action, Traveaux de la session de Tallinn (http://justitiaetpace.org/annuaire_resultat.php?id=16).

[87] See, e.g., an insightful analysis of reasons of successes and failures of different interventions in Rory Stewart & Gerald Knaus, *Can Intervention Work* (W.W. Norton & Company, 2011). One of the main conclusions of the authors is that the success or failure of outside interventions depend less on what the intervenors do, on their characteristics and staying-power and much more on the characteristics of societies where interventions take place. The greatest problem is that intervenors are often rather ignorant of the latter.

[88] M. Burrows, R. A. Manning, 'Kissinger's Nightmare: How an Inverted US-China-Russia May Be Game-Changer', *Valdai Paper* N. 33, 2015

[89] M.Mandelbaum, *Mission Failure: America and the World in the Post-Cold War Era*, OUP, 2016, Empl. 248.

[90] G. Chaliand, *Pourquoi Perd-On La Guerre? Un nouvel art occidental*, Odile Jacob, 2016, p. 17.

Tradeoff: China's Control of the RMB and its Economic Sovereignty

Terry McDonald

Abstract

Currency mobility policy has been not just an economic, but an ideological tool in the years of PRC rule. China has used it to assert independence, and – to a disputed degree – used it as a development tool. Now, as China becomes more integrated into the world economy and its institutions, China's ability to use currency mobility policy as a way to maintain economic sovereignty is being reduced. This paper will outline this process, and then interpret it through the use of classical and post-Western IR theory, drawing the conclusion that China is going through the process of financialisation – which inevitably removes control of the economy from the levers of government.

Keywords: China, Currency, Financialisation, World Systems

China's currency policy has long been a bugaboo in international economic debates. Accusations of Chinese currency manipulation are not just common in world bodies such as the WTO and IMF, but are as much a mainstay in US presidential politics as guns and God.

While American politicians have been unified in their assertions of Chinese currency manipulation, the academic community has not been so inclined to consensus. While it is generally accepted that China has had the structures in place by which they could manipulate the relative price of their currency on the world market; what has been less agreed upon is the degree to which the rate of the renminbi has differed from what would have been the hypothetical market price in the absence of government interference.

Thus this paper will follow a progression through the issue. First, it will outline the history of the policy in question – China's currency mobility policy in the PRC era. Then, it will cover the debate about the degree to which China's policy choices have and continue to distort the relative market position of the renminbi, its motivations, and effects. Finally, these results will be interpreted through international relations theory. First, there will be an application of realism, to understand the choices of China in a traditional, Western IR structure. Then, the interpretation will advance to a post-Western perspective, utilizing the Chinese concept of Tianxia – all under heaven. The paper will then conclude with a variant on critical theory, wherein the concept of finanicialisation is applied to world systems theory.

All of this will bring us to the central argument of the paper: that despite its history, China's moves towards deeper integration with the global economy and its institutions have reduced its ability to exercise control over its currency mobility going forward. Increased vulnerability to capital flows, combined with China's commitments to international governing bodies such as the IMF, mean that China's future capacity to use currency mobility policy as means of ensuring economic sovereignty has been depleted.

Historical Background

Since the Communist party has come to power, currency policy has been central to the party's vision for a strong China. Currency stability was at the centre of Mao's economic policies – as he saw inflation as a scourge of the working masses, and a sign of the inherent economic weakness of the capitalist West and 'revisionist' Soviet Union[1]. A combination of currency and price stability, combined with a total aversion to internal or external debt, thus shaped Chinese policy for the remainder of the Mao years. It was not until the death of Mao, and the rise to power of the reformist Deng Xiopeng, that China's currency policy modulated to any degree of significance.

This took the form of extreme central control of all forms of currency exchange[2]. The state had, from the rise to power

[1] Hung, Yin Han, and Tsai Cheng, China's renminbi: one of the few most stable currencies in the world, Foreign Language Press, Beijing, 1969

[2] Goldstein, Morris, and Nicholas R. Lardy, *The Future of China's Exchange Rate Policy*, Policy Analyses in International Economics 87, July 2009

in 1949 until the late 1970s, fixed an artificially strong value on the exchange rate as part of the Maoist goal of import substitution and self sufficiency[3]. From the 1950s onward, all export earnings and other foreign exchange were required to be deposited in the Bank of China, which was the only institution with authority to handle foreign exchange. Only state-owned companies were permitted external trade, and then the accumulated reserves would be allocated according to state priority. This system continued largely uninterrupted until Mao's death in 1976.

The rise of Deng Xiaopeng

Mao's death led to an openness to reformist ideas, under Liu Shao-Chi[4] and primarily under Deng Xiaopeng. in December 1978, the Third Plenum (of the Eleventh Central Committee of the CCP) the new leadership declared the advent of the *gaige kaifang* policy[5]. This policy basically meant an opening to the outside world, and a renunciation of Mao's more extreme leftist policies.

In terms of currency mobility and exchange, 1979 marked the beginning of this opening up to the outside. Exporters and the local government to which they paid taxes were allowed to hold a portion of their foreign exchange earnings, as opposed to handing them over in their entirety to the Bank of China.[6]

There was another adjustment to currency policy at the same time, which was more complex. Similar portions of earned foreign currency were allowed to be retained, such as those accumulated from remittances, port fees, and tourism. These were all subject to varying levels of permitted retention, but the overall move was a significant shift to market-based incentives to export and engagement with the international economy. In half a decade, these retained portions had risen to 40 percent of overall foreign exchange remaining in the purview of the trading firms and their respective local governments.[7]

Having said reserves in hands outside of the Bank of China, at levels that surpassed the immediate need for overseas purchases, inevitably led to the need for an exchange market of some sort.[8] This led to, as it often does in closed economies, a dual-exchange rate system, introduced in 1981. This began in Shanghai – the traditional hub for foreign trade in China, and gradually led to the introduction of 'swap centres' in dozens of cities.[9] The government initially tried to control the rates of exchange in these, but foreign exchange routinely was valued higher than the official rate.

This market signal, clearly indicating overvaluation, ties with the other major reform undertaken in the same time frame. There was a move to devalue the official rate of the renminbi, beginning in dramatic fashion in January of 1981. At this time, the State Council announced a new internal settlement rate of 2.8 renminbi to 1 US dollar.[10] This was a substantial move from the previous rate of 1.5 renminbi, representing a devaluation of almost 100 percent. This cemented the dual-exchange system, as non-trade transactions were still done at the official exchange rate. Gradually, then, the official exchange rate was lowered, so as to bring it even with the internal settlement rate – which it did in 1984, at the rate of 2.8 Renminbi. Thus merged, in 1985 the internal settlement rate was disbanded, although the swap centres did continue to operate at lower-valued, market-driven prices, with slight fluctuations in the exchange price therein because of 'imperfect arbitrage between swap centres".[11]

The authorities then continued their series of devaluations. They moved 15 percent overnight in July 1986 to a value of 3.7 renminbi to 1 US dollar, and then in 1989 to 4.7 renminbi.[12] This "experiment in gradualism" eased the transition to a more accurate value for the renminbi and to a market economy, with the swap centres forming a platform for market mechanisms

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[3] "The overvaluation of the currency allowed the government to provide imported machinery and equipment to priority industries at a relatively lower domestic currency cost than otherwise would have been possible." *Ibid*.p.3

[4] Previously referred to as a "traitor and scab" that had fomented "counter-revolutionary schemes" for opposing Mao's economic policies, particularly forbidding inflation (Hung, p.29)

[5] Huenemann, Ralph W., *Economic Reforms*, 1978-Present, Oxford Bibliographies, April 2013, http://www.oxfordbibliographies.com/view/document/obo-9780199920082/obo-9780199920082-0008.xml

[6] Goldstein, Morris, and Nicholas R. Lardy, *The Future of China's Exchange Rate Policy*, Policy Analyses in International Economics 87, July 2009

[7] *Ibid.*

[8] Huang, Haizhou, and Shuilin Wang, *Exchange rate regimes: China's experience and choices*, China Economic Review 15, North Holland Publishing, 2004, p. 336-342

[9] Goldstein, p.5

[10] *Ibid.*

[11] Huang, p.337

[12] Goldstein, p.6

outside of central planning.[13] Finally, following a series of more gradual devaluations, the dual exchange rate system, in all variations, was finally abandoned on 1 January 1994. The price of the official exchange rate was moved to the prevailing swap-market rate of 8.7 renminbi. The rate was moved to 8.3 renminbi gradually over the following year and a half, and then settled there more or less all the way until 2005, even during the pressures of the Asian financial crisis of 1998.[14]

Since 2004, China has committed to gradually moving towards a flexible, floating currency regime.[15] Following up on this, China has revalued the renminbi gradually, and has faced widespread calls for further pushes upward in value from international economic and political circles.

Where We Stand Today

Perhaps the most striking aspect of the academic conclusions on the Chinese currency situation is the entire lack of consensus. There is continuous disagreement on if the renminbi has been held at an artificially low value, and even amongst those that do agree that it has, there is no consensus on by how much. Indeed, there are even some that now say that, if anything, the renminbi is overvalued, and that recent currency flight is to get out ahead of an inevitable devaluation to closer to its true floated market value.[16]

There are of course many who argue that China has been selling renminbi and buying US dollars and euros in order to keep the trading value of the renminbi artificially low, thus giving China an advantage in the exportation of its manufactured products. Feldstein argued that not only is China's currency value being held artificially low, but that the resultant current account imbalances pose four specific threats to the world economy.[17]

The first of these is, always popular in election seasons, the pressures created toward protectionist policies in the countries experiencing the deficit. While thus far the reactions have been largely rhetorical, the imbalances raise threat for 'cascading tariff increases' not unlike those that exacerbated the economic crises of the 1930s. Indeed, as Ge points out, such proposals have been seriously discussed in the US congress.[18]

The second is another reactive policy that can arise from such situations. Countries being subject to these distorted capital flows will sometimes make moves to restrict the inflow of foreign capital to prevent their currencies from further appreciating. Such moves of course serve their primary purpose, but can also prevent productive investment, and can cause a 'misallocation of capital among nations.'[19]

The third threat posed by these current account imbalances is that the flood of capital into economies such as the US push interest rates down to artificially low levels. This could be seen in the lead up to the crash in 2008, as investors seeking high yields moved to unconventional and riskier assets. By pushing down interest rates, these imbalances could be leading to more excessive risk taking.

The fourth threat listed by Feldstein is that the prevention of currency appreciation can lead to inflation in those countries in which demand is excessive. Similarly, preventing depreciation can lead to deflation in those with account deficits.

Y. Wang et al. argued that, while the renminbi was undervalued, China had already taken the necessary steps to allow for the eventual market pricing thereof.[20] They cite specific policy changes in China's capital account control policy that would loosen the state hold on foreign exchange. Such changes included the 150 percent increase in the allowable amount of foreign currency a Chinese resident could purchase ($20 000 up from $8 000). Secondly, Chinese institutions were then allowed foreign currency accounts in commercial banks, and insurance companies with the need for foreign exchange transactions were given permission to invest in foreign securities. Another relaxation was Chinese commercial banks being given permission to invest in foreign securities on behalf of their clients.[21]

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[13] Mehran, Hassanali, Monetary and Exchange System Reforms in China: An Experiment in Gradualism, IMF Publishing, 1996

And Huang, p.336

[14] Tobin, James, Asian Financial Crisis, Japan and the World Economy 10 (1998), Elisevier, p. 351-353

[15] Reuters, "Timeline: China's reforms of yuan exchange rate", Business News, 14 April 2012, http://www.reuters.com/article/us-china-yuan-timeline-idUSBRE83D03820120414

[16] Krugman, Paul, *Small News On The Yuan*, The New York Times, December 1, 2015 http://krugman.blogs.nytimes.com/2015/12/01/small-news-on-the-yuan/

[17] Feldstein, Martin, The role of currency realignments in eliminating the US and China current account imbalances, Journal of Policy Modeling 33, Elsevier, 2011, p. 731 - 736

[18] Ge, Wei, "The Chinese Currency and Global Rebalancing: A Discussion", *from China*: An International Journal, Volume 11, Number 1, pp. 55-74, NUS Press Pte, April 2013

[19] Feldstein, p.732

[20] Wang, Y. et al., Estimating renminbi (RMB) equilibrium exchange rate, Journal of Policy Modeling, 29, Elsevier, 2009, p. 417-429,

[21] *Ibid*., p.427

These policies, the authors argue, will expose the renminbi to sufficient market forces to expedite its movement to its real effective exchange rate. They argue that there has been very little renminbi misalignment over the post-reform era, and that steps such as these will serve the purpose of bringing about full convertibility in a way that makes dramatic command revaluations redundant, or at best only serving as a temporary measure in a process that was unfolding regardless.

Yajie et al. similarly argue that, based on the behavioural equilibrium exchange rate (BEER), the renminbi has largely traded at its appropriate value over the open era.[22] Likewise, Cheung et al., using the relationship between relative price and relative output levels, argue that the renminbi's alleged undervaluation has been "Overvalued." [23]

As said above, though, these views do not represent a consensus. Eichengreen, specifically condemns the conclusion that the undervaluation has been overvalued.[24] Amongst other reasons, he questions the validity of Chinese data used to make the claim. As he states, China has been known to wildly revise its economic numbers, such as the 2005 revision of its purchasing power parity per-capita income up 17 percent for the year, making such claims based upon the data unreliable at best.

Tung and Baker, long ago argued that China had been valuing the renminbi at least 15 percent below fair market value.[25] They called for a 'maxi-revaluation' of 15 percent, and this just as a way point for moving to a more flexible exchange rate regime in the medium and long term.

Navarro forcefully argued that China was not only manipulating currency prices to its advantage, but that it must be confronted head-on because of this.[26] He claimed that "The most potent driver of China's competitive edge is not cheap labour, as it is commonly believed, but rather a potent set of illegal trade practices," and that "the most destructive, and least understood of China's illegal trade practices is currency manipulation."[27] His paper likens Chinese currency policy to a tariff of 40 to 50 percent on US goods.

Former Governor of the Bank of England Mervyn King has laid out the case that China, having long limited upward market pressure on its currency, will now find that "its exchange rate comes under downward pressure," and recommends the abandonment of the attempt of fixing the exchange rate.[28]

Similarly, Nobel-winning economist and columnist Paul Krugman has followed the developments full circle on the issue. In 2010, he vehemently argued that "at this exchange rate, Chinese manufacturing has a large cost advantage over its rivals, leading to huge trade surpluses."[29] At the time, he concluded that "Chinese mercantilism is a growing problem, and the victims of that mercantilism have little to lose from a trade confrontation."

By 2015, however, the circumstances have changed. First, he points to the appreciation in the relative value of the renminbi, as shown in this graph (fig.1)[30]

Not only has the real exchange rate risen, but the underlying factors of the Chinese economy no longer indicate the necessity of trying to hold down the value of the currency. Indeed, with growth slowing and competition from other emerging markets increasing, in terms of the renminbi" China was destructively undervalued in 2010 but overvalued now."

[22] Wang, Yajie, et al., Estimating renminbi (RMB) equilibrium exchange rate, Journal of Policy Modeling 29, Elsevier, 2007, p. 417-429

[23] Cheung, Yin-Wong, et al., The overvaluation of renminbi undervaluation, Journal of International Money and Finance 26, Elsevier, 2007, p. 762-785

[24] Eichengreen, Barry, Comment on "The overvaluation of renminbi undervaluation", Journal of International Money and Finance 26, Elsevier, 2007, p. 786-787

[25] Tung, Chen-Yuan, and Sam Baker, RMB revaluation will serve China's self-interest, China Economic Review 15, North Holland Publishing, 2004, p. 331-335

[26] Navarro, Peter, Confront China Now, World Affairs Journal, Washington DC, September/October 2012

[27] *Ibid*., p.28

[28] King, Mervyn, The End of Alchemy: Money, Banking, and the Future of the Global Economy, W.W. Norton and Company, New York, 2016

[29] Krugman, Paul, China 2015 Is Not China 2010, New York Times, August 13, 2015 http://krugman.blogs.nytimes.com/2015/08/13/china-2015-is-not-china-2010/

[30] *Ibid*.

Analysis: Previous Control Now Lost

PWhile the above has demonstrated that there is a lack of consensus on the degree of Chinese manipulation of its currency exchange rate, there is agreement on one aspect: they have historically had the ability to so do. Today, however, that is no longer irrefutably the case.

This argument rests upon three tenets. First, that, when exposed to capital flows, there is no such thing as a truly fixed currency. Second, that China is now subject to the pressures of capital flows. This leads to the conclusion that China, facing new exposures to capital flows, cannot sustain its previous hold on currency mobility, and has therefore lost a degree of control over its own economy.

James Tobin, Nobel-winning economist in the subject of the destabilising effects of capital flows, gives emphasis to the first tenet. Citing the example of the 2008 Asian financial crisis, he states:

> *As general background, remember that a fixed exchange rate, to which a central bank has committed its reserves of hard foreign currency, is always vulnerable. For instance, Korea has promised to pay one dollar for any 1200 won presented to its central bank by anyone, resident or foreign. If people begin to doubt that the Bank of Korea has enough dollars to make good on the promise, they will rush to sell won for dollars. As the Bank's dollar reserves are depleted, it has no choice but to abandon its commitment and the won falls in the market that is, it takes more, many more than 1200, won to buy a dollar. `Fixed rate' is a misnomer; the rate cannot be irrevocably fixed unless the won is abandoned in favor of the dollar, as francs, lire, and other European currencies are scheduled to be merged into the euro next year.*[31]

In short, a fixed rate is only good as long as no one expects it to change. As soon as revaluation is expected, speculative movement of capital will bring to bear great pressure on the state/central bank. The government/central bank can perhaps withstand this pressure temporarily, using its foreign currency reserves to maintain the fixed rate, but – as such reserves are never infinite – cannot so do indefinitely.

The second tenet, that China is more exposed to capital flows today and going forward more than it has been historically is hardly a controversial supposition. As referred to above, China has vastly increased the access to foreign exchange for its citizens, especially its institutions and businesses.[32] The level of exposure was exhibited this year, when in exchange for the renminbi being added to the basket of currencies for special drawing rights (SDR) for the IMF, China had to make further reductions in capital flow barriers. As Bloomberg reported:

> *Xi seems to realize that he paid a high price for the honor of having the Chinese yuan included, starting this October, in the International Monetary Fund's basket of reserve currencies along with the dollar, the euro, the yen, and the British pound. To be included in the basket, China had to demonstrate that the yuan was "freely usable." That forced it to lower some investment barriers—enabling the capital flight now bedeviling the leadership. The Institute of International Finance estimated in October that net capital flows out of China would reach $478 billion in 2015. New estimates due this month could show even larger outflows, the IIF says.*[33]

Thus, China's deepening integration with the world economy and world institutions such as the IMF and the SDR basket inherently mean deeper exposure to capital flows.

The combination of these two truths leads us to the third tenet. Given that China has new exposure to capital flows and the pressures therein, and that there is no such thing as a fixed currency when it is exposed to said capital flows, it follows that China will not be able to maintain the same rigid control over its exchange rate that it has historically enjoyed. Eichengreen and Kawai point out that no matter the scope of China's goals for its currency internationalisation and capital account liberalisation, there are Pandora's box vulnerabilities that come with such degrees of exposure:

> *The risks of evasion and arbitrage – the likelihood that once the PRC moves to basic account convertibility, remaining limits on international capital movements will become increasingly porous and difficult to enforce – should not be underestimated.*[34]

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[31] Tobin, p.351

[32] Wang, Y. et al., Estimating renminbi (RMB) equilibrium exchange rate, Journal of Policy Modeling, 29, Elsevier, 2009, p. 417-429,

[33] McCoy, Peter, "China's Capital Flight: Money is pouring out of China as rapidly as it once poured in. That's a dilemma for Xi Jinping.", *from* Bloomberg, 14 January 2016, http://www.bloomberg.com/news/articles/2016-01-14/china-s-capital-flight

[34] Eichengreen, Barry, and Kiasharo Kawai, eds., Renminbi Internationalization: Achievements, Prospects, and Challenges, Brookings Institute, Washington D.C., 2015, p.12

The move towards a market-based exchange rate, consequently, is treated as more of an inevitability than a choice. The question then becomes one simply of process – or 'sequencing' as it is referred to in this work and Wang, amongst others.[35] It is seen that China's path now has one logical destination, a market-based currency valuation – thus removing that policy arrow from Chinas economic quiver.

IR Interpretation

Now, the task comes to contextualising this result. If China's ability to control its currency exchange regime has been diminished, what does it mean for its place in the international order? In order to explore this, a mixture of IR theories will be applied. First, the classical IR approach of realism will be used, to examine the power implications of this change. Then, the approach will move to critical theory, with world systems theory being used to explore China's position in the global economic order. Then the approach will move on to a Post-Western theory, using the Chinese approach of Tianxia to offer an alternative to the predominant Western slant of traditional IR. Then, the paper will conclude with a mixture of these approaches, adding the modern theory of financialisation, so as to try to bring a holistic close to this contribution to the issue.

For the Western theories, these where chosen, as in McDonald, since "these are normally seen as divergent theories; world systems theory arriving as a critical response to older realist perceptions of the world order."[36] Realism is state-centric, world systems is systemic, and the use of both allows for a suitably representative sample of the possibilities of IR analysis of the matter. First, these theories shall be summarised, as presented in previous work.[37]

Dougherty has given a six-point framework for realist thought that will serve as the working definition for this paper.[38] These can be summed up as: 1) the state is the primary actor, 2) that international systems are inherently prone to conflict, 3) that states have sovereignty – but that "nevertheless gradations of capabilities" exist, 4) that states are unitary actors, 5) that states are rational actors seeking to benefit national interest, and 6) that national interest lays in obtaining and preserving power. It is upon these tenets that realism will be defined in this paper. Consequently, the operation of the international system in realist expectation is, if not predictable, at least comprehendible. States, as the primary and sovereign actors, will make rational choices – within the constraints in which they are held – that will enable them to maximise the power they can attain.[39]

In contrast to the state-centric view of realism, the other theoretical approach to be used in this paper is less confined by boundaries of a geographical nature. These divisions are more economic and, to a degree, cultural. World systems analysis goes beyond the view of a state as a dominant, unitary, and rational actor. The structure of the system is instead divided into core, semi-periphery, and periphery actors, which do not necessarily correspond with state boundaries.

The core, as defined by Wallerstein and Kuznar, comprises areas in which elites control most wealth, technological, and military resources with which to dominate the system.[40] While Wallerstein concentrates on food in this example, others, such as Kardulias have included more "sumptuous precocities" to augment this work.[41]

In order to sustain this position, the core areas use the discounted resources and labour of the periphery. These areas/actors are, often removed from the dominant core culture in the form of language, traditions, and development history. This is a function of "the social organizations of work, one which magnifies and legitimizes the ability of some groups within the system to exploit others".[42]

To bridge this divide, actors within the sphere of the semi-periphery are utilised. These play the role of intermediary,

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[35] Wang, Y. et al., Estimating renminbi (RMB) equilibrium exchange rate, Journal of Policy Modeling, 29, Elsevier, 2009, p. 417-429,

[36] The author has also used these definitions in: McDonald, Terry, "Battered, but Unbroken: Epistomological and Theoretical Challenges to Western IR Theory (Realism and World systems Theory)", European Scientific Journal, Special edition volume 1, June 2014, used here again to facilitate case comparison

[37] McDonald, Terry, "Follow the money: winners and losers in the evolution of global currency mobility regulation", Society and Politics, Volume 10, Issue 1, pp. 170-187, Warsaw, 2014

[38] Dougherty, James and Robert Pfaltzgraff, Jr., Contending Theories of International Relations: A Comprehensive Survey (4th ed.), Longman, New York, 1997

[39] McDonald, *Society*, p.173

[40] Wallerstein, Immanuel, "World Systems Analysis", in Social Theory Today, Anthony Giddens (ed.), Stanford University Press, 1987, and

Kuznar, Lawrence, "The Inca Empire: Detailing the Complexities of Core/Periphery Interactions", in World Systems Theory in Practice, Nick Kardulias (ed.), Rowan and Littlefield, Boston, 1999

[41] Kardulias, N.P., "Fur Production as a Specialized Activity in a World System: Indians in the North American Fur Trade", American Indian Culture and Research Journal, volume 14, number 1, 1990

[42] Wallerstein, p.349

and often feature a mix of the means and capabilities of the core states, such as educational opportunities and core-style institutions, while retaining peripheral characteristics in cultural and labour-division aspects to relegate them to their non-core status. These do not necessarily have to be divided along national boundaries. In China, for example, Shanghai billionaire financiers share a national boundary with peasant rural farmers, many of whom are among the million Chinese who live below the official "absolute poverty" line of $90 US dollars per year.[43]

Analysis:

Realism

If one agrees with the opinion that China has been using its ability to control its currency exchange rate as a means of incurring balance of trade and payments advantage over other states, then it is clear to see how these developments would affect its standing in a realist perspective. China's economic rise since the beginning of its economic reforms has propelled it to major power status. Having so arrived, now some debate whether the long discussed concept of 'peaceful rise' should give way to a 'martial spirit'.[44] The argument is that a military rise should develop from its economic rise.

Here, then, represent how the changes to the China's ability to control its currency exchange rate will affect its status in realist terms. If China's rise was indeed predicated upon the advantages afforded to it by currency manipulation, then does the loss of this ability imply a reduction in power? Does China, with its still-underdeveloped financial services sector, have the capacity to make the transformations necessary to compete on a level playing field, without the advantages of currency manipulation? If not, then China's power, both economic and military, will decline as a result.

World Systems Theory

If one looks at the state as a whole, then China clearly began the reform era as a peripheral state. In fact, the Maoist explanation of China's economic policy could very well have been taken directly from the world systems playbook. The line "Chairman Mao wisely sets forth the principle of maintaining independence and keeping the initiative in our own hands and relying on our own efforts," in referring to rejecting all foreign debt and using an overvalued currency to encourage import substitution, shows that China had an awareness of the means of exploitation inherent in the world system.[45]

In fact, it could be argued that China used its ability to manipulate its currency exchange rate to overcome the trappings of the peripheral states in the world system. By eschewing manufactured foreign goods, China was able to incubate its own industries, and its lack of foreign debt and positive current account balance meant it was not caught in the debt trap and had enough foreign currency reserves to retain a large degree of economic independence.

China has used this opportunity to advance a great deal, but in an unequal manner. As referred to above, China has glaring levels of economic inequality, with the world's highest number of billionaires, and still with many living on less than $90 per year.[46] Additionally, in opening the economy in the era of reform, China has left the protections it had used from systems of exploitation behind in pursuit of integration with the world system. China now has private and public debt, and its workers are exploited for low pay labour and resource extraction, with high-end imports being sent back from the core. Thus, integration into the world system has afforded some Chinese to enter the upper echelons of core status, but in so doing has exposed others to the exploitive cycle that makes up peripheral existence.

Post-Western

While both interpretations above fit with traditional approaches to IR, there has of late been a movement to expand the horizons and perspectives utilised in the study of global affairs. In fact, John Hobson has proposed that the entirety of IR scholarship has been founded upon six myths. They are:

1. *The' noble identity / foundationist myth' of the discipline*[47]

    - Hobson asserts that IR has always had a delusion that it was born in the bloody aftermath of 1919 in the fields of Europe. It was thus thought to be imbued with the noble purpose of avoiding such bloodshed in the future, born pure of heart. Hobson argues that this veils the truth, that since at least 1760 international theory has been Eurocentric and

[43] Moyo, Dambisa, How the West was Lost: Fifty Years of Economic Folly and the Stark Choices Ahead, Douglas and McIntyre, Vancouver, 2011

[44] Kissinger, Henry, On China, Penguin Books, New York, 2011

[45] Cheng, Tsai, China's Renminbi: One of the Few Most Stable Currencies in the World, Foreign Language Press, Beijing, 1969

[46] Moyo, p. 167

[47] Hobson, John M., The Eurocentric Conception of World Politics: Western International Theory, 1760-2010, Cambridge University Press, 2012

worked to defend and celebrate the West.

2. *The 'positivist myth' of international theory*

   - This is the myth that IR theory has a foundational 'value-free epistemological base'.[48] Hobson states that this is undermined by Cox's "well known critical theory mantra, that 'IR is (almost) always for the West and for the Western interest'." He quotes Keohane referring to the idea of humanitarian intervention being necessary because the 'politics of malign neglect' would "deny the backwards East the privilege of developing into an advanced Western form." [49]

3. *The 'great debates myth' and reconceptualising the idea of the clash of IR theories*

   - Here, Hobson says that the much celebrated 'great debates', such as realism versus idealism, or positivists versus post-positivists, are not actually particularly great. He states that these are all minor variations on the same underlying themes, and that, viewed from a non-Western lens, the differences are miniscule.

4. *The 'sovereignty / anarchy' myth*

   - Here Hobson argues that the underlying basis for this myth, that all states possess sovereignty in an anarchic system, is a falsehood. He says that Western states have been granted an implied hyper-sovereignty. Eastern states, alternatively, have at best a conditional sovereignty, which can be withdrawn if "civilized conditions are not met". [50]

5. *The 'globalisation myth'*

   - Here the myth presented is not that globalisation does not exist, but that it is a modern phenomenon. Hobson posits that it has been around since at least 1760, and that it could easily just be called Western opportunism in the mission to recreate the world in a Western image. This still rings true, says Hobson, for post-1989 liberal internationalists like 'end of history' Francis Fukuyama, who preach a similar form of Eurocentric paternalism.

6. *The 'theoretical great traditions myth'*

   - Here, Hobson speaks of the 'epic rendering' of the great traditions of IR theory. He posits that in presenting theories such as realism as continuous strains of pure intellectual thought that can be traced from Thucydides to Kissinger is another falsehood that glosses over large differences in the name of convenience and fitting the Eurocentric metanarrative.

Given this, it is thus beneficial to move outside of Western influence to gain an alternative perspective on the issues presented. Thus we move to the Chinese concept of *Tianxia*.[51] Its literal meaning is a combination of tian – heaven, and xia – under; so, in essence, it means that which is under heaven. Its more nuanced application, though, is that of a system of order in world affairs. In this system, China is the centre of the world order, in a political system of unequal but independent nations. Nations can choose whether or not to enter this arrangement of their own volition, but if they do, they must acknowledge their inferior status.

In its modern incarnation – purely theoretical in a utopian sense – the idea is to move beyond a world in which the nation state is the highest entity. There cannot be world order, so it is explained, unless the world itself is the highest level. In practice, it is not clear exactly what is meant, except that there is a decided idea of non-values-based international cooperation, but is formed around the Chinese cultural philosophical and historical ideas.

In terms of the issue at hand, there are some inconsistencies – in that China's mercantilist approach hardly lends itself to a harmonious global order. Nonetheless, on examples such as human rights, China has been an advocate for allowing states to decide their own internal affairs. Perhaps China's own design for its own economic system, particular to its own historical circumstance, would not be at odds with other states, running their affairs as they see fit, but without interstate conflict.

Financialisation

It is most useful to explain these events and lessons through the lens of financialisation. This is a newer theory in the context

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[48] *Ibid*., p.17

[49] *Ibid*., p.18

[50] *Ibid*., p.19

[51] Chang, Chishen, Tianxia system on a snail's horns, Inter-Asia Cultural Studies, Volume 12, Number 1, Routledge, 2011

of IR application. Originating from Epstein, it is the idea that financial markets, financial institutions, and financial elites and their motives are increasing in importance in the operation of the economy and its governance.[52] It is Streek's and Mair's application of this concept though that has paved the way for its use in this project.[53] In these, political and popular control of the economy has increasingly given way to 'expert governance', so that political parties, left and right, are reduced to tinkering and social issues, as opposed to fundamental questions of the organization and goals of this now 'financialized' economy.

Now, financialisation had been mostly concerned with the loss of democracy and of democratic governance. Of course, in China this has not been the system going into the reform era, or since. Nonetheless, there are still issues of economic sovereignty and self governance at play, not matter the domestic political system. While the citizenry has not been allowed to vote, the government has had the insular ability to run its economy as it sees fit. Now, through the integration with the world system and incorporation into global economic institutions, the levers, such as the ability to control the currency exchange rate, have been removed from domestic hands. The process of financializtion is not about the domestic system of governance – it is about the end result – the removal of the option of opting out of the dominant global economic order from the hands of any political party, actor, or governing body. Financialisation is about the removal of all threats of resistance to the global economic order. Through the integrative processes discussed above, China has exposed itself to the conforming pressures of global capital flows. Having reduced its capacity to set its own exchange rate has thus fully removed China from the original Maoist ideal; it now is – for better or worse – subject to the forces and flows of the world economic system.

Conclusion: Dropping the reins

It has thus been demonstrated that China has had a tight grip on its currency pricing, but that such a grip is no longer possible going forward, as China experiences increased capital flow exposure and finite intervention capabilities through the process of finanicialization. As explained above, trying to retain a fixed exchange rate has already cost China $700 Billion USD in the early part of 2016; even China's vast foreign currency reserves are not infinite and thus cannot maintain such a pace indefinitely.

Moreover, China's integrative moves have allowed for increased capital flows – which, as seen above in Tobin's description of the Asian currency crises of 2008, offer vulnerabilities when currency devaluation is expected. Now, as "export-led growth is no longer a viable strategy for a large emerging market because Europe and North America cannot sustain the domestic demand required to import so much," China will find the RMB under downward pressure.[54] As currency markets sense that devaluation is inevitable, it costs increasing amounts to maintain a fixed rate, escalating until the point of unsustainability.[55] Ergo, China has already lost the ability to exercise the control over RMB valuation that it previously enjoyed, both in economic and IR terms described above, as if it does not move RMB valuation to true market value, the market pressure will do it for them. Thus, herein China sees the eventual result of financialisation.

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[52] Epstein, Gerald, "Financialization, Rentier Interests, and Central Bank Policy", Paper prepared for PERI Conference on "Financialization of the World Economy", December 7-8, 2001, University of Massachusetts, Amherst, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.372.2039&rep=rep1&type=pdf

[53] Streeck, Wolfgang, "How Will Capitalism End?", *from* New Left Review 87, May-June 2014, London, and

Mair, Peter, Ruling the Void: The Hollowing of Western Democracy, Verso Books, London, 2013

[54] King, p. 362

[55] Tobin, p.351

Guaranteeing the Right to Defence Counsel in Estonian Criminal Proceedings: the Estonian System of Defence Counsels

Anneli Soo[1]

Annotation: The aim of this article is to introduce the system of Estonian defence counsels as well as analyse problems it currently faces. As repeatedly stressed by the European Court of Human Rights, the right to counsel has a prominent status in criminal proceedings. In Estonia, accused persons may either hire counsel or counsel is appointed by the state. The system of state legal aid is operated by the Estonian Bar Association, which appoints counsels among its members, advocates. While only advocates may be appointed counsels, retained counsel may be any person with legal education by permission of the body conducting the proceedings – the court, the investigative body, or the Prosecutor's Office. The Supreme Court of Estonia has emphasised that the body conducting proceedings may withdraw its consent if it turns out that the person does not have enough knowledge about Estonian criminal proceedings or criminal law. In addition, several grounds exist for the removal of both advocates and non-advocates. This is a controversial subject, as an accused has the right to have his chosen counsel by his side throughout the whole proceedings. Also, in state legal aid it is preferable that counsel participates from the very beginning to the end of the proceedings. Yet in some cases the court's failure to remove counsel may violate the accused person's rights. In Estonian law, there are three grounds for removal, two of which – conflict of interests, and ineffectiveness of defence counsel – have a practical meaning.

Keywords: right to counsel, retained counsel, appointed counsel, Estonian criminal proceedings, counsel in Estonian criminal proceedings, removal of counsel, state legal aid, Estonian Bar Association, advocate, ineffective defence

Introduction

The main purpose of this article is to describe the system of defence counsels in Estonian criminal proceedings and to introduce the problems it has faced in previous years as well as the ones it currently faces. Firstly, the article focuses on giving an overview of the existing system to inform the foreign reader on how the right to counsel is guaranteed in practice in Estonia. Secondly, it explains the difficulties the system has faced or is facing and makes some suggestions to overcome these difficulties, which could be interesting for both foreign and local readers. In order to achieve these goals, the article follows the structure described below.

Principles related to the participation of counsels in criminal proceedings are described in the first chapter. As there are two types of defence counsels in Estonian criminal proceedings – retained and appointed (state legal aid) ones – first the difference between these two is described. The conditions of becoming either retained or appointed counsel are described. Secondly, the phases of criminal proceedings during which counsel is allowed to enter the proceedings, and during which his participation is mandatory, are defined. Finally, the overview is given on actions that defence counsels are allowed to or are obliged to perform to serve their purpose as diligent defence counsels. The second chapter focuses on the system of state legal aid in Estonia. Here the system is both described and analysed, as the main difficulties it has faced or is facing are introduced to the reader. The third chapter is devoted to one of the most intriguing subjects related to defence counsels – the removal of counsel from the proceedings, therefore, it discusses the existing grounds for removal of both retained and appointed counsels. It is explained when the courts are allowed to end a continuous relationship between counsel and the accused and order counsel to leave the proceedings.

In every chapter, the relevant Estonian legal acts are mentioned, and judicial practice of the Supreme Court of Estonia (SCE) is explained and discussed. In addition, corresponding case law of the European Court of Human Rights (ECtHR) is also introduced and analysed.

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1. How the right to counsel is guaranteed in Estonia – participation of defence counsels in Estonian criminal proceedings

1.1. Retained and appointed counsels

In Estonia, as in many other legal systems, counsel may participate in criminal proceedings on two bases: on agreement with the client (retained counsel) or on appointment by a competent authority (appointed counsel/state legal aid counsel). Whereas the conclusion of a contract with counsel imposes an obligation on the person being defended to pay for the counsel's services, state appointed counsel provides services to the person being defended free of charge, at least during the proceedings.[2] Only advocates who are members of the Estonian Bar Association[3] may serve as appointed counsels. The circle of potential retained counsels is much wider: both advocates and persons who meet certain educational requirements (i.e. have a Master's degree in the field of law or a qualification equal to it) could serve as one. Due to the fact that one has to pass an exam during which his professional knowledge and personal characteristics are verified before he could become an advocate, no further conditions are set for an advocate to participate as counsel in criminal proceedings. Non-advocates with legal education have to receive permission from the body conducting the proceedings[4] to serve as retained counsel.

Therefore, accused[5] persons' right to choose counsel is limited in Estonia to advocates as appointed counsels, and to advocates and other persons with legal education with permission of the body conducting proceedings as retained counsels. Regulations concerning the qualification of lawyers are permissible according to the case law of the ECtHR[6], as the wishes of the accused can be overridden when 'there are relevant and sufficient grounds for holding that this is necessary in the interests of justice'.[7] Taking into account that counsel serves as a legal advisor to an accused in criminal proceedings, it is reasonable to limit a choice of counsels to persons with legal education. Otherwise, the rights of accused persons might be left unprotected, as counsel with no legal education does not have knowledge and skills to exercise them properly. The market of retained counsels is left open not only to advocates but also to other persons with legal education with an aim to enhance competition. There are around 980 advocates in Estonia at the moment.[8] Most of them are not specialised in criminal law and prefer civil cases. Therefore, if the circle of retained counsels were limited to advocates, accused persons in a country of nearly 1.3 million inhabitants would have a very limited choice of counsels. In addition, there would be a chance that due to workload, advocates would not be able to handle all criminal cases. Non-advocates with legal education and, therefore, presumably adequate knowledge of law serve as an additional option for accused persons. Whether it is reasonable to limit the circle of appointed counsels to the members of the Bar is a whole different subject and will be discussed in the second chapter of this article.

As it was determined, if a non-advocate with legal education wants to enter the proceedings as retained counsel, he always has to have consent from the body conducting proceedings. Even if this person receives consent from the body conducting proceedings, which means that the body conducting proceedings presumes that he is able to act as counsel, it does not mean that if he turns out to have poor knowledge of the law of criminal procedure or criminal law, he is allowed to continue to act as counsel. The SCE has repeatedly held that it is in the competence of the body conducting proceedings to permit such person to enter the proceedings as counsel and, therefore, it is in the body's competence to withdraw the permission. If the body conducting proceedings decides to withdraw its permission, it has to notify the accused and counsel, and give the accused an opportunity to choose another counsel.[9] The SCE has not considered such withdrawal to be a formal grounds for removal of counsel but just revocation of one's consent, which means that it could be done not only by courts, but also by investigative bodies and by the Prosecutor's Office, who are generally not allowed to remove counsels from criminal proceedings. The SCE reasons its position as follows. When the body conducting proceedings gives a person permission to participate in criminal proceedings as counsel, he verifies only whether the person meets qualification requirements or not (unless it has additional information about the person), because the body conducting proceedings usually does not know the person personally and, therefore, has no other facts to use for evaluating his competence. During the proceedings, the body conducting proceedings has a chance to monitor the person's actions and gain knowledge of his skills. Consequently, it is possible that the body conducting proceedings reaches the conclusion that the person lacks knowledge to act as counsel and, therefore, leaves the accused without defence. For that reason, it might be necessary to withdraw permission and give an accused a chance to choose another counsel.[10] Even if the accused rejects, it is important to notice that the right to choose

[2] Upon conviction the person has to remunerate at least part of legal costs. It will be further explained in the second chapter below.

[3] The Estonian Bar Association, founded on the 14th of June 1919, is a self-governing professional association which organises the provision of legal services in private and public interests and protects the professional rights of advocates. Since 1992 the Estonian Bar Association is a member of the International Bar Association (IBA) and since the 1st of May 2004 a full member of a body uniting the bar associations of the member states of the European Union (CCBE).

[4] Bodies conducting proceedings are the courts, the Prosecutors' Office and the investigative bodies.

[5] In this article the term 'accused' is used unless there is a need to make a distinction between the accused and the suspect.

[6] *Mayzit v Russia* App no 63378/00 (ECtHR, 20 January 2005) p 66

[7] *Croissant v Germany* App no 13611/88 (ECtHR, 25 September 1992) p 29

[8] https://www.advokatuur.ee/eng/frontpage> accessed 12 October 2016

[9] Court Ruling of the Criminal Chamber of the Supreme Court, 27 April 2006, court case no 3-1-1-37-06, p 7.3; Court Ruling of the Criminal Chamber of the Supreme Court, 2 August 2010, court case no 3-1-1-61-10, p 7

[10] Court Ruling of the Criminal Chamber of the Supreme Court, 2 August 2010, court case no 3-1-1-61-10, p 8

counsel is not just the accused's personal matter: the court has to make sure that counsel actually fulfils his purpose.[11] As it has also been stated by the ECtHR – the rights that are guaranteed to the accused must not be theoretical or illusory but practical and effective.[12] Therefore, when the state authority notices a counsel's manifest incompetence, it has to intervene.[13] This is a principle the SCE has followed by stating that the body conducting proceedings has the competence to withdraw its previously given consent from a non-advocate to participate as counsel in criminal proceedings.

Although there is no statistical data about how many cases non-advocates serve as counsels in per year in Estonian criminal proceedings, it is assumed that it is in no more than 10% of all criminal cases. Also, there is no information that bodies conducting proceedings have misused their power by arbitrarily not giving consent or withdrawing the consent to participate. The most important case that reached the SCE (case no -1-1-61-10 cited above) involved a foreign non-advocate, who had received the consent from the court to participate as counsel. The consent was withdrawn afterwards due to the fact that although he had legal education, it was received abroad, and he did not have any knowledge on Estonian legislative acts. In that case, the SCE justly concluded that withdrawal was justified as the accused was left without defence due to his counsel's incompetence.

1.2. The stages counsel enters the proceedings

According to the Estonian Code of Criminal Procedure[14] (CCP) § 45 (1), counsel may participate in criminal proceedings from the moment a person acquires the status of a suspect. A suspect is a person who has been detained on suspicion of a criminal offence or a person whom there is sufficient basis to suspect of committing a criminal offence and who is subject to any other procedural act (CCP § 33 (1). As according to § 47 (1) 6) counsel has a right to participate in the investigative activities carried out in the presence of the person being defended during the pre-trial proceeding (incl. interrogation), the judgment of the ECtHR *Salduz v. Turkey*[15] did not change anything in Estonian interrogation rules, unlike in many other European countries.[16] Also, the CCP does not provide any restrictions on the participation of counsel during interrogation of the suspect in pre-trial proceedings, which means that in Estonia the right to have counsel present in pre-trial proceedings is an absolute one, unless the suspect himself agrees to participate without counsel.[17] In that sense, the CCP is in accordance with the EU's Directive 2013/48/EU *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*[18] Article 3, which allows the state to temporarily limit the accused person's access to a lawyer in pre-trial proceedings only in exceptional cases.

Participation of counsel in a pre-trial proceeding is mandatory from the presentation of the criminal file for examination to counsel, which means that when the Prosecutor's Office declares a pre-trial proceeding completed, it gives a copy of the criminal file to the defence counsel, who introduces it to the suspect (CCP § 45 (3), § 223 (3) § 224 and § 2241). Therefore, by the time the suspect acquires the status of the accused, participation of counsel is mandatory.[19] In some cases, participation of counsel is mandatory throughout the criminal proceedings (e.g., if at the time of committing the criminal offence the accused was a minor). The fact that the participation of counsel is mandatory means that the accused has no right to defend himself in person. Here the legislator has determined that in court proceedings and in some cases in pre-trial proceedings participation of counsel is required in the interest of justice. As a result, if the accused has not chosen counsel himself, counsel is appointed to him even if he objects. However, if he has chosen counsel it could form a violation of the right to counsel if the counsel of his own choosing were denied access to him and instead the state legal aid counsel were appointed. The ECtHR has concluded that Article 6 of the European Convention on Human Rights[20] was violated in a case, where a minor had retained counsel but at one point he gave up his counsel's services.[21] The message was delivered to counsel by the authorities and counsel was not allowed to meet the accused to verify the accused's true will in the matter.

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[11] *Ibid*, p 10.1

[12] *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980) p 33

[13] *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989) p 65

[14] Code of Criminal Procedure *(Kriminaalmenetluse seadustik)*, passed 12 February 2003, entered into force 1 July 2004, last amended 1 September 2016 – RT I, 20.05.2016, 7, available in English at <https://www.riigiteataja.ee/en/eli/531052016002/consolide> accessed 12 October 2016

[15] *Salduz v Turkey* App no 36391/02 (ECtHR, 27 Nov 2008)

[16] Jaan Ginter, Anneli Soo 'The Right of the Suspect to Counsel in Pre-trial Criminal Proceedings, its Content, and the Extent of Application' (2012) 19 Juridica International 170, p 172

[17] *Ibid*, p 178

[18] OJ L 294, 6.11.2013, pp 1–12

[19] According to § 35 (1) of the CCP the accused is a person with regard to whom the Prosecutor's Office has prepared a statement of charges or a person with whom an agreement has been entered in settlement proceedings, which is an Estonian version of plea-bargaining.

[20] European Convention on Human Rights and Fundamental Freedoms – RT II 1996, 11/12, 34 entered into force in respect of Estonia 16 April 1996

After waving the counsel's services, the accused confessed his guilt at the presence of a counsel appointed by the authorities, although he had denied his involvement in the crime before. The ECtHR was not satisfied that the accused's wish to replace counsel of his own choosing could be considered genuine in the circumstances of the case, and therefore concluded an infringement of the accused person's right to defend himself through legal assistance of his own choosing.[22] Although the Court indicated in its judgment that reopening the case would be a proper remedy for the accused, the SCE refused to do it based on an argument that the violation itself occurred in pre-trial stage of the proceedings and did not concern the body of evidence as a whole.[23] This finding has been strongly criticised by the author of this article because most of the evidence against the accused was gathered based on information gained from an unlawful confession, which means that without new evaluation of evidence by the court the violation of the accused person's rights was never cured.[24]

With some exceptions, participation of counsel in an Estonian court proceeding is always mandatory. It is justified by the argument that the accused as a layperson is not able to defend himself effectively. He does not have sufficient understanding of how to exercise his rights as well as knowledge about the laws in force. In addition, he is not objective as he is the one who is accused of committing the crime and his subjectivity may prevent him from making reasonable choices.[25] Estonian law rests on these presumptions and only in rare cases a person is allowed to defend himself in court proceedings. Therefore, the law also strictly determines that if counsel fails to appear in a court session when his participation is mandatory, the court hearing is adjourned (§ 270 (2) of the CCP). If despite everything a court proceeding is conducted without the participation of counsel, which is material violation of criminal procedural law pursuant to § 339 (1) 3) of the CCP, the court judgment is annulled by the higher court and the case is tried again. This applies also to those cases in which participation of counsel has not been mandatory according to CCP § 45 (4), but the court has not determined whether the accused is able to represent his interests himself.[26] According to the judicial practice of the SCE, violation of the accused person's right to counsel in pre-trial proceedings in case participation of counsel is mandatory results in the prohibition of using evidence gathered as a result of this violation against him.[27] However, as it was mentioned above, this applies to the pieces of evidence that are a direct result of the violation, not the evidence gathered based on the information received from the unlawful piece of evidence.[28]

1.3. Counsels' rights and obligations in criminal proceedings

According to the CCP § 16 (2), counsel, as well as the person he is defending, are participants in the proceedings. Counsel is also the party to a court proceeding when the proceedings reach the trial stage (CCP § 17 (1)). In relation to these clauses, the SCE has emphasised that although the duty of counsel is to act in the proceedings in the interests of the accused, at the same time he is not a representative of the accused, but an independent party to a (court) proceeding. Hence, the duty of counsel is to act in the interests of the accused even if the accused does not understand the need to act.[29] It is an extremely important standpoint when it comes to the question of whether counsel has been effective in the proceedings: effectiveness does not always mean that counsel has to follow the accused party's instructions. It might be that the accused as a layperson does not understand the need to act or stay passive as his knowledge on the rules and the course of criminal proceedings is usually rather limited. Nevertheless, in these situations counsel should act in the best interest of the accused, not according to his instructions. In order to retain a confidential and trusting relationship with the accused, counsel should still explain the reason behind his actions and decisions. The common understanding and also an ethical rule of the Bar Association is, however, that although counsel is not bound by the position of his client when rendering a legal opinion on the accusations made against his client, he is bound to the client's position if the client denies the accusations made against him.[30]

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[21] *Martin v Estonia* App no 35985/09 (ECtHR, 30 May 2013)

[22] *Ibid*, p 93

[23] Court Decision of the Criminal Chamber of the Supreme Court, 29 September 2014, court case no 3-1-2-2-14, pp 11-12

[24] Anneli Soo, 'The Right to Choose Counsel in Pre-Trial Stage of Criminal Proceedings and Consequences of its Violation by Example of the Decision of Estonian Supreme Court No. 3-1-2-2-14' (2015) 23 Juridica International pp 124-132

[25] Stefan Trechsel *'Human Rights in Criminal Proceedings'* (Oxford University Press 2005) pp 244-247

[26] Eerik Kergandberg, Priit Pikamäe. *'Code of Criminal Procedure. Commented Edition'* (Kriminaalmenetluse seadustik. Kommenteeritud väljaanne) (Juura 2009) Article 339 commentary 5.3

[27] Court Decision of the Criminal Chamber of the Supreme Court, 29 September 2014, court case no 3-1-2-2-14

[28] Anneli Soo, 'The Right to Choose Counsel in Pre-Trial Stage of Criminal Proceedings and Consequences of its Violation by Example of the Decision of Estonian Supreme Court No. 3-1-2-2-14' (2015) 23 Juridica International 23 Juridica International pp 124-132

[29] Judgment of the Constitutional Review Chamber of the Supreme Court, 18 June 2010, court case no 3-4-1-5-10, p 57, <http://www.nc.ee/?id=1176> accessed 12 October 2016

[30] Code of Conduct of the Estonian Bar Association *(Eesti Advokatuuri Eetikakoodeks)*, adopted on 8 April 1999 by the General Assembly of the Estonian Bar Association, amended on 5 May 2005, 13 March 2007, 21 February 2008 and 1 March 2013 by the General Assembly of the Estonian Bar Association, <https://www.advokatuur.ee/eng/internal-rules/code-of-conduct> accessed 12 October 2016, § 19 (3)

In Estonian criminal proceedings pursuant to § 47 (2) of the CCP, counsel is required to use all means and methods of defence that are not prohibited by law in order to ascertain the facts that either vindicate the person being defended, prove his innocence, or mitigate his punishment, and to provide other legal assistance necessary in a criminal matter to the person being defended. Therefore, it could be concluded that counsel is bound only by law and relevant court practice in the course of fulfilling his duties.[31] In addition, counsel also has to consider instructions given by the accused, unless these instructions are against the accused person's interests, as it was discussed above. Counsel has to follow the lawful orders of courts and other bodies conducting proceedings, but only if these orders concern procedural issues, e.g., deadlines, etc. In any case, these bodies are not allowed to intervene in the counsel's tactical choices. More specific obligations of counsels include an obligation to participate in the proceedings whenever it is compulsory,[32] to have knowledge of the case,[33] and to remain confidential (§ 47 (3) of the CCP). These are the only specific guidelines the CCP provides to counsels. Counsels that are advocates also have to follow the Code of Conduct of the Estonian Bar Association and state legal aid counsels' guidelines, mentioned in the next chapter of this article. From the case law of the CCP, it could be concluded that although non-advocates are not members of the Bar and legal acts of the Bar do not apply to them directly, some general rules for their conduct could still be derived from the Bar's acts, although it is definitely not clear which ones.[34]

In order to fulfil the duty provided for in § 47 (2) of the CCP, counsel has a number of rights, including the right to submit evidence (CCP, § 47 (1) 2)); submit requests and complaints (CCP, § 47 (1) 3)); upon the completion of pre-trial investigation, examine all materials in the criminal file (CCP, § 47 (1) 7)); and confer with the person being defended without the presence of other persons for an unlimited number of times with unlimited duration, unless a different duration of the conference is provided for in the CCP (CCP, § 47 (1) 8)).[35] As a party to a court proceeding, counsel has the right to question the accused (CCP, § 293 (3)) and examine a victim and a witness in a cross-examination (CCP, § 288). If counsel is not allowed to examine a person who gives testimony against a person being defended, it can lead to the violation of the right to a fair trial.[36] The SCE has held that the duties of counsel not only consist of assisting the accused with composing an appeal against the decision or ruling of the court. Counsel also has to ascertain the position of the accused and to file an appeal that considers the accused person's interests and is in accordance with requirements provided by the law.[37] This is in accordance with the above-mentioned standpoints that although counsel is an independent subject in the criminal proceedings, he has to follow the accused party's instructions whenever possible.

When the Prosecutor's Office declares a pre-trial proceeding completed, it gives a copy of the criminal file to the criminal defence counsel and submits the criminal file for examination (CCP § 223 (3)). Pursuant to § 224^1 (1) of the CCP, it is the task of counsel to introduce the criminal file to the person being defended. If the Prosecutor's Office has submitted a criminal file for examination and is convinced that the necessary evidence in the criminal matter has been collected, it prepares the statement of charges and sends it together with the a list of persons to be summoned to a court session at the request of the Prosecutor's Office to the accused and counsel (CCP, § 226 (1), (2) and (3)). After receiving a copy of the statement of charges, counsel prepares the statement of defence and submits it within a time period set by the law (CCP, § 227 (1)). In the statement of defence, counsel has to set out: his position on the statement of charges (CCP, § 227 (3) 1)); evidence that counsel wishes to present and what counsel aims to prove with every single piece of evidence (CCP, §227 (3) 2)); a list of the persons whom counsel requests to be summoned to a court session (CCP, § 227 (3) 3)); and other requests (CCP, § 227 (3) 4)). The purpose of preparing the statement of defence is to guarantee equality of arms and to conduct a court proceeding that is better prepared and, therefore, speedier.[38] If the matter is solved in simplified proceedings, the statement of defence is not composed, as simplified proceedings do not have an adversary nature. However, if the case is conducted in general proceedings, the obligation to prepare the statement of defence is one of the most important obligations that the counsel has as, in general, the court will only admit the evidence listed in the statement. Therefore, if counsel tries to present additional evidence during the court proceeding, the probability is high that the court will not accept these pieces of evidence.[39]

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[31] Anneli Soo, 'An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?' (2010) 16 Juridica International 252, p 253.

[32] For instance, § 270 (2) of the CCP provides that if a counsel fails to appear in a court session, the court hearing is adjourned.

[33] For instance, § 273 (4) of the CCP provides that if a counsel is not familiar with the criminal matter, the court may adjourn the court session for up to ten days.

[34] Court Decision of the Criminal Chamber of the Supreme Court, 17 March 2010, court case no 3-1-1-7-10 in which the court concluded that a construction worker who does not belong to a professional association still has to follow the professional rules of this association if these rules come from a common knowledge (e.g, rules about how thick a chimney has to be in order to be fireproof).

[35] According to § 34 (2) of the CCP, conference between the accused and his/her counsel may be interrupted for the performance of a procedural act if the conference has lasted for more than one hour.

[36] Meris Sillaots 'Cross-Examination in Estonian Court Proceeding' *(Ristküsitlusest Eesti kriminaalkohtumenetluses)* (2005) 3 Juridica 170, pp 170-171

[37] Court Ruling of the Criminal Chamber of the Supreme Court, 17 February 2010, court case no 3-1-1-9-10, p 9

[38] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts, 599 SE, 11th Riigikogu, <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=793874&u=20130506160423> accessed 12 October 2016

[39] Eerik Kergandberg, Priit Pikamäe. *'Code of Criminal Procedure. Commented Edition'* (Kriminaalmenetluse seadustik. Kommenteeritud väljaanne) (Juura 2009) Article 227 commentaries 2.1. and 3

Counsel has an independent and very important role in Estonian criminal proceedings. By advising the accused as a legal professional, counsel balances the power of the prosecution's side. This, on the one hand, helps to ensure that the rights of the accused are guaranteed throughout the whole proceeding. On the one hand, it also means that the accused is dependant on the competence of a certain counsel. For instance, counsel may give bad advice to the suspect during the interrogation, which might lead to a conviction of the person in latter stages of the criminal proceedings. Counsel might fail to introduce the criminal file to the accused and, therefore, leave the accused uninformed about the development of the case. Counsel might also fail to compose the statement of defence on time, which may cause latter objection of evidence by the court as was discussed above. Or counsel may fail to question a witness adequately, as a result of which necessary information is not revealed. These and many other potential mistakes show how important it is for the accused to have a competent, effectively working counsel by his side. Chapter three of this article gives an overview of what the Estonian courts can do when they notice that counsel is defending the accused inadequately or ineffectively.

2. System of state legal aid in Estonia

2.1. The system operated by the Bar and carried out by its members

As it was already mentioned, only advocates may participate in criminal proceedings as appointed counsels. Appointed counsel enters the criminal proceedings when he is appointed by the Estonian Bar Association at the request of the body conducting proceedings. Before the 1 January 2010, counsel was appointed by the body conducting the proceedings. This caused quite a few problems; for instance, counsel who was convenient, likable, etc., for the body conducting proceedings was appointed (this problem arose especially with prosecutors).[40] This, of course, raised the question of whether the quality of assistance rendered by the state legal aid counsels met the standard determined by the ECtHR, as the aim of counsel in criminal proceedings is to assist the accused and not to please the body conducting proceedings. To avoid this kind of problems, legal aid counsels are now appointed by the Bar Association. State Legal Aid Act [41] (SLAA) § 18 (2) very clearly provides that the body conducting proceedings has no right to appoint counsel anymore. While on the one hand this ensures that the body conducting proceedings cannot appoint an advocate who will make its job easy, it also leaves no possibility for the courts to exclude advocates who are known to provide ineffective assistance, which is the main shortcoming of the new system, together with problems related to funding of the system thoroughly described below.[42]

The provision of state legal aid is regulated by the SLAA. Appointed defence in criminal proceedings is one category of state legal aid (SLAA § 4 (3) 1)). It should be noted that although the ECtHR requires two conditions to be met – financial and legal one – for a person to qualify for the right to free legal aid,[43] the grounds for provision of legal aid by the state are broader in the CCP than required by the ECtHR case law. Namely, there is no consideration of the financial situation of an accused; rather, counsel is appointed either to any accused person who has not chosen counsel but has requested the appointment of counsel, or to one who has not requested counsel in a case where the participation of counsel is mandatory (CCP § 43 (1) 1) and 2); SLAA § 6 (2)). The latter means that counsel is appointed to the accused even if he wishes to defend himself.[44] Nevertheless, here the state acts based on the presumption that the interests of justice require the appointment of counsel. Only when a person wants to submit a petition for review,[45] in order to receive state legal aid this person has to be unable to pay for competent legal services due to his financial situation at the time that the person is in need of legal aid, if he is able to pay for legal services only partially or in instalments, or if the financial situation of this person does not allow meeting basic subsistence needs after paying for legal services (SLAA § 6 (1) and (5)). There is no reason to believe that this condition is discriminative towards people who want to file a review compared to so-called ordinary accused persons, as the petition procedure is not a criminal proceeding in its classical meaning due to the fact that then the court decision is already in force.

Since in Estonia a person's financial situation is irrelevant to his right to use the assistance of legal aid counsel in criminal proceedings, it is reasonable that upon conviction the person assumes the obligation to reimburse the costs of legal aid, from which he can be partially released only if his financial situation does not allow him to perform this obligation. Subsection § 180 (1) of the CCP provides that in case of conviction procedural expenses, which under § 175 (1) 4) of the CCP include remuneration for appointed counsel, are compensated by the convicted person. Pursuant to the first sentence of § 180 (3) of the CCP, when determining procedural expenses, the court has to take into account the financial situation and chances of re-socialisation of the convicted person. Pursuant to the second sentence of the same subsection, the court orders a part

[40] Estonian Ministry of Justice, Availability and Quality of Appointed Counsel in Criminal Proceedings, available only in Estonian <http://www.kriminaalpoliitika.ee/et/maaratud-kaitsja-kattesaadavus-ja-kvaliteet-kriminaalmenetluses> accessed 12 October 2016

[41] State Legal Aid Act, passed 28 June 2004, entered into force 1 March 2005, last amended 1 August 2016 – RT I, 22.06.2016, 27

[42] Anneli Soo, 'An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?') (2010) 16 Juridica International 252, p 253

[43] *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980) p 34

[44] See grounds for mandatory participation in paragraph 1.2 above.

[45] According to CCP § 365 (1) 'review procedure' means hearing of a petition for review by the SCE in order to decide on the resumption of proceedings in a criminal matter in which the court decision has entered into force.

of the expenses to be borne by the state if the convicted person is obviously unable to reimburse the procedural expenses. According to the judicial practice of the SCE, the court is not allowed to order all expenses to be borne by the state,[46] which means that the convicted person always has to reimburse a part of procedural expenses, even if it is just a small part. No one from Estonia has ever turned to the ECtHR to challenge this standpoint based on an argument that he does not have sufficient means to cover the legal aid costs after conviction. The matter itself is still unsolved in the case law of the ECtHR as it is not clear whether it is allowed for the state to require the accused upon conviction to pay the costs of state legal aid even if during the time legal aid was granted for him the state established that he was without sufficient means to hire counsel.[47] Therefore, until the ECtHR has not given a clear standpoint, Estonian courts are justified to continue with this practice and order procedural costs to be compensated even if a convicted person is in fact able to show that he did not have financial resources to hire counsel at the time counsel was appointed to him. Of course, in case of acquittal, procedural expenses are compensated by the state (§ 181 (1) of the CCP).

In practice, the appointment of counsel functions in the following way. The body conducting proceedings files a request to the Estonian Bar. The Estonian Bar enters the request into the electronic system of state legal aid (RIS), where advocates who are interested in providing state legal aid have registered themselves. The request is sent to all advocates who have been given consent to provide legal aid in a certain region of Estonia, and whoever acts quickest receives the task. In principle, when the advocate has given his consent to act as defence counsel in a certain case, he has to act as one until the final decision is made in the criminal proceedings (as the Estonian court system comprises of three instances, it can happen that the final decision is made at the SCE). The advocate is rarely appointed against his will – this could be done only if no one has accepted the request in RIS. In spite of that, some grounds for the change of a state legal aid provider do exist. First, according to SLAA § 20 (1) upon agreement of an advocate providing state legal aid and the recipient of state legal aid, legal services in the given matter may be provided to the person by another advocate, who grants his consent for the transfer of the obligation to provide state legal aid to him. This is, however, rarely allowed by the Bar Association as the Association does not want to promote the idea that the change of appointed counsel is an uncomplicated procedure: this may cause a number of problems as the accused persons who need state legal aid are often contradictory and difficult clients, who are too eager to change their counsel if they have an opportunity to do so. Secondly, there might also be cases in which a state legal aid advocate has been excluded from the Bar Association, disbarred or suspended from professional activities, has died or has a long-term illness. In such events, the Bar Association organises the appointment of a new provider of state legal aid (SLAA § 20 (3)). Thirdly, the advocate may also refuse to render legal aid services if the instructions of the accused are illegal (SLAA § 19 (1)) or if a conflict of interest arises (SLAA § 19 (2)).

All Estonian advocates, including the ones that render legal aid, have to follow the Code of Conduct of the Estonian Bar Association. According to the Code of Conduct § 4 (1), when rendering legal services, an advocate is obliged to observe the law, legal acts and the decisions of the Bar authorities, rules of professional conduct, as well as good practices and his conscience. The whole § 4 of the Code emphasises the independence of the profession, which is a principle also recognised by the ECtHR.[48] The Code of Conduct provides a number of rules that an advocate has to follow when communicating with his clients, the most important of which are mentioned here. First, an advocate must always act in the best interest of his client and must put those interests before his own interests or those of third parties (the Code of Conduct § 8 (1)). Second, an advocate is not allowed to accept an assignment unless he can discharge those instructions promptly, taking into account the pressure of other work, nor handle a matter, which he knows he is not competent to handle in the best interests of the client (the Code of Conduct § 12 (4)). Third, legal services rendered by the advocate must be professional and based on the investigation of underlying circumstances, evidence, legal acts and court practice (the Code of Conduct § 14 (2)). Therefore, it is established by several clauses of the Code of Conduct of the Estonian Bar Association that advocates have to act in the best interests of the accused and, in general, they are only bound by the law and ethics, which is how the independence of the Bar should be understood in the context of the Estonian legal system. As it was discussed above, in criminal proceedings an advocate does not have to follow the instructions of his client if these instructions are not in the interest of his client. Additionally, he is not obliged to follow the instructions of his client if these instructions are contrary to law (the Code of Conduct § 8 (2)). There are quite a few special rules for the advocates acting as counsels in criminal proceedings in the Code of Conduct. The most important of these rules has already been mentioned above, stating that if the client denies the accusations made against him the position of the client is binding for the advocate (the Code of Conduct § 19 (3)). As there is a lack of guidelines in the Code of Conduct for the advocates acting as defence counsels, the rest is up to the CCP and the conscience of the advocate to determine. In addition, the Estonian Bar Association has issued guidelines for the state legal aid counsels on how to act in criminal proceedings.[49] These guidelines are for internal use only and, therefore, not public, but contain a number of important obligations that the state legal aid counsel has in criminal proceedings: e.g., the obligation to know the facts of the case and the relevant law (basically repeating what the CCP provides); inform the accused about his rights and what he is accused of; consult with the accused, etc. In addition to instructing the advocates

[46] Court Ruling of the Criminal Chamber of the Supreme Court, 16 September 2010, court case no 3-1-1-76-10, p 8

[47] Harris, O'Boyle & Warrick *'Law of the European Convention on Human Rights'* (3rd edn, Oxford University Press 2014) p 479

[48] *Daud v Portugal* App no 22600/93 (ECtHR, 21 April 1998) p 40

[49] Guidelines for providing state legal aid in criminal proceedings *(Kriminaalmenetluses kaitsjana riigi õigusabi osutamise juhend)* adopted on 25 November 2014 by the Board of the Estonian Bar Association

who want to participate in criminal proceedings as counsels, these guidelines also serve as grounds for disciplinary actions in case a complaint is filed with the Estonian Bar Association concerning the poor performance of a defence counsel.

2.2. Problems related to the existing system

According to the Bar Association Act[50] § 64[1] (1), the organisation and provision of state legal aid is the responsibility of the Estonian Bar Association. Fees paid to advocates for providing state legal aid are approximately 2-3 times lower than average market prices.[51] In an opinion of the Estonian Ministry of Justice, it is the obligation of every member of the Bar to provide state legal aid at least in some amount in return for advantages that the state has given to the Bar members on the market. For instance, only members of the Bar have a right to use the title 'advocate,' since other people who want to provide legal aid are called just 'lawyers'. In addition, the organisation and operation of the Bar is legally regulated (including: the requirements a person has to meet and the exam he has to pass in order to become an advocate; the organisation of training for advocates; supervising the professional activities of the members of the Bar and their compliance with the requirements for professional ethics; professional liability insurance), which gives advocates a certain degree of credibility and a reputation much higher than the so-called lawyers have in society. This in turn gives advocates an opportunity to sell their services more easily and at higher prices. In addition, there are some advantages for advocates provided by the Estonian procedural codes.[52] Some of these exceptions are stipulated in the CCP for advocates as defence counsels. First, the advocate does not need the permission of the body conducting proceedings to participate in criminal proceedings as retained counsel. Second, if the accused wants to file an appeal in cassation or a petition for review he can do it only through an advocate.[53] Therefore, if the accused has a non-advocate as retained counsel in the previous stages of the court proceedings, he has to change him against an advocate if he wants to file an appeal in cassation or a petition for review. The ECtHR considers it permissible for the special rules to limit the accused persons' choice of lawyers to the members of the bar when appealing to higher courts.[54]

Although the state has no plan to open the market of state legal aid to non-advocates, from time to time lawyers who do not belong to the Bar have expressed their opinion that some of them would be willing to provide state legal aid even with the fee as low as it is today. One of the reasons for it might be that most lawyers who do not belong to the Bar do not earn as much as advocates offering private legal aid, so the difference between the state legal aid fee and their common market fee is not so dramatic. Although it might be an idea to consider, the author of this article sees at least three problems related to it. First, non-advocates have not passed the Bar exam, so their knowledge and skills in the field of criminal law have not been verified. This, as it was already mentioned, is the main reason they need to ask permission from the body conducting proceedings for acting as retained defence counsel in proceedings. Second, as they do not belong to the Bar, the Code of Ethics does not regulate their acts in proceedings. Of course, they still have to comply with the rules of the CCP and a number of commonly recognised ethical rules as it was discussed above, but still their action is much less regulated than that of the advocates. Third, they do not face disciplinary responsibility when they fail to fulfil their duties as counsel. This means that not only are they not sanctioned in these cases, but also their reputation remains untouched, as their failures are not made public by a disciplinary decision. Throughout the whole criminal proceeding, it has to be considered that advocates are members of the Bar Association. For instance, if the party to the court proceeding has requested for the removal of an advocate-counsel, the judge has to notify the Board of the Bar Association of the scheduled time for a proceeding for removal. The court has to notify the Board of the Bar Association also if counsel fails to present a statement of defence on time, if counsel fails to appear in a court session, if counsel appears at the court session, but is not familiar with the criminal matter or violates an order in the court room.[55] On the one hand, the notification is necessary for the Board of the Bar Association to decide about the commencement of disciplinary action. On the other hand, the fact that the law gives the court an obligation to inform the Bar about an advocate's failure to fulfil his duties disciplines advocates. Therefore, the existing system seems to be much safer for accused persons and more easily operable than the one in which non-advocates would provide state legal aid in addition to the advocates.

However, the main problem related to the existing system today does not concern the question 'who should provide legal aid?' but 'how to balance the quality of the system and the resources spent on the system?' Provision of state legal aid is financed from funds allocated from the state budget (SLAA § 30 (1)). The ECtHR has also confirmed that the obligation to grant free legal assistance lies on the state that may delegate the duty to operate the system to the local Bar Association.

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[50] Bar Association Act (*Advokatuuriseadus*), passed 21 March 2001, entered into force 19 April 2001, last amended 1 August 2016 – RT I, 22.06.2016, 23

[51] An hourly fee rate for state legal aid is at the moment usually 40 euros while private legal aid costs approx. 100-120 for an hour.

[52] The decree of the Ministry of Justice to the Estonian Bar Association, 11 Aug 2014

[53] CCP § 344 and § 367.

[54] *Meftah and Others v. France* App nos 32911/96, 35237/97 and 34595/97 (ECtHR, 26 July 2002)

[55] CCP § 56, § 227, § 267, § 270, § 273.

However, the ultimate responsibility for the functioning of the system is still on the state.[56] Two years ago a dispute started between the state and the Bar Association about whether the state has to raise the funding by the request of the Bar Association if the latter shows that it does not have sufficient means to pay competitive fees for the state legal aid counsels. The problem was that at that time the bases for calculating state legal aid provision fees, the procedure for the payment and the amount of such fees, and the extent of and procedure for compensation for the state legal aid costs were established by the Board of the Bar Association (SLAA § 21 (3)). Although today the Minister of Justice has to establish these bases as the law has changed (the reason for it will be explained below), in principle the system itself has not changed much. The Bar Association organises the payment of the state legal aid fee and state legal aid costs to an advocate who has provided state legal aid. An advocate is not allowed to request remuneration from a person being defended (SLAA § 24 (1) and (2)). In short, the payment of state legal aid fees to advocates functions like this: an advocate submits an application for compensation to the body conducting proceedings; the body conducting proceedings determines the amount of state legal aid fee and the extent of compensation for state legal aid costs; the court decision or an order of an investigative body or a Prosecutor's Office is sent to the Bar Association, and the payment is organised by the Bar Association.[57] A person to whom legal services have been provided has nothing to do with this procedure, and he has to compensate the state legal aid fee and state legal aid costs pursuant to the procedure prescribed in the CCP (SLAA § 25 (4)). As the funding itself has always come from the state budget, the actions of the Bar Association on establishing the exact fees for state legal aid were limited by the amount of finances given by the state. This means that even if the Bar Association observed that the fees it had established were considerably low compared to market prices (as it was already mentioned above, in Estonia the state legal aid fees are around half or one third of the average market price), it could not raise the fees unless the state raised the funding. The dispute between the Bar and the state mentioned above started when the Bar Association acted against this principle and raised the fees even though the state funding was not raised. This caused a lack of resources and the aforementioned dispute between the government and the Bar Association at administrative courts of Estonia.[58] The state, however, was of the position that the fees paid to advocates for providing state legal aid do not have to compete with the fees of the private market since the advocates have a duty to contribute to the state legal aid system in return for the advantages the state has given to the Bar. The state also argued that it is the obligation of every advocate (not only of the ones who have agreed themselves) to provide state legal aid, even pro bono if necessary. If an advocate is not willing to do that, he has the opportunity to leave the Bar.[59]

On 26 April 2016, the SCE en banc declared the situation in which the Bar has to establish the legal aid fees to its members unconstitutional, as such a mandate belongs constitutionally only to the Government.[60] As was stated above, now the law has changed and it is the Minister of Justice that establishes the bases for legal aid fees. However, this has not changed the fees, as the common hourly rate for providing legal aid is still 40 euros.

The dispute between the state and the Bar indicates an existential crisis that the state legal aid system is facing. According to estimations of the Bar, only 12.5% of its members provide state legal aid (approx. 100 advocates).[61] No signs indicate that these numbers will grow in future. At the same time, in 2014 nearly 14 000 people needed state legal aid (75% in criminal cases).[62] This means that advocates providing state legal aid are overburdened and, therefore, often ineffective. It can be easily assumed that until the fees are not raised, nothing will change in the system. Nevertheless, the state refuses to admit it, suggesting even that advocates should provide state legal aid *pro bono*, which in turn causes reluctance among advocates. Yet, as the final responsibility for operating the state legal aid system lies on the state, it should be a task of the state to motivate the members of the Bar to provide state legal aid effectively.[63]

3. How is the principle of continuous representation limited by removal of counsel from criminal proceedings?

In general, it is preferred that one counsel defends the accused throughout the whole proceeding. This gives the accused the best opportunity to defend his rights and interests, as counsel is well informed about the development of the case and, therefore, can build adequate defence tactics. The CCP supports this standpoint by stating that once appointed counsel has

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[56] *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983) p 29; Anneli Soo,'How to Ensure Effecive Legal Assistance by the State in Criminal Proceedings?' *(Kuidas tagada efekttivne riigi õigusabi kriminaalmenetluses)* (2014) 9 Juridica 700, p 705

[57] SLAA §§ 21-24.

[58] Overview of the case is unfortunately only available in Estonian: <https://advokatuur.ee/est/uudised.n/advokatuur-jatkab-riigi-oigusabi-rahastamise-kohtuvaidlust-ringkonnakohtus> accessed 12 October 2016

[59] The decree of the Ministry of Justice to the Estonian Bar Association, 11 Aug 2014

[60] Judgment of the Supreme Court *en banc*, 26 April 2016, court case no 3-1-1-40-15

[61] Mailis Meier *'Role of the Estonian Bar Association in Providing State Legal Aid in Criminal Proceedings'* (Eesti Advokatuuri roll riigi õigusabi pakkumises kriminaalmenetluses) (Research Paper, Tartu 2015), p 7

[62] <https://advokatuur.ee/est/uudised.n/advokatuur-esitas-justiitsministeeriumile-ettepanekud-riigi-oigusabi-susteemi-reformimiseks> accessed 12 October 2016

[63] Anneli Soo,'How to Ensure Effective Legal Assistance by the State in Criminal Proceedings?' *(Kuidas tagada efekttivne riigi õigusabi kriminaalmenetluses)* (2014) 9 Juridica 700, p 709

agreed to take the case, he has to participate in criminal proceedings up to the SCE, if necessary. For retained counsel, the situation depends on his agreement with the accused. Courts cannot intrude in the principle of continuous representation and remove counsels from the proceedings without compelling reasons. Estonian CCP names three grounds for the court that removes counsel to override the accused's wish (or interest) to continue with the same counsel.

First, the court has to remove counsel if a conflict of interests arises. More specifically, a person is not allowed to act as counsel if he is or has been a subject to criminal proceedings on another basis in the same criminal matter; or if in the same or related criminal matter he is defending or representing or has previously defended or represented another person whose interests are in conflict with the interests of the accused (CCP § 54 clauses 1)-2)). As the state and, therefore, the bodies conducting proceedings, including the courts, have a duty to guarantee the accused person's right to defence (CCP § 8 clause 2)), it can be concluded that in case of conflict of interest, the court should remove counsel from the proceedings even if the accused insists that counsel continues to represent him, because here the interests of justice outweigh the accused person's wishes. Consequently, the right to defence is not only a matter between the accused and counsel, but also serves the right to fair trial and society's expectation that the procedural rights are guaranteed in criminal proceedings.[64] Subsection § 55 (1) of the CCP, which provides procedural rules for removal of counsel in cases of conflict of interest, takes this into account and does not require the consent of the accused. It is highly probable that counsel is not able to represent conflicting interests equally effectively.[65]

Second, the court removes counsel if it becomes evident that counsel has abused his status in the proceedings by communicating with the person being defended, after the person has been detained as a suspect or arrested, in a manner which may promote the commission of another criminal offence or violation of the internal procedure rules of the custodial institution (CCP, § 55 (2)). As this basis for removal is hardly ever used in Estonia, it will not be further discussed here.

Third, if the basis provided for in § 20 (3^1) of the SLAA exists, the court removes counsel by a ruling on its own initiative or at the request of a party to the court proceeding (CCP, § 55 (1)). According to the first sentence of § 20 (3^1) of the SLAA, at the request of the accused or on its own initiative, the court removes an advocate from the provision of state legal aid by a ruling if the advocate has shown himself to be incompetent or negligent.

In Estonia before the 1 January 2009, the courts had very limited competence in removing ineffective (incompetent, negligent, etc.) counsel: they were only allowed to remove counsel if conflicts of interest arose and if counsel abused his procedural status in the proceedings. Today § 20 (3^1) of the SLAA together with § 55 (1) of the CCP enables the court, at the request of the accused or on its own initiative, to remove an advocate from the provision of state legal aid if the advocate has shown himself to be incompetent or negligent. What 'incompetent' or 'negligent' means is provided for neither in the SLAA nor in the CCP. This means that today courts' conclusion that counsel was 'incompetent' or 'negligent' is a result of a case-by-case analysis. From the case law of ECtHR, it could be concluded that the state is liable for violation of the right to counsel at least in cases in which counsel fails to act[66] or fails to comply with 'formal' but crucial procedural requirements.[67] However, so far the applicants who have claimed counsels' professional errors in presenting the their case have not been successful in the ECtHR.[68] The SCE held in its controversial decision that it cannot assess an appointed counsel's tactical choices and condemn a counsel's decision not to request an expert assessment before the prosecutor filed charges.[69] The court also added that if the accused is not satisfied with the assistance provided by his appointed counsel, he has the opportunity to choose retained counsel.[70] The last argument has to be objected, as an indigent accused is not able to do that due to his financial condition. As in Estonia the financial condition does not matter as it was discussed above, it can happen that counsel is appointed to a person who can actually afford to hire one, but has not done it on time. Nevertheless, it is a rare occasion and usually indigent accused persons receive state legal aid. Therefore, the standpoint of the SCE is not only illogical, but is also contrary to the finding of the ECtHR that it is the responsibility of the state to guarantee practical and effective rights. In court case no 3-1-1-70-10, the accused requested removal of appointed counsel, claiming that there has been a breakdown in the attorney-client relationship. The SCE concluded that there was no violation of the right to defence, because the case had already reached appellate proceedings and changing appointed counsel so late was not practical.[71] Although the SCE did not say it out loud, it could be derived from its judgment that when there is a breakdown of the attorney-client relationship, courts still have to consider and weigh different values (e.g. practicality and efficiency) before they decide whether to remove counsel or not. Yet, that way the accused person's right to counsel might be violated, as an

[64] Court Ruling of the Criminal Chamber of the Supreme Court, 29 January 2002, court case no 3-1-1-3-02, pp 7.2. and 7.3

[65] Even if counsel claims that the conflict does not affect his or her performance, he should be still removed in order to guarantee that the accused receives adequate and unbiased assistance, because another interest may either influence counsel subconsciously or, even if he thinks that at some specific point of the proceedings it does not affect him, it may start to have an effect on him afterwards.

[66] *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980)

[67] *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989), *Czekalla v Portugal* App no 38830/97) (ECtHR, 10 October 2002),

[68] Harris, O'Boyle & Warrick *'Law of the European Convention on Human Rights'* (3rd edn, Oxford University Press 2014) p 481-482

[69] Judgment of the Criminal Chamber of the Supreme Court, 21 December 1999, court case no 3-1-1-115-99, p 4

[70] P 4 of the judgment.

[71] Judgment of the Criminal Chamber of the Supreme Court, 15 November 2010, court case no 3-1-1-70-10, p 24

obligation to guarantee such a right does not depend on practical considerations. The ECtHR's aforementioned standpoint that the rights that are guaranteed to the accused must not be theoretical or illusory but practical and effective allows us to conclude that courts should guarantee the right to counsel at any point of the court proceedings.

Subsection 20 (3^1) of the SLAA entered into force in afore cited wording on 1 January 2010. Before that amendment § 20 (3^1), which was in force since 1 January 2009, required the consent of the accused if the court was planning to remove counsel. Today, as it is obvious from the wording of § 20 (3^1), no consent of the accused is needed, and the court is allowed to remove incompetent or negligent appointed counsel without consulting the accused and even if the accused is against it. This is consistent with the ECtHR case law limiting the accused person's choice of counsel if the interests of justice so require. The ECtHR has described the state's obligation to intervene if 'a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.'[72]

On 1 September 2011, § 267 (4^1) of the CCP entered into force. According to this subsection, a court may withdraw counsel from a procedure if the person is not capable of acting in court properly or has shown himself to be dishonest, incompetent or irresponsible in the court proceedings or if he has maliciously impeded the correct and speedy hearing of the criminal matter or has failed to comply with the order of a judge repeatedly. After withdrawal of counsel, the court immediately proposes the accused to choose another counsel within the term granted by the court (CCP, § 267 (4^2)). It is not clear what this "withdrawal" is. Formally it is not a basis for removal, because it has not been provided for in § 55 of the CCP, where all other bases for removal are. Not a word has been mentioned about this opportunity to withdraw counsel in the initial explanatory memorandum of the CCP or in the additional memorandum.[73] And last but not least, the heading of section 267 is "Measures applicable to persons who violate order in a court session". Therefore, although the formulation of § 267 (4^1) of the CCP seems to indicate that it enables the court to disqualify counsel from the proceedings indefinitely, the abovementioned arguments overturn this conclusion, which in turn means that this may be a temporary measure. Yet, as the court proposes the accused to choose another counsel after initial counsel is withdrawn, it could be claimed that it still is a permanent removal of counsel from the proceedings. Therefore, it can be assumed that criminal courts in Estonia may remove not only state legal aid counsels but also retained counsels (even an advocate counsel) from the proceedings if ineffectiveness of counsel arises. And what is more, courts may do that even without consent of the accused. The same principle could in fact be detected from the case law of the ECtHR, as the Court has concluded that it is the state's obligation to guarantee the right to counsel not only in state legal aid cases but also in case the accused has retained counsel.[74] Similar problems are related to the pre-trial situation, in which counsel has failed to compose the statement of defence on time. The law determines that in that case the court obliges the accused to choose new counsel or asks the Bar Association to appoint substitute counsel to the accused (CCP, § 227 (5)). Although according to the law it is obligatory for the court to act that way, it might not be in accordance to the accused person's right to choose one's counsel as well as with the aim to save resources if the impediment to compose the statement of defence was temporary for the previous counsel.

Ineffectiveness of counsel may bring other consequences than removal of counsel from the proceedings. For instance, the court session may be adjourned, the court may give additional time for counsel to prepare, make remarks to counsel, send notification to the Bar, etc. According to former Estonian judicial practice, if counsel failed to file a notice of appeal or the appeal itself to the higher court, the accused lost the opportunity to appeal, unless there was grounds for restoration of the term of appeal, which according to judicial practice of the SCE is objective impediment, for instance, a natural disaster, traffic accident, illness of counsel, etc.[75] The situation has changed due to the judgment of ECtHR in case *Andreyev v Estonia*[76], where the ECtHR held violation of Article 6 (1) of the European Convention on Human Rights, due to the fact that the accused missed his opportunity to access the higher court (the SCE), because his appointed counsel did not file an appeal on time. The standpoint of the ECtHR was that in cases like that, the accused should be given a chance to file a new appeal through another, this time effective counsel, which the SCE has done lately in cases no. 3-1-2-2-12 and 3-1-2-3-13.[77] However, it is not clear from the wording of the judgment of the ECtHR whether this standpoint also applies to retained counsels. Taking into account the findings of the *Goddi v Italy*, it could be argued that it does, although the SCE has so far given a new opportunity to appeal only to accused persons who have had state legal aid counsels. As so far no accused person has turned to the SCE claiming that his retained counsel failed to file an appeal, so there is no relevant court practice concerning the matter.

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[72] *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989) p 65

[73] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts, 599 SE, 11th Riigikogu

[74] *Goddi v Italy* App no 8966/80 (ECtHR, 8 April1984)

[75] Court Ruling of the Criminal Chamber of the Supreme Court, 12 February 2007, court case no 3-1-1-5-07, p 6.

[76] *Andreyev v. Estonia* App no 48132/07 (ECtHR, 22 November 2011)

[77] Court Ruling of the Criminal Chamber of the Supreme Court, 9 May 2012, court case no 3-1-1-2-2-12, Court Ruling of the Criminal Chamber of the Supreme Court, 14 March 2013, court case no 3-1-2-3-13

Conclusion

In Estonia, there are two grounds for defence counsel to participate in criminal proceedings: they are either retained or provide state legal aid. Retained counsel could be every person that meets educational requirements and is allowed into proceedings by an investigator, prosecutor or court, unless counsel is a member of the Estonian Bar Association, in which case he does not need the consent of authorities. Initially given consent is withdrawable if an investigator, a prosecutor or the court determines that a non-advocate lacks knowledge in Estonian (criminal) law or criminal procedure. State legal aid, however, is only provided by advocates, and members of the Bar who have taken an exam to attain membership. The right to state legal aid does not depend on the financial condition of the accused as it is guaranteed for every accused person who wishes counsel to participate and has not chosen one himself. The authorities also appoint counsel if the accused has not chosen one and participation is mandatory according to the law.

The system of appointment of counsels is operated in Estonia by the Bar. This means that the request for appointment of counsel is sent by the investigative body, the Prosecutor's Office or the court to the Bar, who appoints counsel among its members who have given their consent to provide legal aid. Therefore, the investigative body, the Prosecutor's Office or the court cannot appoint counsel that is convenient for them. Nevertheless, this also means that due to the fact that the Bar runs the legal aid system, the state has taken a standpoint contradictory to the findings of the European Court of Human Rights that it is the sole responsibility of the Bar to guarantee the right to legal aid. Therefore, the Estonian government is of the opinion that the Bar should operate the system effectively even if it lacks resources to pay competitive fees to its members for providing legal aid. The dispute between the state and the Bar found its solution in the judgment of the Supreme Court of Estonia judgment, according to which it is in the competence of the Government not of the Bar to establish the fees for state legal aid. However, this did not change the fees, which are still much lower than the market fees for providing legal services. This is a problem underestimated by the Estonian Government, although low fees make the provision of legal aid unattractive among the advocates, and negatively influence the quality of legal aid.

The Estonian Code of Criminal Procedure regulates the participation of defence counsel in criminal proceedings. The Code defines a counsel's rights and duties in criminal procedure, and grounds for removal of counsel by the court. Counsels who are members of the Bar Association also have to consider the rules defined by the Code of Conduct of the Estonian Bar Association. The activities of non-advocates are directly regulated only by the Code of Criminal Procedure, but some general duties could be derived from legislative acts of the Estonian Bar Association. The main grounds for removal of counsels are conflict of interests and ineffectiveness. While the first is rather clear, the second needs to be specified by the court practice. First, there is no clear understanding of what constitutes ineffectiveness (also named negligence, incompetence) of defence counsel, as it seems to be a matter of case-by-case analysis. Second, it is grounds for removal for appointed counsels, but the law is ambiguous when it comes to retained counsels, as it could also be claimed that for retained counsels this is just a temporary measure.

Generally, it could be concluded that the Estonian system of participation of defence counsels in criminal proceedings meets the criteria set by the ECtHR. First, as the financial condition does not exist for state legal aid, Estonia provides legal aid even on wider grounds than those required by the ECtHR. Second, limitations to persons who are allowed to participate in criminal proceedings as counsels (e.g., legal education for retained counsel; membership of the Bar in the area of state legal aid) consider both the interest of the accused and of justice. Third, when it comes to removal of counsel due to the conflict of interests or counsel's ineffectiveness or incompetence, the consent of the accused is not required, as it is the obligation of the state to guarantee the right to counsel to be practical and effective, not theoretical and illusory. The main problem the Estonian system of defence counsels faces is a lack of resources for fees of appointed counsels. This, however, is primarily a matter of state policy, not law.

The Principle of Procedural Economy in the Estonian Civil Procedure

Mare Merimaa

1. Introduction

In recent years, more and more attention has been paid in the European Union to making procedure simpler, faster and more efficient.

In his report at the XIII plenary meeting of judges on 14 February 2014 in Tartu, Chief Justice of the Supreme Court Priit Pikamäe aptly pointed out that "One ghost wanders around the post-modern legal culture space – the ghost of efficiency. As the progressiveness of different court procedures is more and more assessed by their efficiency, i.e. effectiveness, the court system of the post-modern age as a whole must first and foremost be efficient. This means that in terms of the public resource allocated for it, the court system must be able to provide an even greater number of resolved court cases using as little procedural time as possible. As a rule, court administration strategy documents do not focus on the ways to achieve a just decision, but on increasing the efficiency of the court system during hearings. Obviously, this poses a separate interesting and intriguing public law question of why out of all the state authority branches efficient operation is expected first and foremost from the judicial authority, while in case of enforcement and legislative authorities this category is not emphasised to at least a similar extent."[1]

Additional monetary resources are allocated for the court system in order to increase the efficiency of procedures, the speed of making court decisions and completing enforcement documents. In civil procedure, the principle of procedural economy has obtained a significant meaning, while this principle is not separately highlighted in civil procedural law. This article presents an overview of the substance, goal and meaning of the principle of procedural economy. However, as there are many other important civil procedure principles, other than procedural economy, which aim to ensure the fair and just administration of justice, the author considered it necessary to discuss them as well.

2. Impact of European Union Law on the Civil Procedure of the Member States

There have been a number of discussions regarding the place and significance of civil procedural law among legal professionals. The object of the debate has been the question of whether procedural law is a science at all, what the relations between substantive law and procedural law are, and what the aim of procedural law is.

Civil procedural law as an independent science is a relatively young branch of science, and it is considered to have been born in the second half of the 19th century. Before that civil procedure was a part of civil law. Civil procedure is not just resolving a dispute – it consists of a set of actions taking place in a predetermined order between the parties and the court; a procedural legal relationship emerges with the aim of settling substantive legal disputes. Civil procedural law as a social phenomenon has been addressed from the procedural, philosophical (the question of law and justice) and legal policy standpoint.

Estonian civil procedural law has been influenced by Roman law, as well as by development of civil procedure in other states, such as Germany, Italy, France and Russia, and also by the European Union law due to the accession to the European Union.[2]

Uno Lõhmus, a former judge of the European Court of Justice, has expressed an opinion that the formation of the court system (institutional autonomy) and establishment of procedural rules (procedural autonomy) belongs to the competence of the Member States, however, the established rules cannot be less beneficial than the rules used for resolution of equivalent internal situations, and they cannot make it impossible or harder to use the rights provided by the European Union law.[3] Formation of the procedural autonomy principle belongs to the Member States of the European Union, however, counter-arguments have also been voiced with respect to this issue.[4]

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[1] Report of Chief Justice of the Supreme Court Priit Pikamäe at the XIII plenary meeting of judges on

14 February 2014 in Tartu. Law and Development of the Court System. Internet: http:// www. riigikohus.ee

(04.04.2016)

[2] M. Merimaa. Menetluse põhimõtted ja tõendamine tsiviilkohtumenetluses. Akadeemia Nord. Tallinn 2008, p. 16.

[3] U. Lõhmus. Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime? Juridica 3, 2007, p 143-154

[4] B. Hofstötter. Non-Compliance of National Court. Remedies in European Community Law and Beyond. T.M.S. Asser Press, The Hague 2006 (referred: U. Lõhmus. Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime? Juridica, 3 ,2007, pp. 143-154)

The presence of a limitation to the procedural autonomy has been analysed by Risto Eerola, Tuomas Mylly and Püvi Saarinen, who stated that the principles of court and administrative procedure effective in the Community law limit the procedural autonomy of the Member States.[5]

In her previous research, the author of the present article has analysed recommendations of the Council of Ministers of the European Union that included individual instructions concerning the principles which a European Union Member State must be guided by in civil court procedures, including in appeal procedures[6], and came to the conclusion that European Union Member States do not have complete procedural autonomy.[7]

Subsequent development of European Union law has reaffirmed this. Namely, during recent years the European Union has adopted numerous legal acts with the aim of accelerating and simplifying the procedure in civil cases, as well as promoting the conclusion of compromises, and increasing the efficiency of cooperation between the Member States in the legal field.[8]

Nowadays the number of civil disputes with a cross-border effect, whose central issue is the establishment of international jurisdiction and the application of correct substantive law, has increased. Adoption of legal instruments that concern the designation of jurisdiction and the establishment of procedure for the recognition of court decisions in civil cases between persons located (residing) in the Member States belongs to the competence of the European Union.[9] It is emphasised in paragraph (6) of the preamble of Regulation (EU) No 1215/2012 of the European Parliament and of the Council that in order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.[10] The author considers it to be the right approach that with the entry into force of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on 10 January 2015 a court decision made in one Member State will be recognised in another Member State without a special procedure and that the procedure for the declaration of enforceability was abolished, which makes reaching a final result in cross-border litigation less time-consuming and costly.[11]

However, designation of the correct jurisdiction may cause legal disputes also in the future, which is proven by court practice, according to which questions have been addressed to the European Court of Justice through the preliminary ruling procedure in order to receive its clarifications.

3. Principle of Civil Procedure

Two questions that significant to civil procedure are: what principles are the basis for administering justice and what is the role of a judge in the procedure? There are two main approaches:

1. procedures are performed on the basis of the principle of investigation, in which case the role of the judge is active in ascertaining the circumstances and evidence;
2. adversarial procedure, in which the party must be active, including in the submission and collection of evidence.

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[5] R. Eerola, R. Mylly, P.Saarinen. Euroopa Liidu õigus, Tartu 2001, p.107.

[6] Recommendation No R (95) 5 of The Committee of Ministers to Member States Concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases. http://www.impresaitalia.info (10.03.2016)

[7] M. Merimaa. Menetluse põhimõtted ja tõendamine tsiviilkohtumenetluses. Akadeemia Nord. Tallinn 2008, p. 55

[8] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.-OJ L 199, 31.07.2007, pp. 1-22

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.- OJ L 399,30.12.2006, pp. 1-32

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.- OJ L 143,30.04.2004, pp. 15-39

[9] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.- OJ L 12, 16.01.2001, pp. 1-23

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.-OJ L 7,10.01.2009, pp. 1-79

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.-OJ L 338, 23.12.2007

[10] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.- OJ L 351,20.12.2012, pp. 1-32

[11] M.Torga. Brüssel I (uuesti sõnastatud) määrus: kas põhjalik muutus Eesti rahvusvahelises tsiviilkohtumenetluses. Juridica IV/2014, pp. 304-312

The so-called mixed or combined procedure is also known. There have been significant changes in the civil procedure of the Republic of Estonia. While the initial Code of Civil Procedure,[12] adopted and entered into force on 15 September 1993 as a part of the court reform, established the adversarial principle for the procedure concerning civil cases. In subsequent procedural legal norms, i.e. the Code of Civil Procedure, judges were given a more active role in ascertaining circumstances and collecting evidence.[13] The Civil Chamber of the Supreme Court has directed court practice towards the fulfilment of the court's duty to give explanations, i.e. to ascertain the object of action and basis of action, which also follows the aims of pre-trial proceedings stated in Article 392 of the Code of Civil Procedure. The aim of the duty to give explanations is to abide by the principle of procedural economy, which enables to set limits for the disputes and direct attention to the submission of relevant evidence already at the pre-trial proceedings, which eventually helps to resolve the case within a reasonable time.

In the German theory of law, it has been emphasised that a decision must not be a surprising one. The Civil Chamber of the Supreme Court has also referred to the same principle in its decisions. Judge Indrek Soots[14] has noted that the prohibition of the so-called surprising decision in the German theory of law is based on three grounds: ensuring the right to be heard in court, the right to a fair court procedure, and acceleration and concentration of the court procedure.[15] The author agrees with the abovementioned position that a decision must not be a surprising one for a party. If the court fulfils the duty to give explanations according to the legal requirements, it is possible for a party to the proceedings to use the rights provided by law in a timely manner. In the court of the first instance (i.e. in the county court) and in the court of appeal (i.e. in the circuit court), a party to a proceeding does not have to have a contractual representative. Due to changes in substantive and procedural norms, the procedure concerning civil cases has become relatively complex, and for parties of the procedure that do not possess legal knowledge it is difficult to defend their lawful interests and rights in a court without legal help. Therefore, the provision of Article 351 (1) of the Code of Civil Procedure that obliges the court to discuss the disputed facts and relationships with the participants to the proceeding to the necessary extent from both the factual and legal point of view is completely justified. In this respect, it is important that the court observes the principles of the civil procedure, including the principle of equal treatment of parties, and does not become an advisor of a party to the proceeding. From this the following legal question arises: where are the limits of implementing the duty to give explanations that may not be exceeded?

Based on a general rule of civil procedure, during the course of a procedure it is necessary to follow a number of principles that are applicable at all court instances. The principles are conditionally divided into two large groups:

1. organisational and functional principles, which include both court administration and the procedure itself,
2. functional principles, which include procedural acts between the court and the persons taking part in the process.

Views have been expressed that such a division is not justified, as the principles are connected to each other.[16]

The Estonian legal system is based on the example of German law. In Germany, the following principles are emphasised in civil procedure:

1. Principle of disposition, meaning a person's right to decide whether he or she wants to go to court at all, what legal remedy he or she wishes to use, and what evidence he or she wishes to submit.

2. Principle of deliberation, meaning submission by the parties of required factual circumstances, which is the opposite of the principle of investigation, where the court must be active in ascertaining the circumstances. This also includes the fulfilment of the court's duty to give explanations.

When parties go to court, they have an obligation to submit factual circumstances, which is reflected in the historical legal principle ***da mihi facta, dabo tibi ius*** (give me the facts and I shall give you the law). Based on this principle, the submission of factual circumstances is the duty of the participants of the proceedings, and having knowledge of the law is the duty of the judge ***(iura novit curia)***.

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[12] Code of Civil Procedure. RT I 1993, 31/32 ,538.

[13] Code of Civil Procedure. RT I 1998, 43-45, 666.

Code of Civil Procedure. RT I 2005, 26, 197

[14] I. Soots. Kohtu selgitamiskohustus hagimenetluses. Juridica V/2011, p. 324

[15] M. Koch. Die richterliche Prozessförderungspflicht nach dem ZPO –Reformgesetz, Hamburg 2003, p. 53 (referred: I. Soots. Kohtu selgitamiskohustus hagimenetluses. Juridica V/2011, p. 324).

[16] В.М.Савитский. Проблемы судебного права. Москва 1983

3. Principle of oral proceedings. Oral procedure enables the judge to get a direct impression of the parties and the dispute because of the immediacy. It is also important for the implementation of the principle of public court procedure.

With regard to this principle, it is important that it does not exist in a so-called pure form, as a number of procedural acts during court procedure are performed in writing.

The European Union has issued recommendations for implementing a written procedure in case of small monetary amounts, for example, in case of the order for payment procedure. In Estonia, simplified procedures (Articles 403-406 of the Code of Civil Procedure) can also be performed in the form of a written procedure. An appeal against a ruling is generally adjudicated in a circuit court by way of a written procedure (Article 667 (3) of the Code of Civil Procedure).

4. Principle of directness. This principle is directly related to the principle of oral proceedings.

5. Principle of public proceedings. A court proceeding is open to both the general public and to the parties, which gives the parties a stronger right to receive information.

6. Principle of uniformity of an oral hearing, or principle of concentration, meaning that all hearings (preliminary hearing, main hearing) are equally important and have equal significance for the purpose of making of a decision.

7. Principle of strictness of formal requirements and good faith

Procedural law is strictly formalised, which is important from the position of equal treatment of the parties. Rules of court procedure must be uniform and they must be followed. Disregarding procedural legal norms leads to legally negative consequences for the relevant party to the proceedings. Parties to the proceedings must use their rights in good faith and they may not abuse their rights, which is important from the position of preventing delays in the procedure.[17]

8. Principle of fairness of the court procedure

This principle is applied first and foremost to a judge, and it came to Germany mainly through common law and its requirements of fair trial and due process of law. This principle includes such notions as justice, impartiality, honesty, delivery of a court decision within a reasonable time, and the requirement to ensure being heard before a court.[18]

In Germany, the prevalent opinion is that it is not enough if the parties are provided with an opportunity to express their opinion, but that the court also has to acknowledge what was presented by the parties and take it into account during its deliberations. If the court makes a decision on the basis of a legal norm, the significance of which for deciding the case was not previously explained, it is considered a breach of the right to be heard before a court.[19]

From the position of fairness of the procedure, it is important to provide parties with equal opportunities, including what concerns the submission of evidence. This is especially important nowadays, as substantive law becomes more complex, since a legal position may fail due to a failure to prove it.

Estonian civil procedure uses principles similar to the principles contained in the German civil procedural law, however, a few other principles can be added, such as the **principle of lawfulness**. This means that a procedural act in a civil matter is performed pursuant to the law in force at the time an act was performed (Article 6 of the Code of Civil Procedure), and the conduct of procedures concerning a case is based on the Estonian law of civil procedure, as well as the principle that in the absence of a provision of law regulating a procedural relationship, it is necessary to apply a provision that regulates a relationship similar to the relationship under dispute. If, however, there is no provision of law regulating a relationship similar to the relationship under dispute, it is necessary to apply analogy (Article 8 of the Code of Civil Procedure).

Principle of equal treatment of persons, which is also a constitutional right, meaning that the parties and other persons are equal before the law and the court (Article 7 of the Code of Civil Procedure).

Principle of the language of the court, according to which court procedure and court administration is performed in the Estonian language (Article 34 (1) of the Code of Civil Procedure). Persons that are not proficient in the Estonian language must be provided the possibility to use an interpreter.

The principles of the civil procedure that were listed above have seen an addition of the **principle of procedural economy**, which in recent years has gained significant importance.

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[17] Christoph G.Paulus. Tsiviilprotsessiõigus. Kohtuotsuse tegemise menetlus ja sundtäitmine.

Juura, Õigusteabe AS, Tallinn 2002, pp. 97-99

[18] Same, p. 99 (reference 17)

[19] Same, p. 99-100 (reference 17)

4. The Principle of Procedural Economy

4.1. Substance and of the principle of procedural economy and its meaning in the civil procedure

Former Chief Justice of the Supreme Court Märt Rask noted in his 2012 presentation in Riigikogu that "A state is obliged to ensure that the administration of justice is performed without obstacles. During the last five years the time length of procedures in both civil and criminal procedures has decreased, and only in administrative courts a small increase in the time of a procedure is visible.[20] An ambitious legal policy aim established by the coalition Government, stating that a court procedure must not last longer than 100 days at any court instance,[21] has not been statistically achieved in any of the court instances:

in the general procedure it takes on average three times more time (346 days) to make a decision in a criminal case, a dispute between legal persons in private law on average takes 164 days to resolve, and disputes against the state in an administrative court on average last for 142 days. Without any doubt acceleration of procedures is a worthy goal, and achieving an average procedural duration of one hundred days is a bold aim. Acceleration of court procedures is completely justified, as long as it does not have a negative impact on the quality of the court procedure."[22]

It is the authors' opinion that excessive acceleration of procedure may lead to mistakes in the course of making a correct and high quality court decision, i.e. a decision corresponding to requirements of law.

According to Article 4 of the Constitution of the Republic of Estonia, the activities of the courts shall be organised based on the principle of the separation and balance of powers.[23] On 9 February 2007 at the plenary session of judges, principles regarding the development of the court system were adopted, according to which the court system must ensure the fair and objective administration of justice, free access of persons to the administration of justice and the protection of their rights, and the resolution of court cases within a reasonable time period.[24]

The legal basis for adopting the abovementioned development is Article 15 of the Constitution of the Republic of Estonia, according to which everyone whose rights and freedoms are violated has the right of recourse to the courts, and Article 6 of the European Convention on Human Rights, establishing the right to a fair public hearing before a tribunal.[25]

No legal definition of the principle of procedural economy has been adopted. Justice of the Supreme Court Eerik Kergandberg has stated that according to a common understanding and at least at first sight procedural economy should not mean anything other than the fastest possible resolution of court cases".[26] The author agrees with Eerik Kergandberg that according to a common understanding procedural economy can also be understood in this way, however, procedural economy as a principle has a wider legal meaning and substance. According to the dictionary of foreign words, the definition of "economy" (other than economy as management of economics) is frugality, economy, saving.[27]

In the author's opinion the meaning and substance of the principle of procedural economy derives from Article 2 of the Code of Civil Procedure.

According to Article 2 of the Code of Civil Procedure, the purpose of civil procedure is to guarantee adjudication of civil matters by the court

1. correctly,
2. within a reasonable period of time,
3. at the minimum possible cost.

The abovementioned Article assigns to the court the duty to ensure the implementation of the principle of procedural economy, whereas the three basic principles have an equal role and they ensure the just resolution of a case.[28]

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[20] Procedural statistics of the I and II instances for 2011 were published on the Internet page www.kohus.ee, the data describing the work of the Supreme Court was published on the website of the Court www.riigikohus.ee/?id=79 (06.04.2016)

[21] Section 16b of subdivision "Competitive Economic Environment" and Section 61 of subdivision "Safe Estonia" of the programme of the governing coalition of Isamaa ja Res Publica Liit and Eesti Reformierakond parties. On the Internet: http://valitsus.ee/UserFiles/valitsus/et/uudised/taustamaterjalid/Valitsusliit%20I.pdf (06.04.2016)

[22] Report of Chief Justice of the Supreme Court Märt Rask at spring session of Riigikogu of 2012 on 7 June 2012. Overview concerning court administration, administration of justice and uniform application of laws. On the Internet: http:// www. riigikohus.ee (04 April 2016)

[23] Constitution of the Republic of Estonia. RI 1992, 26, 349

[24] The Principles of Development of the Court System. Decision of the Plenary Session of Judges of 9 February 2007. On the Internet: http:// www. riigikohus.ee/?id=749 (02.04.2016)

[25] European Convention for the Protection of Human Rights and Fundamental Freedoms. RT II 1996, 11/12,34

[26] E.Kergandberg. Menetlusökonoomia: teema piiritlemine, taustsüsteem ja spetsiifilised probleemid süüteomenetluses. On the Internet: http://www.iuridicum.ee/public/files/32teesid/32Kergandberg.pdf (10 March 2016):

[27] E.Vääri, R.Kleis, J. Silvet. Võõrsõnade leksikon. Kirjastus Valgus 2006, p 1163

[28] Regulation of the Civil Chamber of the Supreme Court No 3-2-1-138 -07

The necessity of a just procedure has also been discussed by the Consultative Council of European Judges (CCJE), which is of the opinion that the goal of procedural law is to develop a procedure, if possible, in a way that ensures the correct result by just means.[29]

In the previous edition of the Code of Civil Procedure that was in force until 1 January 2006, the wording of the purpose of civil procedure was different. More specifically, according to Article 3 of the Code of Civil Procedure that was in force until 31 December 2005 the purpose of civil procedure was to review and resolve a civil case correctly and as quickly as possible.[30] Therefore, previously the economy of costs of a procedure was not stated as a goal, and the principle of procedural economy was laid down more clearly in procedural law in the Code of Civil Procedure effective from 1 January 2006.

4.2. Correct hearing of a civil case

Correct hearing of a civil case includes two aspects:

1. application of the correct substantive legal norm
2. observation of a procedural legal norm.

A court must resolve a substantive legal dispute by applying the correct law *(iura novit curia)*, while at the same time observing procedural legal norms. Both aspects have equal importance. A decision that is lawful and justified with regard to substantive law cannot exist if during the procedure the rights of a party were disregarded.

Decisions of the Civil Chamber of the Supreme Court show that decisions of circuit courts have been annulled both due to the incorrect application of norms of substantive law and due to a breach of a procedural legal norm. This is also supported by the analysis of the Supreme Court, which was analysed the period from 1 September 2014 until 31 December 2014. During this period, the Civil Chamber of the Supreme Court made reasoned decisions in 71 civil cases, including decisions made by the full body of the Chamber in 2 civil cases. A court decision was annulled and the case was sent for review to a court of first instance on 12 occasions. A district court decision was annulled and the decision of the court of first instance was brought into force on 4 occasions. A decision was annulled due to the incorrect application of a procedural legal norm on 17 occasions, and due to the incorrect application of substantive law and of a procedural legal norm on 17 occasions.[31]

One reason for the incorrect application of a procedural legal norm is the ambiguity of the legal norm and the resulting possibility for different interpretations. Having worked as a judge for over 29 years, I have questioned the constant changing of procedural legal norms, especially as I have not seen reasoned arguments as to why it is necessary. The author believes that such changes lead to a negative consequence, which is one of the factors hindering the formation of a stable court practice in Estonia. A stable court practice is a valuable factor for a procedure, which should not be underestimated. The author considers that the CCEJ in its opinion on the quality of a court decision has justifiably found that excessively frequent changes of laws do not benefit quality, and that legal acts, also including procedural norms, must be clear and easily[32] applicable.

The Estonian Code of Civil Procedure is overregulated, and judges have repeatedly drawn the attention of the executive power to this flaw.

During the preparation of a draft law, it is necessary to analyse possible legal consequences. Unfortunately, the need for this has been underestimated. One of the reasons for that has also been the goal of accelerating a procedure. The absence of a preliminary analysis before the amendment of a law has resulted in the declaration of a procedural norm being contrary to the Constitution with respect to Article 174 (8) of the Code of Civil Procedure[33].

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[29] Opinion No. 6 (2004) of the Consultative Council of European Judges (CCJE) on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement. On the Internet: http:// www.nc.ee/vfs/490/CCJE%282004%29op6.pdf(02.04.2016)

[30] RT I 1998,43,666

[31] M.Aavik, K. Krillo, K. Mölder. Riigikohtu praktika tsiviilasjades. September-detsember 2014.Aktuaalse praktika ülevaade. Tartu 2015. On the Internet: http://www.riigikohus.ee (03 April 2016)

During the given period, the Supreme Court received 414 applications for procedure concerning civil cases, of which 225 were appeals in cassation, 176 were appeals against court ruling and 13 were applications for review. During the given period, the Civil Chamber of the Supreme Court reviewed 335 applications for procedure, of which 192 were appeals in cassation, 125 were appeals against court ruling, and 8 were applications for review. The leave to appeal was granted in case of 84 applications, i.e. 25% of the applications.

[32] Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) on the quality of judicial decisions. Strasbourg, 18 December 2008.). On the Internet: http:// %20nr%2011.pdfwww.nc.ee/vfs/802/CCJE%20%282008%29op6.pdf (02.04.2016)

[33] RT I, 03.07.2014, 39

By decision of the general assembly of the Supreme Court of 4 February 2014, No 3-4-1-29- 13 Article 125[1] (2) of the Courts Act and Article 174 (8) of the Code of Civil Procedure, according to which the determination of procedural expenses may also be done by a judicial clerk, were declared to be contrary to the Constitution and invalid. Article 125[1] (2) of the Courts Act states[34] that a judicial clerk is also competent to perform acts and make judgements, which an assistant judge or another court official is competent to perform or make pursuant to the law on court procedure. According to the opinion of the general assembly, in this case the legal problem is whether, according to the first sentence of Article 146 and to Article 147 of the Constitution, it is permissible that in a county court the determination of procedural expenses on the basis of the Code of Civil Procedure in force is made by a judicial clerk, and whether the determination of procedural expenses in a county court on the basis of the Code of Civil Procedure presently in force can be considered as administration of justice within the meaning of the first sentence of Article 146 of the Constitution (Section 43 of the decision). According to Section 43.2 of the decision, the ECHR has stated that a procedure for the determination of legal costs that is separate from the main case must be considered as a continuation of the main case; therefore, it is considered as a determination of a person's civil rights and obligations within the meaning of Article 6 (1) of the European Convention on Human Rights (ECHR decision of 5 September 2013 in case No 9815/10: Cepek *vs.* The Czech Republic, section 43).

The general assembly reached the decision that the determination of procedural expenses in a county court on the basis of the Code of Civil Procedure is considered as administration of justice within the meaning of the first sentence of Article 146 of the Constitution. According to section 44.6 of the decision, in a court justice can be administered within the meaning of the first sentence of Article 146 of the Constitution only by a judge within the meaning of Articles 147, 150 and 153 of the Constitution, as a judge is appointed to the position, and the guarantees and limitations stated in Articles 147 and 153 of the Constitution are applicable to the judge, and, presumably a judge corresponds to the requirements of independence and impartiality arising from Article 15 of the Constitution. A judicial clerk is not a judge within the meaning of Articles 147, 150 or 153 of the Constitution. Determination of procedural expenses in a county court on the basis of the Code of Civil Procedure must be considered as administration of justice within the meaning of the first sentence of Article 146 of the Constitution.

Based on the considerations stated above, it was the position of the general assembly that the disputed provision, to the extent to which it gives judicial clerks the competence to make a ruling regarding the determination of procedural expenses in a county court on the basis of the Code of Civil Procedure, is contrary to the first sentence of Article 146 of the Constitution, therefore, it must be declared invalid.[35]

The court decision presented above demonstrates that while in pursuit of reducing a judge's workload by providing a judicial clerk with the competence to determine procedural expenses, it was not taken into account that a court ruling constitutes the administration of justice.

Chief Justice of the Supreme Court Märt Rask has also pointed this out in his report at the 2014 spring session of Riigikogu, noting that "Although with this decision the Supreme Court did not give a general or all-encompassing assessment of what particular tasks are to be construed as administration of justice, and whether or on what conditions a court can transfer them to the competence of an official who is not a judge, it is still possible to make more general conclusions with the help of this case. For instance, it unequivocally follows from the ruling of the general assembly of the Supreme Court that according to the Constitution the workload of courts cannot be reduced nor the speed of procedure increased in a manner that involves permitting court officers, for example judicial clerks, to perform the duties that constitute the administration of justice within its substantive meaning". [36]

Another constitutional problem in civil procedure has emerged in relation to the rates of state fees. The right to go to court must be ensured in practice. The absence of legal help and excessive legal costs must not be an obstacle.[37] During the economic crisis, possibilities for additional income for the budget were searched for, and starting from 1 January 2009 the rates of state fees were increased multi-fold. The letter of explanation to the draft act for the amendment of the State Fees Act No 206 includes a table that shows that the rates of the state fees in Estonia effective before 1 July 2012 were several times higher than the rates of state fees in other European Union Member States.[38] For example, for a civil case with the value of 575 204.83 euros in Estonia it would have been necessary to pay a state fee of 17 895.26 euros, while in other European Union Member States the average rate of the state fee would have been 3484.86 euros. Therefore, in this case the cost of the state fee in Estonia would have been 413.51% higher. As a comparison, I would like to note that in England the state fee in a case with the same value would have been 1774.80 euros, and in Italy it would have been 1100 euros during the same period.[39]

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[34] RT I, 10.03.2015,15

[35] Decision of the general assembly of the Supreme Court of 4 February 2014 No 3-4-1-29-13

[36] P. Pikamäe. Report of the Supreme Court at spring session of Riigikogu of 2014 on 5 June 2014. Overview concerning court administration, administration of justice and uniform application of laws. On the Internet: http://www.riigikohus.ee (03 April 2016)

[37] U. Lõhmus. Inimõigused ja nende kaitse Euroopas. Õigus õiglasele kohtulikule arutamisele. Tartu, SA.Iuridicum 2003, p. 149.

[38] Letter of explanation to the draft act No 206 for amendment of the State Fees Act and other acts related to it. On the Internet: http://www.riigikogu.ee (03 April 2016)

[39] On the Internet: http://www.riigikohus.ee/vfs/1121/Riigiloivud.pdf (3 April 2016)

During the period from 1 January 2009 until 1 December 2014, the Supreme Court declared the rates of the state fees as unconstitutional on 62 occasions [40], which demonstrates that the rates of the state fees were increased without taking their constitutionality into consideration. The increase in the rates of state fees resulted in additional work for the court in relation to the review of applications for procedural help from the state, decisions on the reimbursement of a state fee, and the review of constitutionality. Therefore, increasing the rates of state fees did not correspond to the principle of procedural economy.

4.3. Reasonable time of a procedure

The right to administration of justice within a reasonable time period is an important principle of a democratic state based on the rule of law. The principle of a reasonable duration of procedures is established in international law, European Union law and in Estonian domestic law.

Article 6 (1) of the European Convention on Human Rights establishes every person's right to a fair hearing before a tribunal, one of the conditions of which is hearing a case within a reasonable time.[41] Article 47 of the Charter of Fundamental Rights of the European Union establishes the right to a fair hearing by a tribunal within a reasonable procedural time. [42]

In the Constitution of the Republic of Estonia, the principle of a reasonable duration of procedures can be derived from Articles 13, 14, and 15.[43] According to Article 2 of the Code of Civil Procedure, one of the goals of civil procedure is the adjudication of a case within a reasonable period of time.[44]

With regard to the question of what is a fair court procedure, Uno Lõhmus has stated that "the term 'just court procedure' does not have a clear definition that is uniformly understood. It is not an individual right, but a general term that includes different aspects, principles and rights of a procedure, the catalogue of which is open."[45]

There is no legal definition for a reasonable duration of a procedure. Establishing criteria for limits of a reasonable duration of a procedure is problematic, as the circumstances of civil cases differ, and the length of a procedure depends on different objective and subjective circumstances.

The question arising with respect to a reasonable duration of a procedure is: from what time must one calculate the length of a procedure, and what period should be considered as "reasonable"?

The ECHR has made several decisions with regard to the breach of Article 6 (1) of the European Convention on Human Rights and has given some guidelines for the determination of reasonableness of the duration of a procedure and optimisation of the length of a procedure. The ECHR has adopted the position that delay at some court instance is tolerable, provided that the total duration of the court case is reasonable.[46] The ECHR has also issued a number of decisions concerning the Estonian civil procedure, in which it stated that the procedure in question was unreasonably long and contrary to Article 6 (1) of the European Convention on Human Rights.[47]

Katri Öövel analysed decisions of the ECHR in her Master's thesis and came to the conclusion that "Positions of the ECHR with regard to assessing the reasonableness of the duration of a procedure show that it is not possible to develop a specific standard with respect to reasonableness, and in case of every court case it is necessary to determine the reasonableness of the length of a procedure according to the circumstances of a specific case."[48]

The ECHR has adopted four criteria on the basis of which it assesses the reasonableness of the duration of a procedure: complexity of the case, behaviour of the plaintiff and the public authority, and legal interests of the plaintiff that are the subject of the dispute.[49]

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[40] Review of constitutionality of the rates of the state fees. Overview of practice and pending case procedures of the Supreme Court. On the Internet: http:// www. Riigikohus.ee/vfs/1829/%DClevaade RLS asjadest kodulehel 2014-01-12 pdf (05 April 2016)

[41] RT II 1996,11/12,34

[42] OJ C 303,14,12.2007

[43] RT 1992, 26, 349; 2007 ,33, 210.

[44] RT I 2005,26,197

[45] U. Lõhmus. Põhiõigused kriminaalmenetluses. Kirjastus Juura 2014, lk 36.

[46] ECHR 4 February 2010 No 13791/06, Gromzig vs.Germany

[47] ECHR 2 December 2013, Treial vs Estonia, application No 48129/99; ECHR 29 January 2009, Missenjov vs Estonia, application No 43276/06

[48] Katri Öövel. Mõistlik menetlusaeg tsiviilkohtumenetluses. Master's thesis. Supervisor M. Merimaa- Akadeemia Nord. Tallinn 2010, p. 67.

[49] J .Laffranque. A.Sarapuu. Mõistlik aeg ning selle tagamine tsiviil- ja halduskohtumenetluses. Juridica X/2013, p. 728

Civil disputes can become very complex due to complexity of the circumstances or the legal issues involved. In order to prove circumstances, it is necessary to gather evidence, which may require time. For example, in case of an expert examination it may take a few months to obtain results. If evidence must be collected in another state, then this will undoubtedly influence the length of a procedure.

Ambiguity of a legal norm can result in legal disputes, where it is desirable to get the Supreme Court's interpretation of the issue, resulting in the submission of appeals, which in turn extends the duration of the entire procedure.

Another separate problem is the delivery of procedural documents if the person's place of residence or location is not known. Many natural persons have left Estonia to work abroad. If an action is filed against them, then the question arises as to where their place of residence is and whether the civil case belongs to the competence of an Estonian court. The search for the place of residence or location of a party to a procedure for the purpose of delivering procedural documents is an everyday problem of courts.[50]

When legal norms are being changed, it is necessary to consider what impact it will have on the duration of a procedure. Unfortunately, this is not always done, for example, with respect to the procedure for the determination of procedural expenses. Subsequently, the author considers it necessary to clarify the changes that took place with respect to the abovementioned determination of procedural expenses. Until 1 January 2006 Article 60 (1) of the Code of Civil Procedure was in force, according to which the court orders, on the basis of a petition by a party in favour of which the decision was made, the payment of necessary and justified legal costs to such party by the other party.[51]

On 1 January 2006 a new procedure entered into force, according to which the determination of procedural expenses formed a separate procedure after the entry into force of a court decision. In particular, according to Article 174 (1) of the Code of Civil Procedure a participant in a proceeding has the right to demand, within 30 days after the court decision concerning the division of costs enters into force, that the court of first instance that adjudicated the matter determine the procedural financial expenses based on the division of expenses provided in the decision[52]. Disputes concerning the amount of procedural expenses could last for years and reach the Supreme Court, which cannot be considered as a reasonable way to deal with this issue.

In addition to that, Article 174 (8) of the Code of Civil Procedure caused a constitutional problem. The general assembly of the Supreme Court declared Article 1251 (2) of the Courts Act and Article 174 (8) of the Code of Civil Procedure, according to which procedural expenses in civil procedure can be determined by a judicial clerk, as contrary to the Constitution and invalid. This in turn may lead to new disputes about the lawfulness of court decisions that have already entered into force. [53]

On 1 January 2015, the procedure for the determination of procedural expenses that was in force before 1 January 2006 was restored. According to Article 174 (1) of the Code of Civil Procedure, the extent of necessary and justified procedural financial expenses are determined by the court adjudicating the case, in the same case in relation to which the expenses emerged.[54]

The amendment to Article 174 (1) of the Code of Civil Procedure that entered into force on 1 January 2015 can be considered reasonable and justified, allowing for economy both in the duration of a procedure and expenses of parties to a procedure. In court practice, during the procedure for ordering payment of procedural expenses a party to a procedure used legal help for which the party had to pay. If the dispute reached the Supreme Court, the total amount payable for the contractual representative by the party to the procedure may not have been a small one.

I agree with Uno Lõhmus that one of the main goals of the principle of a reasonable duration of procedures is to resolve an uncertain situation and ensure the achievement of legal certainty. In order for the administration of justice to be effective and reliable, it must be performed without delays, and only judicious speed corresponds to the principle of a reasonable length of time.[55]

Justice of the Supreme Court Villu Kõve has justifiably noted that over the past decades both in Estonia and elsewhere in Europe there has been a tendency of looking for possibilities to increase the speed and efficiency of civil procedure, which in turn leads some people to the understanding that with respect to the adjudication of cases there are no assessment criteria other than speed. It is important to ensure the quality of a procedure, i.e. how parties to a procedure are treated in

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[50] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 establishes minimum standards for delivery of procedural documents in another Member State. On the Internet: http://eur-lex.europa.eu (02 April 2016)

[51] RT I 1998, 43, 666

[52] RT I 2005, 26, 197

[53] RT I, 06.02.2014, 13 – entered into force on 4 February 2014 -

[54] RI I 2005, 26, 197; RT I 30.12.2014,. 665.

[55] U. Lõhmus. Inimõigused ja nende kaitse Euroopas. Tartu: Sihtasutus Iuridicum, 2003. Õigus õiglasele kohtulikule arutamisele, p. 165.

the course of the procedure, whether the court respects their rights and is able to manage the procedure, how competent the judge is in the procedural and substantive law, and whether the judge is able to justify his or her positions in a high-quality court decision.[56]

It is correct if the reasoning of the court provides a party to the procedure with an understanding of why the court reached such a position and why such a decision was made. As a motto for their book, Jyrki Virolainen and Petri Martikainen chose an idea by Professor Aulis Aarnio, who said that the obligation to substantiate his/her decisions is the duty of a judge[57], which is an idea that one must agree with.

In discussing what a right is, Ronald Dworkin has concluded that how judges make decisions in court cases is important for people. "With an unjust court decision the society causes its member moral sufferings, as such a decision leaves the member of the society to some extent or in some way without the protection of the right"[58] ."[59]

The quality of the administration of justice – from a reasonable duration of a procedure and fair procedure to a lawful and justified decision – to a large extent depends on the degree of a state's possibilities to contribute to the performance of the court system.

The Committee of Ministers of the European Union has found that each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the European Convention on Human Rights and to enable judges to work efficiently. According to Section 30 of the Recommendation, the efficiency of judges and of judicial systems is a necessary condition for the protection of every person's rights, compliance with the requirements of Article 6 of the European Convention on Human Rights, legal certainty and public confidence in the rule of law. According to Section 39, alternative dispute resolution mechanisms should be promoted.[60]

Alternative extrajudicial possibilities for the resolution of disputes have been searched for in Estonia and implemented in connection with arbitration procedure, conciliation procedure, as well as the resolution of disputes in extrajudicial bodies, such as labour disputes in the labour dispute committee, lease disputes in the lease committee, third party liability motor insurance disputes in the insurance disputes committee.[61] Without any doubt the extrajudicial resolution of disputes reduces the workload of courts.

The author believes that the duration of a procedure can also be reduced through the work organisation of courts, reducing the workload of judges by hiring qualified supporting personnel and using possibilities of information technology. In 2013 a new reform of the Estonian court system was started that gave courts the new positions of judicial clerks, which required higher qualification requirements compared to consultants, who are gradually being made redundant. For this purpose, the Courts Act was supplemented with Article 125^1, which regulates the status and activities of judicial clerks. The executive power indicated a problem in the letter of explanation to the draft act for the amendment of the Courts Act, stating that "At the moment a reasonable duration of a procedure is not ensured for the person filing a claim, however, at the same time there are problems with the quality of the administration of justice. All this is mainly caused by insufficient funding of the court system, which has not allowed developing a motivated supporting structure that is necessary for the proper administration of justice. The current salary of a consultant is not competitive among lawyers, which is the reason why lawyers of a high standard do not take court positions or leave them at the first opportunity. Creating the institution of the judicial clerk helps increase the qualification of court officers, who assist a judge in the preparation of a court case, and, respectively, the work quality and efficiency of court procedures".[62]

There have also been attempts to accelerate and simplify procedure in the Estonian court system by using informational and technological possibilities, such as utilising the e-file system and electronic delivery of procedural documents. Without a doubt these are positive steps, however, it is necessary to further develop the system also with the goal of unifying court decisions for simplifying the search of court decisions by using keywords.

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[56] Villu Kõve. Tsiviilkohtumenetluse kiirendamise võimalused ja nendega seotud ohud. Juridica IX/2012, pp. 659-661 .

[57] Jyrki Virolainen. Petri Martikainen. Pro&contra. Tuomion perustelemisen keskeisiä kysymyksiä. Talentum. Helsinki. 2003

[59] R. Dworkin. Õiguse impeerium. Kirjastus Valgus 2015, p.23-24.

[60] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. On the Internet:http:// coe.ee (10 March 2016)

[61] I. Nurmela, P.-M. Põlvere. Vaidluste efektiivne kohtuväline lahendamine. Juridica I/2014, pp.-6,

P.-M. Põldvere. Kaheksa aastat mudelseadust. kas Eesti vahekohtumenetlus vastab mudelile? Juridica I/2014, pp. 17-33

K. Valma, L. Surva, H. Hääl. Lepitusmenetlus perevaidlustes, Juridica I/2014, pp. 86-103

C. Ginter, M. Pihlak. Lepitusmenetlus kui võimalus ärivaidluste lahendamiseks. Juridica I/2014, pp. 49-59 A.Pohla. Vahekohtu kokkuleppe tähtsus vahekohtumenetluses. Juridica I/2014, pp. 86-103, pp. 34-48 A.Maltmäe, M.Merila, M. Jesse. Kindlustusorgan kui erasektori initsiatiivil loodud võimalus lahendada kindlustusvaidlusi kohtuväliselt. Juridica I/2014, pp. 86-103, pp. 70-85

[62] The draft and letter of explanation of the Courts Act are available on the website of Riigikogu: http:// www.riigikogu.ee (3 April 2016)

Opinions have been expressed in the media that the Estonian court system is slow and procedures are long. These opinions made the author wonder what they were based on, as statistical data proves the opposite.

On 9 March 2015, the European Commission published a table with statistics regarding the administration of justice, including an overview of the quality, independence and efficiency of court systems of the Member States, which demonstrates that the statistical results concerning the speed of the Estonian court procedure were good.[63]

According to the data of the Ministry of Justice, the average speed of a court procedure in Estonia is characterised by the following data:[64]

Court	Estimated length of a procedure 2014	Change (%)	Estimated length of a procedure 2013	Estimated length of a procedure 2012
Civil cases	145	-13,7%	168	197
Harju County Court	132	-17,5%	160	201
Pärnu County Court	186	-7,0%	200	206
Tartu County Court	154	-9,9%	171	180
Viru County Court	152	-7,9%	165	195

According to the data of the Ministry of Justice, in the CEPEJ report concerning the court systems of 45 member states of the Council of Europe, the average time of a procedure of Estonian courts of first instance in civil cases was very good compared to other member states of the Council of Europe.[65] While the average duration of a procedure of the member states of the Council of Europe was 246 days, in Estonia the average duration of a procedure was 167 days, and, for example, in Finland this indicator was 325 days and in Italy 590 days. [66]

Nevertheless, specific procedures can still be longer, depending on a number of reasons.

4.4. Resolution of a civil case with minimal procedural expenses

As a rule, in a civil procedure the parties to a procedure have to bear procedural expenses.

Chapter 18 of the Code of Civil Procedure establishes that procedural expenses are the legal costs and extra-judicial costs incurred by a participant in a proceeding. Legal costs are the state fee, caution money and the costs connected to the proceeding (Article 138 (2) of the Code of Civil Procedure). The amount of the costs depends on the specific procedural act and the cost of a civil case. Extra-judicial costs are: the costs related to the representatives of the participants in a proceeding and other similar costs incurred in connection with the proceeding mentioned in Article 144 of the Code of Civil Procedure. Based on my experience working as a judge, I can assert that in civil cases the most significant procedural expenses are the state fee and the contractual representative's fee, the amount of which causes the most disputes in practice. The length of a procedure and repeated postponement of court hearings increase the amount of a contractual representative's fee payable

[63] On the Internet: http.//ec.europa.eu/justice/effektive-justice/files/justice_scoreboard_2015_ en.pdf The 2015 EU Justice Scoreboard. COM (2015) 166 final.

[64] On the Internet: http://www.kohus.ee/et/print/kohtute-tohusus (6 April 2016)

[65] On the Internet: http://www.coe.int/t/dghl/cooperation/cepej/evalution/2014/Rapport__2014_en.pdf CEPEJ. Report on „ European judicial systems-Edition 2014 (2012 data) efficiency and quality of justice" (10 April 2016).

[66] On the Internet: http://www.kohus.ee/et/print/kohtute-tohusus (6 April 2016)

by a party to a procedure. The legislative power has searched for different possibilities to accelerate a procedure and, therefore, save procedural expenses:

1. simplification of procedure,

2. promotion of compromises.

In order to accelerate procedure in the European Union, a number of regulations have been adopted for the adjudication of smaller claims, such as the European small claims procedure and order for payment procedure.[67] Estonia has simplified the procedure concerning small monetary claims in domestic procedural law.

According to Article 405 (1) of the Code of Civil Procedure, the court adjudicates an action by way of simplified procedure at the discretion of the court, only taking account of the general procedural principles provided by this Code if the action concerns a proprietary claim and the value of the action does not exceed an amount which corresponds to 2,000 euros on the main claim and to 4,000 euros together with collateral claims.[68] Although the provision enables the simplification of the procedure in case of the abovementioned value of an action and thereby save expenses and accelerate the procedure, the court must follow the principles of equal treatment of parties to the procedure and fair conduct of the procedure. Norms of a simplified procedure were established taking into account the principle of procedural economy, which cannot be a goal in and of itself, cannot be in an advantageous position compared to the principle of effective judicial protection of a person's rights, or an important goal of the court procedure, which is the correct adjudication of a civil case. The Supreme Court has emphasised that a possibility to adjudicate cases according to its fair discretion in a simplified procedure does not release the court from its duty to correctly apply substantive law, with which one can only agree.[69]

In its analysis of the application of Article 405 of the Code of Civil Procedure, the Supreme Court has found that there have been mistakes in the simplified procedure in relation to the application of both substantive and procedural legal norms, including with respect to the procedure concerning evidence. The selective assessment of evidence is not in conformity with the principle of simplified procedure, and simplification of provision of evidence cannot change the burden of proof. Court practice is not clear on the issue of whether observation of the principle of investigation and collection of evidence at its own initiative in the simplified procedure is the right or obligation of a county court. [70]

The value of a civil case as such does not mean that the case at issue is a simple one. Court practice demonstrates that disputes concerning small values of actions can become complex, and that their duration may not be short.

The value of a civil case as such does not mean that the case at issue is a simple one. Court practice demonstrates that disputes concerning small values of actions can become complex, and that their duration may not be short.

In order to accelerate a procedure and make it less costly, a possibility of expedited procedure in matters of payment order in proceedings on petition is established (Articles 481-497 of the Code of Civil Procedure)[71]. According to Article 481 (22) of the Code of Civil Procedure, expedited procedure in matters of payment order is not applied to claims with the value of over 6400 euros. This amount includes both the main and collateral claims. The expedited procedure in matters of payment order is conducted as a written procedure, and an application is submitted in electronic form. The state fee for the expedited procedure in matters of payment order cases according to Article 59 (6)[72] of the State Fees Act is 45 euros, irrespective of the amount of a claim, which is less costly than filing a claim as an action.[73] A debtor has the right to submit an objection to the payment proposal, in which case the payment order is not issued and the procedure continues as an action.

Court statistics show that the expedited order for payment procedure has justified itself, and in 2014 it was possible to obtain an enforcement document in the form of a payment order on average within 73 days. During 2014 a total of 37 542 applications for the expedited order for payment procedure were reviewed. During the same year in county courts, a total of 28 094 civil cases were adjudicated, including in the form of an action and proceedings for petition. These numbers lead to a conclusion that there were more decisions made with respect to applications for the expedited order for payment

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[67] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure – OJ L 199, 31 July 2007, pp. 1-22.

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure - OJ L 399, 30 December 2006, pp. 1-32

[68] RT I 2005,26,197

[69] RKTKo No 3-2-1-33-11

[70] Riigikohus. Tsiviilasja lahendamine lihtmenetluses tsiviilkohtumenetluse seadustiku § 405 kohaselt. Kohtupraktika analüüs. Tartu, oktoober 2012. On the Internet: http://www.riigikohus.ee (05 April 2016)

[71] RT I 2005,26,197

[72] RT I,23.03.2015,31.

[73] For example, in case of an action, in case of the value of an action of 6400 euros it is necessary to pay the state fee of 450 euros, while in case of an expedited order for payment procedure the rate of the state fee is 10 times lower (Annex 1 to the State Fees Act, reference 58).

procedure. The institution specialising in the expedited order for payment procedure is the Haapsalu Court House of the Pärnu County Court, and this procedure is simpler and less expensive (Article 108 of the Code of Civil Procedure).

One of the possibilities to accelerate a procedure and make it cost less is to promote reaching compromises. In this respect, a positive aspect of a compromise solution is achieving legal certainty between disputing parties.

A judicial compromise reached in a civil procedure ensures the fulfilment of the principle of procedural economy and efficiency of the procedure.

Justice of the Supreme Court Villu Kõve has expressed the thought that "At least from the position of legal certainty, a bad compromise is better than a good decision that is completely justified from a legal point of view." According to Villu Kõve's opinion, the conciliation procedure has a lot of potential, first and foremost, for the adjudication of disputes between neighbours, including those related to access roads and borders, as well as for the adjudication of disputes arising from joint ownership and its termination. Conciliation procedure also has a firm position in the adjudication of family matters, such as the division of joint property or the determination of the right of custody over children.[74] The author agrees with the abovementioned considerations and finds that there should be more cases of termination of the civil procedure due to achieving a compromise solution, especially in case of disputes concerning the right of custody over children and disputes between joint owners. Article 4 (4) of the Code of Civil Procedure imposes on a court the duty to take all possible measures during the entire procedure to settle a matter or a part of it through a compromise or in another manner by agreement of the parties if this is reasonable in the opinion of the court.

Statistical data shows that in 2013 compromises in a county court were reached in 2682 civil cases, which constitutes 9.2% of the total number of cases adjudicated in 2013, including 1384 civil cases in the Harju County Court (8.9% of the total number of adjudicated cases), 342 in the Pärnu County Court (10.3%), 532 in the Tartu County Court (8.9%) and 424 in the Viru County Court (9.7%). Analyst of the Legislative Drafting and Development Service of the Ministry of Justice Külli Luha noted that "The proportion of compromises compared to the data for 2010 has remained at the same level, i.e. in the compared year compromises were reached in 9.1% of the total number of adjudicated civil cases. In addition, reaching compromises does not differ depending on the court involved".[75] Therefore, the proportion of compromises in Estonian civil procedure is relatively modest.

In my previous research, I came to the conclusion that the conditions for a compromise are:

1. clarity of a substantive legal norm, which allows a party to a procedure and its representative to understand the reasonableness of reaching a compromise and not to look for court practice for the interpretation of a substantive legal norm;

2. existence of experience for conducting negotiations with parties;

3. optimisation of a judge's workload;

3. readiness of parties and representatives to reach a compromise;

4. increasing the number of assistants for a judge in the organisation of work;

5. increasing the level of the parties' legal knowledge.[76]

I still support this position. There are visible tendencies that certain measures have been taken to promote compromises. With this respect it is necessary to note that the training department of the Supreme Court in its additional training programme has provided for lectures for judges both in the area of negotiation and in the area of psychology. The executive power is dealing with the optimisation of the judges' workload, and courts are given positions of judicial clerks that enable a judge to prepare a case in more detail and to think of different compromise solutions. The Government of the Republic of Estonia considered it necessary to dedicate part V of the direction of the legal policy until 2018 to improving knowledge of law, noting that systematic attention must be paid to legal awareness.[77] A problem of clarity in relation to some substantive

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[74] Kõve, V. Tsiviilkohtumenetluse kiirendamise võimalused. Juridica IX/2012 p. 673. On the Internet: https://www.juridica.ee/juridica_et.php?document=et/articles/2012/9/219256.SUM.php (10March2016):

[75] Luha, K. I ja II astme kohtute 2013.a tsiviilasjade menetlusstatistika. Kohtute Aastaraamat 2013. p. 95. On the Internet: https://wwwkohus.rik.ee/sites/www.kohus.ee/files/elfinder/dokumendid/kohtute_aastaraamat _2013.pdf (28.03.2016).

[76] M.Merimaa. Menetluse põhimõtted ja tõendamine tsiviilkohtumenetluses.Akadeemia Nord. Tallinn 2008, p.55

[77] RT III,07.03.2011,1

and procedural legal norms still exists. To sum up, the conditions for increasing the number of compromises have been created, thereby also creating conditions for the implementation of the principle of procedural economy.

In order to promote compromise solutions to cases, the legislative power has considered it necessary to ensure that half of the paid state fee is refunded if a compromise is reached at the court instance where the compromise is reached (Article 150 (2) 1) and (3) of the Code of Civil Procedure). In this respect, it could be debated whether the amount of the refund should be bigger. In the opinion of the author, it should amount to 70%. Reaching a compromise saves money not only for the participants in the procedure, but also for the state in relation to further possible procedural acts.

With respect to bearing expenses, Article 168 (1) of the Code of Civil Procedure also promotes reaching a compromise, stating that when parties reach a compromise they bear their own legal expenses themselves, unless they have agreed otherwise. This article is surely justified for the purpose of reaching legal certainty. The author believes that it is necessary to look for further possibilities to increase the number of compromises.

5. Conclusion

Accession of the Republic of Estonia to the European Union means that it is necessary to observe the law and guidelines of the European Union, which also concern civil procedural law. Over the last years there has been a trend to make civil procedure simpler, cheaper and faster, which corresponds to the principle of procedural economy. There is no legal definition of the principle of procedural economy, its substance and aim are based on the task of civil procedure that is stated in Article 2 of the Code of Civil Procedure, according to which a procedure must be conducted within a reasonable period of time and at the minimum possible cost. In this respect, it is also necessary to consider the obligation to adjudicate a civil case in the correct manner, which is stated in Article 2 of the Code of Civil Procedure.

The principle of procedural economy has a positive aspect that allows parties to a procedure to get a court decision fast. At the same time, the excessive acceleration of a procedure may result in a negative effect on the principle of fair administration of justice and on the basic rights of parties to a proceeding, which should not be permitted.

The executive power has undertaken concrete steps in order to ensure the principle of procedural economy, by allocating funds to courts for filling the positions of judicial clerks. Without any doubt this will also help a judge to get additional time to prepare for hearings of civil cases and making high-quality court decisions. At the same time, it is necessary to also consider other legal, informational and technological possibilities that can increase the efficiency of a procedure. The author believes that such possibilities include providing support to reach compromises, using alternative possibilities for the adjudication of disputes, conducting analyses prior to amending laws for the purpose of identifying possible legal and economic consequences, and improving information technology. Another equally important aspect is the clarity of a legal norm that would preclude meaningless court disputes concerning the interpretation of the law.

Regulating the Right of Entrepreneurial Freedom in the Area of Liquid Fuel in Estonia and Across European Countries

Ilmar Selge and Raul Ernes

I. Introduction and Background

Writing on the topic of regulating the right of entrepreneurial freedom in the area of liquid fuel is motivated by doubts and potential conflicts with the principle of legal certainty arising from section 10 of the Constitution *(Põhiseadus)*[1] upon legal regulation of the area of liquid fuel, by the effect of the regulation on the formation of monopolies, slowdown in the development of technology and reduction of tax evasion. It is important to find legal solutions in the area of liquid fuel that are less restrictive and less burdensome for business than security deposit requirements, thus enabling filling stations to design the procedure for submitting information associated with automotive fuel and increasing the liability based on the reliance of the handlers. Establishing the qualification requirements of a person renders restricting business less burdensome, makes taxation with excise duty more precise and enables identifying persons who engaged in value added tax evasion.

The act that provides the bases and procedure for handling liquid fuel, liability and arrangements for exercising state supervision is the Liquid Fuel Act *(Vedelkütuse seadus)*.[2] Over the last four years, the Liquid Fuel Act has been amended 15 times. In ten years, all the sections of the act have undergone amendments. The objective of the majority of the amendments has been to ensure the collection of national taxes. In terms of the principle of legal certainty, it is not clear why the legislator has failed to draft the technology standard in subsection 8 (1) of the Liquid Fuel Act and why the power to establish it has been given to the minister responsible for the area without providing any detailed clarifications (without clarifying the purpose, content and scope of the regulatory power), even though these have already been established with a regulation according to subsection 58 (2) of the Ambient Air Protection Act *(Välisõhu kaitse seadus)*.[3] The legal terminology of the area requires more appropriate expressions that take the official language into account when determining the meaning and content of definitions in order to ensure legal clarity; in many ways, the person who drafted the draft amendments has failed to take into account the observations of the Institute of the Estonian Language *(Eesti Keele Instituut)* and suggestions of experts in the area. Adhering to good legislative practices requires using clear, unambiguous and accurate terms when specifying definitions in legislation. If a definition is used in a meaning that differs from one that has been specified in legislation so far or if the definition can have several meanings, the specification of the definition shall have to include the expression "for the purposes of this Act". If a definition appropriate in a draft for amending an act has already been defined in another act, reference shall have to be made to the act for the purposes of which the term is used in order to ensure legal clarity.

Although section 113 of the Constitution (establishing national taxes), put into practice in conjunction with section 31 of the Constitution (right of entrepreneurial freedom), as a consequence establishes restrictions on business the process of collecting any national taxes and payments should not promote the formation of monopolies. The current regulation applicable in the area only promotes an operator that has a comprehensive security deposit[4] upon operating as a handler of automotive fuel. Despite this, supervisory agencies have identified value added tax evasion incidents that continue to be excessive. The circumstance refers to a consequence. Current restrictions on the right of entrepreneurial freedom, disproportionately large security requirements in the legislation may be excessively burdensome on an operator wishing to actually operate in the area, at the same time leaving the state unprotected against value added tax fraudsters and those who only seemingly operate in the area.

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[1] RT 1992, 26, 349; RT I, 27.04.2011, 2; hereinafter referred to as Cx or Constitution.

[2] RT I 2003, 21, 127; RT I, 20.02.2015, 7; hereinafter referred to as LFA or Liquid Fuel Act.

[3] RT I 2004, 43, 298; RT I, 20.02.2015, 9; hereinafter referred to as AAPA or Ambient Air Protection Act.

[4] For example, the fuel supplier's security deposit upon releasing fuel for consumption and upon ceasing tax warehousing is 1,000,000 euros. By relying on risk assessment, the Estonian Tax and Customer's Board has the right to require the fuel supplier to have a higher security deposit and to revisit an already established security (subsections 42 (1) and (4) of the LFA). In practice, security deposit is made up of the capital of the company, cash equivalent of security without an appraisal guideline and business reputation of the person of the owner and members of his/her management and control bodies and business partner together with their future intentions as well as cases of breaching taxation laws, customs rules and the Liquid Fuel Act.

Although the state is not obligated to ensure a profit for entrepreneurs,[5] it is becoming economically more and more questionable whether or not the sale of automotive fuel is possible in sparsely populated areas using some other legal form other than by creating a municipal filling station, due to the great effect of right of recourse on the competitive conditions. Entrepreneurs owning small individual filling stations cannot meet the volume of securities established in the law. At the same time, large chains of filling stations are not focused on supporting local life with the help of less profitable filling stations. Aggravation of this situation has a negative effect on the formation of competition conditions and the interaction of vital infrastructures in a sparsely populated area. The aforementioned line of reasoning shows how dependent functional economy may be on law-making and on emphasised adherence to legal principles arising from the Constitution. Collecting taxes is very important for the state to exist, but ensuring the collection of taxes must be carried out in a way that burdens entrepreneurship to a smaller degree. The Supreme Court has specified and emphasised the principle of proportionality several times in its decisions. The second sentence of section 31 of the Constitution, which provides that the law may establish the conditions and procedure of using entrepreneurial freedom, gives the legislator great freedom to regulate the conditions of using entrepreneurial freedom and to establish restrictions thereto. Any reasonable cause is enough to circumscribe entrepreneurial freedom. The cause must result from public interest or the need to protect the rights and freedoms of other persons, and it must be weighty and legitimate as a matter of course. The more intense the interference in entrepreneurial freedom, the more significant the reasons justifying the interference shall have to be.[6] Taking into consideration the principle of proportionality, the reasons for establishing restrictions on entrepreneurship in the law have to be clarified first, i.e. for the benefit of the rights or collective benefits of which persons did the legislator decide to circumscribe the right of a person to engage in business. It is then possible to assess whether or not circumscribing entrepreneurial freedom adheres to the requirements provided for in clause 11 of the Constitution, which permits circumscribing rights and freedoms only in the event that the circumscriptions are necessary in a democratic society and they do not distort the nature of the rights and freedoms circumscribed. If it is not possible to determine the reason why entrepreneurial freedom has been interfered with, it is also not possible to weigh up the need for interference in a democratic society or whether or not the nature of law has been distorted. Such interference is in conflict with the principle of proportionality provided for in the Constitution.

The Constitution therefore permits circumscribing entrepreneurial freedom[7] only according to the terms and conditions and the procedure provided for in the law, without giving the legislator or the executive power unlimited right regarding thereof. Which less burdensome options that take fundamental rights into consideration are there? Why are these not appropriate to replace the positive law in the near future, also taking into consideration potential situations that may arise in the future? A well-functioning legal provision that protects societal benefits is ready to protect the benefits now and in the future.

II. European Union-wide regulation in the area of liquid fuel

Any energy product may be treated as fuel. Specifying a more accurate type of fuel must first take into consideration the location of use, safety of using the product in an energy converter, which is used to also prove the similarity and substitution of fuel. Circumscribing the marketing of an energy product as fuel differs from classification. Permission to market is strictly regulated using the precautionary principle through European Union[8] regulations, guidelines and decisions.

Specification first arises from the European Council Regulation (EEC) no. 2658/87[9]; subsection 1 (1) is used to establish the nomenclature of goods.[10] Section 27 of annex 1 to the Commission Implementing Regulation (EU) no. 927/2012[11] provides explanations for mineral fuels. There is nothing that says that technically a product belonging to another group cannot be used as liquid fuel. For example, this applies to biodiesel starting with 3826 in the miscellaneous chemical products group 38. Fuel-water-emulsion[12] has a specific product code, but no name that refers to it being a fuel. Designating a CN number depends on the discretion of the person issuing the certificate of conformity and is based on the descriptions submitted

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

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

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

[8] Hereinafter referred to as EU or European Union.

[9] EÜT L 256, 7.9.1987, p. 1.

[10] Hereinafter referred to as CN.

[11] ELT L 304, 31.10.2012, p. 1.

[12] Hereinafter referred to as LWE.

by the manufacturer that may originally not provide a reference to the options of using the product as liquid fuel. As such, LWE may be sold as product CN 38249097 (prepared binders for foundry moulds or cores). At the same time, incorrect statistical data is collected at the EU level. LWE cannot be designated as automotive fuel on the basis of group 27 of 927/20/2012/EU, because it has to be addressed as heavy oil on the basis of additional note 2 (d). The reason for this is a large quantity of water in the product, which does not enable carrying out a fractional composition measurement using the ISO 3405 method. This fact is important for understanding why it is not reasonable to establish the types of liquid fuel at a national level only on the basis of CN. Free movement of goods may, therefore, be restricted, and new equivalent products may not be deemed to be fuels for the purposes of the Liquid Fuel Act.

With the objective of harmonising excise duty, the designation of a CN number to fuel is addressed in article 2 and annex I to Regulation 2003/96/EC.[13] Technically, fuel can be any energy product during the use of which the energy converter can be operated in compliance with the minimum requirements arising from its technical specifications. This can also be derived from the purpose of section 1 of BImSchV[14] (2014), which provides that the suitability of an energy product for an energy converter must be identifiable. Generally, an equivalent product to automotive fuel may also be successfully used in place of light or heavy fuel. Not the other way around, however, because that would damage an energy converter that specifies higher requirements for fuel.

Upon establishing restrictions on handling energy products, the Committee may according to subsection 114 (3) of the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[15] take a high level of protection as a basis, ensuring health, safety, environmental protection and consumer protection. The person who drafts legislations is obligated to adhere to the precautionary principle when establishing restrictions on the indicators of the properties of an energy product.

In order to get a better overview of environmental requirements, Regulations 98/70/EC[16], 2003/17/EC[17], 2009/30/EC[18] and 2011/63/EU[19] must be viewed in conjunction. A lack of legal clarity lies in the references used therein. There are instances where reference is made to a table that has already been substituted with another reference. The reference method is not misleading, but the meaning is not sufficiently clear. An example is an amendment of subsection 8 (1) of 98/70/EC (subsection 1 (7) of 2009/30/EC), which establishes the use of analytical methods provided for in standards EN 288:2004 and EN 590:2004 for carrying out supervision on automotive fuels. 2011/63/EU leaves the year when the standard enters into force unchanged, but establishes 98/70/EC, specifying EN 228:2008 and EN 590:2009 for adhering to test methods. As such, both the older and the revised publication of the standard must be adhered to at the same time. At the moment, both publications of the standards are invalid due to an entry into force of their amendments. The task of member states is to use legislation to establish mandatory compliance with test methods, not the values of indicators describing the properties that are found therein. Values of indicators that are mandatory to comply with are established in the same regulations, but there is no reference made to them being associated with standards. Manufacturers and distributors of liquid fuel must prove the method of sample checking to market supervisory agencies, and provide results of these tests upon request in order to ensure that the product being marketed is safe. A certificate of conformity or a test protocol drafted in order to prepare the certificate of conformity may include other data describing the properties of automotive fuel that the manufacturer deems necessary, the conformity of which does not have to be certified pursuant to subsection 3 (2) and subsection 4 (1) of Regulation 98/70/EC.

Pursuant to subsection 13 (3) of Regulation (EC) no. 1907/2006 of the European Parliament and of the Council,[20] tests for identifying the properties of any substance must be established by the Committee, a respective other committee or recognised by the European Chemicals Agency. The requirement for collecting evidence in the matter is established by the

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

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

[15] ELT C 83, 30.3.2010, p. 1. Hereinafter referred to as TFEU.

[16] EÜT L 350, 28.12.1998, p. 58.

[17] ELT L 76, 22.3.2003, p. 10.

[18] ELT L 140, 5.6.2009, p. 88.

[19] ELT L 147, 2.6.2011, p. 15.

[20] ELT L 396, 30.12.2006, p. 1.

third paragraph of subsection A.2 of the annex to Regulation (EC) no. 440/2008[21]: "All information and remarks relevant for the interpretation of results have to be reported, especially with regard to impurities and physical state of the substance." This sentence provides the grounds for requiring the assessment of losses upon determining fraction composition. Good practice for such losses does not exceed 2%. The operation of engines at idle speed is technically affected by losses of automotive petrol exceeding 5%. Spontaneous shutdown can occur at losses exceeding 7%. The operation of a fuel pump is affected as only vapour that has evaporated from fuel and not liquid itself reaches the pump.

Leaving aside the technical and non-legal analysis of whether or not the restriction established on an indicator of a property is sufficient, the opportunity to consider the requirements arising from the generally accepted principles of manufacturing fuel and energy converters must be analysed. The term "... may ... only if it complies with ..." requires interpretation.[22] In the event of complying with the requirement, the handling of new products is given sufficient freedom for consideration. The wording of the amended subsection (1) a) of Regulation 98/70/EC refers to taking the technical requirements of an engine into consideration. The term does not release the seller from the obligation to comply with other requirements arising from the generally accepted principles of manufacturing automotive fuel and engines and does not make it mandatory to comply solely with the limit values of sizes provided for in the annex to the regulation. Taking this into consideration, the sellers have to account for not only environmental requirements, but also provisions arising from the aforementioned generally accepted principles. Upon deciphering the meaning provided for in the legislation, the background of the future that has a very significant role in the development of technology has to be widely considered. Although automotive fuels are chemical products, the provisions of subsection 20 (2) of Regulation 765/2008/EC[23] shall have to be taken into account when creating a measure arising from the hazardousness of the product. The product may not be removed from the market, prohibited or circumscribed in terms of its availability due to legislation if there are replacement products that are less hazardous according to a risk assessment. The results of a risk assessment are decisive. It is not important whether or not the effect of the hazardous substance is direct.

Taking Regulation 2014/94/EU[24] into account, the implementation of new technologies that are more environmentally sustainable has to be made possible. Complying with the obligation provided for in subsection 4 (1), member states have had to have put in place recharging points for electric vehicles accessible to the public by 31 December 2020 and hydrogen refuelling points for servicing both vehicles with a fuel cell as well as regular internal combustion engine by 31 December 2025. Particular attention has been given to notifying users as provided for in article 7. Holders of vehicles must be given more efficient information on which fuel is suitable to use for operating an engine. As such, the Commission has requested the CEN/TC 19 Committee to draft a harmonised European standard on marking automotive fuel.[25] Estonia has already submitted its consent to draft the standard.

The issuing of a certificate of conformity for liquid fuel is regulated by Regulation (EC) no. 765/2008 of the European Parliament and of the Council that supplements Regulation 768/2008/EC.[26] Taking into consideration the *lex specialis* principle of interpretation, only the requirements of environmental protection have to be taken into account when issuing a certificate of conformity for automotive fuel at the EU level. According to article R8 of 768/2008/EC, products that comply with the harmonised standard or part thereof shall be presumed to be compliant. According to article R6, the importer or distributor shall in some cases be treated as a manufacturer. Such treatment is necessary to identify the area of responsibility. If the importer/distributor uses its name/brand on the product or makes changes to the properties of an automotive fuel already on the market, which might affect compliance with the requirements provided for in the legislation, the importer/distributor will be subject to obligations applicable to the manufacturer. To which circumstances it is possible to implement the aforementioned article or when it has to be implemented with regard to automotive fuel have to be interpreted.

According to subsection 3 (1) of Regulation 2001/95/EC[27], the manufacturer may only market safe products. Subsection 5 (1) specifies an obligation for the manufacturer to carry out sample checks on its products. With regard to automotive fuel, it is highly justified upon storage in case of pollution and changes to properties arising from transport. Sample checks enable

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[21] ELT L 142, 31.5.2008, p. 1.

[22] Reference 15, subsection 3 (2).

[23] ELT L 218, 13.8.2008, p. 30.

[24] ELT L 307, 28.10.2014, p. 1.

[25] Online: http://standards.cen.eu/dyn/www/f?p=204:7:0::::FSP_ORG_ID:6003&cs=1FAF2D8F6A6FE92BF5C85E6AAFDBDD16D. (1 February 2015).

[26] ELT L 218, 13.8.2008, p. 82.

[27] EÜT L 11, 15.1.2002, p. 14.

the distributor to acquire information on whether or not the product complies with the requirements. The distributor is obligated to not deliver products that do not comply with the requirements.

III. National regulation in the area of liquid fuel

The legislation of the Republic of Estonia regulates the handling of liquid fuel with the following acts in its jurisdiction: Liquid Fuel Act *(Vedelkütuse seadus)*; Ambient Air Protection Act *(Välisõhu kaitse seadus)*; Liquid Fuel Stocks Act *(Vedelkütusevaru seadus)*;[28] Fiscal Marking of Liquid Fuel Act *(Vedelkütuse erimärgistamise seadus)*;[29] Alcohol, Tobacco, Fuel and Electricity Excise Duty Act *(Alkoholi-, tubaka-, kütuse- ja elektriaktsiisi seadus)*.[30] Before classifying fuel in the legislation, it would be wise to consider if and when preparing an overview of different technological materials is necessary upon setting out and establishing thereof with the law. An issue to consider is, for example, how weighty is the classification of technological materials upon ensuring safe operation of the place of use, establishing environmental requirements and collecting national taxes.

How national supervision is to be carried out in the event that the company only engages in selling and/or manufacturing equivalent fuel needs to be interpreted. Pursuant to subsection 66 (18) of the ATFEEDA, the state can collect excise duty on any liquid energy product. The legislator has not specified the difference in the definitions "specialty and unconventional fuel-like mineral oil" and "liquid combustible substance" used in the ATFEEDA in more detail. Using the method of grammatical interpretation, it is possible to derive that specialty and unconventional fuel-like mineral oil is intended to replace commonly used fuels, while also being designated with specific CN ranges, and liquid combustible substances are all other equivalent fuels.

According to subsection 58 (1) of AAPA, fuel is "… combustible materials or substances which are used in combustion plants for the purposes of obtaining energy…" Leaving liquid fuel without specific classification, it is possible to classify equivalent fuel according to the environmental requirements once the technical circumstances have been determined. Harmonising Regulation 98/70/EC is reflected in the regulation of the minister responsible for the area prepared on the basis of subsection 58 (2) of the AAPA,[31] which is used to specify environmental requirements for fuels in the list specified with CN codes.

With the purpose of subsection 1 (1) of the LFA, the legislator has not excluded the possibility of classifying other energy products as liquid fuel, although subsection 2 (3) of the LFA gives the authority for more detailed classification to the minister of the area. The legislation specifies *expressis verbis* that "...specific list /.../ is established by..." On the basis of the legislation, the minister has, while adhering to the same provision, established the list of fuels[32] with one regulation and requires the registration of a company[33] with another. Additionally, CN has been used to assist the designation of fuel in the AAPA, LFSA and ATFEEDA.

Pursuant to subsection 3 (1) of the LFA, a person engaged in fuel handling must have the necessary technical equipment and staff. One task of the staff is manufacturing suitable fuels, selecting them for trading, understanding the need to organise conformity assessment regarding methods for sample checks and changes to properties of fuel, and performing the explanation obligation. Existence does not necessarily mean possession, rather making it available. A sufficient level thereof has to be ensured with available means and methods. It is not prohibited to guarantee any obligation[34] with agreements. Specifying a requirement for the necessary staff presumes developing a certain methodology that must already be done according to the LFA.

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[28] RT I 2005, 13, 66; RT I, 12.07.2014, 153; hereinafter referred to as LFSA.

[29] RT I 1997, 73, 1201; RT I, 12.07.2014, 18.

[30] RT I 2003, 2, 17; RT I, 30.06.2015, 1; hereinafter referred to as ATFEEDA or Alcohol, Tobacco, Fuel and Electricity Excite Duty Act.

[31] Regulation of the Minister of the Environment no. 45 of 21 June 2013 "Environmental requirements for liquid fuel, sustainability criteria for biofuel, procedure for monitoring and reporting on the compliance with environmental requirements of liquid fuel, and methodology of determining the reduction of emission of greenhouse gases arising from the use of biofuel and liquid biofuel"; **RT I, 28.06.2013, 7**; RT I, 29.07.2014, 10; hereinafter referred to as Regulation no. 45 in the text.

[32] Regulation of the Minister of Economic Affairs and Communications no. 46 of 30 June 2014 "Detailed list of fuels"; RT I, 02.07.2014, 3; hereinafter referred to as Regulation no. 46.

[33] Regulation of the Minister of Economic Affairs and Communications no. 37 of 4 May 2012 "List of fuels that require registration for handling"; RT I, 09.05.2012, 3; RT I, 05.08.2014, 20.

[34] Section 2 of the Law of Obligations Act, RT I 2001, 81, 487; RT I, 11.04.2014, 13, hereinafter referred to as LOA.

Pursuant to subsection 4 (5) of the LFA, the seller is required to ensure that the consumer has access to the information upon the sale of fuel. Such wording must be viewed as a broader definition. Submitting information to the consumer requires the service staff to have certain skills. It is necessary to perform the explanation obligation regarding the information included in the test report that enables determining conformity with the requirements of fuel and other important information regarding the intended purpose. Explaining other important information regarding the intended purpose of fuel requires a certain understanding of technology. It is important to find calculated indexes using the values of properties included in the test report, analysing the heating, starting and acceleration properties of the engine arising from fuel.

In subsection 4^2 (4) of the LFA, the reasons for increasing a security deposit, including reviewing or reconsidering the amount of a security which has already been determined, which are due to *expressis verbis* "... business plan or any other activity plan; ... solvency and timely payment of tax amounts which have fallen due; ... business reputation of business partners; ..." should be noted. The legislator has given the authority carrying out national supervision great discretionary power, which gives rise to developing relevant methods for assessing companies, thereby increasing administrative obligations and the burden of the Tax and Customs Board *(Maksu- ja Tolliamet)*.

Although requiring a security deposit is not in conflict with the purpose of article 5 of EU Regulation 98/70/EC and does not restrict the marketing of fuel complying with environmental requirements as a measure, it may be a technical standard that the Commission must be notified of in connection with limiting the principle of free trade. Upon carrying out the administrative proceeding of the Tax and Customs Board,[35] the business reputation of business partners of market entrants from other member states, other activity plans, or the ability of a member of a management or control body to operate in the sector of handling fuel pursuant to subsection 4^2 (5^1) of the LFA may not be applicable, because the provision is null and void.

Basic requirements for fuel result from Regulation no. 46 of the responsible minister established on the basis of subsection 8 (1) of the LFA, and environmental requirements result from Regulation no. 45 established on the basis of subsection 58 (2) of the AAPA. The objective of establishing basic requirements is to ensure the compliance of fuel with the purpose of using thereof and the environmental requirements. The legislator has provided the option to establish two types of environmental requirements for fuel. As such, the content of regulations has to be interpreted simultaneously in order to comply with the environmental requirements. It may be concluded that fuels specified with the law are also subject to other environment requirements in addition to the ones provided for in EU Regulation 98/70/EC. At the same time, the legislator of the Republic of Estonia, *Riigikogu*, has the right to facilitate or circumscribe the marketing of products that have not been regulated with EU law, using national technical standards to do so.

Subsections of section 9 of the LFA use the definitions "certificate of conformity" and "declaration of conformity". A certificate of conformity is a certificate issued by a conformity assessment body that attests the manufacturer's ability to manufacture fuel in compliance with EU Regulation 98/70/EC. The definition of the declaration of conformity is not in compliance with articles 3 and 4 of the same legislation. A declaration of conformity is a declaration of the manufacturer that attests the conformity of the product with all the requirements of EU legislations. According to article 5 of 768/2008/EC, the manufacturer must certify the compliance of the product with a declaration if so required by EU legislation. The submission of the manufacturer's declaration of conformity is associated with certifying the CE conformity marking, which is an integral part of this process. The objective of the CE-marking is to visibly present information on the basis of which it is presumed that the product is in compliance with the requirements provided for in EU legislation. Pursuant to article R2, obligations of the manufacturer include first drafting technical rules and then carrying out the conformity assessment procedure. Fuels belong in the area where conformity must be certified. Because the state has to ensure compliance with the requirements, this presumes comparing test protocols to applicable requirements. Although subsection 9 (6) of the LFA provides that the certificate of conformity assessment has to be reviewed every six months, EU law provides that this will also have to be carried out by a distributor if the distributor is treated as a manufacturer. A new conformity assessment procedure must be carried out upon making changes to the properties of fuel. This usually constitutes harmonising some property with a requirement or improving a property. While, in the first case, the procedure involves a sample check carried out by the distributor, the second one requires creating a new product.

In the event that there is no applicable EU legislation, the member states may establish regulations for the area of liquid fuel through national legislations. However, mutual recognition of products must be applied to ensure the free movement of goods. To ensure this, the Commission has to be notified of technical requirements that circumscribe economic activity pursuant to subsection 6 (1) of the General Part of the Economic Activities Code Act *(Majandustegevuse seadustiku üldosa*

[35] Hereinafter referred to as TCB.

seadus)[36] in conjunction with subsection 8 (1) of Regulation 98/34/EC.[37] Although it is not permitted to establish additional restrictions on the indicators of properties at a national level, the permissibility of establishing other technical requirements is not excluded.

IV. Legal practice of the European Court of Justice upon interpreting legislation of the area

The practice of the European Court of Justice arising from combined cases C-43/13[38] and C-44/13[39] interprets subsection 2 (3) of Regulation 2003/96/EC. Upon defining the term "equivalent fuel", it must be first identified how the product has been used and only then can conformity with the properties provided for in the tables of the annex to the same regulation be certified. This ensures the principle of equal treatment and that products performing the same task have been taxed at the same level. Technically, this enables not complying with the established test methods when assessing similarity, basing it instead on the technical requirements of an energy converter, bases of safe operation, which are supplemented with other measures of the precautionary principle.

The compliance of dual use fuel with environmental requirements does not have to be certified as long as it is not marketed as liquid fuel. The definition of the dual use of liquid fuel is provided for in clause 23 of decision C-426/12:[40] "... used for a purpose other than as automotive fuel or heating fuel."

In the proposal of the Advocate General of 19 July 2014 in case no. C-26/11,[41] the term of free circulation arising from article 5 of Regulation 98/70/EC on liquid fuel is interpreted in conjunction with other EU legislations. Establishing additional terms and conditions for marketing fuel compliant with the requirements of the regulation according to the principle of limiting fundamental freedom required interpretation. In his teleological interpretation, the Advocate General provides reasons for: why only the changes to the values of technical requirements have to be taken into consideration, according to the purpose of the regulation; why the purpose of the regulation is not harmonising the marketing of the whole fuel economy but rather only harmonising technical requirements across the EU. The objective of harmonisation is to prevent the use of technical requirements arising from applying different standards as a barrier to trade. As such, the restriction provided for in article 5 must only be applied to legislation that affects technical requirements. Had it been a wide-reaching prohibition on circumscribing, the legislation would have had to come up with an exception that takes the effect of article 6 into account. The exception would also have had to account for price regulation, formation of liquid fuel stock and advertisements. It is the effect of article 6 that enables the member state to establish stricter environmental requirements in its legislation, but only doing so in compliance with subsections 114 (5)–(7) of the TFEU, which requires approval from the Commission.

The preliminary ruling procedure of case C-343/09[42] addresses the precautionary principle. The complexity of taking a stand in technical matters is illustrated by the explanation provided for in clause 28: "...in particular as to the assessment of highly complex scientific and technical facts ... whereas review by the Community judicature has to be limited to verifying whether ... the legislature has manifestly exceeded the limits of its discretion." A lack of scientific information that would verify its harmful effect is not decisive upon permitting a fuel, component or additive that differs from the norm to be placed on the market. Establishing a restriction according to this principle enables preventing hazards, even though the actuality of hazards has not been fully proven, instead having been proven only to a small extent.

The sale of liquid fuel does not presume that all of the fuel being sold is transported to one place of business of the distributor and then onwards from there on the basis of accompanying documents. While subsections 6 (1), (3), (4), (6) and (7) do provide the option for the authority carrying out supervision to require the existence of documents at the registered office, it does not exclude the transfer of the object being sold on the basis of section 93 of the Law of Property Act.[43] Although the legislator is obligated to comply with the reporting requirements in order to ensure the identification of the volume of fuel

[36] RT I, 25.03.2011, 1; RT I, 29.06.2014, 8.

[37] EÜT L 204, 21.7.1998, p. 37.

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

[39] *Ibid*.

[40] Online: http://eur-lex.europa.eu/legal-content/ET/TXT/?qid=1424888396281&uri=CELEX:62012CJ0426 (25 February 2015).

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

[42] European Court Reports 2010 I-07027, ECLI:EU:C:2010:419.

[43] RT I 1993, 39, 590; RT I, 08.07.2014, 7; hereinafter referred to as LPA.

being sold and of the buyer, this does not affect the actual location of liquid fuel at the moment of sale. Upon complying with handling requirements, the Liquid Fuel Act does not expressly exclude the option to use provisions provided for in the LOA and LPA in the course of sale.[44] It follows that parties may comply with and implement all agreement forms when concluding their transactions, incl. authorisation, upon selling liquid fuel.

Security deposit has a legitimate purpose.[45] Security deposit is a measure that protects against value added tax evasion and is, therefore, sure to serve the public interest. However, a reasonable amount of time has to be taken into consideration when establishing, increasing and decreasing a security deposit. A person engaged in business should have enough time to create a security deposit. While an entrepreneur that is just starting out in business is able to take this into consideration already upon launching on the area of activity, this cannot be expected from an entrepreneur whose operations are already up and running. With regard to a person that is already engaged in handling liquid fuel, what is important is not just finding resources suitable to serve as a security, but also enabling the option to cease operating in the area of activity. Upon ceasing business in the sector, fuel that has already been purchased has to be sold, employment and other cooperation contracts have to be terminated or cancelled, and the company has to be deleted from the register. It is also not reasonable for the legislator to presume that entrepreneurs should already be aware of and adherent to a new law or a new provision included in already applicable legislation. *Vacatio legis* as legal certainty[46] must ensure reasonable adaptation to standards. Sufficient time for this should be clarified upon planning and carrying out necessary activities upon implementing the standard. The legislator has not given an administrative agency the obligation to establish a methodology or guideline for establishing, amending and increasing a security deposit. There is no obligation to lay down a uniform measure for establishing a security deposit. This is a shortcoming in the applicable law.

The provision and purpose of the Liquid Fuel Act should be interpreted to provide that the legislator has prescribed operating as a handler only in economic and professional activity. This can be derived from the requirements applicable to the handler. The handler must have the technical requirements and necessary staff. Expecting the consumer to comply with these requirements is not reasonable. As such, the compliance of fuel with the established requirements and the respective liability stemming from the LFA cannot be required in the event of transporting fuel intended for personal use.[47] This interpretation enables transporting a larger quantity of fuel by persons that are not handlers. Therefore, national supervision authorities cannot treat the transport of a larger quantity of fuel under a contract of partnership in a small area as handling of fuel. This also applies to fuel imported from another EU state.

V. Liability of a mandator upon establishing a supply chain

Relying on the Constitution, legal scholar Lasse Lehis highlights conflicts associated with the delegation of authorisation. These consist in the interaction between sections 4, 10, 11 and 19 of the Constitution.[48] In other words, the delegation of authorisation violates the principles of separation of powers, democratic government founded on the rule of law, circumscribing rights and freedoms, and self-realisation. The law, therefore, prescribes that liability for establishing a security for a handler lies with the TCB. Entrepreneurs actually operating with liquid fuel are, therefore, at the mercy of the TCB, who, having the respective right under specific circumstances, makes a considered decision on increasing or decreasing a security deposit. The LFA specifies neither an upper limit for a security, nor the obligation to draft a guideline for the amendment thereof. This situation facilitates the formation of monopolies, because new entrants are expected to engage in more fraud than competition. As Jõgi has pointed out, "...legal models are a very interesting chain where each following link is possible due to a previous one."[49] If the small effect of the requirement for the lower limit of share capital brought about the establishment of a requirement for a security deposit, consideration should be given to invalidating the requirement for share capital as an impractical measure, which would also facilitate competition.

The original text of the draft amendment of the LFA of 21 April 2011[50] proposed amending the terms and conditions for

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[44] RKKKo 27.09.2010, no. 3-1-1-63-10, c. 12.

[45] RKPJKo 31.01.2012, no. 3-4-1-24-11, c. 53.

[46] Constitution of the Republic of Estonia, annotated edition 2012, justification point 108 (4). Online: http://www.pohiseadus.ee/pg-108 (20 March 2015).

[47] RKKKo 09.03.2009, no. 3-1-1-4-09, c. 13.

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

[49] Jõgi, P. Õigus ja eetika: teooriad õigusest ja õiglusest 20. sajandi õigusfilosoofias, Juura Õigusteabe AS 1997, p. 221.

[50] Draft act amending the Liquid Fuel Act 24 SE. Online: http://www.riigikogu.ee/?page=eelnou& op= ems2&emshelp=true&eid=1340790&u=20150311170459. (1 March 2015).

alleviating the seller's security upon releasing fuel for consumption from the excise warehouse. Section 4² of the LFA established a restriction that the TCB may consider this only after 1 January 2013. Among others, the Constitutional Committee of the *Riigikogu* has been asked to provide an opinion in the matter. In clause 2.2 of his response, Rait Maruste has deemed it necessary to explain the definition of lesser encumbrance through section 5 of the LFA, state supervision. Despite the use of existing verification measures, tax evasion continues to be intensive enough. It follows that the state has verified the provisions of section 3 of the LFA with sufficient efficiency, paying particular attention to organisational and technical conditions, and these have not been effective. However, in its following response, the Constitutional Committee admits that it is not possible to differentiate between the 370 companies entered in the register of economic activities according to areas of activity within the sector. In other words, it is not possible to differentiate between who engages in releasing fuel for consumption and who engages in tax warehousing. If this claim holds true, attention should first be given to finding out how the executive power has understood the purpose of the provision of the LFA prepared by the legislator and which measures have the supervisory authorities been using so far to identify conformity with the provision of section 3 of the LFA.

Taking the purchase of automotive fuel as the basis of an authorisation agreement enables identifying the actual creators of long supply chains, where intermediate distributors reduce the value added tax obligation by way of fraudulent invoices. Today, every buyer is able to justify his involvement in the scam only by giving an affirmative answer to the seller's offer and complying with the duty of care. Thereby he has met all the obligations arising from the law.

Subsection 3 (1) and clause 4 (1) 4) of the LFA in conjunction enable interpreting the legislator's will to obligate the distributor to show other technical rules that usually accompany the area in addition to complying with requirements of liquid fuel established by the responsible minister. Other important information regarding the use of liquid fuel can be identified and explanations can be given regarding thereof only by an expert in the area. The handler must, therefore, be more familiar with the most often described circumstances of liquid fuel being sold than the precepts arising from the EU legislations or standards provide for.

Finding adequate evidence is important for identifying tax evasion. Therefore, the best method for this is not identifying the supply chain but rather identifying the creator of the supply chain or a person who has caused the circumstances that enabled creating the supply chain. In other words, it must be possible to identify the mandator.

How parties have acted towards one another is not important for preventing tax evasion. What is important is whether the parties have entered into an authorisation agreement or some other type of agreement to purchase liquid fuel. In order to identify the circumstances of authorisation, it must be ruled out that the buyer who acts as a handler of liquid fuel has purchased what has been offered and has instead given the order to create or intermediate a product that has the properties unique to the fuel being distributed by him. Giving an order is described by giving instructions[51] on what the product to be purchased should be like. In this case, the mandatary can only mediate automotive fuel that meets the conditions established by the mandator. It is not important whether or not the manufacturer and distributor of liquid fuel have entered into an authorisation agreement, because the supply chain in this case is short and a deduction of input tax does not take place within a long supply chain, thereby being easier to check for the TCB. Giving an order is characterised by establishing standard indicators on liquid fuel by the distributor. The task of the distributor's staff is to identify these indicators, disclose them with technical means and give intermediaries or mandataries the task of purchasing them. The intermediary must comply with the duty of care and notification obligation before the mandator. As the LFA provides that the country of origin of liquid fuel must be known, the mandatary is obligated to identify the circumstances related to the fuel. For this, a certificate of conformity must be perused and carriers must be identified. Although the mandator may claim that the mandatary has failed to perform his obligations, he is connected to creating a supply chain and has chosen persons that act inappropriately to serve as mandataries.

Although exact verification of creating a supply chain may be too burdensome and complicated for an administrative authority, the TCB may consider increasing a security deposit without an established upper limit due to the distributor's failure to comply with the duty of care arising from the LFA. It must not be forgotten that each sale in a long supply chain must involve an expert that confirms the conformity of liquid fuel to the buyer's requirements. While a company may be established by any person with active legal capacity, working as an expert requires acquiring specialisation at a certain level.

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[51] Varul, P. jt. Võlaõigusseadus II. Kommenteeritud väljaanne, Tallinn, Juura, 2007, p. 2.

VI. Conclusions and proposals *de lege ferenda*

Proposals to amend the law are aimed at determining the area of handling fuel more exactly. According to the precautionary principle that is familiar from the European Union (including German) law, the state also has to adhere to the explanation obligation regarding the product when handling fuel. Since, pursuant to the applicable law, any type of fuel can be taxed according to its place of use, irrespective of the raw material and type of production, such handlers must be subject to the same security requirements and provisions accompanying the explanation obligation, taking into consideration the principle of equal treatment of persons. The option to establish qualification levels of competent staff have been added and legal questions that have arisen from the performance of the explanation obligation have been specified (including preparing standard indicators of fuel and submitting them before the purchase).

Although it should be possible to tie the legal decision to the law, it is necessary to use the entire subject matter that may influence the matter when making a fair decision.[52] New measures must be in accordance with the principle of proportionality arising from section 11 of the Constitution, while being appropriate, necessary and moderate. Public interest is achievable with a measure that is in accordance with the Constitution, that leads to achieving the objective, that is necessary in the society, that is the only existing solution, and that takes the importance of the objective into account compared to interference with fundamental rights.

Proposal 1. *Subsection 1 (1) of the LFA. The Act establishes the bases and procedure for handling fuel, the arrangements for exercising state supervision and the liability for violations of the Act.*

The amendment prescribes equal treatment of all handlers irrespective of the type of fuel. Taking into consideration the technical and environmental protection requirements of the energy converter, equivalent fuel requires regulation to at least the same extent as commonly used automotive fuel. Principles of calculating and collecting national taxes arise from other acts, and a more accurate registration of the competence of the handler's staff and persons operating on a broad area of activity is important.

Proposal 2. *Subsection 1 (3^2) of the LFA ... does not govern the sales of fuel, excl. with regard to the explanation obligation of standard conditions of fuel, by a government authority...*

The explanatory memorandum to the act[53] does not specify how the standard indicators of fuel can be identified and the obligation of explanation can be complied with. Government authorities may be released from performing the obligation of security and registration with regard to the requirements of non-technical equipment and personnel. Upon the sale of fuel, the state should be treated on equal grounds with the distributor.

Proposal 3. *Subsection 2 (3) of the LFA. Operating as a handler of fuel requires registration in the register of economic activities.*

The requirement to register a handler of any type of fuel enables identifying the availability of competent staff, the scope of complying with the obligation of explanation and the level of awareness among persons carrying out supervision. In comparison, according to section 1 of the German legislation BImSchV (2014), the area of activity has been described in addition to the CN code as follows: "zum Betrieb von … bestimmt ist".

Proposal 4. *Subsection 3 (1) of the LFA. Persons engaged in fuel handling (hereinafter, 'handlers') must have necessary technical equipment and staff to ensure compliance with the requirements arising from this Act. Competency level of staff performing the explanation obligations of fuel being handled and establishing the standard conditions is specified with a regulation by the responsible minister.*

Requiring certificates to verify qualification or professional skills is nothing extraordinary.[54] Issuing certificates can be organised by SA Kutsekoda, whose activities are supported by universities and other institutions of higher education. With a regulation, the minister can specify[55] the provided list of staff if it is set out accordingly in the legislation. The handler's compliance with

[52] Aarnio, A. Õiguse tõlgendamise teooria. Õigusteabe AS Juura 1996, p. 175.

[53] Explanatory amendment to the draft act amending the Liquid Fuel Act and the Ambient Air Protection Act, SE 675. Online: http://www.riigikogu.ee/?page=eelnou&op=ems&eid=da929829-584b-495f-b983-4a949eff5f2b. (1 March 2015); c. 10.

[54] Obligation to ensure professional training for pharmacists and assistant pharmacists arising from subsection 45 (4^2) of the Medicinal Products Act – RT I 2005, 2, 4; RT I, 10.03.2015, 23.

[55] Subsection 78 (4) of the Electronic Communications Act" In order to ensure access to information, the minister responsible for the area may specify the content and form of information to be made available to the public pursuant to subsection (1) of this section and the manner of making the specified information available to the public." Electronic Communications Act – RT I 2004, 87, 593; RT I, 30.12.2014, 7.

the provisions of clause 4 (1) 4), subsection 4 (2) and sections 8 and 9 of the LFA presumes professional competency, e.g. knowing the technical properties of automotive fuel and engines. Taking into consideration the development of scientific equipment, it is not reasonable to provide the standard of technology as a final list in the legislation. A lay person does not have to understand why it is not recommended to use motor spirit when the RON-MON difference exceeds 10 or why would distributors benefit from using 90 kPA instead of the summertime requirement of vapour pressure of 70 kPa. The holder of a professional certificate has knowledge of the properties of fuel, including liquid fuel, which makes him the most appropriate person to draft the standard indicators of the distributor's automotive fuel and give explanations. Adhering to this, standard indicators take into consideration both the requirements provided for in Regulation 98/70/EC and specifications established by the state and the company itself. In the event of cases like this, there is no need to establish an obligation to comply with the standard in legislations in order to ensure quality, and the company is liable for complying with standard indicators established by the company itself upon selling fuel.

Proposal 5. *Subsection 4 (2) of the LFA. The seller is obligated to submit to the buyer standard indicators of fuel being sold, ensure the provision of explanations concerning the properties or substitutability or biofuel content. At places of business where service personnel is not present on site (automatic filling stations), information concerning the possibilities of obtaining additional information together with a corresponding telephone number shall be displayed in a visible place.*

Pursuant to clause 14^1 (1) 2) of the Law of Obligations Act, the buyer is obligated to provide information on the main characteristics of the item before conducting a transaction when trading with a consumer. According to this principle, the consumer must be able to obtain volumes characterising the properties arising from the manufacture of fuel to be purchased and from the use of the engine at the filling station before making the purchase. Earlier wording enabled the seller to provide explanations with a long delay, which meant that verifying the accuracy of information could have proved to be impossible due to the speed of consuming fuel in the energy converter.

Proposal 6. *Subsection 8 (1) of the LFA. The handler has and shall prepare standard indicators for fuel to be purchased, taking into consideration the development of technology, the opportunities of using as a fuel, and environmental requirements.*

The legislation must provide for conditions that help handlers to emphasise the quality of their fuel. Forwarding standard indicators of fuel to the customer and adhering to them is not complicated and excessively burdensome, considering the possibilities of contemporary information technology. This ensures a more exact compliance with the explanation obligation of the distributor. It must be presumed that when selecting values for standard indicators, the distributor's necessary staff has carefully considered which properties require the most attention for expressing the best properties of automotive fuel being sold. Environmental requirements of Regulation 98/70/EC to be harmonised have been established with a regulation of the Minister of the Environment on the basis of subsection 58 (2) of the AAPA. Repeating them by a minister of another area causes a lack of legal clarity. Establishing standard indicators creates a basis for identifying the liability of a mandator. The quality of fuel cannot be presumed upon complying with applicable requirements of liquid fuel, because there are no harmonised standards that would regulate the sector. Only significant limitations arising from environmental sustainability and the engine have been met, which does not specify whether the fuel has low, average or high quality. Analyses of motor oil refer to a content of residues in low quality automotive fuel. As such, oil must already be replaced before reaching 16,000 km and not at 32,000 km as required by manufacturers of engines. Composition of reliance refers to an objective part of the composition of liability based on reliance.[56] Estonian distributors of liquid fuel have distinguished the liquid fuel sold by them from other fuel only by the fuel additives added to the fuel. Disclosing the scope of other important properties characterising fuel such as standard indicators has been avoided. This situation enables selling a product that falls within the limits of EU requirements, but the effect of fuel additives has not been certified. Legislation of the Republic of Latvia has established an obligation to disclose standard indicators of fuel.[57]

The Supreme Court has not interpreted how the obligations of a manufacturer fall on/extend to a distributor of automotive fuel. According to article R6 of Regulation 768/2008/EC, the importer or distributor shall in some cases be treated as a manufacturer. The manufacturer will usually choose the liquid fuel to be used in testing of fuel additives with care. Grounds for careful selection are usually not available for Estonian distributors, and the staff of the fuel distributor is unable to give explanations regarding the selection. It is, therefore, not clear to what extent the improvement of properties has affected compliance with environmental requirements. The second circumstance of the obligation to disclose standard indicators that improves the situation is avoiding the sale of any found fuel by the distributor. Found fuel may be deemed to be liquid fuel that is compliant with environmental requirements. At the moment, any batch sold by the distributor may have a significantly different value, taken into compliance with a limit value of some property. In such cases, the actual manufacturer or the country of origin have not been verified.

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

[57] Clause 13.3 of the regulation established on the basis of article 7 of the Conformity Assessment Act. Online: http://likumi.lv/doc.php?id=11217. (27 March 2015).

The development of mental health strategy in Armenia: A review of the activities of the Armenian mental health policy working group

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Abstract

For many years, the health care system of the Republic of Armenia has focused on purely inpatient psychiatric care, which limits the potential for providing services at the community level. Psychiatric care has been exclusively provided in specialised mental health institutions, including hospitals and social psycho-neurological centres.

In 2010, Armenia ratified the Convention on the Rights of Persons with Disabilities. Since 2013, by adoption of two national policy papers – the Mental Health Strategy and Concept together with an Action plan – the government made a commitment to start the deinstitutionalisation process and introduce community-based services on a policy level.

The purpose of this paper is to introduce the processes recorded in the framework of a deinstitutionalisation process in the Republic of Armenia, its achievements and current issues. The study shows that the process of introducing the model of community-based service in the Republic of Armenia was accompanied by a number of challenges, which were more or less successfully overcome. It is deemed a success because the introduction of a community-based model is now on the government agenda and there is close cooperation with state agencies, as well as the private and public sectors. However, in addition to discriminatory attitudes and societal stigmatisation, the inability to currently operate community-based models due to the absence of relevant state budget allocations and a lack of knowledge and awareness of specialists, state officials and wider public about mental health issues is still a challenge.

Keywords

Mental disability, community-based services, discrimination, deinstitutionalisation, group home, human rights, psycho-social disabilities, Armenia

Background

Following the independence of the Republic of Armenia in 1991, due to socioeconomic hardships, the number of people in need of medical psychiatric and social services significantly increased. "As a result of a disastrous earthquake, military conflicts, poverty, political clashes, and the flooding in of refugees, producing many lonely and homeless people, there has been an increased number of persons in Armenia who need the medical psychiatric and social services in the last ten years".[1] This was the main reason for a rising level of recorded stress reactions. However, as a post-Soviet state, the Republic of Armenia inherited a health system organised according to the Semashko model with guaranteed free medical assistance and access to a comprehensive range of medical care for the entire population.[2]

[1] WHO. Mental Health in Europe. Country reports from the WHO European Network on Mental Health. Copenhagen 2001.p. 6.

http://www.who.int/iris/handle/10665/107419

[2] WHO. Mental Health in Europe. Country reports from the WHO European Network on Mental Health. Copenhagen 2001.p. 6.

http://www.who.int/iris/handle/10665/107419

In December of 1991, the UN General Assembly adopted the Resolution A/RES/46/119, endorsing "The principles for the protection of persons with mental illness and the improvement of mental health care", which was a significant step towards internationalization of mental health disability rights.[3]

Since then, the provision of mental health services in Armenia has not undergone significant reforms. As the system of psychiatric provision in the RA has inherited the Soviet system, mental health services are still exclusively provided in specialised psychiatric institutions, including hospitals and social care homes, but lack appropriately trained mental health providers.[4] According to civil society monitoring reports, people with psychosocial disabilities in specialised mental health institutions still face enormous problems, such as poor resource supplies, stereotyped approaches to patient management, cases of ill-treatment, discrimination, social exclusion, and human rights abuses. Stigmatisation of patients with mental health problems remains a challenge for both families and society as a whole.[5]

Despite the existing problems of the past decade, remarkable changes towards the reformation of the mental health system of the RA have been recorded. The year 2013 marked the first time that the government made a strong commitment to introducing community-based services on a policy level.

The overall new approaches are dramatically changing the perception towards the mental health field in the RA and thus allow the shift in policies and practices from purely psychiatric medical approaches to a human rights based model where the human rights of people with mental disabilities are given the highest priority.

The speedy adoption of two national policy papers in 2013 and 2014, the Mental Health Strategy and Concept, was a breakthrough in the whole reform, creating the opportunity for the country to institutionalise a community-based service model.

While there is a lack of financing, credible analytical data regarding the needs of countrymen, and a lack of professionals trained in the field,[6] now more than ever, crucial steps must be taken to assess the needs, adjust policies related to different aspects of the system, organise a plethora of trained professionals, and test the community-based service model for further scaling up nationwide.

The development of the legal sector is very important in regards to the promotion of equal rights for people with disabilities and their participation and integration within their community.

Method

The goal of the current study is to introduce the processes recorded in the framework of deinstitutionalisation in the RA and their effectiveness.

Namely, the legislative amendments within the scope of legal processes, their progress, institutional amendments, as well as the current change of attitudes towards persons with psychosocial disabilities will be presented.

This document presents the analysis of projects over implementation of amendments in the field, the results of amendments to the legal system, the impact of amendments on persons with psychosocial disabilities, and the public at large. In order to compile this study, the contents of the aforementioned state projects, the implementation process of projects, project results as for now, and their impact were analysed.

Besides the recent legislative amendments and their impact, the reflection and expression of the field-related issues under the general state policies were studied. The study also covers the issues that have come out during the establishment of a group home (alternative social care facility), functioning of the service, as well measures to overcome those issues.

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[3] Eric Rosenthal and Leonard S.Rubenstein. International Human Rights Asvocacy under the "Principle for the Protection of persons with Mental Illness" (Vol. 16). International Journal of Law and Psychiatry. 1993. p. 269

[4] WHO. WHO-AIMS Report on Mental Health System in Armenia. Yerevan 2009. p. 9.

http://www.who.int/mental_health/armenia_who_aims_report.pdf

[5] Helsinki Citizens' Assembly Vanadzor Office. "A hospital can never become a home… for anyone". Vanadzor 2014. p. 54.

http://hcav.am/en/publications/human-rights-situation-in-neuropsychiatric-medical-institutions-in-2013-hospital-never-can-become-a-home-for-anybody/

[6] John McCarthy, Hasmik Harutyunyan, Meri Smbatyan, Heidi Cressley. "Armenia: Influences and Organization of Mental Health Services". New York 2012. p. 106

Results

The start of reforms

In September 2010, the RA ratified the UN Convention on the Rights of Persons with Disabilities. Among other commitments, the ratification of the convention necessitated utmost complex amendments for mental health services in the RA. In Armenia, the mental health system is based upon inpatient medical care[7] and thus diverts its attention and efforts to persons with mental disabilities registered at various dispensaries, thus practically neglecting the problems of mental health among the general population.

Since 2011 the government undertook efforts to transfer the mental health care system from exclusively inpatient (institutional medical care) to another system that mainly focuses on the provision of medical care and assistance at community level.

The absence of the RA general policy was a serious challenge for achieving such systemic amendments and results, where each event or action would be exclusively driven by the fundamental principles and norms of human rights.

The drafting of the first mental health policy document was launched in 2011, when a joint working group was created by the Ministry of Health (MoH) of the RA with support of the Open Society Foundations – Armenia (OSFA).

The interdisciplinary working group was comprised of both state governing bodies and public sector specialists, including psychiatrists, psychologists, and NGO representatives.[8] The goal of the working group was to draft the Mental Health Strategy for the RA, the first document directed to reform the mental health field. The Chair of the working group was Armen Soghoyan, the representative of the MoH of the RA and the president of the Armenian Psychiatric Association at the same time. The activities of the working group were supported by the international expert Zsolt Bugarszki, lecturer of Tallinn University, Estonia, director of CARe Europe.

The working group singled out the main domains that were challenging in the RA and necessitated amendments. The analysis of those domains and the responsibility of presenting recommendations/actions directed at amendments in target areas were split according to separate subgroups. The activities carried out by the group were discussed during the workshops and online.

Due to efforts of the working group over the following year, the Strategy on Preserving and Improving Mental Health in the RA and the list of actions for 2014-2019 ensuring the implementation of the strategy was developed. The strategy and the plan of actions were approved via decree #15 of the RA Government dated April 17, 2014.[9] In the meantime, on September 13, 2013, the RA Government approved the Action plan of the Concept on Provision of Alternative Care and Social Services to Persons with Mental Health Problems for 2013-2017.[10] The Concept was adopted on May 2, 2013,[11] to be implemented under the RA Ministry of Labour and Social Affairs (MLSA).

The Concept and the Action Plan under MLSA of the RA was directly aimed at the introduction of relevant community-

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[7] John McCarthy, H. H. (2012). "Armenia: Influences and Organization of Mental Health Services". New York 2012. p. 106.

[8] Representatives from the RA Ministry of Health, RA Ministry of Labor and Social Affairs and Ministry of Education and Science presented the state authorities in the working group, while human rights organization Helsinki Citizens' Assembly Vanadzor and "Khnamq" NGO that provided community-based services to persons with mental health issues represented the NGOs.

[9] Legislative Information System of Armenia. "2014-2019 Strategy on Preserving and Improving Mental Health in the RA and the list of actions ensuring the implementation of the strategy."

http://www.arlis.am/DocumentView.aspx?DocID=90364

[10] Legislative Information System of Armenia. "Action plan of the Concept on Provision of Alternative Care and Social Services to Persons with Mental Health Problems."

http://www.arlis.am/DocumentView.aspx?DocID=85539

[11] Legislative Information System of Armenia. " Concept on Provision of Alternative Care and Social Services to Individuals with Mental Health Problems." http://www.arlis.am/DocumentView.aspx?DocID=83190

based services. Meanwhile, the Strategy on Preserving and Improving Mental Health in the RA and the list of actions for 2014-2019 envisaged activities of institutional nature, such as improvements of the legislative field, including the compliance of the RA legislation with the CRPD, training of specialists, raising public awareness, design and implementation, and evaluation of a community-based pilot project.

The impact of international experiences and east-west co-operation

During the development work, international experiences were studied to customise (adapt) to local strategies and needs. Along with analysing the contemporary literature of deinstitutionalisation and policy documents and guidelines of the European Expert group;[12] the Armenian working group on policy reforms participated in study tours to understand the experience of different European countries.

Three Eastern European and post-Soviet countries – the Czech Republic, Estonia, and Hungary – were selected for closer review. The working group members believed that the new member states of the European Union were closer in their historical and socio-economic situation to Armenia than traditional Western European welfare states. The experiences gained by these countries in the field since the early 90s largely contributed to the work of Armenian experts, especially policy design and its implementation.

In the Czech Republic, besides the relevant shift toward community-based care, working group members explored a vibrant sphere of social enterprises connected to traditional social and health services. Restaurants, stores, workshops, gardening and repair services, catering, hotels and many other small social enterprises are supporting not only the employment of people with mental health problems, but also the sustainability of the knowingly underfinanced social services in the Eastern European region.

In Hungary, the Armenian working group had an insight into the ongoing development work of community-based mental health services and the relevant role of local NGOs as service providers and advocacy organisations. Hungarian experts learned about the importance of involving different stakeholders in the policy reforms, which would prevent future tensions in the new, community-based care system. Armenia made relevant progress regarding interdisciplinary policymaking, including not only the representatives of mainstream services but also academics, government and local government representatives, and the often very critical human rights organisations and other NGOs.

Estonia was an especially interesting example for Armenian experts, as both countries were part of the Soviet Union and the Soviet culture is still a very relevant burden for the mental health systems of Estonia and Armenia. Analysing the post-Soviet transition and the opportunities and obstacles for contemporary rehabilitation and care models provides a relevant support for the implementation of Armenian policy reforms. It was necessary to understand that neglecting the heritage of the Soviet care system and the cultural environment of care is the same mistake as denying the urgent need for reforms, referring to the large differences between the Western European welfare traditions and Eastern Europe.

In the three analysed countries, the Armenian expert group found relevant ideas and encouragement to move forward with the system reforms, creating a unique combination of solutions based on the available Western European models and the special cultural and socio-economic circumstances of post-Soviet countries.

Implementation

As of the end of 2014, the process of forming and incorporating the model of community-based services launched more actively. In the framework of the process of implementation, another working group was set up by the OSFA jointly with MLSA and MoH of the RA to facilitate the implementation of the 2013-2017 Action Plan for the Concept on Provision of Alternative Care and Social Services to Individuals with Mental Health Problems through the implementation of several actions. The group was created to assess the field and disclose the gaps, namely to evaluate the community needs and

[12] European Expert Group on the Transition from Institutional to Family Based Care. "Common European Guidelines on the Transition from Institutional to Community based Care." Brussels 2012.

provide evidence for policy adjustments, to define a community-based model for the country, and to design and evaluate the pilot to be further supported by the government.

As a result of the activities by the working group,

- the Project for incorporating a community-based service model was drafted [1];
- individual needs of persons receiving care in mental health facilities and social services were assessed in line with a CANSAS adapted tool in order to provide relevant services[13][2];
- on December 17, 2015, Government decree N 1533-N on approving the Order of providing alternative care and social services to persons with mental health problems in 24-hour care homes was adopted[14] [3];
- on March 2, 2016, a joint order of the Minister of Labour and Social affairs and the Minister of Healthcare approved the Evaluation procedure of the clinical condition of persons with psychosocial disabilities, their social skills and abilities (including evaluation methodology and criteria), the Formation and working procedure of specialised commissions, and the sample form of conclusion issued by commissions was adopted.[15]

[1] Dual-type care home services for up to 8 and up to 16 persons with mental health problems in two regions were defined and approved by MLSA with the aim of ensuring the full integration of the residents in community living (as set forth in Article 19 of the Convention[16]), more specifically through developing their skills for carrying out basic activities of daily living, interpersonal relationships, and participation in community activities.

[2] The results of the assessment in one of the large care homes Vardenis Neurological and Psychiatric Boarding Home showed that 216 out of 438 residents were eligible for further stay in the boarding home, while 110 residents needed treatment or diagnosis; therefore, it was impossible to issue a final conclusion. Nine residents needed treatment outside a mental hospital, and a conclusion drawn about only 103 residents showed that the latter did not need further stay in the boarding home; instead, they could live in care homes for 3 people or in residential homes for 10 people maximum.[17]

[3] The order of providing alternative care and social services to persons with mental health problems in 24-hour care homes, enforced by Government decree N 1533-N, defined the goal and principles of 24-hour alternative community care services for people with psychosocial disabilities. According to the decree, the main goal of the care home is to promote the right to independent living and to be included in the community, as well as provide support to the social inclusion of persons with psychosocial disabilities. Transparency, cooperation, equality, and continuity are defined as the main principles of care home services. The decree also stipulates the general requirements of care home admission and discharge of persons with psychosocial disabilities, as well as issues related to their social integration and responsibilities of the care home personnel.[18]

The tangible result of the implemented actions was visible in May 2016. A pilot project started in Spitak city, in the Lori region of Armenia. The pilot project assisted the first 10 people in moving out of a large mental health institution.[19]

The selection of the mentioned location and facility was determined by local self-governing agencies and the regional administration's motivation to support the creation of the service. The motivation could be explained by their ambition to enhance their reputation in the field of human rights protection, as well as to create new job opportunities in the community.

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[13] A. Soghoyan, S. Sukiasyan, L. Baghdasaryan. CANSAS adapted methodology. https://drive.google.com/file/d/0B7yWVhb_Q9E8MzAxY0tjSnYxems/view?usp=sharing

[14] Legislative Information System of Armenia. N 1533-N Government decree on approving the Order of providing alternative care and social services to persons with mental health problems in 24-hour care homes.

http://www.arlis.am/DocumentView.aspx?DocID=102747

[15] Legislative Information System of Armenia. Joint order of the Minister of labor and social affairs and Minster of Healthcare on approving the procedure of evaluation of clinical condition of persons with psychosocial disabilities, their social skills and abilities (including evaluation methodology. https://drive.google.com/file/d/0B7yWVhb_Q9E8V0w3NnRDN1lmbWc/view?usp=sharing

[16] UN. Convention on the Rights of Persons with Disabilities. 2006.

http://www.un.org/disabilities/convention/conventionfull.shtml

[17] A. Soghoyan, S. Sukiasyan, L. Baghdasaryan. "Report of the working group to the Minister of Social and Labor affairs." Yerevan 2015.

[18] Legislative Information System of Armenia. N 1533-N Government decree on approving the Order of providing alternative care and social services to persons with mental health problems in 24-hour care homes.

http://www.arlis.am/DocumentView.aspx?DocID=102747

[19] Find more information about the group home on its Facebook page.

https://www.facebook.com/profile.php?id=100012608611103&fref=ts

The support of the local community and regional governing bodies played a crucial role in the creation of the care home in this specific area, as well as in the organisational aspects during the home's establishment and formation of the personnel.

The home care service in Spitak city has benefited from close cooperation with the human rights organisation Helsinki Citizen's Assembly Vanadzor, which provides legal counselling, training and awareness-raising on human rights issues to the personnel and residents of the service. The organisation is a member of the mental health policy working group and a strong advocate in the field. It is noteworthy that prior to the project development, discussions and meetings were organised for the stakeholders, including state governing bodies, to outline and determine perspectives of the home care service in Spitak city. Currently, the organisation is supporting residents to resolve a number of issues related to their legal status and social benefits.

Discussion

Challenges posed during the introduction of a community-based service model

As stated above, the drafting and adoption of national strategic programs in the field of mental health served as legal grounds for the implementation of mental health reform in the RA. Moreover, taking into account that the system of social and medical services in the RA is split, two main strategic programs were drafted.

The following issues were encountered during the introduction of the alternative services model and drafting of the programs.

- *Stereotypical approaches*
- *Material, legal and financial provision*
- *Selection and training of the community-based home personnel*
- *Selection of residents*
- *Full ensurance of human rights*

Stereotypical approaches

In a country, where no effective legal and institutional anti-discrimination mechanisms exist,[20] and the phenomenon of stereotypisation and stigmatisation towards vulnerable groups is accepted by society, it is difficult to achieve success in promoting the rights of persons with psychosocial disabilities by legal reform alone.

Stereotypical approaches among members of the policy-working group, especially during the development of national policy documents, were one of the main challenges faced during the development of concepts and action plans. Nonetheless, it is worth noting that those approaches have been overcome in the majority of cases and have not negatively affected the policy development process, however, they did complicate the implementation process.

Material, legal and financial provision

The need for establishing alternative care facilities in the RA is determined by relevant governmental action plans and governmental agencies that are bound to implement those action plans. In the meantime, it should be noted that the adopted action plans failed to clearly define necessary allocations from the state budget. Due to private allocations, the implementation of only one part of the program was made possible, although it was initially planned to create two care homes intended for 8 and 16 residents. As a result, only one home was established with 10 persons currently residing in it.

At the same time, the community had its fundamental contribution in terms of material provision through donating of property and allowing free use of the house for an unlimited period of time.

[20] A. Ghazaryan, Vahe Grigoryan. "Is it expedient to adopt a separate "non-discrimination law"?" Yerevan 2015.

http://www.epfarmenia.am/wp-content/uploads/2014/06/Research-on-Anti-discrimination_-21.05.15-ENG_Final-1.pdf

Selection and training of the community-based home personnel

The presence of stereotypical approaches again posed a serious challenge to the selection and training of the personnel. Therefore, the most pressing issue of the project is the education and training of persons with required capacities, which will contribute to the formation of such services in the near future.

Apparently, in this stage the personnel have not yet fully understood the mentality and approaches driven by the principle of the project goals. However, this issue is being tackled through talks and expression of treatment towards the residents based on personal experiences during regular visits of the project team and relevant specialists.

The crucial issue in the formation of the staff is the large number of personnel, which was caused by the cautious approaches to ensure the secured course of the pilot project. Thus, in the given conditions, it is a significant challenge to monitor the proper and full implementation of obligations by the staff, so that they really contribute and express determination for the independent development of residents while overcoming the fear of losing their jobs.

The number of personnel will be gradually decreased in parallel with the development and reinstatement of residents' capacities.

Selection of residents

As mentioned above, several issues came about during the selection of the residents, which the experts linked to identifying persons with required capacities, who are also endowed with self-criticising abilities.

Actually, this issue needs further research: it is unclear how much of a challenge it is, in fact, and whether or not the approach based on which the person's capacities were assessed was not a challenge itself.

On the other hand, the 3-month functioning of the home in Spitak city has revealed that there might be a situation, where the identified person would be unable to adapt to the conditions of such type of a care home. Namely, over a month later one of the residents returned to Vardenis Neurological and Psychiatric Boarding Home. According to experts, the person's further residence in the care home was impossible due to her health condition and ambition to join her family. Her family resided in the same community, but did not want to mingle with her; her stay in the same community was a problem for her family most likely due to the stigma. Although the person's return to Vardenis cannot be justified merely by the consequences triggered by her family's treatment, this circumstance once again pushes for the need to carry out consistent work (both preliminary and current) with the resident's family members and friends.[21]

Ensuring human rights

Although the whole process was directed at the implementation of a human rights based approach, the process itself also required greater attention in terms of safeguarding minimum human rights standards during the changing of the persons' living place and the provision of a new dwelling. Particularly, issues such as acknowledged consent of persons while deciding to move into another place of residence were kept in the limelight.

In the meantime, it should be pointed out that approaches typical of the institutional system against its residents still occur in the pilot care home system. The residents are not perceived by the staff as competent subjects, who can make their own decisions regarding any matter (including where to sit and what to eat); instead, they are treated as persons under guardianship (guarded objects). It should be recorded that the approaches based on the human rights model are not yet formulated in the established home, but they are rather based on the social model.

The status of persons under guardianship is another issue, which poses a serious challenge to the protection of human rights of persons with psychosocial disabilities in the RA[22] (Helsinki Citizens' Assembly Vanadzor Office, 2013-2015).

Conclusion

Thus, although the process of introducing the model of community-based mental care services in the RA was accompanied by a number of problems and challenges, which were more or less successfully overcome (putting the issue on the agenda and introducing a community-based model as a result of joint work with state agencies, private and public sector is itself qualified as a success), currently the RA is facing greater challenges.

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[21] Later that resident returned home again.

[22] Helsinki Citizens' Assembly Vanadzor Office. "RA legislative regulations on recognizing an adult legally incapable and appointing a guardian". Vanadzor 2013-2015.

The presence of discrimination and stigmatisation in the society is a challenge, and the reduction or elimination of discrimination is as important as the introduction and implementation of community-based models with relevant state budget allocations and redistribution, as well as the enhancement of skills and knowledge of specialists and state officials.

Abbreviations

RA	Republic of Armenia
UN	United Nations
CRPD, Convention	Convention on Rights of Persons with Disabilities
MoH	Ministry of Healthcare
MLSA	Ministry of Labour and Social Affairs
OSFA	Open Society Foundations-Armenia
NGO	Non-governmental organization

Promising Community-Based Practices to Postpone the Need for Institutional Elderly Care: a descriptive study of community developers in Estonia

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Abstract

The proportion of elderly people in the society is constantly growing. The elderly who live alone form one of the most vulnerable groups in the society that is also at considerable risk for poverty and social isolation. According to the last population census in Estonia (2011), 39.3% of the elderly (65+) lived alone. The ageing of the population is accompanied by novel challenges, among them especially the coping of the elderly living alone. In 2015, the research team at the Tallinn University School of Governance, Law and Society conducted a study to map Estonian community-based practices that are available for the elderly (65+), especially for those who live alone at home, and the way these practices support interdependent coping and prevent the need for institutional care. This study, based on qualitative and quantitative data collected in Estonian communities, suggests that cooperation between Estonian local governments and communities should be more effective and involve regular interaction. Promising practices include developing network-based community support models and broadening communication possibilities.

Keywords

Community-based practice, empowerment, resilience, active ageing, social networks.

In an effort to reduce prevent or delay the need for institutional care and facilitate ageing-in-place despite age-related functional decline, a growing number of governments, non-profit organisations and foundations have implemented initiatives designed to foster comprehensive changes in physical and social environments.[1,2] The goal of these initiatives is to help communities become places where older adults continue to engage in lifelong interests and activities, enjoy opportunities to develop new interests and sources of fulfilment, and receive the necessary support and accommodation to help meet their basic needs.[3,4]

This is also the case in Estonia. This article reports on the results of a study investigating the quality of community based services for the vulnerable elderly in Estonia. Estonia has a population of 1.3 million people, of whom 18.7% are older than 65 years.[5] This is the same percentage as, for example, in the Netherlands. Like in the other countries, the prognosis for 2040 is that the proportion of very old people in Estonia will grow rapidly; consequently, this increases the costs of pension and health care and welfare services.[6] Planning welfare services correctly is an important factor in improving the quality of life

[1] Hodge, G. (2008). *The geography of aging: Preparing communities for the surge in seniors.* Montreal, Canada: McGill-Queen's University Press.

[2] Lehning, A., Scharlach, A., & Wolf, J.P. (2012). An emerging typology of community aging initiatives. *Journal of Community Practice*, 20(3), 293-316.

[3] Lehning, A., Chun, Y., & Scharlach, A. (2007). Structural barriers to developing 'aging-friendly' communities. *Public Policy & Aging Report*, 17(3), 15-20.

[4] Lehning, A., Scharlach, A., & Wolf, J.P. (2012). An emerging typology of community aging initiatives. *Journal of Community Practice*, 20(3), 293-316.

[5] Statistics Estonia. (2016). Retrieved 3 May, 2016, from http://stat.ee

[6] Altmets, K., Katus, K., Puur, A., Saava, A., & Uusküla, A. (2008). Toimetulekupiirangud Eesti taisealises rahvastikus – levimus ja tegelik abistamine. *Eesti Arst*, 87(2), 92-101.

of these people.[7,8,9]

The number of elderly people who live alone has increased due to the growth of the average lifespan as well as the improvement of living conditions.[10] A longer lifespan may be accompanied by decreased psychological and physiological functioning, lower income and diminished ability to move around and cope with life independently.[11] Due to that, older people have a lower quality of life compared to other groups in the population.[12] Another issue related to the ageing of the population involves providing care for older people who need help to a greater or lesser extent in order to cope.[13] The current organisation of welfare has undergone several changes over time – local communities play an increasing role in activating and supporting people.[14] The Estonian elderly are less actively participating in the community compared to other European countries.[15]

The aim of the study was to map community-based good practices that are directed at and available for the elderly (65+) in Estonian local governments, investigate how support was provided for the independent coping of elderly people who live alone in their homes and, thereby, prevent the need for institutional care. The study provides recommendations for improving services and collaboration between local governments, service providers and community initiatives.

Theoretical framework of the research

The study is based on the theories of empowerment, resiliency, and active aging, whereas the focus is on the individuals as well as on the community.

According to Israel et al.[16], **empowerment** refers to the ability of people to gain understanding and control over personal, social, economic, and political forces in order to take action to improve their life situation. The concept of empowerment is positive and proactive compared to reactive approaches that derive from a treatment or illness model. Israel et al.[17] categorised empowerment into three different levels: 1) individual or psychological empowerment, which refers to an individual's ability to make decisions and have control over his or her personal life; 2) organisational empowerment, which means the members in empowered organisations share information and power, utilise cooperative decision-making processes, and are involved in the design, implementation, and control of efforts toward mutually defined goals; 3) community empowerment, which means individuals and organisations within an empowered community provide enhanced support for each other, address conflicts within the community, and gain increased influence and control over the quality of life in their community. Likewise, Peterson and Zimmerman[18] showed that the success of organisations at achieving their goals and missions is a complex interplay between organisational features, empowerment at the level of individual participants and the characteristics of the community.[19]

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[7] Ageing World: U.S. Census Bureau, International Population Reports, issued by Kinsella, Kevin and Wan He. (2009). *P95/09-1*, U.S. Government Printing Office, Washington, DC. Retrieved 2 April, 2016 from http://www.census.gov/prod/2009pubs/p95-09-1.pdf

[8] Altmets, K., Katus, K., Puur, A., Saava, A., & Uusküla, A. (2008). Toimetulekupiirangud Eesti taisealises rahvastikus – levimus ja tegelik abistamine. *Eesti Arst,* 87(2), 92-101

[9] Altmets, K., Katus, K., Puur, A., Saava, A., & Uusküla, A. (2008). Toimetulekupiirangud Eesti taisealises rahvastikus – levimus ja tegelik abistamine. *Eesti Arst,* 87(2), 92-101

[10] Tiit, E.-M. (2014). *Eesti rahvastik. Hinnatud ja loendatud.* Statistikaamet.

[11] Tammsaar, K., Laidmäe, V.-I., Tulva, T., & Saia, K. (2014). Family caregivers of the elderly: quality of life and coping in Estonia. *European Journal of Social Work*, 17, 4, 539-555.

[12] Gabriel, Z., & Bowling, A. (2004). Quality of life from the perspectives of older people. *Ageing and Society*, 24, 675691. doi:10.1017/S0144686X03001582

[13] Tammsaar, K., Laidmäe, V.-I., Tulva, T., & Saia, K. (2014). Family caregivers of the elderly: quality of life and coping in Estonia. *European Journal of Social Work*, 17, 4, 539-555.

[14] Tulva, T., Medar, M., Bugarszki, Z., Kriisk, K., Saia, K., Wu, J., Tabur, H. (2015). *Kogukonnapõhine toetus üksielavate eakate toimetuleku tagamiseks ja institutsionaalse hoolduse ennetamiseks.* Uuringu lõppraport. Tallinn: Tallinna Ülikooli Ühiskonnateaduste instituut.

[15] Tambaum, T., Medar, M., & Kriisk, K. (2016). Sotsiaalteenused ja mitteformaalne abi 55+ rahvastikus. In L. Sakkeus & L. Leppik (Eds), *Pilk hallile alale. SHARE Eesti uuringu esimene ülevaade ja soovitused eakate poliitika kujundamiseks* (pp 207-228).

[16] Israel, B.A., Checkoway, B.N., Schulz, A.J., & Zimmerman, M.A. (1994). Health education and community empowerment: Conceptualizing and measuring perceptions of individual, organizational, and community control. *Health Education Quarterly*, 21(2), 149-170.

[17] *Ibid*.

[18] Peterson, N.A., & Zimmerman, M.A. (2004). Beyond the individual: Toward a nomological network of organizational empowerment. *American Journal of Community Psychology*, 34(1/2), 129-145.

[19] Janssen, B.M., Snoeren, M.W.C., Regenmortel, T.V., & Abma, T.A. (2015). Working towards integrated community care for older people: Empowering organizational features from a professional perspective. *Health Policy*, 119(1), 1-8.

Resilience is understood as the successful coping of a person or community or overcoming risks and unfavourable circumstances, as well as the ability to adjust to changes.[20] As the ability to adapt positively in adversity, resilience may be an important factor in successful ageing.[21] Resilience as a social cultural adaptation skill is a concept created by a combination of culture-based protection and risk factors influenced by individual, family and society variables.[22] According to Dyer and McGuinness (1996), resilience is a dynamic process whereby people bounce back from adversity and go on with their lives. Dyer and McGuinness[23] stated that resilience is highly influenced by protective factors, for example, healthy skills and abilities that the individual can access, and it may occur within the individual, interpersonal or family environment. A high degree of resilience has been described as an enduring positive view of life despite difficult circumstances during the ageing process.[24] Therefore, Yee-Melichar[25] proposed that health and human service providers who interact with an older person must adjust their responses to that individual by taking into consideration the person's level of resilience, culture and ethnicity.

According to the studies of community resiliency, most people are exactly as successful as is their community as a whole, whereas success rests on the resources of the community. These resources include support from other people, but also formal systems of social services, including welfare and health care.[26]

Since the beginning of the 21st century, the World Health Organisation has promoted the concept of "active ageing" – "the process of optimizing opportunities for health, participation and security in order to enhance quality of life as people age, and active ageing applies to both individuals and population groups". This definition allows people to realise their potential for physical, social, and mental well-being throughout the life course and to participate in society according to their needs, desires and capacities, while providing them with adequate protection, security and care when they require assistance.[27]

When there is a wish to include all members, the community could make a joint effort to achieve this kind of a situation. The strong social network of care-givers is one of the most important factors that enables to cope better with the load of care and need for help, and this has also been found in previous studies carried out in Estonia,[28,29] but weaker ties in social networks can break when activities become restricted.[30]

Community-related notions in the Estonian context

There are various definitions of the term community that put emphasis on different aspects. Several researchers have debated how to understand the concepts of community and community-based practices, "The initial meaning of community in Latin *com* (together) and *munus* (present) refers to the fact that community can be seen as a manifestation of social capital".[31] The current study used the definition developed by the Estonian community-based village movement "Kodukant", according to

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[20] Aavik, A. (2012). Sotsiaalpedagoogilised probleemid koolis ja õpetaja toimetulek. E-kursuse materjalid. Retrieved 2 May, 2016, from http://dspace.utlib.ee/dspace/bitstream/handle/10062/25450/Sotsiaalpedag_probl_materjalid.pdf?sequence=1

[21] Lamond, A. J., Depp, C. A., Allison, M., Langer, R., Reichstadt, J., Moore, D. J., Golshan, S., Ganiats, T. G., & Jeste, D. V. (2008). Measurement and predictors of resilience among community-dwelling older women. *Journal of Psychiatric Research,* 43(2), 148-154.

[22] Ho, H.Y., Lee, Y.L., & Hu, W.Y. (2012). Elder resilience: A concept analysis. *The Journal of Nursing*, 59(2), 88-92.

[23] Dyer, J. G., & McGuinness, T.M. (1996). Resilience: Analysis of the concept. *Archives of Psychiatric Nursing,* 10(5), 276-282.

[24] Aléx, L., & Lundman, B. (2011). Lack of resilience among very old men and women: A qualitative gender analysis. *Research and Theory of Nursing Practice,* 25(4), 302-316.

[25] Yee-Melichar, D. (2011). Resilience in aging: Cultural and ethnic perspectives. In B. Resnick, L.P. Gwyther & K.A. Roberto (Eds.), *Resilience in aging: Concepts, research, and outcomes* (pp. 133-146). New York: Springer.

[26] Ungar, M. (2011). Community resilience for youth and families: Facilitative physical and social capital in contexts of adversity. *Children and Youth Services Review,* 33(9), 1742-1748.

[27] World Health Organization. (2002). Active ageing: *A policy framework*. Geneva: WHO.

[28] Tammsaar, K., Laidmäe, V.-I., Tulva, T., & Saia, K. (2014). Family caregivers of the elderly: quality of life and coping in Estonia. *European Journal of Social Work*, 17, 4, 539-555.

[29] Laidmäe, V-I., Hansson, L., Tulva, T., Lausvee, E., & Kasepalu, Ü (2010). Multi-generation family in Estonia: multiple roles and the stress of living together with elderly people. *The Internet Journal of Geriatrics and Gerontology,* 5(2), 1. doi:10.5580/8b9

[30] Sakkeus, L., & Abuladze, L. (2013). Becoming a New SHARE Country: Estonia, eds. F. Malter, & A. Börsch-Supan, *SHARE Wave 4: Innovations & Methodology* (pp 10-13). Munich: MEA, Max-Planck-Institute for Social Law and Social Policy.

[31] Wilken, J.-P., Bugarszki, Z., Saia, K., Hanga, K., Narusson, D., & Medar, M. (2015). Kogukonnaga seotud mõisted ja kogukonnas osalemist toetavad teenused Eestis. *Sotsiaaltöö*, 2, 7-12.

which community is seen as a "group of people connected by a network of specific social ties living in a certain area. Village community consists of people who define themselves as residents of that village."[32]

According to Vihma and Lippus,[33] contemporary Estonian communities were differentiated by three types: interest-based communities, where cooperation is possible and communication takes place face-to-face as well as on-line; value-based communities that share common values, understandings, history and traditions; and "open" communities that mainly represent a common meeting place also open to new members (for example, a club house). There is a need to focus more extensively on community development by "activating, encouraging and stimulating the members of the community in order to express one's health-related needs and meet health-related socio-ecological and other changes through collective action, increased competences and sharing of applied knowledge" (MTÜ Salutáre, s.a[34]).

Research aim and methods

The aim of this study was to map Estonian community-based practices that are directed at and available for the elderly (65+) to postpone the need for institutional care.

The research questions were as follows:

- What possibilities are seen to provide community-based support to elderly people who live alone?
- Which forms of existing support can be seen as promising practice?
- Which activities can be used to empower and support an elderly person who lives alone in order to prevent the need for institutional care?

The current study was conducted in Estonian communities (including different regions and villages), and in our paper it means 15 counties in which the study was conducted. (See Figure 1) The data were collected from two different types of samples, using both quantitative and qualitative methods. Combining quantitative and qualitative methods can inform understanding of practices in a descriptive format and provide insights into how these practices have been performed.[35]

Sampling and data collection

The sampling method used was criterion sampling, which involves selecting cases that meet some predetermined criterion of importance and can be useful for identifying and understanding cases with plenty of information.[36] In the first round of data collection, a survey using a structured questionnaire was sent to 150 specialists and volunteers, who had experience in community development (ensuring the coverage of all 15 counties). They were working as social workers, health promotion specialists, policemen, psychologists, cultural and education specialists, members of municipality management commissions, coordinators of elderly organisations, leaders of sport and cultural work, etc., and responses were received from 79 of them (Figure 1). The questionnaire consisted of 5 topics with open-ended questions.

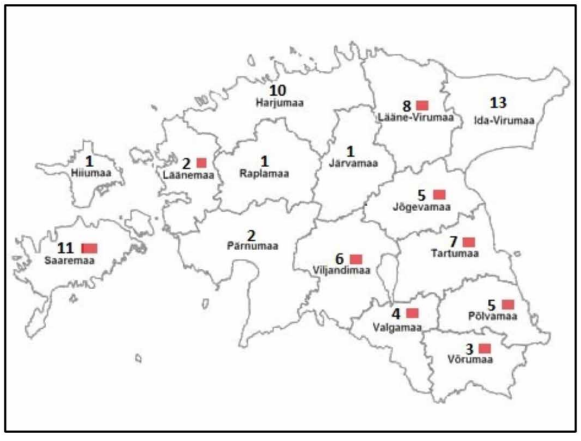

Figure 1. Community developers from all 15 counties of Estonia and red dots marking the promising community-based practices that were identified.

[32] Vihma, P., Lippus, M. (2014). *Eesti kogukondade hetkeseis.* Uuringuraport. Tallinn: Linnalabor ja Eesti külaliikumine Kodukant.

[33] *Ibid.*

[34] MTÜ Salutàre (s.a). *Mõisted.* Retrieved 15 May, 2016, from www.salutare.ee/moisted

[35] Reeves, S., Zwarenstein, M., Goldman, J., Barr, H., Freeth, D., Koppel, I.,& Hammick, M. (2010). The effectiveness of interprofessional education: Key findings from a new systematic review. *Journal of Interprofessional Care,* 24(3), 230-241.

[36] Patton, M.Q. (2001). *Qualitative research and evaluation methods (2nd ed.).* Thousand oaks, CA: Sage Publications.

In the second round of data collection, 13 promising (assessed by community developers as "what works") community-based practices described in the questionnaires were selected and oral interviews were carried out. These thematic interviews were used focusing on five research questions, where the notions were not predefined: (1) interpreting of concepts of "community" and "community support"; (2) community-based activities, which effectively support the independent living of the elderly and prevent the need for institutional care; (3) community-based practices, which effectively support older people; (4) valuing and appreciating community-based support and community stakeholders; (5) innovative and efficient development of the communities to support the coping of elderly people living alone to prevent the need for further institutional care.

Data analysis

The data analysis method used for the two rounds was qualitative content analysis, which is a systematic qualitative data describing method characterised by three main features: it contains data, is systematic and flexible.[37] This systematic approach not only defines the terms, conditions or the occurrence of words and their meanings but also transfers a summative verbal text to smaller categories based on clear coding rules, which facilitates making findings for the researchers.[38] Key themes and observations were extracted from interviews. Data were coded and categorised openly and thematically. The results were interpreted by using quotations from the respondents. In the results section, information is provided in the brackets about the county and sequence number of the interview in that county. The data collected with the electronic structured interview tool were quantified.

Results

The participants of the study interpreted the terms 'community' and 'community-based support' as having the following meanings. The responses indicated that community has been perceived as a group of people connected to each other via shared interests and values. The keywords most frequently used for community were: 'common interests', 'group of people', 'common values', 'related persons', 'living close-by' and 'common goals'. Based on these terms, the specialists in Estonian communities defined, therefore, the notion 'community' mainly as a group of persons that are interchangeably linked, share common interests and values, and act based on common goals. A community might also be a group of people living in the countryside, in a village, in a shared geographical/territorial area, or belonging to some kind of network. One participant wrote that *"a community is a group of people who require outside their homes (but also at home) mental, social and physical help."* (Põlvamaa-4)[39].

When it comes to community-based support, the words most frequently used were 'support', 'caring', 'assistance', and 'noticing'. Key actions of community-based support were caring, shared habits/traditions, motivating each other, noticing and providing inputs. All these actions are aimed at supporting the effective "working" of a community. The persons interviewed emphasised voluntary activities and not earning any profits. Community-based support was considered to be *"neighbourly relations, all kinds of assistance without the aim of earning profit"* (Tartumaa-1) and the *"need to help each other"* (Harjumaa-10). The main terms used were 'supporting', 'caring', 'helping', and 'noticing'. It needs to be mentioned that the understanding of 'community' and 'community-based support' is vague and the answers are eclectic.

Promising community-based activities that support the coping of elderly people and help prevent the need for institutional care

The persons interviewed were asked to name community-based voluntary activities and examples of how the elderly are supported. The answers could be divided into eight general categories: (1) hobbies and cultural activities that keep the elderly active: e.g. participation in handicraft and singing clubs, which have been organised in village centres or social centres by community activists; (2) basic help, such as taking the elderly to a pharmacy/to a doctor/to a shop, provided by neighbours or friends; (3) prevention services organised in cooperation with social welfare, healthcare and security specialists, e.g. safety training days to learn how to give first aid and how to prevent health problems or accidents, emergency-button service and other ICT-based services that support the life quality of the elderly; (4) institutional/formal methods, such as day-care centres, home visits by social workers, home-care services, and library services that allow the elderly to read newspapers, check out books and have the possibility of sharing information; (5) involvement of the elderly in community actions and developments (e.g. organising events), so that the elderly could perceive their rights and responsibilities to participate and

[37] Schreier, M. (2014). Qualitative content analysis. In U. Flick (Ed.), *The SAGE handbook of qualitative data analysis* (pp. 510-524). London: SAGE Publications Ltd.

[38] Stan, L. (2010). Content analysis. In A. J. Mills, G. Durepos & E. Wiebe (Eds.), *Encyclopedia of case study research* (pp. 226-231). Thousand Oaks: Sage Publications Inc.

[39] Here and after: (Põlvamaa – 4) (Name of the county – respondent´s number).

to give their input into community cohesion based on their life experience and skills; (6) organising community volunteers to provide help for the elderly and to activate elderly people to be volunteers in community (e.g. society ladies for the elderly); (7) help for and from neighbours (this presupposes good cooperation with social and health-care specialists, who could coordinate and supervise these activities in the community and also inform people about formal services available in the community); (8) community-based solutions (e.g. 'chat-benches' in parks or in front of apartment buildings, where older ladies, especially those who speak Russian, usually sit together for several hours per day and share information).

It seems that the variety of community-based activities for supporting the elderly who live alone depends largely on the livelihood and resiliency of the community. Important aspects here are human resources (assistance from a neighbour and friend, society ladies for the elderly), social networks (participating in the activities of day centres, 'chat benches'), the living environments of the elderly (help with getting fire-wood, access to meeting places, help with transport) and noticing (home visits).

The most frequently mentioned best practices were participation in handicraft circles; assistance from a neighbour, which was also called 'neighbourhood watch'; assistance from a friend; cooperatives (for example, apartment cooperatives); involving the elderly in the activities of associations for pensioners, but also NGOs, formal and informal societies; cultural activities – reading nights, book clubs, singing and dancing circles; activities for supporting the elderly who live alone – bringing food home and helping with shopping, helping with transport, helping in household activities, taking part in the activities of churches and congregations – voluntary work in nursing the elderly; cafeteria mornings for the elderly living in the neighbourhood; participating in the activities of active day centres.

Valuing and appreciating community-based support and community stakeholders

Many respondents thought that, in general, community activities are valued but not explicitly acknowledged. Compared to the actions for children and youth, the actions for the elderly were much less valued (and acknowledged). Some answers were full of certain optimism, *"It is highly valued, but at the same time it is also a routine and natural daily activity that is not seen as an annoying everyday duty. It's a win-win situation for them, where no-one needs to be motivated.*" (Pärnumaa-1). One possible method of valuing the community activities was to organise exhibitions and performances and to focus on community activities and their meaning for the elderly or the degree to which they are considered supportive to leading a meaningful life in the community. *Some motivational methods could be, for example, free café/tea at events for the elderly, free rooms for activities, and a free bus (Tartumaa - 3).* Valuing was thought to be manifested in positive coverage of best practices by media – *national television, local newspapers, spreading knowledge from person to person, valuing societies' movement, taking suggestions into account, for example, when renovating the culture house, organising different events where the elderly have the possibility to present and sell their handicrafts (Saaremaa - 10).* Positive attention was also considered to be visits to day centres by heads of local government, friends, cooperation partners and social workers, etc.

Moreover, it was important to find, motivate and keep stakeholders in the community. Since a lot of elderly people were mainly passive, there was a need to find coordinators or stakeholders who could activate other people.

Community developers have a vital role in community-based practices since they are able to inspire and include others. When the leaders are absent, there is little chance that something gets done in the community. It was mentioned that leaders have the will to get something done, they disseminate information about various support possibilities, they inspire the community, they matter a lot and they are counted on. An important aspect is also the positive attitude of leaders, their activeness and joy of life. There were also concerns related to leaders – it was thought that they are tired and need to be motivated themselves, and in the worse-case scenario they can suffer from burn-out.

How to postpone he need for institutional care among the elderly living alone

There was a need for various community-based services. Necessary services mentioned by respondents were, for example, an alarm button service, a taxi for the disabled elderly, transport service, warm home lunch (meals-on-wheels) service, sauna service, home-care service, home nursing care, counselling service about movement and nutrition for the elderly, etc. It was considered necessary for caregivers to pay attention to the early identification of problems and developing different ways of caring behaviour towards the elderly. It was found that noticing the support needs of elderly in the community depends on the awareness, capabilities and opportunities of the community and the likelihood of noticing is higher where older members had knowledge and skills to use those opportunities.

Although the study was mainly about exploring community-based practices, the answers indicated mainly the need for different welfare services that support the coping of elderly people in their homes, such as personal assistant service, support person service, home-care service, etc. These were seen as innovative and effective ways of support that should be developed in communities so that the elderly could cope as long as possible in their living environment and start using institutional care as late in life as possible (if at all).

The respondents pointed out that attention should be paid to strengthening cohesion between generations and supporting closer relations of elderly people with their family and friends, as isolation worsens the coping of the elderly and speeds the need for institutional care. Elderly persons need to belong to the community and feel necessary. The elderly can support younger people (looking after children, joint cooking when living with their children's families, helping with housekeeping, etc.).

The elderly also need to be motivated to move around, which is necessary for both their mental and physical balance. The respondents mentioned that attention should be paid to early noticing, whereas those who notice could be people living in the same house with the elderly. This means that different ways of caring behaviour should be developed in the communities, including signalling when someone might be in need.

It was suggested that active elderly people should be included in voluntary activities, for example, in the movement `from elderly to elderly`, where the elderly support and assist each other, and possibilities have to be found for training volunteers so that active elderly people could provide support to the elderly living alone. Family members would like to receive counselling help from day centres.

In combination of the abovementioned evaluations of respondents and input from the project team during the study period in 2015, the following examples of good practices were identified: activities provided in close cooperation between a community and a local municipality (e.g. library brings books home in Northern Estonia); day-care/social centres for organising events and home-care services (e.g. Northern Estonia day-care centre); elderly and women clubs, which are more informal than NGOs and are smaller unions in Estonia (e.g. in Saaremaa – Western Estonia); support for life-long learning e.g. `Smarts Academy`, which has created opportunities for the elderly for self-enrichment, mutual enrichment and acquiring new knowledge; voluntary initiatives, which support independent living at home (e.g. volunteers in church, volunteers in the community, etc.); community centres for the elderly living alone (e.g. joint-home for elderly living alone in Central Estonia); village homes and village communities (e.g. those in Southern Estonia), which enable the elderly to share their problems and seek solutions together.

These practices could be categorised as good community-based supportive practices and several of them could be developed as community services that are officially provided by the local government. These are the selected examples of preventive actions and their prerequisite is a functioning informal network.

Discussion and conclusion

The theoretical model provides us insights in order to better understand the features of an empowered community, while improving the resilience of elderly people in the community means the postponement for the need for institutional care. Even though the notion of 'community' was not yet clear, the community developers had a basic understanding that to some extent a community might be a group of people that belong to the same area and have common values, goals and social networks. Based on a study carried out in three European countries (Estonia, Hungary and the Netherlands), Wilken et al.[40] emphasised that it is important to define the notions of community in each country, since these can have quite different meanings. Some professionals and practitioners who provide services maintain an old 'clinical view' rather than a community perspective; therefore, awareness should first be ingrained among them concerning the importance and values of community life and community-based services.[41]

[40] Wilken, J.-P., Medar, M., Bugarszki, Z., & Leenders, F. (2014). Community support and participation among persons with disabilities. A study in three European countries. Journal of Social Intervention: *Theory and Practice,* 23(3), 44-59.

[41] *Ibid*.

Empowerment at the community level is connected with empowerment at the individual and organisational levels.[42,43] Our results showed that the frail elderly preferred to stay at home and were not as active as others in better health. In contrast to earlier constructions of the elderly as marginalised and uninvolved in day-to-day decision-making, elderly people are now portrayed as being empowered to take matters into their own hands, and they have gained control over their own lives.[44] Scharlach and Lehning proposed that public policy can help to change public attitudes about ageing and the aged by recognising and promoting the unique contributions that older community members can make for the well-being of the community as a whole.[45]

Katz described how promoting activity among older people has become of key importance in addressing the anticipated care needs of the growing elderly population.[46] Emphasis is increasingly on healthy living and the prevention of ill health and disability.[47] Respondents in our study mentioned that there is a need to engage elderly people into community actions and developments, for example, volunteering. Piliavin and Siegl revealed in their study that elderly respondents expressed interest in formal volunteering, which has a large and reliable association with reduced mortality.[48] Formal or organisational volunteering within an institutional context has the potential to serve a person, people, or a community.[49] Considering the benefits of volunteering and predictions of a shortage of volunteers, strategies to encourage the elderly to volunteer are needed.[50,51] Some of the respondents in our study also advocated life-long learning activities, by which elderly people can be promoted to have an active and engaged lifestyle that can help create and preserve the well-being of the community as a whole.[52]

Resilience as a social cultural adaptation skill is a concept created by a combination of culture-based protection and risk factors influenced by individual, family and society variables.[53] As the ability to adapt positively to adversity, resilience may be an important factor in successful ageing.[54] Throughout the study, the respondents pointed out a variety of activities supporting the resilience of the elderly in the community to prevent the need for institutional care. These ranged from defining community and community-based support, and selecting the best practices that effectively support the coping of elderly in their daily life, to translating these best practices into the regular community services and proposing strategies to make good use of community resources to prevent the need for institutional care among the elderly living alone.

Dyer and McGuinness stated that resilience is highly influenced by protective factors, for example, healthy skills and abilities that the individual can access, and may occur within the individual or the interpersonal or family environment.[55] A high degree of resilience has been described as an enduring positive view of life despite difficult circumstances during the ageing process.[56] Ungar[57] stated that community resilience requires the success of both the community and the people living in the community. Success depends on existing community resources, including not only informal social support but

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[42] Israel, B.A., Checkoway, B.N., Schulz, A.J., & Zimmerman, M.A. (1994). Health education and community empowerment: Conceptualizing and measuring perceptions of individual, organizational, and community control. *Health Education Quarterly,* 21(2), 149-170.

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[49] *Ibid*.

[50] Gottlieb, B. H., & Gillespie, A. A. (2008). Volunteerism, health, and civic engagement among older adults. *Canadian Journal on Aging*, 27(4), 399–406.

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[57] Ungar, M. (2011). Community resilience for youth and families: Facilitative physical and social capital in contexts of adversity. *Children and Youth Services Review,* 33(9), 1742-1748.

formal social systems (for example, welfare and health care). In line with previous research above, many respondents in this study indicated that more resources should be provided for organising activities for the elderly, for example, library services that allow the elderly to read newspapers, books and magazines, and to have the possibility of sharing information; public transportation services to pharmacies, to doctors, to shops, and so on.

A strong social network of care-givers is one of the most important factors that enables to cope better with the load of care and the need for help, and this has been also found in previous studies carried out in Estonia,[58,59] but weaker ties in social networks can break when activities become restricted.[60] Active communities and community organisations with their various activities are making a considerable but currently still under-valued contribution. A balanced mix of formal care and informal care that matches with the needs of the elderly, as well as people with a chronic disease or disability, can decrease the need for residential care to a minimum. Ac ommunity that supports elderly people and takes them into account can become an important resource for a positive ageing experience.[61] A community can provide the elderly with fixed social networks, familiar medical institutions and medical staff, public services and possibilities for spending free time. All this impacts positively the experience of ageing and supports the independence of the elderly, which is often required in order for people to remain living in their homes.[62] This tendency was also revealed by the results of the current study.

On the one hand, elderly people have barriers to social connections created by transportation and income limitations;[63] on the other hand, they encounter challenges with physical and mental functioning as well as health management.[64] Under the circumstances, group settings provided by, for example, senior centres could be comforting since they create an opportunity to share safety and falling fears, as well as limited income and transportation.[65] The answers from the respondents showed that day-care or social centres are important for organising events and home-care services for the elderly, one of the good examples being the Northern Estonian day-care centre. In line with the results, previous research concluded that senior centres reduce the elderly's loneliness[66] and provide a context for developing social networks.[67]

On the basis of the analyses, the following conclusions can be drawn:

1. The concept of 'community' is vague, but according to the responses it is connected mainly with the shared values, objectives and interests of its members. The community members are connected by social ties/networks.
2. In general, three main promising practices can be highlighted: 1) supporting the independent coping of elderly people living alone, 2) supporting their security, 3) fulfilling their needs of communication and participation in cultural activities. In order to support independent coping, it is important to notice, include and support the "fragile" elderly who live alone in the community.
3. As promising practices, the following groups of activities became apparent: activities organised in cooperation with the community and the local government; community centres as places for organising joint events and developing hobby activities and community-based social services; societies, clubs for the elderly.

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4. The extent to which community activities are valued was viewed differently. It could be not only financial support for activities, but also the results of community-based activities (appearances of elderly collectives at events organised by rural communities and by more distant actors), positive media coverage – in national television, local newspapers. Important key persons for initiating and conducting activities in the community were termed to be leaders or 'stakeholders'.

5. There might be multiple ways to prevent the need for institutional care: increasing the extent of home care and making it more versatile, supported by community-based joint activities. This increases primarily the motivation of the elderly who are already active, but unfortunately there is a lack of support for those elderly people who live alone and have special needs. There are only a few good practices in this area (e.g. voluntary support for the elderly, bringing the library home, help from friends and neighbours) and these practices need to be spread and disseminated.

Some recommendations are subsequently presented on how to improve community-based practices aimed at the elderly, which might shed light on all members active in community development:

- Taking into account the principles of inclusion and participation of community members, the services provided by the local government should work more closely with communities, in order to support the security of the elderly while living in the environment that they are used to and help to decrease their loneliness.
- Since community members communicate with one another mainly face-to-face, by phone and partly by e-mail, it is important to develop a network-based community model, which would take into account the situation of those elderly people who live alone and their needs. Innovative electronic means are helpful in broadening communication possibilities and spreading information for the elderly living alone. It is especially vital for those people who are unable to leave their homes and could be trapped in isolation in the the community.
- More possibilities have to be found to introduce promising practices to different communities via media. Acknowledging volunteers including the elderly in local newspapers as well as radio and television should be more widespread.
- Voluntary activities in which the elderly can be involved are one of the resources that could be used more effectively. Some activities, such as cooperation networks and caring communities, training of network members and the constant analysing and disseminating of Estonian and international best practices, might play an important role in creating a society in which positive attitudes towards the elderly could be possible.

Limitations of the study

Several factors may have affected the results of the study and should be taken into consideration. The sample of the study was limited due to small numbers of community developers in Estonia. The promising community-based activities included in the study might have been biased due to the non-representative sampling method.

Declaration of interest

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